THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 8

Case No. 4131 — Case No. 4760

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DUNCAN—FIEDLER

Case No. 4,131—Case No. 4,760

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FEDERAL CASES.

BOOK 8.

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

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

Case No. 4,131.

In re DUNCAN et al.

[8 Ben. 365;[1] 14 N. B. R. 18.]

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

SETTING ASIDE ADJUDICATION OF BANKRUPTCY — RES ADJUDICATA—COLLUSION — RIGHTS OF ASSIGNEES IN BANKRUPTCY.

1. The requirement of the statute, that a petition in involuntary bankruptcy shall be the petition of one-fourth in number and one-third in amount of the creditors is not a jurisdictional point, in such wise that, where there is a proper allegation in the petition, as to the number and amount of creditors and a judgment of the court that such allegation is true, such fact can be re-examined, either by the court which rendered such judgment, or in a collateral proceeding, unless fraud be alleged.

[Approved in Re Funkenstein, Case No. 5,158. Cited in Re Alsberg, Id. 261; Platt v. Mead, 9 Fed. 94.]

2. A petition in involuntary bankruptcy was filed against the firm of D. S. & Co., containing the proper averments as to the number and amount of creditors. It was accompanied by a paper, signed and acknowledged by the debtors, admitting that the petition was presented by the requisite number and amount of creditors, and that the bankrupts had committed the acts of bankruptcy alleged, and consenting to an adjudication. It was also accompanied by an affidavit as to the amount and number of creditors. On the presentation of the petition, an order of adjudication was made. Thereafter, creditors who had obtained judgments in the state courts against the bankrupts, which they were seeking to enforce by execution and levy, or by creditors' suits, applied to this court to set aside the adjudication, on the ground that the petition and accompanying papers did not show the petition to be the petition of creditors to one-third of the amount of the debts, but did show that it was not such; and on the further ground that the petition could be shown, and was shown, by evidence outside of such petition and papers, not to be the petition of creditors to that amount: *Held*, that there was an allegation in the petition that the requisite number and amount of creditors had petitioned, which was not overborne by any conflicting facts appearing in it, although, by a clerical error, the amount of the debts was not filled in, in certain parts of the petition.

[Cited in Re Lalor, Case No. 8,001.]

3. That the affidavit accompanying the petition was no part of the petition, but was evidence of the good faith of the admission of the bankrupts; and that any inquiry into the truth of the facts set forth in it, or any re-examination of the fact adjudged by the court, was forbidden, unless fraud or bad faith was alleged.

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

4. That there was no evidence of bad faith on the part of the bankrupts in giving the admission.

5. That the fact, that the debtors gave their aid to the signing, presenting and filing of the petition, by soliciting some of the creditors to join in it, furnished no ground for setting aside the adjudication.

[Cited in Re Bouton, Case No. 1,706.]

6. That the fact, that the debtors might be able to obtain a discharge in the proceedings without paying any percentage on their debts or proving the assent of creditors, was no objection to, or ground for, setting aside the adjudication.

[Cited in Re Alsberg, Case No. 261; Re Austin, Id. 662.]

7. That the fact, that both creditors and debtors failed to file any petition in bankruptcy till the present one was filed, and that, by reason of this delay, certain transfers which might have been attacked, could not now be attacked, had no bearing on the question of the validity of these proceedings.

8. That it is not necessary, in order to enable an assignee in bankruptcy to recover back property conveyed in fraud of the bankruptcy act, that such assignee should represent a creditor who was at the time of the adjudication enabled, by the fact of his having recovered a judgment against the bankrupt, to take proceedings to set aside such conveyance.

9. The case of In re Collins [Case No. 3,007] criticised.

[Cited in Platt v. Matthews, 10 Fed. 282.]

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

Field & Deyo, Abbott & Wilds, D. D. Lord and E. L. Andrews, for applicants.

F. N. Bangs, J. H. Choate, and Carter & Eaton, in opposition.

BLATCHFORD, District Judge. In this case, on the 18th of December, 1875, a petition in involuntary bankruptcy was presented to and filed in this court, praying that William Butler Duncan, William Watts Sherman and Francis H. Grain, copartners under the firm name of Duncan, Sherman & Co., be adjudged bankrupts. The petition purported to be the petition of 205 creditors. It set forth the claims of those creditors, and was signed by them. It was properly verified. It averred that the debtors resided in the city of New York, and had carried on business in this district for more than six months next preceding the date of filing the petition; that the demands of the petitioners were provable in accordance with the provisions of the Revised Statutes and the several amendments thereof; that the petitioners believed that the debtors, as such copartners, owed debts to an amount exceeding the sum of $300; that the petitioners' demands each exceeded the amount of $250; that the petitioners constituted one-fourth at least in number of all the creditors of the debtors, as such copartners, whose debts exceeded $250; and that the aggregate of the petitioners' debts provable under the said Revised Statutes, and the said several amendments thereof, amounted to at least one-third of all the debts so provable against said debtors, as such copartners. It averred properly acts of bankruptcy, and was accompanied by depositions as to such acts, and by depositions as to the claims of the first five signers of the petition. It was also accompanied by a paper signed and acknowledged by the three debtors, in which they stated that, "upon the filing of the petition," they "severally appear in person and admit that the requisite number and amount of their creditors have petitioned for an adjudication of bankruptcy against them herein; and waive service of a copy of the petition and of the order to show cause herein, and admit that they committed the acts of bankruptcy alleged in said petition and consent to the entry of said order of adjudication." It was further accompanied by an affidavit made by Walter S. Carter, one of the attorneys for the petitioning creditors, setting forth, "that he has examined the statement of debts of said alleged bankrupts, and that the total number of creditors of said alleged bankrupts whose claims exceed $250 does not exceed 786, and that the aggregate of all the debts of said alleged bankrupts, provable under the Revised Statutes of the United States, title 61, 'Bankruptcy,' and the several amendments and supplements thereof, does not exceed the amount of $5,400,000; that the number of creditors whose debts exceed the amount of $250, uniting in the petition herein, is 205, the aggregate of whose debts provable under said Revised Statutes, and said several amendments and supplements thereof, amounts to $2,168,142.49." On the presentation and filing of these papers, the court made an order, on the 8th of December, 1875, in these words: "Upon reading and filing the foregoing admission, also the affidavit of Walter S. Carter, and the court being satisfied that said admission was made in good faith, it is hereby adjudged, that the requisite number and amount of the creditors of the said William Butler Duncan, William Watts Sherman and Francis H. Grain, copartners under the firm name of Duncan, Sherman & Co., have petitioned for an adjudication of bankruptcy against them, in the above-entitled matter, and that the same proceed without further steps on that subject." Thereupon, on the same day, on the foregoing appearance in person and consent of the debtors, an order of adjudication in bankruptcy, in due form, was entered and filed.

Certain creditors of the bankrupts, six in number, had, prior to the filing of the petition in bankruptcy, obtained judgments against them, as copartners, in a court of the state, and three of those six had, prior to the filing of such petition, brought what are known as creditors' suits, in a court of the state, founded on such judgments, to reach assets alleged to have been transferred by the debtors in fraud of creditors. One other of the six had, prior to the filing of the petition in bankruptcy, made a levy under an execution issued on his judgment, on property alleged by him to be liable to such levy. Seven other creditors have recovered judgments against the debtors, as copartners, in a court of the state, since the petition in bankruptcy was filed. On the 24th of December, 1875, this court, on the petition of the bankrupts, made an order staying the suits brought by the said thirteen creditors until the question of the discharge of the debtors shall have been determined, and staying the issuing of execution on the judgments, and further proceedings on executions issued. The creditors so stayed now present a petition to the court, praying that the adjudication of bankruptcy, and all the proceedings thereunder, be adjudged void and revoked.

One ground urged for setting aside the adjudication is, that the petition for adjudication, and the papers which accompanied it, do not show that the petition is the petition of creditors to one-third of the amount of the debts, but show that it is not the petition of creditors to one-third of the amount of the debts. Another ground urged is, that it may now be shown, by evidence aliunde the papers which were before the court when the adjudication was made, that one-third in amount of the creditors did not unite in the petition, and that such fact has been shown.

The 12th section of the act of June 22, 1874

(18 Stat. 180), in amendment of the 39th section of the act of March 2, 1867 (13 Stat. 536), provides that any person residing within the jurisdiction of the United States, and owing provable debts exceeding the amount of $300, who shall commit any one of certain specified acts, "shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable;" and that "the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt." The section then proceeds: "But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs." The 13th section of the act of 1874, in amendment of the 40th section of the act of 1867 [14 Stat. 517], provides as follows: "And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act, as to the number and amount of petitioning creditors, has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise, it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

A careful examination of these provisions shows that congress intended that certain prescribed steps shall be taken to ascertain whether the petition presented is the petition of one or more creditors who constitute one-fourth, at least, of the creditors, in number, and whether the aggregate of the debts of the petitioning creditors provable under the act amounts to at least one-third of the debts so provable. In the first place, the petition must allege that fact. That fact is alleged in the petition in this case. If such allegation is denied by the debtor, either as to number or amount, in writing, the court is required to ascertain, on notice to the creditors, whether one-fourth in number and one-third in amount, as aforesaid, have petitioned. If they have not, time is to be given for others to join. If the required number join, the matter is to proceed. If not, the proceedings are to be dismissed. If, on the return day of the order to show cause, the court is satisfied that the requirement of the act as to the number and amount of the petitioning creditors has been complied with, or if, within the time allowed, creditors sufficient in number and amount sign the petition, to answer such requirement, the court is required to "so adjudge," and it is declared that such "judgment shall be final." The foregoing provisions cover the cases where the debtor appears and denies the allegation in question, and the cases where he appears and makes no denial of it, and the cases where he does not appear at all, but makes default. But there remains another class of cases. The foregoing three classes are cases of action on the return day of the order to show cause. The remaining class comprises cases where the debtor, on the filing of the petition, and without awaiting the issuing and service of an order to show cause, admits in writing that the requisite number and amount of creditors have petitioned. If he does, the court, if satisfied that the admission is made in good faith, is required to "so adjudge," and it is declared that such "judgment shall be final," and that the matter shall "proceed without further steps on that subject." It was under this latter provision that the proceedings in this case were taken. The debtor is clearly invited by the statute to make such admission, if the admission can be made in good faith, and he is invited to do so on the filing of the petition, and before the order to show cause is issued or can be served, and when he can be advised of the existence of the petition only by information communicated to him otherwise than in the due course of a legal proceeding. If, on the making of the admission, the court is satisfied that the admission is made in good faith, the court is required to "so adjudge," that is, to adjudge "that the requisite number and amount of creditors have petitioned;" and it is enacted that such judgment shall be final, and that the matter shall proceed without further steps on that subject. The requirement in regard to so ad-

judging is the same in respect to the three classes of cases of action on the return day of the order to show cause, and the finality of the judgment is declared in the same terms. The admission in this case and the judgment thereon were in due form. No question is raised on that subject. What, then, is the effect of the statute? The court is authorized to find a fact, to be satisfied of the existence of a fact, by evidence placed before it, either a sworn allegation in the petition, not denied by the debtor on the return of the order to show cause, or evidence that added creditors, coming in after a denial by the debtor on such return, make up the requisite number and amount, or an admission by the debtor made in writing on the filing of the petition, if the court be satisfied that such admission is made in good faith. If the court finds such fact, it is to adjudge that the fact exists, and that judgment is declared to be final, and it is enacted that the matter in bankruptcy shall proceed without further steps on that subject. These provisions are significant and indicate that some effective meaning must be attached to the word "final." It is to be the end of all inquiry on the point as to whether the required number and amount of creditors have petitioned. There are to be no further steps on that subject. If the debtor denies the allegation, on the return of the order to show cause, and files a list of his creditors, and the court, on notice to the creditors and on evidence obtained by an investigation, determines that the required number and amount of creditors have not petitioned, and then allows time for others to join, and they do join and sign the petition, and then the court determines and adjudges that, with those so joining, the required number have petitioned, that judgment is to be final, and it is not to be permitted either to the debtor or to any creditor thereafter to come in and show that the court erred, and that the fact was otherwise. So, of a like judgment on a failure of the debtor to deny, on the return of the order to show cause, the allegation of the petition as to the number and amount of creditors; and so, of a like judgment, on an admission by the debtor, on the filing of the petition, that the requisite number and amount of creditors have petitioned. Unless this be so, there is no necessary limit to the number of times the court may be required to re-examine the question thus declared to be finally adjudged. I speak now of an allegation merely that the court in fact erred, and not of an allegation of fraud or bad faith.

These provisions show that the judgment is final not only as respects the debtor, but as respects all his creditors. It is final as respects his estate and all interested in it. It is in the nature of a judgment in rem in respect to the matter adjudged by it. These provisions further show that the requirement of the statute that the petition shall be the petition of one-fourth in number and one-third in amount of the creditors, is not a jurisdictional point, or a quasi jurisdictional point, in such wise that, when there is a proper allegation in the petition as to the number and amount of creditors, and when there is a judgment of the court that such allegation is true, the fact can be re-examined, either by the court which rendered the judgment, or in a collateral proceeding, unless fraud be alleged and proved. The observations of Judge Lowell, in Ex parte Jewett [Case No. 7,303] seem to me to be entirely sound. He says: "I cannot admit that the number and amount of petitioners have anything to do with the jurisdiction of the court. Congress has very carefully provided, that a want of parties shall be taken advantage of as a strictly dilatory plea, and be disposed of in a summary way, not for the purpose of ascertaining the jurisdiction of the court, but the sufficiency of the plaintiff's petition, which is a very different thing. If the court should decide wrongly on that point, its decision would bind all the world. The district court has jurisdiction in bankruptcy of every person residing within the district, who owes three hundred dollars of provable debts; and, when a paper which purports to be a petition in bankruptcy, and which alleges such residence and indebtedness, is filed, and an order of notice has been duly served, there is and can be no jurisdictional fact remaining, if the residence and indebtedness to the extent of three hundred dollars are admitted. The court may then proceed to allow or refuse amendments, or do anything else proper for a court to do that has undoubted jurisdiction of the subject matter and the parties." In that case, the petition was one in involuntary bankruptcy, and there had been no adjudication; but a resolution for a composition had been passed. It was objected that the petition was fatally defective, and gave no jurisdiction to the court, so that a case in bankruptcy could be said to be pending, because it averred that the petitioning creditors constituted the requisite number and amount of the creditors of one of the petitioning creditors instead of the person proceeded against. The court, while of opinion that no amendment was necessary, granted a motion to amend in the above particular.

In the present case, the petition contains all the necessary jurisdictional allegations, and the further allegation that the petitioners constitute one-fourth, at least, in number, of all the creditors of the debtors, as copartners in business in the city of New York, under the firm name of Duncan, Sherman & Co., whose debts exceed $250, and that the aggregate of the petitioners' debts, provable under the statute, amounts to at least one-third of all the debts so provable against the debtors as such copartners. It then proceeds to set out the natures and amounts of the several claims of the petitioning creditors. It nowhere appears, in the petition,

what is the total number of all the creditors of the debtors whose debts exceed $250, or what is the total amount of the debts provable against the debtors, so that the court can say, on inspecting the petition, and comparing the number of petitioning creditors with any total number, or the aggregate of the debts set forth as debts due to the petitioning creditors with any total amount of provable debts, that the requisite number and amount of creditors have not petitioned. There is an allegation in the petition that they have. Hence, such allegation cannot be regarded as being overborne or controlled by any conflicting facts appearing on the face of the petition. This observation applies to the error, manifestly clerical, in omitting to fill in the amounts of the debts in three instances, and to the statement of the claim of Baring Brothers & Co.

As to any facts set forth in the affidavit of Walter S. Carter, presented to the court with the petition, to satisfy the court that the admission of the debtors was made in good faith, such affidavit was no part of the petition. The court received it as evidence of the good faith of the admission, and acted upon it, and thereupon, upon it and upon the petition, adjudged that the requisite number and amount had petitioned. Any inquiry now into the truth of the facts set forth in such affidavit, or any re-examination of the fact adjudged by the court, is forbidden, as before shown, unless fraud or bad faith be alleged.

As to fraud or bad faith, there is not the slightest evidence that the petitioning creditors, or any of them, in signing the petition containing the allegations it does, did not, in good faith, believe those allegations to be true, or were parties to any fraud or imposition, in respect of any of such allegations. Nor is there any evidence that the debtors, in signing the admission they did, practised any fraud or imposition, or acted in bad faith; nor that Mr. Carter did so, in making the statements contained in his affidavit. Moreover, if I were now to entertain the forbidden inquiry as to whether the petitioning creditors did, when the petition was filed, constitute the requisite number and amount, the burden of proof, after an adjudication made on a petition regular on its face, would be on those who apply to set aside the adjudication; and, on the evidence now adduced on the question, I could not hesitate to say that the applicants had failed to make out that the petitioning creditors were not sufficient in number and amount.

The adjudication is further attacked on the ground of what is called "collusion" by the debtors. This collusion is alleged to consist in the fact that the debtors gave their aid and assistance to the signing, presenting and filing of the petition filed against them, and followed that up by making the written admission and waiver of service of the order to show cause, before set forth. They solicited some of their creditors to join in the petition against them, and they sent a circular note signed by themselves to others of their creditors, saying that "a movement is now on foot among some of our leading creditors to put us into involuntary bankruptcy, and we feel assured that this course will realize the most to our creditors, and be the best for all concerned," and asking for the signature of the creditor to an appended paper, authorizing the attorneys who represent the petitioning creditors in these proceedings to sign the creditor's name to a petition in bankruptcy against the debtors. It is alleged that the debtors thus favored, instead of resisting, what is, under the statute, a hostile proceeding, and thus made it ostensibly hostile when it was really not hostile; that what the debtors ought to have done was, to file a petition in voluntary bankruptcy; that, under this involuntary petition, they will, if otherwise entitled to a discharge, be enabled to procure it without paying the proportion of their debts, or obtaining the assent of creditors, required in respect of proceedings under a voluntary petition; and that they ought not to be allowed to obtain, by promoting the involuntary proceedings, an advantage which they would not have enjoyed if they had filed a voluntary petition.

No creditor who joined in the involuntary petition appears, to make any complaint in respect of any matter. The creditors who joined in it have rights which the court is bound to consider. They took these proceedings, as is very apparent, for the purpose of securing, as far as possible, an equal distribution of the property of the debtors among all their unsecured creditors, and for the purpose of preventing any more creditors besides those who might, by the proceedings in the state courts, have already acquired liens or rights of preference, from acquiring liens or rights of preference by proceedings in the state courts. This was a lawful motive and a lawful result. It is one of the results aimed at by the bankruptcy statute. Creditors who desire to secure such result, secure it by the mere filing of the proper petition in involuntary bankruptcy, if it be followed by an adjudication. No injunction to restrain such proceedings in the state courts is necessary, to make the filing of the petition effective to prevent after-acquired liens or rights of preference from attaching. If such injunction is desirable to prevent embarrassment in the future from such proceedings, it is granted on the application of the petitioning creditors as well as on the application of the bankrupts. U. S. v. Bancroft [Case No. 14,513]; In re Ulrich [Id. 14,328]; In re Clark [Id. 2,801]. The petitioning creditors in this case manifestly concurred and concur in the view expressed in the circular note of the debtors, that the administration of the estate of the debtors in bankruptcy would realize the most to their creditors, and be the

best for all concerned, both creditors and debtors. The estate might be brought into the bankruptcy court by involuntary proceedings, or by a voluntary petition by the debtors. The creditors could not compel the debtors to file a voluntary petition. All that the creditors could do to secure their own interests, in respect of bankruptcy proceedings, was to combine and unite in a petition in involuntary bankruptcy, to the requisite number and value. It was deemed by them important and necessary that they should do so, for the ends before stated. If they could secure the co-operation of their debtors, not only in not resisting the petition, but in inducing, by lawful means, creditors to join in the petition, and in making the written admission invited by the statute, as to the requisite number and amount of creditors, and in appearing and waiving service of notice and consenting to an adjudication, as invited by sections 40 and 41 of the act of 1867 (now sections 5025 and 5026 of the Revised Statutes), such action of the debtors cannot, without an entire abrogation of the provisions of the statute, be held to be unlawful. It is not alleged or shown that the debtors or any creditor influenced the action of any creditor in respect of uniting in the involuntary petition, by any pecuniary consideration or obligation, within the purview of section 5110 of the Revised Statutes. The fact that, as an incident of the involuntary proceedings, the debtors will, if otherwise entitled to a discharge, be enabled to secure it without paying any percentage of their debts or obtaining the assent of any of their creditors, is no valid objection to an adjudication in involuntary bankruptcy shown to have been aided by the debtors in the manner in which such aid was given in the present case. As pointed out by me in Re Scull [Case No. 12,568], the provision of the statute, that, in cases of involuntary bankruptcy, the bankrupt may receive a discharge, if otherwise entitled thereto, without paying any proportion of his debts, and without procuring the assent of any portion of his creditors, as a condition of his discharge, while, in cases of voluntary bankruptcy, no discharge can be granted to a debtor whose assets are not equal to 30 per centum of the claims proved against his estate, upon which he is liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value, is based on the view, that, if one-fourth in number and one-third in value of the creditors petition in involuntary bankruptcy, they shall be regarded, under the provisions of the statute, as assenting to the discharge of the bankrupt, in like manner as one-fourth in number and one-third in value assent in voluntary bankruptcy. This view is concurred in by Judge Lowell, in Re Wilson [Case No. 17,784]. As the debtor is expressly allowed by the statute to procure, by lawful solicitation from his creditors, their affirmative assent to his discharge, in proceedings in voluntary bankruptcy, no reasonable objection can exist to his procuring from them, by lawful solicitation, their implied assent to his discharge, in proceedings in involuntary bankruptcy, by procuring, by lawful solicitation, their signatures to the petition in involuntary bankruptcy, if such creditors deem it for their interest to institute proceedings in involuntary bankruptcy.

I do not perceive that Mr. Elliot was a partner who should have been joined in the proceedings.

As to the suggestion that certain conveyances, transfers and assignments, and a general assignment by the bankrupts, all made more than four months before the petition in bankruptcy was filed, could have been set aside by the assignee in bankruptcy as being in fraud of the bankruptcy statute, if the bankrupts had filed a voluntary petition within the time limited by the 35th section of the act of 1867 (now sections 5128 and 5129 of the Revised Statutes), as modified by section 10 of the act of 1874, after the transactions occurred, it is a sufficient answer to say, that the observation is equally true of the failure of creditors to file an involuntary petition within the time so limited, as the limitation in the statute is expressly applied to one and the same period before the filing of a petition against the debtor and before the filing of a petition by him. But the fact that both the creditors and the debtors failed to file any petition in bankruptcy until the one now under consideration was filed, and that thus certain transfers which might have been attacked as in fraud of the bankruptcy statute, cannot now be attacked, can in no manner bear on the question of the validity of the present proceedings in bankruptcy. Creditors were the persons most concerned in setting aside, under bankruptcy proceedings, transactions which could be set aside as in violation of the bankruptcy statute, and could not otherwise be set aside, and, if they did not choose to avail themselves of opportunities which the bankruptcy statute would have afforded in case they or the debtors had filed a petition in bankruptcy at an earlier day, that fact can be no objection to the filing of the present petition, with the other advantages to grow out of it, that are accorded by the statute to creditors and debtors.

It is alleged that certain conveyances, transfers and assignments made by one or more or all of the debtors prior to the filing of the petition, were, because of certain irregularities, defects and unlawful intents, void and of no effect, as having been made with intent to delay, defraud or hinder the creditors of the debtors, and for other reasons, and it is claimed that this court ought to allow the creditors who have commenced proceedings in the state courts to set aside such conveyances, transfers and assignments, to prosecute further such proceedings.

Among other things, it is contended that the power and the right of an assignee in bankruptcy will not extend to the setting aside of the instruments in question. The sufficient reply to this suggestion is, that, so far as any property was the property of the bankrupts when the petition was filed, for the reason that the title to it had not passed out of the bankrupts by conveyances proper and adequate in form to convey it, it vests in their assignee when appointed, and he can collect it as assets; and that, so far as any property has been conveyed by the bankrupts in fraud of their creditors, such property, by section 5046 of the Revised Statutes, vests in the assignee in bankruptcy, and he can recover it by a suit to set aside the fraudulent conveyances. If it be necessary that the assignee in bankruptcy should in such a suit, be shown to represent a creditor who had, before the petition in bankruptcy was filed and before the title of such assignee accrued, acquired a specific lien upon the property fraudulently conveyed, on the ground that such assignee cannot set aside a conveyance which a creditor could not set aside, and that, under the laws of New York, a creditor must have acquired a specific lien upon property fraudulently conveyed by his debtor, in order to entitle him to maintain a suit to set aside the conveyance, it is manifest, that if, when the petition in bankruptcy was filed, there was a creditor occupying such a position, the assignee represents such creditor, and can maintain any suit which such creditor could maintain; and that if, when the petition in bankruptcy was filed, there was no such creditor, no creditor can, after the filing of the petition in bankruptcy, acquire any such lien on property, as the property of the bankrupt, as against the assignee in bankruptcy and the general creditors represented by him. The consideration, that no creditor can acquire a lien on the property of a bankrupt after the filing of a petition in bankruptcy, and that it may be that there was no creditor having a lien when the petition was filed, would seem to indicate, that, to hold that an assignee in bankruptcy cannot, under the provision of the statute which declares that "all the property conveyed by the bankrupt in fraud of his creditors" "shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee," "be at once vested in such assignee," recover the property thus declared to be vested in him, unless there was a creditor having a lien when the petition was filed, would entirely render nugatory such provision of the statute, in many cases. Whatever authority may be found in Re Collins [Case No. 3,007], for so holding, would seem to be a departure from what was done in Sedgwick v. Place [Id. 12,621], and in Beecher v. Clark [Id. 1,223], and to be in conflict with the cases of Allen v. Massey [Id. 231], In re Wynne [Id. 18,117], and Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391, and with the decision of Judge Woodruff, holding the circuit court for this district, in Re Leland [Case No. 8,234]. But, however this may be, whatever lien any creditor had acquired before the petition in bankruptcy was filed, of such a character as to place him in a condition, at that time, to enforce, by a suit, the setting aside of a conveyance fraudulent as to creditors, or whatever lien he had at that time acquired by bringing any such suit, is preserved by the bankruptcy statute and will be respected and enforced by the bankruptcy court, which acts as much for secured creditors as for unsecured creditors; but it belongs to that court to adjudicate as to all such liens, and it has power to restrain all interference, by suit or otherwise, by individual creditors, with property which, if it be property that was, before the filing of the petition in bankruptcy, transferred by the debtor in fraud of his creditors, is declared by the statute to be property that vests in the assignee. In re Grinnell, [Id. 5,830]; In re Rosenberg [Id. 12,054]; In re Clark [Id. 2,801]; U. S. v. Bancroft [supra]; In re Ulrich [supra]. And, in this connection, it may be observed, that what is vested by the statute in the assignee in bankruptcy is all the property conveyed by the bankrupt in fraud of his creditors, and not merely such right of action, in respect of such property, as the bankrupt had, or as any creditor had, when the petition in bankruptcy was filed; and that, as the filing of such petition prevents the after attachment of liens on such property, as against the assignee and the creditors of the estate, it is not only proper but necessary to regard the vesting of the assignee with the title to such property, as giving him a right to recover and reduce to possession his own property, and as displacing any requirement which otherwise might exist, that he shall represent a creditor who was, at the time the petition was filed, clothed with legal process against the property, because the title to property is a broader interest than a lien on property, and the existence of such title satisfies every principle upon which the existence of a lien or of legal process has been held to be requisite.

In the present case the suits already brought and those desired to be brought in the state court are numerous, and the case is one in which it is proper to continue the injunctions and stays granted until an assignee in bankruptcy is appointed and can have an opportunity, on behalf of the creditors, to examine into the matters relating to the estate of the bankrupts, and determine what action he will take in respect to the property which it is alleged was transferred in fraud of creditors or was the property of the bankrupts when the petition in bankruptcy was filed.

As to the examination of the bankrupts in the bankruptcy proceedings, the provisions

of section 5086 of the Revised Statutes are ample to allow creditors to obtain an examination of the bankrupts.

[The Case of Mrs. Ferrero (unreported) is governed by the decision of this court in Re Rosenberg [Case No. 12,054]. Her suit is really to recover the money she paid to the bankrupts on purchasing a bill of exchange, and is a provable debt, although it will not be dischargeable if it shall be shown to have been created by fraud. Such a suit and all proceedings in it are to be stayed, on the application of the bankrupts, until the question of their discharge is determined.][2]

I have intended to cover all the questions raised in the voluminous papers and exhaustive briefs in this case and have considered them all, even though I may have failed to discuss some of them as fully as others. It results that all the applications must be denied, except that of the petitioning creditors, to continue in force, on their behalf, as against the persons heretofore enjoined on the application of the bankrupts, the injunctions so granted, and to restrain such persons from interfering with any property of the bankrupts, or any property which, by operation of law, will pass to their assignee in bankruptcy when appointed.

[NOTE. For subsequent proceedings in this case, see Cases Nos. 4,132 and 4,133.]

Case No. 4,132.

In re DUNCAN et al.

[8 Ben. 541.][1]

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

EXAMINATION OF WITNESS BY CREDITOR — RIGHT OF BANKRUPT TO HAVE NOTICE AND TO CROSS-EXAMINE.

Bankrupts having applied for their discharge, a creditor, having given notice of his intention to oppose a discharge, but not having filed specifications of objection, began an examination of one of the bankrupts. While it was pending, the creditor subpoenaed a witness for examination. The counsel for the bankrupts appeared at such examination and objected to its proceeding, on the ground that no notice had been given to the bankrupts of such examination, and claimed the right to appear and cross-examine the witness. *Held*, that the bankrupts were not entitled to such notice, or to such cross-examination.

In this case the bankrupts [William Butler Duncan, William Watts Sherman, and Francis H. Grain] had applied for their discharge. A creditor, who had given notice of his intention to oppose a discharge, began, before his time to file specifications had expired, an examination of one of the bankrupts, which was continued by various adjournments. While that was so pending the creditor obtained a subpoena duces tecum for the examination of a witness. Counsel for the bankrupts appeared at the examination of such witness, and on their behalf claimed the right to have notice of such examination and to attend such examination and cross-examine the witness. The register held that the bankrupts had no such right. The following questions were then certified to the court:

1. Whether, after the bankrupts have instituted proceedings to obtain a discharge, and after specifications have been filed, and after a particular creditor has obtained time to file specifications, the bankrupts are not entitled to appear by counsel upon the examination of any witness called by the particular creditor adversely to the bankrupts.

2. Whether a creditor, who, after the bankrupts have applied for a discharge, has entered upon the examination of the bankrupts, and has procured such examination to be adjourned from time to time and has obtained time to file specifications, has a right to enter upon a general ex-parte examination of a witness, without notice to the bankrupts or their counsel and without opportunity to the bankrupts or their counsel to attend and cross-examine the witness and exercise the other rights of adverse counsel.

The register gave the following opinion: "Here is pending the examination by a creditor of the bankrupts, before specifications filed under their application for discharge; and here is pending the examination of a witness summoned on behalf of the same creditor and required to produce books and papers. They are separate proceedings in this matter of bankruptcy. The deposition of the witness to be made here would not be competent evidence if offered as such upon the trial of specifications that may be filed against the bankrupts in opposition to their discharge. Upon that trial witnesses must be produced and examined as in other cases, and the legal rights of all parties then are secured to them. The final words of the first question, as proposed by the bankrupts' counsel, assume the proceeding to be adverse to the bankrupts; and an adverse proceeding, without right to appear and defend, seems unjust. But if the foregoing paragraphs are not mistaken those final words need qualification. In the Matter of Bach, December, 1872 [case unreported], a witness was under examination at the instance of the assignee, and the counsel for the bankrupt claimed the right to cross-examine and otherwise act as opposing counsel may, because, otherwise, evidence might be improperly obtained to operate against the bankrupt upon his application for discharge. The register held that the bankrupt was not then a party and that the evidence given could not be used against him on his application for discharge, when all issues would be tried independently of proceedings had elsewhere; and this court sustained the decision. In the Matter of Levy [Case No. 8,295] the ex-

[2] [From 14 N. B. R. 18.]

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

amination of the bankrupts had been begun and adjourned over, and the assignee summoned a witness, in the meantime, for examination as to the bankrupts' property, without notice to them. Upon objection to this by the bankrupts' counsel, the objection was overruled by the court and the examination was allowed to proceed. Upon authority, I have felt bound to deny the motion of the bankrupts' counsel."

BLATCHFORD, District Judge. I concur with the register in his conclusions and in the reasons he assigns therefor.

[NOTE. For other proceedings in this case, see Cases Nos. 4,131 and 4,133.]

Case No. 4,133.

In re DUNCAN et al.

[18 N. B. R. 42.][1]

District Court, S. D. New York. June 8, 1878.

BANKRUPTCY—SPECIFICATIONS IN OPPOSITION TO DISCHARGE—EXCEPTIONS—PRACTICE.

1. All objections to specifications should be raised by the exceptions first filed.

2. Where the court has sustained the exceptions in certain respects, it must be deemed to have disallowed them in all other respects, and they cannot afterwards be renewed, unless the amendment allowed is, in effect, the making of a specification substantially different from the former one.

[In the matter of William Butler Duncan, William Watts Sherman, and Francis H. Grain, bankrupts.]

Exceptions to specifications filed in opposition to application for discharge.

[For previous proceedings in the case, see Cases Nos. 4,131 and 4,132.]

F. N. Bangs, for bankrupts.

Field & Deyo and Howard Payson Wilde, for opposing creditors.

CHOATE, District Judge. Certain creditors having filed specification in opposition to a discharge, the bankrupts excepted, and upon the hearing of the exceptions the first and second specifications were held to be indefinite and vague in a certain particular, and leave was given to amend in this particular. The opposing creditors having filed amended specification containing more definite allegations in the parts thus directed to be amended, and differing from the original specifications only in those parts, the bankrupts have filed exceptions to the amended specifications, renewing some of the objections contained in their former exceptions, and containing some further objections, the objections now made relating to other parts of the specifications.

The amendments are in accordance with the order of the court. As to all the other objections raised by the exceptions, I think that they must be considered as already passed upon by the court, or as made too late. All objections to specifications should be raised by the exceptions first filed. So far as the exceptions now taken are the same as were taken before, the case was heard, and the order, having sustained the exceptions in certain respects, must be deemed to have disallowed them in all other respects. They cannot now be renewed. If the amendment allowed is in effect the making of a specification, substantially different from the former, the right to except thereto of course exists. But that is not this case. If this practice were not adhered to there would be no end of dilatory proceedings, and it works no practical injustice. The exceptions to the third specification were taken before, and must, therefore, be overruled.

Exceptions overruled. Case to stand for argument on the specifications, either party to have leave to take further testimony before the register upon notice.

[1] [Reprinted by permission.]

DUNCAN (The BETSEY v.). See Case No. 1,367.

DUNCAN (DARST v.). See Cases Nos. 3,580 and 3,581.

DUNCAN (DIBBLE v.). See Case No. 3,880.

Case No. 4,134.

DUNCAN v. DUNN.

[8 Reporter, 299; 9 Cent. Law J. 151; 7 Wkly. Notes Cas. 246.][1]

Circuit Court, E. D. Pennsylvania. April 29, 1879.

NEGLIGENCE—CONTRACT — MERCANTILE AGENCY—ERRONEOUS INFORMATION—GROSS NEGLIGENCE.

1. A mercantile agency is not liable for a loss to a subscriber acting upon information communicated to him by the agency under a written contract, wherein it is expressly agreed that the agency shall not be responsible for any loss caused by the neglect of those collecting such information.

2. Under such a contract, the agency would not be liable even for the gross negligence of those who collected the information for it.

[2] [Motion to take off nonsuit. Case, by Duncan, Hale & Co. against Dun, Barlow & Co., proprietors of the "Mercantile Agency," to recover damages for the loss suffered by the plaintiffs by reason of selling goods on credit to one James Hill upon information obtained from the mercantile agency as to his mercantile standing and credit. The narr. alleged a contract whereby the defendants undertook to communicate to the plaintiffs, who were subscribers to the agency, information by means of which they might be enabled to know the standing, responsibility, means, and

[1] [Reprinted from the Reporter and Central Law Journal by permission. The syllabus and opinion are from the Reporter, and the statement from the Central Law Journal.]

[2] [From 9 Cent. Law J. 151.]

credit of persons with whom they should be connected in business. That the plaintiffs, to determine the propriety and safety of selling goods to one James Hill, applied to the defendants at their offices in Williamsport and in Philadelphia for information concerning the pecuniary responsibility of the said James Hill, and were informed that he had in his business a capital of $4,000, and was the owner of real estate worth $10,000 clear of incumbrances, whereupon the plaintiffs, believing and relying upon said information, and that due care and diligence had been exercised in ascertaining the same, sold and delivered to the said Hill goods to the value of $5,110.30. That the defendants were grossly negligent in ascertaining the financial responsibility, standing, and credit of the said Hill, and that on the day on which the defendants communicated the information to the plaintiffs the said Hill was not the owner of real estate clear of incumbrances and worth $10,000, but, on the contrary, was the owner of real estate, all of which had mortgages thereon which were duly recorded in the county wherein the said real estate was situated, and that the said Hill was at the date of the sale and delivery of the goods insolvent, and did not pay for the goods, whereby the plaintiffs, by reason of the gross negligence of the defendants, wholly lost the value thereof. The defendants pleaded "not guilty," and also a special plea, averring that the information was given the plaintiff in pursuance of a written contract, whereby it was agreed that such information as might be communicated by the defendants to the plaintiffs had mainly been and should mainly be obtained and communicated by servants, clerks, attorneys, and employees appointed as sub-agents of the plaintiffs, and that the defendants should not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting and communicating the said information.

[Upon the trial, before McKennan and Butler, JJ., the plaintiffs offered in evidence the written contract between the parties, which contained, inter alia, the following clauses: "The said Proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the dominion of Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys and employees, appointed as our sub-agents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations, with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit: * * * The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting, and communicating the said information, and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co." The plaintiffs also offered the following report of James Hill, communicated by the defendants by their agents at Williamsport and Philadelphia: "James Hill, Comm. Merchant, Pittston, Pa., July 20, 1876, character, etc., good; capital in business $4,000, owns real estate worth $10,000, and clear. Credit good." Plaintiffs then offered the records of unsatisfied mortgages given by James Hill, amounting to $8,250, and judgments against him amounting to $4,000, and rested. Defendants asked for a nonsuit, which was granted. Plaintiffs now moved to take it off. Upon the hearing of the motion, the court requested counsel to confine the argument solely to the question of liability for gross negligence under the contract.

[David W. Sellers, for the motion. The interpretation given to the contract upon the trial as a release of all liability, even from gross negligence, is contrary to public policy. Pennsylvania R. Co. v. Henderson, 1 P. F. Smith [51 Pa. St.] 316; New York Cent. R. Co. v. Lockwood, 17 Wall. [84 U. S.] 368. The clause in the contract relied on by the defense cannot be construed to protect them from the consequences of the gross negligence of its employees; it should be construed as covering ordinary negligence only, and as merely expressive of what the law would have been without it, viz., freedom from liability for ordinary negligence. Pasley v. Freeman, 2 Smith, Lead. Cas. Eq. *55, American note. The law frequently exempts from liability for ordinary negligence where it would not if the negligence was gross, thus recognizing a distinction which defendants claim does not exist. De Haven v. Kensington Nat. Bank, 31, P. F. Smith [81 Pa. St.] 95; First Nat. Bank v. Graham, 4 Norris [85 Pa. St.] 91.

[W. W. Montgomery, Samuel Wagner and Wm. Henry Rawle, contra. There is no difference in kind between ordinary and gross negligence. Though a man may not protect himself by contract against his own negligence, he may do so against that of his servants. Austin v. Manchester S. & L. R. Co., 10 C. B. 454; Perkins v. New York Cent. R. Co., 24 N. Y. 196; Wells v. New York Cent. R. Co., Id. 181. The cases of Pennsylvania Railroad v. Henderson and New York Cent. R. Co. v. Lockwood (cited on the other side), hold that a common carrier cannot exempt himself by contract from liability for the negligence of his employees; but this is not the law as to private persons or those on whom there is no common law liability in regard to the work to be done. See Bullitt v. Baird, 27 Leg. Int. 171, and comments thereon in Bradstreet v. Everson, 72 Pa. St. 124; also

the telegraph cases in the different states. Passmore v. W. U. Tel. Co., 78 Pa. St. 238. When the employment of sub-agents or substitutes is expressly provided for in the contract, the original agent will not be liable, unless negligence in the choice of the agent be proven. Story, Ag. § 201; Commercial Bank v. Martin, 1 La. Ann. 346; Darling v. Stanwood, 14 Allen, 504. Here the mercantile agency by its contract has particularly warned the plaintiff of the danger of mistakes which arise from the necessity of employing a multitude of subagents, and has bargained for liberty to employ them, without responsibility for their neglect. Plaintiffs being so warned, entered into the contract with their eyes open, and ipso facto make the employees of defendants their own agents. Moreover, they do so in terms, and thereby show clearly their intention of taking the risk of the mistakes of such employees.] [2]

BUTLER, District Judge. At the close of the plaintiffs' case a judgment of nonsuit was entered by direction of the court. A motion having been made to take it off, we have again looked into the testimony to ascertain whether it contains anything to support a verdict in the plaintiffs' favor; and the impression we entertained on the trial has now deepened to conviction. The declaration charges "gross negligence in ascertaining the financial standing and responsibility of James Hill." Mr. Hill resided at Pittston, Luzerne county. The evidence shows an application by the plaintiffs to the defendants' agent at Williamsport for information respecting the financial standing of this gentleman; that they received an answer saying he had a business capital of $4,000, and real estate worth $10,000, clear of incumbrances; that the inquiry was repeated at the defendants' Philadelphia office, and a similar answer received; that the plaintiffs, relying on this information, sold goods to Hill, to a large amount, on account of which a balance of over $3,000 remains unpaid and cannot be collected, Hill having failed; that the information furnished was incorrect, the real estate owned by Hill being incumbered at the time beyond its value. Upon this statement (which is sufficiently accurate and particular for the purpose in hand) it may be admitted that the plaintiffs would be entitled to recover but for the provisions contained in the second and fourth paragraphs of the contract; the former of which stipulates that the agents, in gathering information, shall be regarded as the plaintiffs' representatives; and the latter, that the defendants "shall not be responsible for any loss caused by the neglect of said agents, attorneys, clerks, or employees in procuring, collecting, and communicating the said information." The language in this latter paragraph of itself is broad enough to exempt the defendants from liability for all negligence of such agents. The plaintiffs think it should apply only to ordinary negligence, and be read as if gross negligence was expressly excepted. For this we can find no warrant. The defendants' business required the employment of numerous agents; and it was foreseen that they might, in some instances, prove negligent and unfaithful. The defendants were particular in calling attention to this, and in guarding themselves against the danger of loss therefrom; and no reason can be seen why they should be less anxious for protection against gross than against common negligence from this source. The danger from the former was as great as from the latter. By the contract the plaintiffs expressly agreed to take the risk of such loss on themselves. The authorities to which we have been referred have, in our judgment, no application to the case. Common carriers, innkeepers, and others engaged in the exercise of a public calling cannot thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract as parties may choose is an exception from the general rule, and confined to the class of cases named, where the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it, and they must take the consequences. That the negligence here complained of, whether gross or otherwise, is the negligence of the agents and not of the defendants personally, is undisputed and clear. Motion refused.

[2] [From 9 Cent. Law J. 151.]

DUNCAN (DUNN v.). See Case No. 4,175.

Case No. 4,135.

DUNCAN et al. v. FIRST NAT. BANK OF MT. PLEASANT.

MILLINGER v. SAME.

[26 Pittsb. Leg. J. 129; 15 Alb. Law J. 330; 11 Bankers' Mag. (3d S.) 787; 1 Thomp. Nat. Bank Cas. 360.]

District Court, W. D. Pennsylvania. March 14, 1877.[1]

USURY BY NATIONAL BANKS — SPECIAL STATE STATUTES—ACTION FOR PENALTY—LIMITATION.

[1. Special state statute, authorizing certain banks to charge more than the legal rate of interest, cannot operate to give national banks within the state a right to exceed the legal rate.]

[See note at end of case.]

[2. National banks which have taken usurious interest may, notwithstanding the giving

[1] [Reversed in Case No. 4,804.]

of successive renewal notes, apply such interest to the principal at any time before the principal is actually paid or judgment is entered for it. After such payment or entry of judgment, the right of action to recover the penalty becomes complete, and the limitation of two years begins to run.]

These cases, for the recovery of penalties for exacting usurious interest, were decided in the United States district court at Pittsburgh, on March 14th, 1877, the jury rendering for the plaintiffs in double the amount of interest charged. The verdict for Millinger was $76.04, and for William Duncan & Brother, $1,259.92.

The charge of the court, delivered by Judge KETCHAM, is as follows:

Gentlemen of the Jury:—These are cases brought by the plaintiffs to recover from the defendant the penalty for taking usurious interest under the thirtieth (30th) section of the national bank law of June 3, 1864 [13 Stat. 108]. By agreement of counsel both these cases, William Duncan & Brother and Benjamin Millinger, are tried by you together. The plaintiffs, as you have seen in the course of the testimony at different times, loaned money of the defendants, Duncan & Brother, at three different times; $500 on January 30, 1873, $4,000 on July 9, 1873, and $500 July 18, 1873. Benjamin Millinger loaned $250 January 27, 1873, and $274.35 January 15, 1875. At the time of the loan in each case the bank retained nine per cent. as discount and credited the plaintiffs with the balance, taking their notes respectively for the full amount of proceeds and discount. The notes of Duncan & Brother were not paid at maturity, but were renewed from time to time. The first note of $500, of January 30, 1873, was renewed till the fall of 1874. It had been reduced by payments to the sum of $150. The note of July 9, 1873, for $400, was renewed till October, 1874. The note of July, 1873, for $500 was renewed till November, 1874. At each renewal nine per cent. interest was charged, and was paid by the plaintiffs. These notes were all sued and judgment obtained upon them for the face of the notes or the principal, before the bringing of this suit. The Millinger notes were renewed, the note of January 27, 1873, for $250, from time to time till March, 1874, when it was paid in full; the note of January 15, 1875, for $274.35, was renewed at the end of three months, for two months, and then for one month, and remained unpaid until suit was brought upon it. Judgment was obtained upon it for the full amount and interest from maturity to judgment. Interest was charged at each renewal at nine per cent. No credit was given on the principal of any payment of interest by way of reducing the principal of either of the notes of Millinger or Duncan & Brother. Judgment was entered for the notes in full, independent of interest. And the note that Millinger paid he paid in full without reduction of any payment made of interest. The nine per cent. that had been paid and retained was left entirely out of the computation.

The act of congress permits the national banks to charge the rate of interest fixed by law in the state where they are located, and no more except when by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. The legal rate of interest in Pennsylvania is six per cent. The rate of discount allowed to banks of issue is also six per cent. and no more. It is true there are some banks that by special acts of assembly are allowed to charge more, but these are exceptions to the general law of the state. Congress deals with general rules and when it excepts banks of issue under the state laws it means the general law, applicable to the whole state, and relating to banks of issue all over the state. The special acts authorizing banks of issue, if there are any, apply only to the particular bank created by them, or permitted by them, to take more than six per cent. discount. The national banking law prohibits a national bank in Pennsylvania from taking more. In case a greater rate of interest has been paid the person by whom it has been paid, or his legal representative, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or recovering the same, provided such action is commenced within two years from the time the usurious transactions occurred. From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a locus penitentiae for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election. When payment is actually made, or judgment is entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the other Millinger note and the judgments on all the Duncan & Brother notes were entered, near the time of bringing these suits, less than two years before. The payment and the judgment concluded the transaction, and determined their character to be usurious. Till that time it was undetermined and the statute did not begin to run. These actions were brought February 1, 1876; so that they are

within the statute. The Millinger note was not paid in money direct, but by the proceeds of another note, made by another person, and indorsed by Millinger. This was not a renewal, but payment. It closed out the old note and commenced another transaction on a different piece of paper, with different parties under different liabilities. The defendants treated it as payment, and made the entries in their books accordingly. The amount of interest charged in these cases is computed, and is agreed upon by the counsel of both parties as correctly computed. It amounts in the case of Benjamin Millinger to $38.02. In the case of William Duncan & Brother to the sum of $629.91. It is the amount of interest retained and paid upon each of the notes sued by defendants up to the entry of judgment, and upon the note paid by Millinger to the time of the payment. You will find double the amount in each case for the plaintiffs respectively.

[NOTE. Defendant took the case on error to the circuit court, where it was held, per Strong, Circuit Justice, that national banks were authorized to take the same rate allowed to the local banks by the special laws, and the judgment was accordingly reversed. See Case No. 4,804.]

DUNCAN (FIRST NAT. BANK OF MT. PLEASANT v.). See Case No. 4,804.

DUNCAN (HALE v.). See Case No. 5,914.

DUNCAN (JANUARY v.). See Case No. 7,217.

Case No. 4,136.

DUNCAN v. KOCH.

[Wall. Sr. 33.][1]

Circuit Court, D. Pennsylvania. May 16, 1801.

MARINE INSURANCE—ABANDONMENT — EFFECT OF DELAY—UNCERTAIN INFORMATION.

[1. A vessel and cargo from Baltimore to Kingston, Jamaica, in 1797, was captured by a French privateer, and taken to Cape François, where she was acquitted by the admiralty court, but the cargo was afterwards seized by the government. The cargo was insured, and in the latter part of April the owner thereof received a letter from his correspondent giving information of the acquittal, but stating that the government "will take the cargo * * * for which they propose bills on France, drawn at 40 days' sight." The owner answered that this would cause considerable loss, and that he must abandon to the insurers. He also promptly communicated his information to the insurers, stating that if the cargo was taken as expected he would be under the necessity of abandoning. The vessel returned to Baltimore early in June, and the owner then promptly abandoned to the insurers. *Held* that, in the absence of definite information that the cargo had been seized, the owner was not required to abandon on receiving his first information; that there was no reason to infer that he delayed with a view of speculating on the result; and that, therefore, the abandonment was good.]

[2. When a loss is well authenticated or well-known, abandonment should be at once tendered. But if it is not certainly known, but from strong evidence is fully believed, and the assured suspends his option with a view to avail himself of some favorable contingency, this might turn the property on him at its full or supposed value. But such intent must be certainly and clearly proved, not inferred from slight circumstances, or from the probability that such would naturally be a motive with the assured for delaying an abandonment.]

A verdict in this cause was found for the plaintiff, on the 16th April, 1800, subject to the opinion of the court on the following case:

The plaintiff had insured the schooner Mary and her cargo, at and from Baltimore in Maryland to Kingston in Jamaica, and brought this action against the defendant for the amount of his subscription to the policy, as for a total loss of her cargo. The facts agreed were, that the Mary, on her voyage out, was taken by a French privateer, and carried into Cape François, and with her cargo, after being libelled in the admiralty, acquitted. After the acquittal, but it did not appear on what day, the cargo was, forcibly and against the will of the captain, taken by the French administration at the Cape. The proceedings relative to the capture, acquittal, and seizure, were communicated to Duncan in Baltimore, as follows: On the 2d of April, 1797, Thompson, the captain, wrote to him thus: "Mr. Duncan, I send this to let you know that I am captured by a French privateer and brought in here (Cape François). I am now waiting for my trial, which I do expect will be to-morrow. If the Mary is cleared, the administration will take the flour and the bread; the flour they take at twenty dollars per barrel; the corn and staves and shingles they do allow me to have. I am in great expectation of her being restored again; and if she is, Mr. Hussey will freight her home, &c."

On the 5th of April, 1797, Mr. Hussey, who appears as the friend and correspondent of the plaintiff at the cape, writes to him thus: "Dear Sir, I wrote to our friend, Mr. Garts, under date of the 29th ultimo, relative to the situation of the schooner Mary; since when I beg leave to acquaint of her acquittal. Whether this will tend to your advantage or no, I cannot judge. At the period I wrote the letter, it was my opinion it would be better 'to make no appeal;[2] but at the request and opinion of your friend Captain Green, who was here almost in the same situation, I used my endeavour for her restitution. She was delivered up yesterday morning (4th April) to the captain; but I am sorry to say the government will take her cargo; that is, the flour and bread, for which they propose bills on France, drawn at 40 days sight. Those bills will be accompanied by a copy of the minister of marine's letter from France, authorizing the commissioners here to draw on the treasury in Paris for any

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

[2] Meaning "no opposition," as was understood by the counsel.

provisions, &c. I presume this is far better than a colony debt; God only knows when they would pay here. I hope still it will be to the interest of all the parties. The bills shall be drawn in your name, and every paper sent to enable you to recover of the underwriters. I am in hopes to obtain 100 or 120 hhds. freight for the Mary, &c. In a few days I will inform you fully on the prospects of the Mary, &c." This letter was received by Duncan in Baltimore, between the 21st and 28th April, 1797.

On the 28th of April, 1797, Duncan writes to Hussey thus: "I did myself the pleasure of writing to you under the 21st current, and am favored with yours of the 5th, informing me of the schooner Mary and cargo being acquitted; but that government would take her cargo. This is a most iniquitous proceeding, and will at any rate be a considerable loss to me and the others concerned. We are insured, as you would see by my letter to Thompson; but there was every prospect of her making a good voyage, had the Mary got to her port of destination. In this situation, must abandon to the underwriters, and expect you will send me the protest, as mentioned in my last. Since the administration will give no satisfaction but by bills on France, see these bills are accompanied with every proper document; and you will, if possible, get a freight for the Mary. I doubt not in a few weeks will expect her, &c." On the 30th of April, 1797, Duncan writes to his correspondents, Philips, Cramond & Co. in Philadelphia, informing them of the capture and acquittal of the Mary, and adds, "But I am sorry to say that government will take her cargo, at least, he (Hussey) expects this will be the case; and if so, I will be under the necessity of abandoning. Be pleased to communicate this to the underwriters on that vessel and cargo, for their government." Philips, Cramond & Co. received this letter on the 2nd May, and immediately sent it to Wharton and Lewis, the insurance brokers who effected the insurance; the answer returned by them was, "that it was very well." The vessel returned to Baltimore on the 7th of June, and on the 8th the plaintiff wrote to Philips, Cramond & Co. as follows: "The schooner Mary has arrived at Baltimore from Cape François, after being taken and sent in there by a French privateer on her passage to Jamaica. Through the influence of my friend, Mr. James Hussey, the vessel and cargo were acquitted, but the administration would not allow the cargo to be taken away, so that Mr. Hussey was under the necessity of doing the best he could, and taking the treasurer of the "colony's draft on Paris, at 40 days sight, for $12,462.03. You have likewise the protest taken at Cape François, with a copy of the account sales of the cargo, all which you will please to lay before the underwriters, and claim the amount of the policy, which I presume there will be no hesitation in settling, &c."

This letter was received by Philips, Cramond & Co., on the 10th June, and immediately sent to a notary, with the other papers, to be adjusted, translated, &c., in order to lay before the underwriters a claim for the insurance. These papers were not prepared until the 20th June, and were then sent to the insurers. The jury (who found the facts, or some of them, stated in the case) found that the insured abandoned on the 20th June, 1797. The question submitted in this cause was, whether the abandonment should not have been made on the first receipt of the letter from Hussey, of the 5th April, 1797. If the court were of that opinion, then a non-suit to be entered.

Ingersoll and Rawle, who argued for the defendant, premised, that it was to be regretted, the jury had not been put to find whether the abandonment was "in time or not." They considered this as the province of the jury, upon a full consideration of the fact and law, and so was the practice, as Rawle stated, on trials of this kind in England.[3] It was argued:

1st. That the capture and detention of the vessel and cargo, under the circumstances, of which the plaintiff had full notice, both from Thompson, the captain, and from Hussey, by the letters of the 2nd and 5th of April, amounted to a total loss, and called for an immediate abandonment. But this was not much pressed by Rawle, and not insisted on by Ingersoll; the court inclining to think on the opening, that this was not a capture, but a mere arrest and detention of a neutral vessel by a belligerent, for the purpose of legal adjudication, it could not authorize an abandonment on the part of the insured.

2nd. But the great point labored by the counsel for the defendant, was, to show from the case, that the plaintiff, in respect to the cargo, had full notice of a total loss by the seizure of the administration, from the letters of the 2nd and 5th of April; and not having abandoned then, he took the risk on himself. They contended, that the information of the seizure was positive, and so understood by the plaintiff. Every sentence of Thompson and Hussey's letters represented the loss of the cargo as inevitable: they speak of the taking of the flour; the price to be given; the freighting the Mary back; and the propriety of abandoning, in terms so positive, as to have left no rational doubt of the loss on the mind of the plaintiff. Under these circumstances, he was bound by law to relinquish to the underwriters; or by declining it, to take the risk of loss or gain upon himself. The law is settled, that in cases of total loss, or what amounts to it, the insured must abandon in the first instance, and not wait to take the

[3] Quaere. Whether the "time" in which an abandonment ought to be made after notice, is not a question of law? When notice was received and understood by the party is matter of fact, and to be decided by the jury.

benefit of contingencies in his favour, and elect only to give up, and put the adventure and chance of recovery upon the underwriter, when his projects of advantage have proved hopeless. In this case, Duncan kept the underwriters ignorant of the full contents of his information. His letter of the 28th April does not disclose what he knew, that the cargo was inevitably lost, to the purposes of the voyage. He did not inform them of the bills to be drawn on France for the flour, at 20 dollars per barrel. This might be a very advantageous speculation; by suspending an abandonment, he secured to himself the chance of payment in Paris, or the sale of those bills at par. He had a right to say at the time, "The bills are my own; I do not look to the indemnity;" or to say, "The risk insured against has happened, the voyage is defeated, and the cargo lost. You must pay the invoice value, and accept my abandonment of the property, its proceeds, and whatever chances of loss or gain from it may exist." His conduct was diametrically opposite to it; and having kept the property after a loss in its nature entire, he cannot afterwards, when he finds it unproductive, throw it upon the insurers. They cited upon this and other points, Park, Ins. (4th Ed.) 171, 172, 150, 161, 81, 103; 1 Term R. 608; 6 Term R. 413.

E. Tilghman and Lewis, for plaintiffs, said there was no ground to contend that a total loss arose from the capture, and for that cause the insured ought to have abandoned. 1st. The insured heard of her capture, of her being libelled, and the probability of an acquittal, at the same time. Had the capture even worked, a total loss, so as to enable the insured to abandon, that information coming alone; yet hearing at the same time of her being libelled and like to be acquitted, it was not optional to abandon, or they might waive their right. 2nd. The capture in this case worked no loss; no risk in legal contemplation occurred. A neutral taken by a belligerent into port for adjudication, is not a ground for abandonment, unless condemnation follows. In such case, the abandonment is good if condemned—bad if not. It was argued on the other side, that the capture and the seizure of the cargo was one continued act, and so a total loss ab initio; but the fact on the face of the statement is otherwise. The case expressly states, that the vessel and cargo were acquitted in the admiralty, and the cargo afterwards forcibly seized by the administration; so that the seizure by the government, was after the 4th of April, the day of acquittal, and wholly a distinct risk and loss.

2nd. The only question is on the abandonment of the cargo. It is certainly true that the insured, upon information, certain information, of a total loss having actually happened, must make his election in a reasonable time, to keep the property, or throw it up. In this case, Duncan had no information from the letters of the 2nd and 5th of April, of the actual seizure of the cargo; and until that arrived, was not bound to abandon. As to all the reasoning to prove that Duncan withheld a surrender of the cargo and its proceeds from the underwriters, with a view to speculate on the bills, there is no foundation for it; and a bare inspection of his letters, from first to last, proves that he considered it as an injury from the beginning. He never had but one intention, which was to give up to the underwriters as soon as he could assure them of an actual loss.

TILGHMAN, Chief Judge. In considering this question, it is necessary to distinguish between the capture of the vessel and cargo, and the seizure of the cargo by the administration. I shall throw out of the question all idea of loss by the capture; the counsel for the plaintiff have declared that they do not rely upon it, and that they rest their claim solely on the seizure. There is no doubt but the seizure was one of the risks insured against by the policy. 'Tis so conceded by the counsel for the defendant. The only question, then, is, whether the letters from the captain of the 2nd of April and from Mr. Hussey, of the 5th, gave information to the plaintiff that the loss by seizure had actually happened. If they did, the case is with the defendant; for I take the law to be well settled, that the insured must abandon within a reasonable time from his notice of the loss. This reasonable time, generally speaking, should be a short time, a much shorter time than that which elapsed between the receipt of the letter of the 5th of April, and the 20th of June, when the abandonment was made. With respect to this point, upon which the cause turns, I must first remark, that it does not appear the defendant has suffered any injury from the delay of the abandonment. There is no reason to suppose the underwriters could have taken any effectual means to procure payment of the French bills, if the abandonment had been made at the time they contend it ought to have been. I must also remark that the plaintiff acted candidly. His communication in his letter of 30th April to Philips, Cramond & Co. contained every thing material that he knew; that is to say, the acquittal of vessel and cargo, and the opinion of his agent, Mr. Hussey, that the cargo would be taken by the government. There was no occasion to mention the letter of the captain, because it was two days prior to Hussey's, and because it was evident that the information of Hussey, who had been principally instrumental in procuring the acquittal of the vessel and cargo, was more to be relied on than that of the captain.

Now we will consider those two letters of the 2d and 5th of April. It is evident the letter of the 2d contained no account of the seizure; because at that time the trial had

not taken place; and it was more than possible, that the vessel and cargo might be condemned as prize. Then what information was contained in the letter of the 5th? Why, substantially this, that the government would take the cargo. At what time they did take it, we know not. The case states that it was taken after the acquittal, which took place about the 4th of April. But there is no proof that the seizure had taken place on the 5th. Then ought we to presume, can we presume this essential fact, to the prejudice of the plaintiff, who has acted in all respects fairly and openly? It is said his own letters show, that he considered the loss as having taken place. His letters show, that he confidently expected the loss had taken place on the 28th of April, when he wrote to Hussey; and he well might expect it. The underwriters, no doubt, had the same expectation from the communication made to them by Philips, Cramond & Co.: but there is no ground to say the plaintiff ever lay by one moment with the view of taking the chance of what might turn up with the French government. On the contrary, his letter to Hussey of the 28th of April is decided, that he shall at all events suffer a considerable loss, and that he must abandon. And every man of intelligence must have known, that at the period of those transactions, the chance of bills by the administration drawn on France, was a bad one. I take for granted from the whole correspondence, that the only reason why the plaintiff did not abandon on receipt of the letter of the 5th of April, was, that he did not consider that letter as a document sufficient to entitle him to abandon. Nor do I think that the underwriters would have paid, without further proof that a loss had actually taken place. I am therefore of opinion that it was not incumbent on the plaintiff to make an abandonment on the first receipt of the letter of the 5th April from James Hussey.

BASSET, Circuit Judge, was absent.

GRIFFITH, Circuit Judge. I lay out of the case what has been said of the first capture amounting to a total loss, or the taking by the administration a continuance of the loss. It will not bear an argument, and was fully answered by the counsel for the plaintiff. Then as to the seizure of the cargo, by the administration: this to be sure was in its nature a total loss: not only defeating the voyage, but an actual conversion of the property. In these circumstances, the insured had a right to abandon, and ought so to have done. Nothing is truer or more reasonable, than that the insured should, in such cases, act fairly. He is not to play at fast and loose; to keep the insurer at bay, while he avails himself of the chances of gaining by the loss. What Lord Kenyon says in Allwood v. Henchell, cited in Park, Ins. 280, is very reasonable, "He must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of the property, whether sold or unsold. He cannot lie by and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know the property is abandoned to them." But this election to abandon, (for it is optional in the assured,) cannot be made until the calamity has happened; nor to give it effect, is it necessary on the part of the assured, to give notice of it until he has received certain information of it. The only question here is, whether from the letter of the 5th April, 1797, the plaintiff had received such certain information of the loss by seizure of the cargo, as to make it incumbent on him to give notice of abandonment. By adverting to the case stated, it appears that the actual seizure, and the loss consequent thereon, had not happened when Hussey wrote this letter. It is a fair presumption that it did not happen until after the 5th; for in that letter he says, "The vessel was delivered up to the captain yesterday (the 4th of April) but government will take the cargo," not that it was taken. And the case further states, that it was after the acquittal in the admiralty that the cargo was seized. When Duncan received this letter, it gave him no certain account that the loss had happened, in the event of which he intended or was entitled to abandon. The utmost he could collect from either or both the letters, was, a high probability, and almost certain conviction, that this would be the issue. He seems, indeed, by his letters of the 28th to Hussey, and 30th of April to Philips, Cramond & Co. to have made up his mind that this was to be the fate of the cargo. Still however, as a ground to abandon, he had not received information of an actual loss. Indeed, the probability is, the seizure was not made on the 5th. It cannot be collected from Hussey's letter, that the administration had then fixed its "fangs" (to use the expression of one of the counsel,) upon the cargo. Thompson and Hussey, indeed, considered it as a thing in course, and spoke of events to come, as if they had already transpired; under a full conviction they would happen: but the "forcible seizure" mentioned in the case was not then made. Duncan could, therefore act no otherwise than he did act; to tell the insurers what had happened; what was likely to happen; and that if the impending loss did happen, he would abandon in toto. All this he told them immediately on receipt of Hussey's letter on the 5th of April, in his to Philips, Cramond & Co. of the 30th. What if he had gone to the underwriters and showed his letters, and offered to abandon. They might have said, "You are too hasty; your cargo does not appear to be lost; you call for the insurance money before it is certainly payable; your agent may have so managed

things that the Mary may now be on her voyage to Kingston; we will not accept your abandonment and pay the loss, before we know it has happened."

In the circumstances of this case, the plaintiff was justifiable in writing for the confirmation of the loss. His idea, indeed, seems to have been, that he ought to have a protest of the loss before he could abandon. It was argued against the plaintiff, that he was fully convinced of the loss; that he was mentally as certain of it, as if the protest had been in his hand; and that it was with a view to see what would come of the French bills, (which were nominally a great price for his flour,) that he delayed an immediate abandonment. I should perhaps agree, though I speak not with certainty on this point, that though his information was not certain, yet if he firmly and undoubtedly believed a loss had happened, and so it afterwards appeared, and he deferred an abandonment with a view to take the chance of the bills, if good, or abandon them to the underwriters, if bad; in such case he ought not to recover for a total loss, but the bills would be considered as his own. But there is not the least evidence of his delaying to surrender on any calculations of this kind. On the contrary, from the first moment, he considered the seizure as injurious, and resolved to come on the underwriters. On hearing the government would take the cargo, he writes to Hussey on the 28th of April, "That it was a most iniquitous proceeding, and would at any rate be a considerable loss to him and others concerned," and adds, however, that they were insured, and requests him to send a protest. But what is decisive as to the intent of the plaintiff in not making a formal abandonment on the letter of the 5th of April, is his communication to the underwriters on the 30th. He informs them of the situation of the cargo, that government would seize it, at least Mr. Hussey expected it, and in that case, he should abandon. If he designed to keep them at bay, and take the chance of a market for the bills, he would not have written this letter. In fact, by this letter he precluded himself from the possible contingency of gain in the alternative of the bills proving good; for I consider, that on this letter the underwriters would have been entitled to the proceeds. It was a conditional abandonment, and if the loss happened by the seizure as contemplated, the abandonment in favour of the underwriters would have related to the 5th of April, 1797, upon the contents of his letter of the 30th, which says positively, "If the loss happens, I must abandon," and desires this to be communicated to them, "for their government."

Upon the whole, I consider this a very plain case for the plaintiff. He was not bound to relinquish, nor could he with propriety have relinquished the cargo to the insurers, on the letter of the 5th of April; because this letter did not give an account of an actual loss. Nor ought he to lose his assurance upon the ground that in fact the loss had happened, and he was fully convinced of it, though not positively informed; but delayed with a view to speculate on the bills, considering them as his own: for no such intent appears; but the contrary. From the first he resolved to abandon; and as soon as he received certain notice of the loss did do it. All the acts of Hussey must be taken in this case for the common interest, and not done as by the special agent of Duncan. In cases of this kind, it is difficult to propose a rule, by which to determine what shall be notice of a loss, to the assured: much must depend on circumstances. If the loss be well authenticated or well known, immediate dereliction should be tendered by the assured. If not certainly known, but from strong evidence fully believed, and the assured suspends his option with a view to avail himself of some favorable contingency for the disposition of the property insured on his own account, this might, if the loss had in fact happened, (though I do not say it would,) turn the property upon him, at its full or supposed value. But such intent must certainly be proved, and clearly proved—not inferred from slight circumstances, or from the probability that such would naturally be a motive with the assured for delaying a surrender to the underwriters. In this case there was neither full notice of the loss on the 5th of April; nor has any artifice or improper procrastination appeared on the part of the plaintiff. Judgment must therefore be entered for the plaintiff.

DUNCAN (McLEOD v.). See Case No. 8,898.

Case No. 4,137.

DUNCAN et al. v. MOBILE & O. R. CO. et al.

[2 Woods, 542.][1]

Circuit Court, S. D. Alabama. June Term, 1876.

RAILROAD MORTGAGES—FORECLOSURE — APPLICATION OF INCOME TO FLOATING DEBT—POWER OF COURT.

The president and directors of a railroad company had contracted a floating debt to pay interest on its bonds, and for supplies and repairs for which certain persons interested in the road had become individually liable. *Held*, in a suit in equity brought by the trustees of the first mortgage on the railroad property, to foreclose the same, that the court had no power without the consent of the bondholders to direct the application of the income of the road to the payment of the floating debt, although it was made to appear that it could be paid on favorable terms, and that it was equitable and probably for the interest of the bondholders that such application should be made.

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

Petition filed in a suit in equity.

On the 3d of February, 1876, [William B.] Duncan and [A. Foster] Elliott, trustees of the first mortgage executed by the defendant company, filed a petition in this court in this case, in which they represented that as such trustees they were, under the order of this court, in possession of the defendant company's road and real and personal property, which they were administering under the order of the court; that a large portion of the property of the company was unproductive and contributed little to the payment of its debts; that from April, 1861, to the year 1866, the railroad company was deprived of remunerative business by reason of the civil war; that its property was wasted and its debt greatly increased by accumulation of unpaid interest, so that at the close of the war the company was embarrassed, if not insolvent; that this increase of debt was funded, and it was expected that there would be an increase in the demand for the services of the road, and a great improvement in the resources and growth of the country. These expectations had not been realized, and for the last two years preceding the filing of the petition, there had been stagnation and decrease of business, resulting in a default of the payment of interest and a taking possession of the road by the trustees under the power of their deed of trust. The petition further stated that the interest bearing bonded debt of the company was $11,500,000, on which the annual interest was $900,000, which, under existing circumstances, the road was unable to pay; that in 1874, the company made default in the payment of its interest, and that during a part of the year 1873, and in 1874 and 1875, in order to maintain its credit, had contracted a floating debt to the amount of $582,385.52, which was expended in payment of interest, and for supplies, materials and equipments. A portion of this debt, it was alleged, was secured by a pledge of bonds and other securities of the company, the par value of which exceeded the debt, but which would not sell for more than a third or fourth of the debt; another portion was secured by the individual indorsement of persons who had been president and directors of the company, and who gave their names and credit to maintain the credit of the company, and to purchase supplies; another part of the debt was held by the patrons and customers of the company, secured by third mortgage bonds, having little market value. The petition further stated that it was the hope and expectation of the trustees that there should be a reorganization of the company by the owners of the bonds becoming the owners of the railroad, and that for that purpose a removal of these floating claims might be desirable to the bondholders, if the same could be done on favorable conditions and with their consent. The petitioners alleged that in their opinion, the debt could be compounded and settled at much less than its face, and that by its settlement a number of the bonds and securities of the company would be preserved from sacrifice, but that the petitioners had no authority to employ for that purpose the moneys which have come into their possession as trustees. Petitioners did not admit that the holders of the floating debt had any legal claim upon the moneys in their hands arising from the income and receipts of the road since it has been in their hands; but they prayed for a reference to a master to report whether it was legal or proper to pay said floating debts, or any portion of them, as a compromise; that the trustees and representatives of the several classes of bondholders might be notified of the reference, and their action thereon reported to the court, and how far they consented to and approved said application, and that the master report what is prudent, legal or proper to be done in the premises. A reference was made to the master, as prayed in the petition, and after taking testimony and hearing argument, he filed his report. It appeared from the report, that the trustees of the several deeds of trust, executed by the railroad company, as well as the railroad company itself, were notified of the reference and were represented before the master. The master reported the floating debt to be $529,598.34, of which $114,932.34 was a gold obligation. Of this total, $120,023 was contracted for supplies, and the residue, $406,048.48, was received upon loans, and went into the general fund of the company, and to that extent released the accruing receipts and created a fund sufficient to meet the accruing interest, The master finds that the sum of $327,332 thus raised was probably applied to the payment of interest. The master further reported that, with the use of $230,000 in money, and the use of county bonds already pledged to the payment of this floating debt, the whole could be compromised and discharged. The master further reported that it would be equitable to use the income of the road for the purpose mentioned; and that on several accounts it would be good policy, and recommended the application of $230,000 of the income to this object.

George N. Stewart, Robert H. Smith, and Wm. G. Jones, in support of the master's report, cited Ludlow v. Grayall, 11 Price, 58.

E. L. Andrews, contra.

WOODS, Circuit Judge. Briefly stated, the grounds upon which this recommendation is based by the master, and upon which the confirmation of his report was urged by counsel, are: (1), That the whole of the money represented by this floating debt has in good faith gone to the bondholders, partly and chiefly by paying their interest coupons; and as to the residue, by the improve-

ments and betterments of the railroad property; and (2), that a large amount of the bonds of the company are hypothecated for the payment of this floating debt; and (3), that the settlement of this floating debt, by payment or compromise, is essential to such management of the property or reorganization of the company, as will preserve the valuable franchises, privileges and exemptions of the existing corporation. I have been unable to come to the conclusion, that the recommendations of this report ought to be adopted by the court. The debt, which it is proposed to pay out of the income of the road, is a floating debt, partly secured by bonds, etc., inferior in rank to the great mass of bonds making up the bonded debt of the defendant company. The company has failed to pay the interest on those bonds having the superior lien, and for that reason the trustees of the first mortgage have taken possession of the road for the purpose, among others, of applying its income to the payment of the interest, and if there should be a surplus, to the principal of these bonds. The proposition is to apply, for the reasons stated, the income which the first mortgage bondholders are entitled to, to the payment of the floating debt. The fact that the floating debt was contracted in good faith for the benefit of the railroad company's property, and therefore for the benefit of the bondholders, is true of perhaps all such debts. But that does not give the floating debt creditors any ground upon which to claim that their debt should be paid first. Galveston R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 482. But I do not understand that the floating debt creditors claim this application of the income of the road as a legal right. It stands simply on the ground that to refuse their payment, would be inequitable. But I cannot invade the legal rights of others to relieve the floating debt creditors from the position in which they have voluntarily placed themselves. The facts that a large amount of inferior securities of the railroad company, now hypothecated for the floating debt, would be released by its payment, and that a reorganization of the company would be greatly facilitated and the valuable franchises of the company thereby preserved by the proposed payment of the floating debt, are doubtless strong considerations, when addressed to the bondholders themselves. But can this court waive the rights of the bondholders, because we might think it would turn out to their advantage? Can we make a contract for them, because we think it would be a good contract? Have we the power to take money which belongs to them and give it to others without their consent, because we think it would be for their interest? They have not consented to this diversion of their money, and no one who is authorized to do so has consented for them. For the trustees to undertake to give assent for the bondholders is clearly outside of their powers and duties, which are plainly prescribed in the deed of trust. This court is, in my judgment, without any power to make the decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a court of equity, would shake the credit of railroad securities throughout the world. I must, therefore, decline to adopt the recommendations of the master.

[NOTE. For opinion on final hearing, see Case No. 4,136.]

Case No. 4,138.

DUNCAN et al. v. MOBILE & O. R. CO. et al. KETCHUM v. SAME. ZEIGLER et al. v. SAME.

[3 Woods, 567.] [1]

Circuit Court, S. D. Alabama. June Term, 1877.[2]

EQUITY — ADMINISTRATION OF COMMON FUND — RAILROAD COMPANIES — BANKERS AS FINANCIAL AGENTS—PURCHASE OF BOND COUPONS — LOANS — SALE OF DETACHED COUPONS — PRIORITY OF LIENS.

1. In the administration, by a court of equity, of a common fund subjected to the equal benefit of many creditors, if one creditor objects to the claim of another, and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all.

2. If other creditors expressly waive all objection to such claim, and consent that it shall participate in the fund, such waiver and consent can only affect the proportion of the fund to which they would be entitled if the disputed claim were excluded.

3. A banking firm in New York was the financial agent of a railroad company, was interested in its capital stock, in various classes of its securities, and its floating debt. The head of the firm was president of the railroad company, invested with full control of its financial affairs. The company being in a failing condition, and unable to pay the coupons about to fall due on its first mortgage bonds, said banking firm, with the concurrence of the railroad company, in the hope of preserving the credit of the latter, and if its resources should continue to be inadequate to pay the interest on its bonds, with the purpose of instituting proceedings to administer the mortgaged property for the protection of the bondholders, agreed to purchase and hold said coupons. *Held*, that there was nothing in the relations between the banking firm and the railroad company which forbade this arrangement. The banking firm was only bound to observe good faith.

[See note at end of case.]

4. Where said banking firm had made a temporary loan to the railroad company, to enable it to pay interest on its maturing coupons, this constituted a confidential debt which the banking company were justified in repaying to itself out of the earnings of the company, the company not objecting.

[See note at end of case.]

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

[2] [Affirmed in Ketchum v. Duncan, 96 U. S. 659.]

5. A railroad company pledged its earnings for advances obtained by its president to pay its semi-annual interest. *Held*, that this pledge of the earnings was made for the security of the president, and did not prevent him from paying other debts with such earnings, if he found it expedient and for the company's interest to do so.

[See note at end of case.]

6. Possession of uncanceled coupons, detached from negotiable bonds, is prima facie evidence of title, with all the rights of purchaser.

7. There could be no sale of such coupons unless there was an intent on the part of the holder to sell.

8. Such intent may be inferred when the holder has actual notice that purchase, and not payment, was intended by the other party, and, having such notice, he consents to take his money, or if, after such notice, he acquiesces in the transaction.

9. The circumstances stated, which, in this case, were held to amount to notice, were sufficient to put the party on inquiry.

10. Although such circumstances may not be sufficient notice to bind the party absolutely to a contract of sale, yet, if he fails to repudiate the contract and return the money, he will be bound.

11. Coupons severed from negotiable bonds, secured by a mortgage on the property of a railroad company, are not entitled to priority of payment over the principal of the bonds or the coupons subsequently maturing, unless the mortgage contains some provision to that effect.

[See note at end of case.]

12. When a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all, and this whether the claims have matured or not.

These suits were instituted for the common purpose of securing a sale of the railroad and other property of the Mobile & Ohio Railroad Company, covered by the first mortgage executed by the company. William Butler Duncan and A. Foster Elliott, the complainants in one bill, claimed to be the trustees of the said first mortgage; Morris Ketchum, the complainant in another of the cases claimed to be the sole trustee under said mortgage. By consent of parties, and by the order of the court, the three cases were consolidated, and were then concurrently heard upon the pleadings, evidence, reports of master, exceptions thereto, exhibits, etc., for final decree.

The main controversy in the cases was touching the coupons due May and November, 1874, on the first mortgage bonds. These coupons, amounting, without interest, to $535,106.74, were propounded before the master by Alexander Duncan, who claimed to be their holder and owner. He averred that they had been purchased at the dates of their maturity, respectively, by Duncan, Sherman & Co., of New York, and that he was their transferee, and that the coupons were outstanding and unpaid, and a lien upon the property covered by the first mortgage executed by the railroad company, and entitled to payment out of the proceeds of its sale. The claim of Alexander Duncan was contested before the master by one Belloni, a first mortgage bondholder, who claimed that the coupons held by Alexander Duncan had not been purchased by Duncan, Sherman & Co., but had been paid by them for the company, and with the company's means. The master found for Alexander Duncan, and reported that the coupons held by him were unpaid, and constituted a just and lawful claim, and should be allowed, with interest from their maturity, as a valid and subsisting lien of the same force and effect as other unpaid coupons of the first mortgage bonds. Exceptions were filed by the contesting bondholders to this part of the master's report, and the question thus raised was argued by counsel and decided by the court.

It was claimed further in behalf of Alexander Duncan, that as the coupons held by him fell due before any other unpaid coupons, and before the bonds to which they belonged, he was entitled to priority of payment out of the proceeds of the mortgaged property.

John A. Campbell, J. A. Garfield, Peter Hamilton, and F. N. Bangs, for complainants in the first-named case, and for Alexander Duncan.

George N. Stewart, for the Mobile & Ohio R. Co.

Wm. G. Jones, George Hoadly, E. H. Grandin, and E. L. Andrews, for other defendants and contestants.

Before BRADLEY, Circuit Justice, and WOODS, Circuit Judge.

BRADLEY, Circuit Justice. In the case of the Mobile & Ohio Railroad Company, in which the various suits were consolidated, we have given the subject discussed a good deal of consideration, and have prepared the following opinion: The consolidation of these cases by agreement of the parties has relieved us from the necessity of deciding between the conflicting claims of the two sets of trustees. Both being before the court, as well as the parties beneficially interested, we can make a decree by which a sale of the mortgaged property will be valid, and confer a good title. We are also relieved from making any adjudication in reference to the claim of priority of the Tennessee substitution bonds, which, by like agreement of the parties, is submitted to the consideration of another court.

The only question of importance remaining in the causes as now consolidated is, whether the interest coupons which became due in May and November, 1874, on the first mortgage bonds, are valid and outstanding securities, entitled to payment out of the proceeds of the mortgaged premises pari passu with the bonds from which they were severed, or even prior to said bonds, or whether they are to be deemed to have been paid and satisfied. The holder of these coupons (they not having been canceled) contends that they were purchased from the original holders thereof, and were not paid, and that by virtue of such purchase he is enti-

tled to the full benefit of the mortgage security, and even to priority of payment over the coupons subsequently maturing, and over the principal of the bonds; and if not entitled as purchaser, that he is at least entitled to be subrogated to the rights of the original holders, as if the coupons had never been paid. The coupons in question were regularly presented for payment at the proper places appointed for that purpose, at or soon after the time when they became due; but the money due thereon was not received by the parties holding the same in the usual manner, at the place of presentment; but, after being examined, they were inclosed in a sealed envelope and indorsed with a memorandum of the number and amount, and returned to the holder or his agent, with directions to present them at some neighboring banking house, where they would get the money. It is claimed that they were not paid by the railroad company, but that Duncan, Sherman & Co. advanced the money on them with intent to hold them as subsisting securities, and that the holders consented thus to dispose of them. Parties contesting the validity of the coupons as an outstanding claim insist that they were in fact paid by the company or with funds procured by it for the purchase, and that the holders did not consent to a sale of them, and that Duncan, Sherman & Co., at all events, are estopped from setting up a claim to them as purchasers.

The right of the contestants to appear and oppose the claim of the present holders of these coupons is questioned. It is said that, having come before the master and proved their own bonds without making objection to the coupons which were also presented and proved before the master, they are now precluded from raising objections to them. The statement is not precisely accurate. One of the contestant bondholders at least did present objections before the master (which objections were adopted and presented by the complainants as trustees of the mortgage), and others have since been permitted to appear as defendants in the cause and file an answer, which they have done, raising the very issue. In addition to this, the trustees of the second mortgage filed an answer disputing the validity of the coupons. We think, therefore, that the issue has been distinctly and properly raised.

In the administration by a court of equity of a common fund subjected to the equal benefit of many creditors, if one creditor objects to the claim of another creditor and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all. It questions the right to participate in the common fund. If the other creditors, not opposing the claim, expressly waive all objections to it as to themselves, and consent that it shall participate, such waiver and consent can only affect the proportion of the fund to which they would be entitled if the disputed claim were excluded. It comes in for a portion of their share by equal participation with themselves. This proposition is so obvious that it needs no argument to support it. Waiver of objections to a claim is no proof of its validity except as against those who make the waiver. The waiver filed in this case, therefore, cannot have the effect of proof that the coupons in question were purchased by Duncan, Sherman & Co., except by way of estoppel as against those who filed it. The questions raised by the contestants, therefore, are properly raised, and must be met; and in considering these questions, it is necessary to inquire into the precise position which Duncan, Sherman & Co. occupied towards the company.

It appears from the evidence that they had for some time previous to May, 1874, been the general financial agents of the Mobile & Ohio Railroad Company, and were interested in its capital stock and its various classes of securities, to wit: First mortgage bonds, second mortgage and other bonds, and also in its floating debt. They made the arrangements for the current funds necessary to meet its various liabilities from time to time; and, in short, may be said to have carried the concern for a considerable period. Wm. B. Duncan, the head of the firm, was for several years a director of the company, and in April, 1874, he became its president, and was invested with the most plenary control of all its financial affairs. By resolutions of the directors, adopted in April, 1874, after Mr. Duncan was elected president, he, as such, was invested with full discretion over the available securities held and owned by the company, in consolidated bonds, convertible bonds, first and second mortgage bonds and stock, and was authorized to sell or hypothecate the same; and the net earnings of the company were pledged for repayment of advances made by him for the purpose of meeting the May interest; and the consolidated bonds were pledged as a security for the floating debt. The truth is, the whole financial operations of the company were under the control and passed through the hands of Duncan, Sherman & Co., both in 1873 and 1874, and up to the time of its open suspension in May, 1875. The resources which thus came into their hands were derived from the earnings of the road, the disposable securities and stock of the company, and the temporary loans that were made from time to time. It appears from the annual report of the company for the year 1874 (the year in question) that its net earnings for that year were $708,000, and the sales of bonds (mostly convertible) amounted to $94,000, making a total of $802,000. The contestants, in this case, contend that these sums were sufficient to have kept down and paid the interest of the first mortgage bonds and most of the other outstanding bonds of the

company. This is true. The annual interest of the first mortgage bonds (including the Tennessee substitution bonds), was about $730,000, and of all the bonds together, about $880,000.

But there was a large floating debt, which, at the close of 1873, amounted, according to the annual report for that year, to the sum of $1,451,147.77, of which Duncan, Sherman & Co. held about $191,000. They had, during the year, loaned to the company, on its notes, $150,000, which had not been re-imbursed, and the balance due them on general account at the close of the year was over $41,000. This loan was made to enable the company to keep up the payment of its interest and to meet its current obligations. The floating debt was kept along by renewals and by pledging various securities of the company as collateral. During the year 1874 it was reduced about $282,000, and as a part of this reduction Duncan, Sherman & Co. reduced their own debt $174,000, bringing it down to about $17,000. That is, they re-imbursed themselves their temporary loan, with interest, amounting to $160,000, and $14,000 on their general account. The contestants complain that this reduction ought not to have been made, especially so much of it as applied to the debt due to Duncan, Sherman & Co. They say that by the resolution of April, 1874, the earnings of the road were pledged for the May interest (which is the interest represented by one-half of the coupons in question), and that at all events this interest should have been paid. They also insist that the same considerations apply to the November interest. They contend that this was a specific appropriation of these funds, and that Duncan, Sherman & Co., occupying the fiduciary relations towards the company which they did, were bound in equity to carry it out, and had no right to assume the role of purchasers of those coupons. This position will presently be considered.

Besides reducing the principal of the floating debt as before mentioned, the sum of $118,346 was absorbed in paying interest thereon, for the purpose of extending it and preventing the sacrifice of collaterals; the sum of $139,296 was used to pay over-due coupons of the previous year, and $128,000 to pay interest on convertible and other bonds; besides which, some of the assets were uncollected, amounting, in excess of what was realized from those of 1873, to $47,726, and the sum of $45,000 was paid on the Oktibbeha branch. These items together amount to $478,368, and with the amount paid on the principal of the floating debt, made an aggregate of $763,000. Various other claims in judgment, and otherwise, absorbed the balance. It is not pretended that any portion of the bonded interest accruing in 1874 (except as above stated) was paid by the company, unless the payment hereafter mentioned is to be regarded in that light. The only resources which the company had were actually disposed of as above stated.

In this state of affairs, it was evident that the company was in a failing condition. Its net income from the road (which was its only real resource) was insufficient to pay the interest on its funded debt, to say nothing of the floating debt. The great mass of its property was primarily liable to its first mortgage bondholders. If subjected to an indiscriminate scramble of judgment creditors, the rolling stock and outside property would be sacrificed and scattered, and the whole security would be ruined. What was to be done? The first mortgage bonds were not due, and if the earnings were applied to the payment of the interest accruing on them, the bondholders could not take possession of the property, nor bring a suit for foreclosure. At the same time, other creditors were clamorous for every cent which could be realized. Duncan, Sherman & Co. conceived the idea of purchasing the coupons with their own funds, or funds provided by them for the purpose, perhaps in the hope of preserving the credit of the company until a change for the better should enable it to avoid ultimate bankruptcy. It is evident, moreover, that this would place it in their power, if the resources of the company should continue inadequate to redeem the coupons, to take proceedings for administering on the property for the protection of the bondholders, and of putting the company into a course of liquidation. The mode of carrying out the plan of purchasing the coupons was this: Funds were furnished, or provided for, by Duncan, Sherman & Co., in some bank near the usual place of payment, for the purpose of taking up the coupons on their account. When presented for payment by the holders, the course pursued is stated by the master in his report, as follows:

"As to the mode and manner the evidence is very complete. For instance, the couponholders who presented them for payment at the company's office in Mobile, were handed back their coupons after they had been verified or counted by the treasurer or his assistant, and placed in envelopes indorsed with memoranda of the number and amounts, and the holders were told to take them to the Bank of Mobile, where they would be paid. On presentation at said bank to the teller, the coupons were retained by the bank officer and the bank's cheques or money were given for them. The mode and manner of payment in London and New York was not the usual mode. In London the coupons for May, 1874, were taken up on instructions from Duncan, Sherman & Co. by the Union Bank, and for November by the Credit Foncier. In New York, the evidence is that they were not paid in the usual manner, and that the holders were informed that they were being purchased, and held uncanceled. * * *

"Evidence was adduced to show that a portion of the original owners did not know that the company was not paying. It appears that some did not know, and did not inquire. Others did and were fully informed. Payment was not made at the treasurer's counter as usual. It appears that all who inquired were informed of the nature of the payment. There was evidence to show that a written notice was posted up in view of the treasurer's office. The evidence is full that the purchasing agencies and the officers of the company fully understood the transaction. Evidence offered to show that the matter was kept secret, failed."

The master further finds, as follows: "The proof is full as to the intent of Duncan, Sherman & Co., and their agents—the Bank of Mobile, Credit Foncier, etc., with the assent of the company, not to pay or satisfy said coupons so as to extinguish them; but, on the contrary, their plainly expressed intention was that they should be purchased and remain uncanceled, with all the rights that purchasers would have. Their taking up the coupons without extinguishment was with the consent of the company, by the express agreement with its officers that they were to be purchased with all lien rights as existing mortgage security, preserved and held until the company could pay them."

These findings of fact have been excepted to by the contestants, but after a careful examination of the evidence, we think they are substantially correct. Now, upon this state of facts several questions arise:

First. Were Duncan, Sherman & Co. precluded from purchasing the coupons by the relation in which they stood to the company? We do not see that this can be successfully maintained. As financial agents of the company, and general managers of its pecuniary concerns (Wm. Butler Duncan being the chief executive officer), it is undoubtedly true that they were bound to preserve entire good faith. Had they been furnished by the company with the requisite means to pay the coupons, it would have been acting in bad faith towards it to have purchased the coupons in this manner, without the company's consent; and, under such circumstances, even to have purchased them with its consent, and kept them on foot, for the purpose of getting possession of the company's property, would have been a fraud upon other parties interested in that property. But the requisite funds were not furnished by the company. Money enough was furnished, it is true, to have paid these particular coupons, by leaving everything else unpaid. But the company was overwhelmed with floating debt, and creditors were pressing to be paid. Securities to a large amount had to be pledged as collateral to prevent instant prosecution, and debts had to be extended by payment of interest to prevent the sacrifice of the securities. Duncan, Sherman & Co. cannot justly be condemned for paying these pressing obligations as far as the money in their hands would go. Immediate bankruptcy would have resulted from a contrary course. It is true, the resolution of April pledged the earnings of the road for the advances obtained by the president for the purpose of meeting the May interest; but this pledge was only made for his security, and did not prevent him from paying other debts with such earnings if he found it expedient, and for the company's interest to do so. And, even if the company could have insisted on such an appropriation, it did not, but assented to his purchasing the coupons instead of paying them.

As to Duncan, Sherman & Co. paying their own temporary loan to the company, it does not appear but that they had claims of the highest equity to be paid. They had made this loan to enable the company to pay its interest. It was a confidential debt for a loan made to relieve the company from its pressing embarrassments.

Secondly. Was the transaction, as it actually occurred, a purchase of the coupons? It is insisted by the claimant that his possession of the coupons uncanceled is prima facie evidence of his title to them, with all the rights of a purchaser. So it would be if the evidence did not disclose the exact nature of the transaction. Whilst he has possession we know how he got that possession, or, rather, we know how Duncan, Sherman & Co. got it, and it was conceded that the present holder, having obtained them after maturity, is affected by the consequences that attach to the transaction. If they were paid, he cannot hold them as unpaid. He has the same title to them which Duncan, Sherman & Co. acquired, and no greater. Then was it a purchase? We are clearly of opinion that there was no purchase, unless there was an intent on the part of the original holder to sell. This is almost a self-evident proposition. And where, as in this case, a sale, as compared with payment, is prejudicial to the holders' interest by continuing the burden of the coupons upon the common security, and lessening its value in reference to the balance of the debt, the intent to sell should be clearly proved. Such an intent may be inferred, however, when the holder has actual notice that purchase, and not payment, is being made, and when having such notice, he consents to take his money. So the same result will follow if the holder acquiesces in the transaction, on being subsequently informed that payment was not made by the debtor company, but was made by a third party intending to purchase the coupons and keep them, subsisting and uncanceled. In such case the holder would undoubtedly have a right to repudiate the transaction, and demand possession of his coupons by returning the money received for them. But, not doing this, he will be presumed to acquiesce in their transfer.

In the present case many of the parties had actual notice of the nature of the transaction, and all who inquired were informed in relation to it. The circumstances of the payment were calculated to excite inquiry. The coupons were not paid in the usual manner, by the officers or agents of the company, at the place designated for payment; but, after examination, were sealed up in an envelope, and the holder was directed to go elsewhere to get his money. At the place to which he was directed to go he received it, and delivered up his coupons. They were not delivered up to the company. This was an indication that they were not to be canceled. The great advantage to the holder of payment by the company would have been the cancellation of the coupons, so as to diminish the burden on the mortgage security. But he delivered his coupons to a third party, who furnished him the money for them. He ought to have known that that party, whether the bank itself, or some person by whom it was employed, and furnished with funds, would at least keep the coupons for its security until the company could pay them.

We think that this was notice to the holder, at least sufficient notice to put him upon inquiry. It may not have been, and we think it was not, sufficient notice to bind him absolutely to a contract of sale. He might still have repudiated the transaction by returning his money. But it was certainly sufficient to put him upon inquiry; and his subsequent acquiescence confirmed the title of Duncan, Sherman & Co., whose money he received. Had any other parties than Duncan, Sherman & Co. placed themselves in the gap as they did, and taken up the coupons with their own funds, hardly a doubt would have been raised as to their title to keep the coupons until they were re-imbursed. In our judgment, therefore, Alexander Duncan, who obtained the coupons from Duncan, Sherman & Co., is justly entitled to hold them as subsisting demands against the mortgage security.

But the claim put forward, that these coupons are entitled to priority over the principal, and over coupons subsequently maturing, we regard as utterly untenable. This would be giving to coupons a far greater sanctity than justly belongs to them. They are created as a mere matter of convenience for collecting the interest. According to them, the additional quality of being severed from the bond, and of being passed from hand to hand, does not clothe them with any additional privileges prejudicial to the bond itself. They have no preference or priority over it, any more than unpaid installments of interest would have if there were no coupons to represent it. They all stand, as to the security, on the same platform of equality with the principal, unless the mortgage or deed of trust contains some provision to the contrary, which is not the case here (Dunham v. Railway Co., 1 Wall. [68 U. S.] 254); and this is so whether the principal is due or not. It is suggested that the holder of the coupons may cause the mortgage to be foreclosed and the property to be sold to obtain payment. But he cannot do this to the prejudice of the principal. He must bring in the bondholders who are equally entitled to the benefit of the common fund. The latter are not obliged to stand by and see the entire security taken from them at the instance of the owner of the coupons. Where a common fund is equally liable as a security for various claims, it can only be administered for the benefit of all; and this, whether they have all matured or not. It is true, the bondholders themselves, when they have not parted with their coupons, or when an installment of interest or principal not represented by coupons, is due, may foreclose and sell the whole security for the satisfaction of the amount due, and thus deprive themselves of security for the residue of the debt. But that is because the matter is all in their own discretion, and no other person is injured by their acts. But it does not follow that the holder of separated coupons can do likewise. Equity will not allow him to pursue the entire security, or any part thereof, to the prejudice of other parties equally interested in it.

The conclusion to which we have come as to the right of Duncan, Sherman & Co. to hold the coupons by purchase, renders it unnecessary to discuss the question of subrogation, so ably argued by counsel. Whilst we are inclined to think that, as holders of junior securities, Duncan, Sherman & Co. would have been entitled to pay the coupons, and hold them by way of subrogation, we are not prepared to concede that this would have placed them on equality with the bondholders. No one can deprive the creditor of his security, or any part of it, without his consent, until his whole debt is satisfied. Sureties and others entitled to the privilege of subrogation, paying only part of the debt, must be postponed to the creditor until they are in a position to demand all his securities.

We observe that many exceptions have been taken to the report of the master and to his rulings, in the course of the examination before him, which we have not yet mentioned. We have examined these exceptions, however, but from the view of the case which we have taken, we do not consider them to be material.

A decree should be rendered in the cause in conformity with the views expressed in this opinion, that is to say, that Alexander Duncan is entitled to come in on an equal footing with the first mortgage bondholders for the amount of the first mortgage coupons held by him, including in the term "first mortgage bonds," all bonds which are ranked by the master in his report as belonging to the category of first mortgage bonds, such as ten year interest bonds, etc., so far as they represent coupons actually unpaid, excepting, however, the Tennessee substitution

bonds, which are not passed upon by us, and are not to be affected by the decree, but which are to take their rank of priority according to the decision of the court which has cognizance of the controversy relating to said bonds; also, that the mortgaged premises should be sold as an entirety to pay and satisfy, first, the said first mortgage bonds and coupons, and then the other securities of the company in the order reported by the master, saving and excepting the rights of the holders of the Tennessee substitution bonds, as before provided. Also, that masters should be appointed to make the said sale and to execute the decree; and that the sale should be duly advertised by them, and fixed to take place on a day named; and that, upon such sale being made, first mortgage bonds and first mortgage coupons should be received in payment in place of cash, when tendered for that purpose, except a sum sufficient to pay the costs and expenses of the various litigations, and the expenses and compensation of the commissioners, reserving for further order the status of the said Tennessee substitution bonds, in respect to said sale. Provision should also be made in the decree for executing all proper deeds and conveyances necessary to perfect the title; and all further equities and directions necessary to be made between the parties, or with regard to the mortgage fund, are to be reserved at the foot of the decree. The counsel of the complainants in the original suit will prepare a draft of the decree, and submit it to the opposite counsel, before presenting it to the court, in order that if the terms be not agreed on they may be then settled.

[NOTE. On appeal the decision in these cases was affirmed on substantially the same grounds stated by the circuit justice. The court, however, was divided, Justices Clifford, Swayne, Miller, and Harlan dissenting. In the opinion of the court, delivered by Mr. Justice Strong, it is said, among other things:

["But the intent to sell, or the assent of the former owner to a sale, need not have been expressly given. It may be inferred from the circumstances of the transaction. It often is. In the present case, the nature of the subject cannot be overlooked. Interest coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title; and especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them, and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act. We cannot close our eyes to things that are of daily occurrence. It is within common knowledge that interest coupons—alike those that are not due and those that are due—are passed from hand to hand; the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case, the holder intends to transfer his title, not to extinguish the debt. * * *

["It is argued, however, by the appellants, that Duncan, Sherman & Co., and consequently Alexander Duncan, their assignee, are estopped from claiming that the May and November coupons are unpaid. Precisely wherein this alleged estoppel consists we are unable to discover. It is said, that setting up the coupons now as an existing claim, entitled to the protection of the mortgage of the railroad company, is a fraud upon the bondholders secured by it. This we cannot see. If the original holders of the May and November coupons had sold them to some one else than Duncan, Sherman & Co., it could not be doubted those vendees would have an unimpeachable right, equal at least to the right of the bondholders. Such a sale would have worked no injury to the bondholders of which they could complain. They are in no worse condition now than they would have been in the case supposed. If there be any difference between that case and the present, it must be found in the relation William B. Duncan, and the firm of which he was a member, held to the railroad company and to its creditors. The firm had been financial agents of the company, and Mr. Duncan had been a director several years. In April, 1874, he was elected its president. It was his duty, therefore, to have regard for the interests of the company, its stockholders, and, measurably, of its creditors. He was bound to entire good faith. This may be conceded. But was it unfaithfulness to the company, or to the bondholders of the company, to purchase either the bonds or the coupons falling due, which the company was unable to pay as they fell due? Was it unfaithfulness thus to save the company from going into immediate bankruptcy? * * *

["But we think they (the coupons) have no equity superior to that of the bonds from which they were taken, or the subsequently maturing coupons. The mortgage was given as security for the principal of the bonds as well as the interest, with no priority to either. The coupons are mere representatives of the claim for interest. The obligation of the debtor evidenced by them cannot be higher, or entitled to greater privileges, than it would be had the bonds, in their body, undertaken the payment of interest. Cutting them from the several bonds of which they were a part, and transferring them to other holders, can give them no increased equities, so far as we can perceive. * * * The meaning of such a transfer, without more, is that the transferee takes precisely the rights of the person from whom he obtains his title, and no more. But certainly such a transfer cannot have the effect of giving to the transferee greater rights than those created by the mortgagee. Dunham v. Railroad Co., 1 Wall. (68 U. S.) 254; Gordillo v. Weguelin, 5 Ch. Div. 287."]

Case No. 4,139.

DUNCAN et al. v. MOBILE & O. R. CO. et al.

[3 Woods, 597.][1]

Circuit Court, S. D. Alabama. June Term, 1879.

RAILROAD FORECLOSURE SALE—PAYMENT IN BONDS — REORGANIZATION — RIGHTS OF DISSENTING BONDHOLDERS—APPEAL BONDS.

1. If bondholders secured by a mortgage on a railroad, purchase the entire property at a foreclosure sale, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the residue of their

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

bid in bonds, so far as to cover their own proportion of such residue.

2. The disposal, by decree of court, of railroad property mortgaged to secure many bondholders, so as to protect the interests of all, is beset with difficulties. In this case, where a large proportion of the bondholders had combined to purchase the railroad, or to reorganize the company without a sale, the court allowed the non-subscribing bondholders to participate in the purchase or reorganization on an equal footing with the others, provided they came in by a day named.

3. Penalty of appeal bond in this case fixed at $100,000, and reasons given therefor.

In equity. In this case, which was a bill [filed by William Butler Duncan and A. Foster Elliott, trustees] to foreclose the first mortgage executed by the Mobile & Ohio Railroad Company on its railroad and other property, it appeared that a large majority, both in number and amount, of the bondholders secured by said mortgage, had entered into an arrangement with each other for the purchase of the mortgaged property for their common benefit, or for the re-organization of the railroad company without a sale. After some discussion as to what form the decree should take, so as to protect the rights of the bondholders who had not come into the arrangement, Mr. Circuit Justice BRADLEY expressed the following views.

John A. Campbell, Peter Hamilton, T. A. Hamilton, F. N. Bangs, J. A. Garfield, George N. Stewart, W. G. Jones, George Hoadly, E. H. Grandin, and E. L. Andrews, representing the various parties in interest.

Before BRADLEY, Circuit Justice, and WOODS, Circuit Judge.

BRADLEY, Circuit Justice. Bondholders secured by a common mortgage have equal rights in the common security, proportional to the amount held by each. If the mortgaged property be sold to a stranger, the proceeds are equally distributed and perfect justice is done to all. If bondholders purchase the entire property, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the balance in bonds, so far as their own proportion of such balance extends, for it is to come to them. But it is evident that those who singly, or in combination, hold a large portion of the bonds, have a great advantage over the minority; for they can pay their own proportion of the purchase money, which is much the largest, in bonds, and have only a small amount of cash to pay, whilst the minority can only pay a small proportion in bonds, and have a large amount to pay in cash, which, as a generality, they are totally unable to pay. This practically puts it in the power of the majority to get the property at a large sacrifice, and turn the minority off with a mere pittance. This is inequitable, and to be avoided if possible. Perhaps the most equitable mode of disposing of the property (when practicable), when it cannot be sold for cash to an amount sufficient to pay the bondholders, is to decree a strict foreclosure, in which all will participate alike, or to make a sale for the equal benefit of all the bondholders who choose to come in and participate. A strict foreclosure may be attended with difficulties in those states where a mortgage is a mere security, and does not give a legal title, besides which, it places the property in the hands of a vast number of beneficiaries whose consent may be very difficult to obtain in perfecting a new organization for conducting the business. A sale for the benefit of all is attended with the difficulty of determining who shall make the bid. The court has sometimes authorized the trustees of the mortgage to bid for the bondholders. In this case, it is obvious that one class or the other of the bondholders would be dissatisfied with any selection of trustees which the court might make. To decree that all the bondholders shall be allowed to participate in any sale that may be made, would practically nullify an auction sale. Who would bid on such terms?

In this case, it has been brought to our notice that a scheme for reorganizing the company, or the interests represented in its property, has been agreed to and subscribed by about seventy-eight per cent (in interest) of the first mortgage bondholders. We have examined this scheme, and if not perfectly equitable, we are unable to point out any want of fairness in it. It would give to those who have not joined in it, should they do so, about twenty and one-half per cent interest in the entire purchase; whilst if all first mortgage bondholders (including the Tennessee bonds in the number) were placed on an exact proportionate division, the non-subscribing interest in the purchase would amount to about twenty-one and five-eighths per cent. But they run the risk of the Tennessee bonds being placed ahead of the others. If the latter were given the preference, then, subject to that incumbrance, the non-subscribing interests would, by an equal division with the others, take about twenty-four eight-tenths per cent of the purchase, which is probably less advantageous to them than the proposed plan of reorganization would be.

Looking at the difficulties which beset the subject on every side, we think that if we allow the non-subscribing bondholders to participate in the purchase of the property, should it be made in behalf of the reorganizing combination, on an equal footing with those who have joined it, that we shall have done all that we can do under the circumstances to protect their interests. The parties representing the reconstruction scheme, through their counsel, have offered to allow them to come in, and to extend the time for doing so until the first of August. We suggest that this time should be extended to the day of sale of the property. We perceive that the trustees have the power to do this—and keep the agreement on foot by extending

the time sixty days at a time. We have, therefore, proposed an additional proviso to the decree to carry out this view. We hope that it will be acceded to by the counsel for the complainants and those representing the reconstruction scheme. We do not wish to dictate these terms to the parties who propose to purchase, but suggest that, in our judgment, the interest of all parties would be subserved by an arrangement of this sort. (The counsel for the complainants here suggested that it was very desirable, if the plan of reconstruction should be generally adopted, to avoid any sale at all, and proposing to extend the time for other bondholders to come to an arrangement, to the 1st of September, the court adopted that modification, and announced that the decree would be made accordingly, unless very forcible objections to it should be presented at to-morrow's session of the court.)

Counsel for Ketchum & Moran having applied for a rehearing, the court denied the application. Counsel for Ketchum & Moran then applied for the allowance of an appeal, and also to fix the amount of the appeal bond at $10,000. On this application the court, after consideration, delivered the following opinion, fixing the bond at $100,000.

BRADLEY, Circuit Justice. An appeal being granted and allowed in these cases from the decree rendered therein on the 15th day of June, 1877, the question is raised as to the amount of the appeal bond to be given by the appellants, they being the plaintiffs in the second and third suits, and defendants in the first. The decree appealed from sustained the claim of Alexander Duncan, as holder of certain first mortgage coupons to the amount of over $500,000 to come in pari passu with the first mortgage bondholders, and directs a foreclosure of the first mortgage and a sale of the mortgaged property to pay the bonds secured thereby, and also certain other bonds given for interest, amounting in the aggregate to about ten millions of dollars. Purchasers are, by the decree, allowed to pay the purchase money in bonds and coupons to the extent of their proportionate interest as bondholders in the whole amount of first mortgage bonds. About four-fifths of the bondholders have agreed to and subscribed a scheme for reorganizing the company and purchasing the road. The court has allowed the remaining bondholders until the 1st of September to join in said scheme. A portion of the bondholders, holding less than one-tenth of the entire mortgage interest, are dissatisfied with the decree, and promote the appeal.

The property being in the hands of a receiver, and not producing much, if any, more than the expenses and necessary repairs of the road, the bondholders to whom the property or its proceeds really belongs, will be kept out of possession for two or three years by the intervention of the appeal. This delay in obtaining possession of the property or its proceeds we regard as calculated greatly to injure them. By having immediate possession they could make the necessary improvements and connections required for making the property much more remunerative, and could manage it much more to their advantage generally than a receiver can do. Or, if the property were immediately sold, they would be in possession of the interest of the purchase money, of which they will now be deprived for two or three years by the appeal. In our judgment, therefore, an appeal bond for one hundred thousand dollars is very moderate in amount.

The appellants contend that on the principles of the decision of the supreme court in the case of Jerome v. McCarter, 21 Wall. [88 U. S.] 17, a bond for one hundred thousand dollars is greatly in excess of what should be required. They insist that, in contemplation of law, possession by a receiver is equally beneficial to those who are interested in the property, as possession by the parties themselves. Whilst this may be the case with regard to dead property, or even real estate generally, we think it is not so where the property, like a railroad, is perishable in its character, and has to be managed, worked, repaired and taken care of, in order to preserve it. We think that the owner is a better manager than a trustee or receiver, who is hampered and restrained in his management, and cannot take advantage of all those means and opportunities which the owner could do for rendering the property most profitable and productive. On these grounds, we think that the damage sustained by the delay will be much more than the mere costs and expenses of the suit, and that the actual loss and injury to the owner, or in this case, the bondholders, may be taken into consideration by the court in fixing the amount of the bond, and that loss and damage, we think, will not be less than the amount we have required.

The most forcible difficulty which presents itself to our minds is the measure of damages which would be applicable in a suit on the bond. Would it be admissible for the plaintiffs to show a loss to the bondholders by reason of advantages lost for the cause above referred to? Of this there may be a question. But our opinion is, on the whole, that such a damage would be the subject of a recovery. If damages are really sustained, there seems no good reason why they should not be recovered.

DUNCAN (THWING v.). See Case No. 14,019a.

DUNCAN (UNITED STATES v.). See Cases Nos. 15,002–15,004.

DUNCAN'S HEIRS (UNITED STATES v.). See Case No. 15,005.

Case No. 4,140.

DUNDAS et al. v. BOWLER.

[3 McLean, 204.][1]

Circuit Court, D. Ohio. July Term, 1843.

JURISDICTION OF FEDERAL COURTS — CITIZENSHIP — ASSIGNEE OF MORTGAGE — CONSTITUTIONAL LAW.

1. The assignee of a mortgage may file a bill of foreclosure in the federal court, though his assignor could not have done so.

2. Such a bill acts upon the estate as directly as an action of ejectment.

3. An ejectment may be brought by the assignee of the mortgage, and the jurisdiction of the court cannot be doubted.

4. The constitution gives jurisdiction where the parties live in different states; and in so far as the eleventh section of the act of 1789 [1 Stat. 78] is restrictive of this right, it is in conflict with the constitution. This has not been so ruled heretofore; but the attention of the court does not seem to have been strongly directed to the point.

5. The restriction of the above section seems to have been designed to act upon negotiable paper.

6. It has been construed to extend to other choses in action.

7. But no decision has gone so far as to exclude the jurisdiction of this court, on a bill to foreclose a mortgage, by the assignee of the mortgagee, being a citizen of another state.

[Cited in Hampton v. Truckee Canal Co., 19 Fed. 4.]

8. Such a bill acts upon the land, and the assignment of a mortgage is not within the above section.

Mr. Worthington, for plaintiffs.

Wright, Coffin & Fox, for defendant.

OPINION OF THE COURT. This bill was filed to foreclose a mortgage. The mortgage was executed by Bowler to Shoenberger, both being citizens of Ohio; and by the latter it was assigned to the Bank of the United States, of the state of Pennsylvania. The bank assigned to the plaintiffs, who are citizens of Pennsylvania, in trust for certain purposes. The question is, whether the court have jurisdiction of the case? The second section of the third article of the constitution of the United States provides, that, "the judicial power shall extend to controversies between citizens of different states." And the eleventh section of the judiciary act of 1789 declares, "the courts of the United States shall have jurisdiction where the amount in dispute exceeds five hundred dollars, between citizens of different states, one of whom is a citizen of the state where the suit is brought." And the same section provides, "that no circuit or district court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover such contents, if no assignment had been made, except in cases of foreign bills of exchange." This statute is in conflict with the constitution. The constitution declares, the judicial power shall extend to controversies between citizens of different states; but the law declares that the court shall not have jurisdiction between citizens of different states, where the action is brought by the assignee of a chose in action, unless the assignor could have sued in the same court. I am aware that in Shute v. Davis [Case No. 12,828], it was held that the circuit court has no other jurisdiction than that which is given by the same statute. Where, to carry out a power given in the constitution, legislation is necessary, the judicial power cannot act until the mode of its exercise shall be provided. But whether the case under consideration is of this class, is the question. In De Lovio v. Boit [Case No. 3,776], the court say, that the expressions, "admiralty and maritime jurisdiction," in the constitution of the United States, "give jurisdiction of all things done upon and relating to the sea," &c. And in the case of the Post Master General v. Early, 12 Wheat. [25 U. S.] 136, the court held, "that the circuit courts of the United States have jurisdiction under the constitution, &c. of suits brought by the post master general of the United States on bonds given to him by a deputy post master, though no law required such bond." In the case of Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 613, the court held, that, under the provision of the constitution in regard to fugitives from labor, the master may seize his slave and remove him from the state in which he is found, if he can do so without any breach of the peace. That this remedy is open to him; although the act of congress provides, that the claim of the master shall be asserted before some judicial officer. Now it would seem if, in this respect, the right of the master is not restricted, by positive legislation on the subject, much less is the right of a citizen of another state to bring suit in the federal court. If redress of a wrong is given, by the constitution to an individual, more clearly and safely is it given when the remedy is sought by action.

That the judicial power shall extend to controversies between citizens of different states, is clearly and in terms declared in the constitution. Where suit is brought by the assignee of a note against the maker, who lives in a different state, the case is literally within the constitution; and yet the act of congress declares the jurisdiction shall depend not alone upon the citizenship of the parties on the record, but also upon the citizenship of those by whom the note may have been negotiated. In so far as this law is restrictive of the constitutional right of a non-resident, it is, in my judgment, unconstitutional. If congress can impose this restriction, they may go farther, and impose other restrictions, as their discretion may

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

dictate. In this way a constitutional right may be modified or taken away in whole or in part, as congress may determine. This is a new and most dangerous principle, and cannot be maintained. It is too late to say that a constitutional right, though explicitly given, cannot be carried into effect, except through legislative action. No legislation was required, and the only inquiry is, whether a legislative act can abrogate the right thus given. I am aware that the practice of the courts of the United States has been different, and that, by frequent decisions, they have sanctioned the law; and I am also aware that this has been done without inquiry, as to the validity of the act. Its constitutionality has not been questioned, and, after so many years of acquiescence, it may excite some surprise that it is now questioned. Satisfied as I am that the act restrictive of a constitutional right should be held void, yet, by the course of decisions made on the act under consideration, I cannot rest my decision on its unconstitutionality. I have referred to it with the view not to declare it void, but to show, that, as it is clearly restrictive of a constitutional right, it should receive a liberal construction. Keeping this in view, the decisions under the act will be referred to.

Effect was given to the eleventh section, in the case of Turner v. Bank of North America, 4 Dall. [4 U. S.] 8, and no doubt of its constitutionality is suggested. And so in Montalet v. Murray, 4 Cranch [8 U. S.] 46; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537. But the case of Sere v. Pitot, 6 Cranch [10 U. S.] 332, is supposed to have a more direct bearing on the point now before us. That was a case where an alien, who was appointed a syndic of an insolvent's estate, and who brought a suit in the district court, which, the court held, was not sustainable, as the insolvent could not have sued in his own name.

Now the eleventh section applies to citizens of states, and not residents or citizens of a territory. It is well settled that a citizen of a territory cannot sue in the federal courts of a state, because he cannot, within the meaning of the law, be called a citizen of a state. The above act, therefore, did not apply to the case before the court, unless under the provision that the district court should possess the same jurisdiction as the court of Kentucky. The chief justice, in giving the opinion of the court, says, that an assignment of an insolvent's effects by operation of law, is within the eleventh section, and that it embraces cases in equity as well as at law. He considers an unsettled account as a chose in action, and that the items of the account may be denominated the contents of a chose in action. This would seem to be reaching after objections against the jurisdiction of the court, and on ground most unsatisfactory to my mind. A chose in action embraces, in one sense, all rights of action. A judgment is a chose in action, and so is a deed for land; but these could not have been within the mischief which the statute intended to remedy. It has always seemed to me that the eleventh section was intended to apply to negotiable instruments, as by the assignment of such instruments only could the statute be evaded. The assignment of an instrument not negotiable would only convey an equity, and the remedy in such a case would be, by an action in the name of the assignor. This would be no fraud upon the law, as it could not give jurisdiction to the federal court. Indeed this jurisdiction could only be acquired by an assignment of a negotiable instrument. No other description of paper could be so assigned as to evade the law. An assignment of a mere equity, to give jurisdiction, could easily be exposed and defeated. In his plea or answer the defendant could set up this defence, and the complainant could not avoid it. An executor or administrator, it has often been held, is not within the law; and that he may sue in the federal court, though the deceased, whose interests he represents, was a citizen, at the time of his decease, of the same state as the defendant. It is difficult to make a distinction between this case and the suit by the syndic. The syndic was an alien, and of course occupied the same ground, in regard to the jurisdiction of the court, as if he had been a citizen of another state. As administrator he could have sued, but could not as syndic. In both cases, by operation of law, he was vested with the interests he represented. Notes payable to an individual or bearer are not within the statute. Neither is a suit by the indorsee against the indorser. And the right of the holder of a bill to strike out intermediate indorsements in blank, and fill up the indorsement to himself by the payee of the bill, is well established. Now here may be an evasion of the act, and it would be very difficult if not impossible to detect it. Where a judgment of a state court between citizens of different states, had been assigned to a citizen of the same state with the original plaintiff, it was held that the assignee may sue in the circuit court, although the note on which the judgment was obtained in the state court could not have been sued on in the federal court. Bean v. Smith [Case No. 1,174]. A conveyance of land is not a chose in action. Briggs v. French [Case No. 1,871].

This suit is on a mortgage, which is a deed subject to all the laws which relate to conveyances. It must be recorded, &c. as other titles to real estate are required to be recorded. And this is notice to all subsequent purchasers. The mortgagee has a conditional estate in fee simple. After condition broken, ejectment may be maintained on a mortgage. Dexter v. Harris [Case No. 3,862]. The assignee of a mortgage may bring an ejectment, and it is supposed that no one could

doubt his right to sue in the federal court, without regard to the place of assignment. He claims by deed, and he claims the possession of real estate. A bill of foreclosure acts equally upon the deed and the land, as the action of ejectment. Suppose a deed purporting to convey a legal estate, by reason of some defect of title in the grantor or form of the deed, conveys only an equity. Could not the grantee or assignee sue in the circuit court of the United States? And yet if the deed conveyed only an equity, that equity could not be asserted by the grantor or assignor in the federal court. The transfer or conveyance in such a case is not within the statute. The mischief to be guarded against is not found in such a transaction. And yet this is a chose in action, for every possible right on which an action may be maintained may be so denominated. The statute, then, does not reach every transfer of a right on which an action may be brought. And if the statute mean less than this, what limit shall be imposed on its meaning. The only just limit must arise from the nature of the provisions, and the subject on which it acts. That the statute acts upon negotiable paper is clear, but that it acts beyond this is difficult to maintain. That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted. The mortgage was executed to Shoenberger, and he conveyed the premises to the Bank of the United States. Now if this conveyance had been unconditional, there could be no doubt that the bank or its assignee could sue in this court. But does the condition annexed to the estate affect the jurisdiction of this court. It is not less a conveyance of the estate with the condition than without it, except that on the performance of the condition, the estate may be defeated.

I do not look into the New York reports to ascertain the nature of the mortgagee's interest. In so far as the courts of that state differ in this respect from the English rule and the decisions of the federal courts, they are not to be regarded. The mortgagee, at law, has the legal estate, after default in payment; and by a foreclosure of the mortgage, the estate becomes absolute. That by the modern practice there is rarely a strict foreclosure, does not affect the question under consideration. A sale of the land is generally decreed, if the money be not paid within the time limited. But the title of the mortgagor is foreclosed under the decree, and the sale is directed from equitable considerations. The bill of foreclosure acts upon the land as fully as an action of ejectment brought to recover possession of it. And this being the case, the transfer of title is not within the 11th section. Upon the whole, we think the court have jurisdiction, in this case, in the form brought; and that this view does not conflict with any decision made. The court will decree the foreclosure as prayed, and direct the property to be sold, &c.

[NOTE. For opinion on the merits, see Case No. 4,141.]

Case No. 4,141.

DUNDAS et al. v. BOWLER et al.

[3 McLean, 397;[1] 2 West. Law J. 27; 7 Law Rep. 343.]

Circuit Court, S. D. Ohio. July Term, 1844.

CONFLICT OF LAWS—ASSIGNMENT OF NOTE — ASSIGNMENTS FOR BENEFIT OF CREDITORS —BANKS —CONSTITUTIONAL LAW.

1. An assignment of a note is a new contract, and is governed by the place where it is made.

2. The supreme court of Pennsylvania having decided that the assignment made by the late Bank of the United States to trustees for certain purposes was valid, this court will so consider it.

3. The power of the bank to make the assignment depended on the construction of a statute of that state. The indorsement of a negotiable note in different states by different indorsers, will be governed, on the dishonor of the bill, by the local law where each indorsement was made.

4. The law of Ohio, which declares that an assignment by a debtor in failing circumstances, to a part of his creditors in preference to others, shall be for the benefit of all creditors, can have no effect on an assignment made in another state, of an instrument executed in Ohio. The act of 1824, in regard to assignments made by banks, does not apply, if the assignment was bona fide, so as to pass the interest out of the bank.

5. The act of 1842, which declared that the true construction of the above act was and is, to apply to all assignments, so as to compel the assignee to receive the notes of the bank in payment, by the assignee, as regards prior contracts, is unconstitutional and void.

6. On subsequent contracts it can have a constitutional operation.

7. The effect of this law on future contracts is to restrain the negotiability of notes given to banks, by declaring that the equities, as between the original parties, shall remain open in the hands of the assignee.

Mr. Worthington, for plaintiffs.
Wright & Fox, for defendants.

OPINION OF THE COURT. This bill is filed to foreclose a mortgage executed by the defendants the 17th of July, 1839, on a lot in Cincinnati, to secure the payment of a certain sum to Shoenberger, who assigned it, and the accompanying notes for the same amount, to the Bank of the United States, on the first of September following. On the 1st of May, 1841, the bank assigned the mortgage and notes to the complainants, in trust, with other choses in action, to pay certain banks in the city and county of Philadelphia, for post notes of the Bank of the United States, which they held, amounting in the whole to the sum of five millions seventy-eight thousand four hundred forty-four dol-

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

lars and ninety-four cents; a schedule of which notes is annexed to the assignment, and also the sums due to the respective banks. The choses in action assigned, amounted to the sum of seven millions seven hundred seventy-two thousand two hundred and fifty dollars. As the claims should be collected, payments pro rata were required to be made to the creditor banks, and after full payment, the trustees were to account for and pay over to the Bank of the United States the surplus that should remain in their hands.

The defendants contend, that under the statutes of Ohio, they have a right to pay off the above mortgage and notes in the bills of the Bank of the United States, which are at a considerable discount. There are several other causes pending, which involve the same principle, and in one or more of which, the validity of the assignment to the complainants, is made a question. At the last term, this court held, that they could exercise jurisdiction in the case, and the points now urged in the defence may be considered under two heads: 1. Is the assignment to the complainants valid? 2. What effect can the statutes of Ohio have on the case?

And first, as to the validity of the assignment. This point has been settled by the decision of the supreme court of Pennsylvania, in the case of Dana v. Bank of U. S., 5 Watts & S. 223. After considering the question at large, under the provisions of the charter and on general principles, the court say, "Hence, also, if the Bank of the United States had not had any express powers granted to it by the act of its incorporation, to dispose of and assign its property for the purpose of securing and making payment of its debts either in part or in whole, as the occasion might seem to require, in the judgment of the board of directors, it would have had such power by necessary implication. from the very nature of its business, unless it were expressly restrained by its act of incorporation, which is not pretended." They held that it belonged to the president and directors, and to them only, to make the assignment, and to determine on the propriety of its being done. This assignment having been made in the state of Pennsylvania, is governed by the law of that state. It was made under a statute of that state, and the construction of that statute, in regard to the power of the president and directors, has been settled in the opinion above cited. This constitutes a rule of decision for the courts of the United States. The law of the place where an assignment is made governs it, whether the instrument transferred be negotiable or not. A bill of exchange was drawn in Massachusetts on England, and indorsed in New York; and again it was indorsed by the first indorsee in Pennsylvania, and by the second in Maryland. The bill was dishonored, and a question was made for what amount of damages the respective indorsers were liable. In Massachusetts the damages on a protested foreign bill were ten per cent., in New York twenty, and in Maryland fifteen; and it was held that each indorser was liable under the law of the place where the indorsement was made. Each indorsement was considered a new contract, governed by the lex loci; and that each indorser bound himself to pay, should the bill be dishonored, the damages given by that law. Story, Confl. Law, § 314. This does in no respect conflict with the doctrine, that the law of the place where a contract is to be performed governs it. A note was made at Paris, in France, payable to the order of the payee, which was indorsed at Paris in blank. By the law of France, for an indorsement to transfer the legal right in the note, the name of the party and the consideration must be stated; a blank indorsement is treated as a mere procuration. Suit was brought in England on this note, and it was held, that although the indorsement, if made in England, would have transferred the property in the note to the assignee, yet as such was not the effect of it in France, the indorsee could not maintain the action. Story, Confl. Law, § 315.

And so if an indorsement of a negotiable bill be made in a state, where a prosecution to insolvency of the maker is the condition on which the indorser is made liable, he can be made liable in no other mode. And if it shall appear that the indorsement was made to an unauthorized banking institution, in violation of law, the holder under such indorsement cannot maintain an action. The contract of assignment is as much governed by the lex loci, as the original instrument. It is supposed that the statute of this state, of the 14th of March, 1838 [Laws Ohio, p. 57], which provides, that "all assignments of property in trust which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to enure to the benefit of all the creditors," applies to the assignment under consideration. How this law can affect an assignment made in Pennsylvania, I cannot perceive. The idea that, as the original contract was entered into in Ohio, the assignments, though made in any other state, are governed by the laws of Ohio, is wholly unsustainable. This has already been shown. Now, is there anything in the nature of the above mortgage and negotiable notes, to make them an exception to the general rule? A deed for the conveyance of real estate, can only take effect in virtue of the law of the state where the land is situated. A mortgage comes within this rule, but the rule does not embrace an equitable transfer of such mortgage, and an indorsement of the negotiable notes, to which it is an incident. No law of a state can have an extra territorial operation. Contracts made within the state, unless they are to be executed beyond its limits, are regulated by the local law.

There is no exception to this rule, except as regards the sale and conveyance of real estate. Under the law of Pennsylvania, a debtor may secure by mortgage, or otherwise, some creditors in preference to others; and such is the common law. There is no law in Ohio, that can reach or affect the contract of assignment by the bank to the complainants. The mortgage and negotiable notes are Ohio contracts. They were executed within the state, and nothing is required to be done under them in a foreign jurisdiction. We may look, therefore, to the local law to see what effect, if any, it can have on the terms of the above contracts.

It is conceded that where a note is given under a law which declares that the equities shall remain open between the original parties in the hands of a bona fide assignee, no negotiation or change of place can cut off this right of the maker. It is the law of the contract, and may be set up wherever suit shall be brought. And this holds in all instances, where the local law enters into the contract and becomes a part of it. A note is given and made payable in a state where eight per cent. is the legal rate of interest. This interest is recoverable in a state where more than six per cent. is declared to be usurious. And this, in my judgment, is the only practicable distinction between the remedy and the law of the contract. The former belongs to the forum, like the statute of limitations, the latter is inseparable from the contract, like the rate of interest. The ninth section of the act of January 28, 1824 [Laws Ohio, p. 360], in relation to assignments made by banks, provides, "that when suit is brought by a bank, or by assignees for its benefit, the sheriff shall receive the notes of the bank in discharge of the judgment."

In Pancoast v. Ruffin, 1 Ohio, 381, the court held "that where the debt due a bank has been assigned in good faith, and the bank has no interest left in it, the assignee is not bound to receive the notes of the bank in discharge of it." The assignment by the Bank of the United States in this case, is not alleged or shown to be fraudulent. The assignment must be presumed to be bona fide, until the contrary be proved. But it is contended that the bank did not transfer the whole of its interest in the choses in action specified, as they exceed the amount of the debt secured by more than two millions of dollars, and the complainants are bound to account to the bank for the surplus. This is true, but the assignment is absolute until, from the proceeds, full payment shall be made to the creditor banks. Now whether there will be any surplus cannot be known before the collections are made. The interest of the bank is contingent, depending upon an event which may never happen. When the creditor banks shall be paid, the residue of the fund, if there shall be any residue, will belong to the bank. The whole of the fund, without any reservation, is conveyed by the bank for the payment of the debt, and until this object shall be accomplished the complainants in law and equity have an exclusive interest in the mortgage claim. The law of 1824 is not objectionable on the score of principle or policy. A bank should be compelled to receive its own paper in payment of debts, and also in discharge of judgments, whether obtained in its own name or in behalf of some other name for its benefit. And this is the extent to which the act goes. A bona fide assignment is not within the letter or policy of the act. But it is insisted that the first section of the act of the 5th March, 1842 [Laws Ohio, p. 33], "declares that the true intent and meaning of the ninth section of the act of 1824 was, and is, to entitle every debtor of a bank or banker to pay such debt in the notes of the bank or banker, against such bank or banker, or the assignee of either, whether such bank or banker retains an interest in the same or has parted with all interest therein." The legislature have an undoubted right to modify existing laws, or pass new ones, as in their judgment the public interest may require. And there are many cases in which they may give a retrospective effect to remedial laws. But they are expressly inhibited by the constitution of the United States, from impairing the obligation of contracts—and here the question directly arises whether the above act is not a violation of the constitution in this respect.

The settled construction of the contract in the hands of a bona fide assignee and holder, by the supreme court of the state, is that such holder is not bound to receive, in discharge of the demand, the notes of the bank. The statute would seem to be susceptible of no other construction. How then does the act of 1842 affect the contract? By it the holder is bound to receive the notes of the bank in payment. This then impairs the obligation of the contract. It provides that the contract shall be discharged by the payment of a different medium from that which the constitution secures. Every evidence of debt gives the holder a right to demand in payment gold or silver, but the above act declares that such debt may be paid in bank notes. If this law had existed when the contract was entered into, there would be no objection to it. The effect of the act would then have been to restrain the negotiability of notes given to banks. The assignee under the law would have had no better right to demand payment in gold or silver than the bank, and this being the law it would have entered into the contract and constituted a part of it. It would be nothing more than leaving all equities open in a suit brought by the assignee, as they would have been in a suit brought by the bank. But this act instead of being a remedial one, as regards past transactions, strikes at the contract and essentially im-

pairs it; the act is, therefore, as regards prior and bona fide assignments, unconstitutional and void.

A declaratory, like any other act, may be unconstitutional, as it impairs the obligation of prior contracts, and yet its action on future contracts may be unobjectionable. And this is the character of the act under consideration. From the time of its passage it modifies the ninth section of the act of 1824, but retrospectively, it can have no such effect. An act which declared that all promissory notes which had been negotiated might be discharged by the makers, with the notes of the promisees, would so clearly impair the obligation of the contract to pay in gold or silver, that no one could doubt on the subject. And this, as regards prior contracts, is the effect intended to be given to the act of 1842. The negotiability of choses in action, are subject to the regulation of the legislature, but they can no more affect a prior assignment, than they can impair or destroy any other prior contract. As between the original parties to the note, a law of off-set, though enacted subsequently to the execution of the note, may apply to it. For in this view it relates to the remedy. But when the note is in the hands of a bona fide assignee, an off-set, as between the original parties to the note, cannot be applied to it without essentially impairing the legal effect of the contract of assignment. A decree may be entered for the sum due, and if not paid in, the mortgaged premises may be sold conformably to the laws of the state.

Case No. 4,142.

DUNDORE v. COATES et al.

[6 N. B. R. (1873) 304.][1]

District Court, D. Maryland.

BANKRUPTCY—DISMISSAL OF PETITION—ATTORNEY'S FEES.

Where a petition is dismissed the debtor is entitled to receive by law the attorney's fees on a hearing in equity twenty dollars. No fee can be taxed for petitioner's attorney.

In bankruptcy.

The debtors filed a denial and upon trial before the court without a jury were adjudicated not to be bankrupts, and the petition was dismissed. The clerk taxed an appearance fee of twenty dollars for the attorneys for both parties. The following exceptions were made: Exception is taken to the taxation of any attorney's fees at all. The appearance fee is only allowed to the attorney of the successful party. Gordon v. Scott [Case No. 5,620]. It is not allowed unless there is a trial by jury. In re Mead & Co. [Case No. 9,364]. The ten dollars for judgment without jury trial and the five dollars for discontinuance, are only allowed in actions at law. 10 Stat. 161. A proceeding in bankruptcy is not an action at law within the meaning of the statute.

GILES, District Judge. Exceptions in this case overruled so far as respects the costs taxed for the defendant. By the thirty-first of the general orders in bankruptcy, in a case where the petition shall be dismissed by order of the court, the debtor is entitled to recover from the petitioner the same costs that are allowed by law to a party recovering in equity. By the act of eighteen hundred and fifty-three (the fee bill) the attorney's fee on a hearing in equity is twenty dollars. No fee can be taxed for petitioning attorney in this case.

[1] [Reprinted by permission.]

DUNGLER (COOPER v.). See Case No. 3,192.

Case No. 4,143.

In re DUNHAM et al.

[2 Ben. 488;[1] 2 N. B. R. 17 (Quarto, 9); 1 Am. Law T. Rep. Bankr. 89.]

District Court, S. D. New York. July, 1868.

MORTGAGE BY SOLVENT DEBTOR—REVENUE STAMP—PLEADING.

1. Where a firm executed a mortgage upon personal property in their store, to secure a debt due to one of their creditors, which mortgage was executed November 1st, 1867, and filed November 26th, 1867, and on the 2d of January, 1868, the mortgage was foreclosed and the property sold, the mortgagors having failed in business in December, 1867, and it was not alleged in the petition in involuntary bankruptcy, which was filed against the firm, that they were, when the mortgage was given, bankrupt or insolvent or then contemplated bankruptcy or insolvency: *Held*, that, though the mortgage was not given for a present consideration, within the fourteenth section of the bankruptcy act [of 1867 (14 Stat. 522)], and although it was made with the intent to give a preference to a creditor, it was not made with intent "to delay, defraud, or hinder" the creditors of the mortgagors, within the meaning of the thirty-ninth section of that act.

2. Where, in support of an allegation that an act of bankruptcy had been committed by the transfer of certain property by the debtors, when bankrupt or insolvent, with intent to prefer a creditor, an assignment of the property in question was offered in evidence, which had no internal revenue stamp upon it, and which was the only proof offered: *Held*, that, under the one hundred and fifty-eighth section of the internal revenue act of June 30, 1864 (13 Stat. 292), the assignment was void, and the allegation of the petition in bankruptcy was not sustained.

3. In proceedings in involuntary bankruptcy, no replication is necessary to the denial by the debtors, according to Form No. 61, of the allegations of the petition.

[Cited in Re Heydette, Case No. 6,444.]

[In bankruptcy. In the matter of Marshall L Dunham and Joseph Orr.]

Thomas McGovern, for petitioning creditors.

L. J. Lansing, for respondents.

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

BLATCHFORD, District Judge. The petition in this case alleges two acts of bankruptcy: (1.) That the debtors, on or about the first of November, 1867, being possessed of certain estate, property, rights, or credits, to wit, a stock of millinery goods, consisting of feathers, flowers, and numerous other articles, together with the lease, fixtures, and furniture of the premises known as number 334 Canal street, in the city of New York, made a sale, conveyance, or transfer of the same to one Robert Orr, of said city, with intent to delay, hinder, and defraud the creditors of the said debtors; (2.) That the debtors, on or about the —— day of January, 1868, being bankrupt or insolvent, made to the said Robert Orr an assignment, conveyance, or transfer of certain property, rights, and credits, to wit, the book accounts, claims, demands, and debts due or to become due to the said debtors, with intent to give a preference to said Robert Orr, he being or claiming to be a creditor of the said debtors, or with the intent, by such disposition of their property, to defeat, delay, or hinder the operation of the bankruptcy act.

The debtors have denied the acts of bankruptcy set forth in the petition, and testimony has been taken on the issues thus raised.

An objection is taken on the part of the debtors, that, as no replication has been filed by the petitioners to the answer of the debtors, the answer must be taken as true, and the proceedings must be dismissed. The answer is merely the form of denial contained in form No. 61, and states that the debtors deny that they have committed the acts of bankruptcy set forth in the petition, and aver that they should not be declared bankrupt for any cause in the petition alleged. Such an answer sufficiently raises an issue as to the acts of bankruptcy alleged in the petition. It amounts to the general issue, and no replication is necessary. The objection is, therefore, overruled.

The first act of bankruptcy alleged is founded on that clause of the thirty-ninth section of the act which provides, that if a debtor shall make a sale, conveyance, or transfer of his estate, property, rights or credits, with intent to delay, defraud, or hinder his creditors, he shall be deemed to have committed an act of bankruptcy. It is not an element of this act of bankruptcy that the debtor shall be, at the time of committing it, bankrupt or insolvent, or be contemplating bankruptcy or insolvency, nor is any allegation to that effect made in the petition, in connection with the first alleged act of bankruptcy.

The testimony in support of the first act of bankruptcy alleged shows that the debtors, on the first of November, 1867, executed and delivered to Robert Orr a chattel mortgage on "six bunches of flowers, and all other the stock in trade, fixtures, lease, and furniture, and all other goods and chattels mentioned" in a schedule annexed to the mortgage, and then "in the store and premises No. 334 Canal street, in the city of New York" (the schedule specifying the lease of the premises, and sundry flowers, straw goods, feathers, and the fixtures and furniture in the store), to secure the payment of the sum of five thousand dollars on demand, with interest thereon from the date of the mortgage to the time of payment, being (as the mortgage states) "the amount of my promissory note bearing even date herewith, this mortgage being given as collateral security thereto." This mortgage was filed on the 26th day of November, 1867, in the proper office to make it a valid mortgage under the laws of New York, in the absence of an actual and continued change of possession of the mortgaged property. The evidence shows, that the debtors commenced business in January, 1867, and failed the last of December, 1867; that the mortgage was given at the suggestion of Robert Orr, to secure a debt of $5,000 due by the debtors to Robert Orr, and evidenced by a note or notes of the debtors for that amount, held by Robert Orr; that the value of the mortgaged property, at the time the mortgage was given, was between $2,000 and $3,000; that the mortgage covered all the property of the debtors, except their book accounts; and that the debtors continued business, and remained in possession of the mortgaged property, after the mortgage was given, until the 2d of January, 1868, when Robert Orr foreclosed the mortgage, and a sale was had of the mortgaged property. It is not shown affirmatively that the debtors were insolvent at any time prior to the last of December, when they failed. Under these circumstances, although the mortgage was not given for a present consideration, within the provision of section fourteen of the act, still it was a mortgage on personal property of the debtors, held by the creditor, Robert Orr, for securing the payment of a debt owing to him from the bankrupts, and thus within the saving clause of section twenty of the act; and, it not being alleged in the petition, or shown by the evidence, that the mortgage was given when the debtors were bankrupt or insolvent, or contemplated bankruptcy or insolvency, it cannot, although it was made with the intent to give a preference to Robert Orr as a creditor, be held to be within any of the inhibitions of the thirty-ninth section of the act, or to have been made with intent to "delay, defraud, or hinder" the creditors of the mortgagors, within the meaning of those terms as used in that section. There is nothing to impeach the bona fides of the debt due to Robert Orr, and, to hold that these debtors, when not bankrupt or insolvent, or contemplating bankruptcy or insolvency, had no right to secure that debt by a chattel mortgage so long as they owed other debts, and that the giving of such mortgage is to be taken as evidence of an intent to delay, defraud, or hinder the creditors of the mortgagors, and is to be regarded as forbidden by the thirty-ninth section of the act, would render invalid all chat-

tel mortgages by solvent debtors. There certainly was no intent to delay, defraud, or hinder Robert Orr as a creditor. The inhibition is against the hindering, delaying, or defrauding by the debtor of "his creditors," that is, all his creditors, as a body, generally. The only inhibition against giving a preference to a creditor by a mortgage is found in a subsequent clause in the thirty-ninth section, which is confined to the case where the debtor so giving the preference is bankrupt or insolvent, or is contemplating bankruptcy or insolvency. The first act of bankruptcy alleged is, therefore, not sustained.

As to the second alleged act of bankruptcy, the only evidence to sustain it is an instrument in writing, signed by the debtors, dated December 28th, 1867, purporting to transfer to Robert Orr, in order to secure the indebtedness of the debtors to him, sundry accounts against sundry persons named in the transfer, and amounting to $2,593.98. This instrument has no internal revenue stamp upon it. It ought to have had upon it a stamp of at least five cents, as an agreement or contract, under Schedule B following section 170 of the internal revenue act of June 30th, 1864, as amended. By section 158 of that act, every instrument not stamped according to law is declared to be invalid and of no effect. Not only did the petitioning creditors, on the hearing, claim that this instrument was void for want of the proper stamp, but the debtors also insisted that it was void for the same reason. It was and is void for that reason, and the second alleged act of bankruptcy is, therefore, unsustained by proof.

The proceedings are, therefore, dismissed, with costs to the respondents.

Case No. 4,144.

In re DUNHAM.

[1 Hask. 495.][1]

District Court, D. Maine. Dec., 1873.

PARTNERSHIP—FIRM CREDITORS—BANKRUPTCY.

A firm creditor cannot share in the assets of a bankrupt partner until his creditors are paid if the other partners are solvent, even if there be no firm assets.

In bankruptcy. Proof of debt against the estate of a bankrupt co-partner by a firm creditor.

FOX, District Judge. The question here presented is, whether a co-partnership creditor can share in the assets of one member of the firm who has been adjudged bankrupt, the other member being solvent, and there being no firm assets.

In such a case it seems to be well established by the English courts, that the firm creditor is not entitled to receive a dividend from the individual estate. There being a solvent partner to whom he can look for the payment of his demand debars him of the right to a claim on the individual estate. In re Corf, 3 Mad. 229; T. Pars. Partn. 348; Ex parte Kensington, 14 Ves. 447.

Under the bankrupt law of 1841 [5 Stat. 440], this rule was recognized by Judge Ware in Re Marwick [Case No. 9,181], and it has since been sanctioned by Drummond, J., in Re Knight [Id. 7,880]. See, also, Bump, Bankr. 213, 572; In re Downing [Case No. 4,044].

In the opinion of the court, the proof of the firm debt must be postponed until the separate creditors are paid.

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

Case No. 4,145.

In re DUNHAM et al.

[27 Leg. Int. 404;[1] 7 Phila. 611.]

District Court, D. New Jersey. 1870.

BANKRUPTCY—LANDLORD'S LIEN FOR RENT—ASSIGNEE'S LIABILITY FOR EXPENSES.

1. A lien for rent due, or which may have accrued to the landlord, under the state law, for the premises held by the bankrupt, is not disturbed by any provisions of the bankrupt act of March 2, 1867 [14 Stat. 517].[2]

2. The assignee is liable for the payment of the expenses incurred in the settlement of the bankrupt's estate, from the commencement of proceedings in bankruptcy.

3. The use and occupation of the rented premises by the marshal for storage and sale of the property of the bankrupt is such an expense.

[In the matter of Dunham & Hawks, bankrupts.]

S. B. Ransom, for claimant.

Bird, Van Syckel & Voorhees, for assignee.

NIXON, District Judge. On the 28th of December last, L. D. Cook and Co. filed their petition in this court against William Dunham and Andrew J. Hawks, co-partners, alleging that the said firm had committed certain acts of bankruptcy. Upon the return of the rule to show cause, etc., the defendants made default, and were adjudged bankrupts on the 11th day of January following. The bankrupts had been engaged in manufacturing black walnut photograph frames, and had leased of the claimant real estate and buildings, in the township of Lebanon, county of Hunterdon, upon certain terms and conditions, not necessary for the decision of this case, to be more particularly stated. The firm of Dunham and Hawks was dissolved on the 1st of November, 1869, the former buying out the interest of the latter, and continuing the business in the name of Dunham and Brother, under the allegation that one of his brothers had

[1] [Reprinted from 27 Leg. Int. 404, by permission.]

[2] Since the decision was made in this case, the opinion of Chief Justice Chase has been published in Re Wynne [Case No. 18,117], reaching the same result.

agreed to become a partner and put capital into the concern. The firm having become indebted to Dr. W. A. A. Hunt, the father of the claimant, for advances of money made by him for the purchase of pictures and machinery, to be used in carrying on their business, William Dunham, alone, on the 6th day of November, 1869, (shortly after Hawks had retired) executed to the said W. A. A. Hunt, a chattel mortgage upon the stock and machinery, to secure the payment of $6,600, which was filed in the clerk's office of the county of Hunterdon, on the 9th of November. There being a clause in this chattel mortgage, which authorized the mortgagee to take possession of and make sale of the mortgaged chattels, the said Hunt seized the property on the 23d of December following, and closed up the factory. On the next day, the landlord, who is the claimant in this case, issued his warrant, directed to a bailiff, commanding him to restrain for the sum of $862, claiming that to be the sum due to him for rent up to that date.

Upon filing the creditor's petition in bankruptcy, and upon making proof before the court, of the foregoing proceedings, on the part of the mortgagee and landlord, my predecessor here ordered an injunction to be issued, restraining the said parties from any farther prosecution of their claims, until the further order of the court. The property of the bankrupts was taken possession of by the marshal, and sold under order of the court, before the appointment of the assignee, and the proceeds of the sale were handed over to the assignee for the benefit of the creditors, subject to the decision of the court, as to the claims of the landlord and mortgagee, alleged to be liens thereon. The chattel mortgage was declared by my predecessor to be void; holding it to be a preference given by debtors to a creditor in fraud of the provisions of the bankrupt act. On the 25th of January, 1870, the landlord proved the demand for rent, claiming that there was due to him from the bankrupts' estate, to that date, $874.24, and that the same was a lien upon the goods and chattels in the leased premises, and which had been sold by the marshal discharged of all incumbrances. After proofs and able argument in that case, I held, that the landlord's lien for rent, created by the laws of New Jersey, had not been disturbed by the act of congress; that the fourth section of the "act concerning landlords and tenants" (Nixon's Dig. *418), forbidding the removal from any leased premises, of any goods and chattels, by virtue of an execution, attachment or other process, until payment is made to the landlord of all rent due, or which may have accrued at the time of the removal, provided that the arrears shall not exceed one year's rent, was the law of this court, in the administration of the bankrupt act; and that the landlord was entitled to receive out of the fund then in the hands of the assignee, the sum of $869, the amount of rent due at the time of the seizure of the property by the marshal. On the 20th day of September last, upon application to the court, in behalf of the said landlord, a rule upon the assignee of said bankrupts was granted, requiring him to show cause on the 4th day of October following, why he should not pay to the landlord a reasonable compensation for the use and occupation of the leased premises, by the United States marshal, and that both parties have leave to take affidavits.

The proceedings in the case and the affidavits under the rule disclose the facts, that the marshal took possession of the personal property of the bankrupts, by virtue of the warrant issued upon the petition filed by creditors about the 1st day of January, 1870; that the property consisted of stock and machinery for carrying on their manufacturing business; that he made sale on the 24th day of January; and that the landlord again got possession of the premises on the first or second day of February, after the sale. It further appears that the Hunterdon Manufacturing Company had rented the property of the landlord for $1,700 per annum, the lease to commence as soon as the lessee could have possession; that the marshal used the real estate and buildings for the storage of the personal property of the bankrupts, and surrendered the possession thereof to the lessees about the second day of February aforesaid.

If the case rested here, I should have no difficulty in holding, that the landlord was entitled to receive from the assignee a fair compensation for his buildings, whilst they were held by the marshal for the storage of the bankrupt's effects; that they were thus held for the space of one month; and that the proofs in the case show, that the sum of $141.66 would be a reasonable recompense to be made for their use and occupation. For in such cases the assignee is the representative of the bankrupt's estate, and the theory of the law is, that he is in possession thereof, not from the date of the deed of assignment, but from the commencement of the proceedings in bankruptcy, to wit, from the filing of the petition. In re Faxon [Case No. 4,704]. And whilst he is not liable for the rent as such, after the date of the petition, unless, in behalf of the estate and for the benefit of creditors, he adopts a lease, that he may find upon the premises, yet he may not occupy the property of strangers for the custody of the bankrupt's goods and chattels, without making a just and proper compensation for the same. In re Walton [Id. 17,131]; In re Appald [Id. 499]; In re Merrifield [Id. 9,465]. But the case does not stop here. It seems that the marshal held the premises, sold the chattels and machinery of the bankrupts, and handed over all the proceeds to the assignee, when notified of his appointment. No demand was made

by the landlord upon the marshal, and it does not appear that he was in any way apprised that the landlord had a claim or charge against him or the bankrupts' estate, for such occupation of his premises. The assignee received the proceeds of the sale from the marshal without notice that any such claim existed; and he testifies that the first knowledge he had of it, was on the 20th day of June last, after the dividend had been declared from the assets, and a payment made of such dividend to one of the creditors. The landlord then put in a written demand for the payment of $195.-79, as due to him for the use of the factory buildings by the marshal.

It is true, that there is a conflict in the testimony of the assignee and landlord, upon this subject. The landlord deposes that shortly after the appointment of the assignee he gave him notice of his claim for the occupation, and understood him to assent to the payment of the same. But I think this conflict can be easily reconciled without the impeachment of the character or veracity of either the assignee or landlord. It must be remembered that the landlord's other claim for rent for the occupancy of the same premises by the bankrupts, was then unpaid, and it is quite probable, that whilst the landlord had one of these claims in his mind, the assignee presumed that his reference was to the other.

It was insisted upon the argument by the counsel for the assignee, and with much force, that the conduct of the landlord was a waiver of his demand; that he should not be permitted to stand by and see the assignee distribute to the creditors the assets of the estate, and then come in with his claim and virtually compel him to pay the debt out of his own pocket, and that all the court ought to be expected to do, would be to order the assignee to make a proper compensation to the landlord for his demand out of any assets that might hereafter come to his hands. I should be glad to be able to take this view of the matter, and if the proof had been, that the landlord did in fact remain silent on the subject of his claim, when he ought to have spoken, and by his reticence, had led the assignee into the error of distributing the assets without a knowledge of this unsettled demand, I should be inclined to hold, that he had waived his right to compensation. But it does not so appear. He was not diligent, it is true, in pressing his claim; but there is no evidence that he was aware that the dividend was about to be made, and that the assignee had not reserved funds for his payment.

Although it may seem a hardship in the case before us, I am constrained upon principle to order the assignee to pay this claim. Some rule must be adhered to; and it is a reasonable one, to hold the representatives of an estate liable for the expenses arising in administering it. It is well enough for assignees to understand that courts deal with them as the representatives of the bankrupts' estate from the commencement of proceedings in bankruptcy; that in the settlement it is their duty to look after the payment of all proper expenses incurred subsequent to that date; that before they consent to a dividend to the creditors, they should retain under their own control a sufficient sum of the assets to cover expenses and costs; and that their failure so to do—such failure being of their own wrong, or the result of their own neglect—can hardly be made the basis of an appeal to the court to relieve them from the consequences.

The order of the court is, that the claim of the landlord be allowed to the amount of $141.66, and that the assignee pay unto him this sum, as a reasonable compensation for the use of his premises by the marshal for the storage of the goods and chattels of the bankrupts, from the time that he took possession under his warrant until his surrender of the same to the lessee of the landlord.

Case No. 4,146.

In re DUNHAM.

[29 Leg. Int. 389;[1] 9 Phila. 471; 2 Md. Law Rep. 485.]

District Court, D. New Jersey. Nov. 19, 1872.

COURTS — REVERSAL OF PREVIOUS RULINGS BY COURT OF LAST RESORT — RETROSPECTIVE EFFECT—MORTGAGES — INDORSEMENT OF SATISFACTION—PAROL EVIDENCE—CONTRACTS — MISTAKE OF LAW.

1. When a court of last resort reverses one of its own decisions, the change of the law is retrospective, and makes the law at the time of the first decision, as it is declared to be in the last decision.

2. But the last decision only changes the law as to those transactions that can be reached by it, and in the absence of fraud, no contracts executed are disturbed by such retrospective action.

3. Where a mortgage is satisfied by payment and receipt indorsed, parol evidence of any agreement contradicting the receipt not admissible.

4. Courts will not relieve a party from contract or agreement entered into by mistake, where the mistake is one purely of law.

[In bankruptcy. In the matter of Henry M. Dunham.]

James Buchanan, for assignees.

Frederick Kingman, for respondent.

NIXON, District Judge. A petition has been filed in this case by the assignees of the bankrupt, asking for an order upon John Aumack, a creditor, to show cause before the court, why he should not refund to the assignees the sum of $148.41, the amount paid by them to him on the 25th day of March, 1870, in excess of the sum due at that time, upon a bond and mortgage, which he held

[1] [Reprinted from 29 Leg. Int. 389, by permission.]

against the estate. Aumack was one of the mortgage creditors of the bankrupt. On the 2d of March, 1870, he made proof of his debt with security, claiming that he held a bond of the bankrupt, dated January 18, 1861, for the payment of $1,000, in one year after date, with interest at six per cent., that the interest due was $233, that the bond was secured by mortgage upon certain real estate of the bankrupt, and that he was entitled to have the debt paid in gold or its equivalent. The assignees were at Tom's River, on the 25th of March, 1870, for the purpose of paying off certain preferred claims against the estate; Mr. Aumack presented his mortgage for the payment. After some conversation between him and the assignees, as to whether the debt should be satisfied in gold or not, and to which I shall more particularly refer hereafter, they paid to him in currency the sum of $1385.16. The amount of principal and interest, at that time due upon his claim, was $1236.75, the excess of the payment, to wit, $148.41, was twelve per cent. added for the gold premium, to make the sum received by Aumack equivalent to a payment in gold. One of the assignees then drew upon the back of the mortgage, and Aumack signed, the following receipt: "March 25th, 1870. Received of A. C. McLean and C. Robbins, assignees, $1385.16, in full satisfaction of the within mortgage; the amount of principal and interest being $1236.75, and paid in currency at gold value of twelve per cent. premium. (Signed.) John Aumack." This settlement was made after the supreme court of the United States in Hepburn v. Griswold, 8 Wall. [75 U. S.] 604, and the court of chancery of New Jersey in Martin's Ex'rs v. Martin, 20 N. J. Eq. 421, had decided that the clause in the act of congress, passed February 25, 1862 [12 Stat. 345], making United States notes a legal tender in the payment of all debts, public or private, so far as it applied to debts contracted before the passage of the act, was unconstitutional; and before the reversal of the first-named case, by a majority of the court, in Knox v. Lee, and Parker v. Davis, 12 Wall. [79 U. S.] 457.

It is now contended by the counsel for the assignees, that the interpretation of acts of congress, by the supreme court of the United States, is final, and binds all inferior judicatories, national or state; that the effect of the last decision was to render lawful the payment of all indebtedness, in the notes of the United States, from the 25th of February, 1862, when such notes were made a legal tender for the payment of private debts; and that hence, the assignees may demand and receive back from the creditor, the twelve per cent. premium allowed by them in the satisfaction of the mortgage held by the respondent. It is undoubtedly true that the law, as to the constitutional effect of all acts of congress, must be taken from the supreme court, and that any change of the law, by the decision of a court of last resort, is retrospective and makes the law to be at the time of the first decision, as it is declared to be in the last decision. It was so held by the chancellor of this state in Stockton v. Dundee Manuf'g Co., 22 N. J. Eq. 56, but with this important qualification, that the last decision only changes the law "as to those transactions that can be reached by it." All contracts that are executed, all matters that are closed by the parties before the change effected by the last decision takes place, in the absence of fraud, are beyond the reach and influence of any retrospective action of the law caused by such change. What, then, are the facts of the transaction which is sought now to be opened? Has anything been left by the parties, contingent upon a subsequent construction of the legal tender act?

I have examined the testimony taken, and the fullest import of the proof is, that the assignees understood that they might demand a repayment of the premium, if any change in the views of the court should afterwards take place. There is no evidence that the mortgagee knew of or assented to any such arrangement. There was some talk at the time that, if a rehearing of the case should be ordered by the court, there would perhaps be a reversal of the previous decision, but one of the assignees, who seems to have done the chief part of the talking, admits, upon being recalled, that it is quite probable Mr. Aumack did not hear the suggestion that he would, in any contingency, be called upon to pay back the premium. But admit that he did hear them. Can the court be expected to get at the intention of the parties from their loose conversations, when they afterwards came to a settlement and reduced its precise terms to writing? Hunt v. Rousmanier, 8 Wheat. [21 U. S.] 211. The receipt drawn by one of the assignees at the time, and signed by the respondent, is the legal evidence of what the parties agreed to, and did, and that shows that the assignees paid, and that Aumack accepted, $1385.16, in "full satisfaction of the mortgage, the payment being made in currency at gold value of twelve per cent. premium."

The counsel for the assignees, in the argument, states, that the receipt was framed to enable the assignees to make reclamation of the gold premium, if subsequent events should favor the demand. If such was their design, they have been unfortunate in the language employed to convey their meaning. No hint is anywhere indicated, that under any circumstances was the settlement to be disturbed. If there had been no change of views in the court respecting the right of the mortgagee to demand gold, and if the premium had advanced to twenty-five or fifty per cent. after the payment of the mortgage, would it be claimed that the respondent could now invoke the aid of this court to compel the assignees to pay to him the advanced premium? And, yet, looking at the terms of the receipt as embodying the contract of the

parties, there would be quite as much reason for that as for listening to the assignees' present demand for restitution. Authorities were quoted upon the argument to show that courts have, and therefore may, relieve parties against mistakes arising from ignorance, either of the law or of the facts. But no such ignorance seems to have existed here. There was no lack of knowledge and there was no concealment on either side. Both parties knew what the facts were, what the law had been declared to be, and had equal means of anticipating what it would continue to be. They concluded under these circumstances a settlement, which the court is now asked to open and reform. But conceding that ignorance did exist, I can find no well-considered case where the court has relieved the party from a contract or agreement entered into by mistake, where the mistake was one purely of law, although many may be found where such relief has been granted when attended with misrepresentation, undue influence, misplaced confidence, or any badge or indication of fraud. Lyon v. Richmond, 2 Johns. Ch. 59; Clark v. Dutcher, 9 Cow. 674; Wintermute's Ex'rs v. Snyder, 3 N. J. Eq. 490; Hunt v. Rousmanier, 1 Pet. [26 U. S.] 15; Bank v. Daniel, 12 Pet. [37 U. S.] 55. The maxim "Ignorantia legis neminem excusat," which, as Judge Story remarks, is so old as to have been long laid up among the settled elements of English jurisprudence, is applicable to the case under consideration. Both parties have acted honestly, and they are left by the law to stand just where they voluntarily placed themselves.

A question quite analogous to the one I am considering was before the supreme court of California in Kenyon v. Welty, 20 Cal. 637, and after a careful examination of the authorities, the court held that where a contract was entered into by the parties under a mutual supposition that the law affecting the subject of the contract was in accordance with a previous decision of the supreme court upon a similar state of facts, it would not be set aside because of a subsequent decision of the same court overruling the former one and declaring a different rule upon the subject.

The assignees have not exhibited a case where they are entitled to relief, and the rule to show cause must be discharged.

Case No. 4,147.

DUNHAM v. BAIRD.

[Brunner, Col. Cas. 18;[1] 1 Law & Eq. Rep. 391; 2 Wkly. Notes Cas. 52.]

Circuit Court, E. D. Pennsylvania. 1875.

REMOVAL OF CAUSE TO FEDERAL COURT—ACT OF MARCH 3, 1875.

On a petition for removal of a cause from a state court, no action of the state court upon either petition or bond is required by the act of March 3, 1875 [18 Stat. 470]; it is for the United States court to determine the sufficiency of the latter.

[Cited in Huddy v. Havens, Case No. 6,826.]

[2] [Motion to dismiss suit for want of jurisdiction. This suit was originally brought in the district court of the county of Philadelphia to June term, 1874, and, after issue joined, was thence transferred (on the cessation of that court) to the common pleas No. 3 of the same county. A petition to remove the cause to the circuit court of the United States for the eastern district of Pennsylvania was presented by the defendants on June 12, 1875, and on June 19th a rule to show cause why the petition should not be granted was discharged. 1 Wkly. Notes Cas. 493. On July 26th, 1875, a petition was granted by Paxson, J., of the supreme court, for a rule to show cause why a writ of peremptory mandamus should not issue to the judges of the common pleas No. 3, directing them to proceed no further with the above cause and to permit it to be removed to the circuit court of the U. S. (1 Wkly. Notes Cas. 625), and the rule was made returnable on the first Monday of Jany., 1876. In August a bond was filed by the defendants, in the common pleas No. 3, conditioned as required by the act of congress of March 3, 1875 (18 Stat. 470), and a certified copy of the record, was on Sept. 1 filed in this court, whereupon the plaintiffs moved to dismiss the suit for want of jurisdiction.

[S. C. Perkins, for the motion. The suit is by citizens of Connecticut against citizens of Pennsylvania. Section 2, of the Acts of March 3, 1875, allowing suits to be removed from the state courts to this court, where there is "a controversy between citizens of different states," was not intended to apply, where, as here, the defendants are sued in their own forum by strangers, and local prejudice cannot be expected. But the petition in the common pleas was presented too late under the proviso of section 3 of the same act, directing the party entitled to remove the suit to file his petition and bond in the state court, "before or at the term at which said cause could be first tried; and before the trial thereof." The act was passed in March term; while the petition was not filed till June term. The term at which the said cause could be first tried was June 1874, at which time the cause was at issue. The defendants recognized and acquiesced in the authority of the state courts by filing their petition, and obtaining their rule to show cause. They will not be permitted to proceed here, after a refusal by the state court, to allow the case to be removed. This course is required by judicial comity. But in any event this court will not allow this case to proceed until the rule for a man-

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [From 2 Wkly. Notes Cas. 52.]

damus has been disposed of in the supreme court of the state. The defendants chose to pursue the remedy, and until its determination they can adopt no other. Lastly the bond was filed in vacation and was never approved. The act of congress has therefore not been complied with since the bond has no vitality until approved.

[Sydney Biddle and McMurtrie, contra. The language of the act plainly includes cases where a citizen is sued in his own state, by those of another state. The petition was not filed too late, for the act provides for all pending cases, and the first term after the passage of the act, at which the cause could be tried, was the June term, the March term being judicially over after the first return day (March 1st), after which day the act was passed. The language of the act gives this court no discretion except where the case has been "wrongfully or improperly removed," which cannot be alleged here. The objection that the bond had been filed in vacation, and had not been approved, was taken (Osgood v. Chicago D. & V. R. Co. [Case No. 10,604]), but the judge of U. S. court, said that no action of the state court was required. There it could not have been obtained, since the court had refused the petition.] [2]

McKENNAN, Circuit Judge. The petition was filed in time, and no action of the state court was required by the act of the 3d March, 1875, upon either petition or bond; it was for the United States court to determine the sufficiency of the latter, and upon a careful perusal of the judiciary act of the 3d March, 1875, the court is of opinion that its provisions were intended to be co-extensive with the powers conferred upon the judiciary in section 2, subsection 1, article 3, of the constitution of the United States. The petition for removal was not filed too late in the state court as it was presented in the term succeeding that in which the act was passed. [Motion denied.] [2]

Case No. 4,148.

DUNHAM v. CINCINNATI, P. & C. R. CO.

[9 Pittsb. Leg. J. 90.]

Circuit Court, D. Indiana. 1861.

RAILROAD MORTGAGES — CONSTRUCTION CONTRACT — PRIORITY OF LIENS.

[1. A mortgage executed upon a railroad right of way before the building of the road does not, in law, include the road when completed. But equity will hold that the road is included, when, from the terms of the mortgage, such appears to be the intention of the parties.]

[2. But where, after execution of the mortgage, the company is unable to build the road, and thereupon makes a contract with a third person for the construction thereof, with a stipulation that he may retain possession of the road and its earnings until receipt of payment, this gives him an equity, superior to that of the mortgage bonds, to receive payment from the proceeds of the road on foreclosure sale.]

[3. To uphold this equity the court will presume that the trustees and bondholders assented to the contract under which the road was built.]

Dunham as mortgagee filed his bill against the railroad company, Walker et al., to foreclose a mortgage upon the right-of-way, road, &c., of the company, to satisfy the interest due and unpaid on the first mortgage bond. Walker, in his answer, alleges, that, after the mortgage was made, and 300 bonds had been issued, and while the road was but partially graded, say one-fourth of the cost of construction had been expended, the company, being otherwise unable to construct the road, agreed with him to construct it. That the company agreed to pay him therefor a certain amount of its bonds, and also agreed that Walker should retain possession of the road and its earnings until the company paid him what it might be owing him therefor. That he completed the road in July, 1856, and has ever since retained possession of it. That the company was then owing him, principal and interest, over and above the bonds he had received from the company, $154,800, for which amount he claimed priority of payment in the distribution of the proceeds of the sale of the road.

THE COURT decided such priority in his favor.

THE COURT held:

1. That the road not being in existence when the mortgage was made, the mortgage at law did not cover it. That by the terms of the mortgage it appears to have been the intention of the parties that the road when built should be covered by the mortgage, and was consequently enforcible in equity and only there, and that, therefore, the doctrine of industrial annexations to the soil did not cause the superstruction made by Walker to pass under the mortgage, to the exclusion of Walker's rights under the agreement.

2. That the large expenditure of Walker in completing the road, and the company's inability to otherwise do so, than by agreeing to leave Walker in possession until the company paid him what it might owe him therefor, presented so manifest and superior an equity to priority of payment from the proceeds of the sale of the road, that no court of equity would deprive Walker of the road and its earnings without awarding and enforcing that priority; and to uphold that priority, the court would presume that the trustee and bond-holders assented to the agreement between Walker and the company giving that priority, if such presumption were necessary, to overcome any technicality of the law militating against such a manifest equity.

[2] [From 2 Wkly. Notes Cas. 52.]

Case No. 4,149.

DUNHAM v. EARL et al.

[16 Leg. Int. 45.]

Circuit Court, D. Michigan. 1859.

PERSONALTY OF RAILROAD COVERED BY MORTGAGE TO BONDHOLDERS.

[The power of the company to mortgage its franchise and property includes, as incident thereto, power to pledge everything that may be necessary to the enjoyment of the franchise and road; and a mortgage expressly including all after-acquired personal property, covers fuel collected and stored by the company for the use of its engines.]

Bill in equity filed by Edward W. Dunham, as mortgagee (in trust for bondholders) of the Michigan Southern and Northern Indiana Railroad Company, to enjoin Joseph E. Earl and the sheriff of the county of Branch from selling a large quantity of wood collected by said railroad company in their sheds and on their station ground at Bronson, in Branch county, for the use of their engines; upon which the sheriff had levied by virtue of an execution issued upon a judgment recovered by Earl against said railroad company in the circuit court of that county. The mortgage, in terms, includes the railroad and its appurtenances, engines, cars, and all rolling stock and personal property of the company which they possessed at the date of the mortgage, as well as all property to be afterwards acquired by it for the use and operation of the road, &c. The mortgage was recorded in the office of the register of deeds in each of the counties through which the road passes. Notice of the application for the injunction was, by the direction of the court, given to the defendant, and yesterday was appointed for the hearing of the application.

A. M. Baker and Warner Wing, for complainant.

T. Romeyn, for Earl and the sheriff.

WILKINS, District Judge, ordered that an injunction issue in the case, according to the prayer of the bill.

The judge, in granting the order for injunction, conceded that the power of the company to pledge the franchise and property of the corporation implies, as an incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise and road, and upon which its real value depends; and that it could not have been intended by the legislature merely to confer the power to pledge the naked track and franchise, which belonged to the corporation, without the right also to pledge such things as were incident and indispensable to its use and enjoyment, and without which it would be of no value. The corporation was authorized to pledge, not only the existing property of the road, but the corporate rights and franchises, and the railroad itself as an entire thing. The judge held, that to render such a pledge effectual, it was necessary it should embrace all such future acquisitions of the corporation as were proper accessories to the thing pledged, or essential to its enjoyment. Of what value would the railroad be without the cars on the road, or the fuel necessary to run them? The bonds of the company were redeemable in twenty years. New cars and engines and materials of all kinds would from time to time become necessary, and fuel would all the time have to be purchased as it was needed. The judge held, that these articles were included in the deed of mortgage, and as the business of the road could not be carried on without them, the power to pledge the road itself, with its profits and privileges, and the rights and franchises of the corporation, carried along with it the implied authority to pledge all such future acquisitions of the company as were necessary for the full and complete operation of the road itself. This view of the case is in accordance with the opinions of the supreme court of New York, the court of appeals of Kentucky, the supreme court of New Hampshire, the superior court of Cincinnati, and of Judge McLean. The opinion of Judge WILKINS was not put on the ground that the mortgage covered the wood as personal property simply, but that, though not attached to the freehold as a fixture, it was nevertheless a necessary element of the road, as indispensable to the use and enjoyment of the thing conveyed.

Case No. 4,150.

DUNHAM et al. v. EATON & H. R. CO. et al.

[1 Bond, 492.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1861.

EQUITY PLEADING—ENFORCEMENT OF STOCK SUBSCRIPTIONS—DISCLOSURE—RECEIVERS.

1. The complainant in a bill in equity is not required to set out all the minute facts of his case; the general statement of a precise fact is usually sufficient.

2. Where a bill in equity distinctly alleges that the defendants subscribed stock for the express purpose of constructing a branch railroad called the "Eaton and Piqua Branch," and are liable in equity to account to the complainants therefor, such statement embraces facts which constitute the right of complainants to enforce the claim asserted by them, and it is not necessary for the defense that the bill should state all the particulars of the subscriptions, including the amount subscribed and due by each one.

3. Where a receiver has proceeded, under a decree in favor of complainants, to reduce into his possession the property or assets of the defendants, the complainants can not call on the defendants for a disclosure by means of a supplemental bill.

M. H. Tilden, for plaintiffs.

Wm. B. Caldwell, for defendants.

OPINION OF THE COURT. The question before the court arises on a demurrer

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to the supplemental bill filed by the complainants, the object of which is to carry into effect the decree of this court based on the original bill. The objection mainly relied on, and urged in argument in support of the demurrer, is the alleged uncertainty in the statement of the nature and extent of the liability and indebtedness of the defendants, and the want of any sufficient reason or excuse for such uncertainty. The supplemental bill recites the material averments in the original bill, to which the Louisville and Sandusky Railroad Company and the Eaton and Hamilton Railroad Company were the only defendants. These recitals are, in substance, that the last-named company, being about to construct a railroad from the town of Piqua to the town of Eaton, in the state of Ohio, obtained from divers persons, averred to be unknown to the complainants, by way of subscriptions for the construction of the branch road from Piqua to Eaton, certain moneys, bonds, bills, notes, and securities; that the complainants with another person, who has since assigned his interest in the contract, on September 15, 1853, entered into a written contract with the Eaton and Hamilton Railroad Company, by which they agreed to construct the railroad from Piqua to Eaton, at prices stipulated between the parties, and by which it was expressly agreed that the complainants were to be paid exclusively and only out of the subscriptions for the construction of said branch road; that some time after the complainants had entered upon the execution of said contract, the Eaton and Hamilton Railroad Company assigned the branch road from Piqua to Eaton, and the said contract, together with the subscriptions and all funds procured for the special purpose of constructing said branch road, to the Louisville and Sandusky Railroad Company; that company agreeing to construct the branch road, and to comply with the contract made with the complainants, and to apply the subscriptions and funds specially obtained for the construction of the branch road, to that object; that the complainants continued in the execution of said contract until September, 1854, when they were required by said Louisville and Sandusky Railroad Company to suspend operations; and that when they so suspended, there was a large amount due them for work done, and materials furnished, in the construction of the road; that the Louisville and Sandusky Railroad Company suspended all business operations and wholly failed to collect and apply the special subscriptions for the construction of the branch road to the payment of the complainants. The supplemental bill further avers, that by the original bill it was claimed that the complainants had a specific lien on the subscriptions and funds raised for the purpose of constructing the road from Piqua to Eaton, and were entitled in equity to enforce payment from the persons who had become subscribers of stock for that specific purpose; and the bill prayed an account of such subscriptions and a discovery of the names of those who had thus subscribed and were liable therefor.

The supplemental bill further avers that at the April term of this court, in the year 1858, a decree was entered in the original case against the Louisville and Sandusky Railroad Company, in favor of the complainants, for $12,181, as the sum due them for work done under their contract in the construction of the Piqua and Eaton road; and that it was held and adjudged by said decree that the complainants had a specific claim to, or lien upon, the stock subscriptions made for the purpose of constructing said branch road. And by said decree it was further provided that the case should be referred to a master to ascertain and report the property and effects of the Louisville and Sandusky Railroad Company, which, when ascertained, were to be delivered to a receiver, then appointed by the court. It is then averred that the supplemental bill is filed to obtain "the aid and assistance of this court to carry said decree into execution;" and also, "that the following-named persons became and are subscribers to the capital stock of said Eaton and Hamilton, and to the stock of said Louisville and Sandusky Railroad Company, and that they subscribed their said stock for the special purpose of having the same applied to the construction of said line of road from Eaton to Piqua." Then follow the names of these persons numbering several hundred, averred to be subscribers or stockholders for the construction of the last-named road, and as to whom the prayer of the bill is, that they may be made defendants thereto, and may be required to answer; and that an account may be taken of the sum due from them respectively, and that they may be adjudged to pay the same to the complainants.

By an amendment to the supplemental bill, it is averred "that each and every one of the said defendants named is indebted on account of their said subscriptions to said stock therein set forth, subscribed for the special purpose of constructing such branch road, and made to said Eaton and Hamilton Railroad, but the complainants do not know, and are unable to state, the several amounts due from them, or any or either of them, and they pray that each and every of them may be compelled to state and set forth by answer on oath the amount respectively subscribed and paid by them, and when and how the same was paid, and when and how the same was subscribed, and that it be referred to the master to inquire and report how much remains due from each and every of them," etc.

This reference to the recitals and allegations of the supplemental bill seems necessary to a right understanding of the question presented on this demurrer. It will be

seen that it is simply a question of pleading, and its decision either way will not affect the merits of this controversy. The demurrer admits all the facts alleged in the bill, and presents the single inquiry, whether those facts, as set forth, are sufficient to fix liability on these defendants. All inquiry into the regularity and validity of the original decree is precluded, in the present posture of the case. The decree is conclusive on them, though not parties to the original bill, so far as it establishes the equity of the claim of these complainants, as set up in that bill. It finds the fact that under their contract with the Eaton and Hamilton Railroad Company, the complainants performed labor in the construction of the Piqua and Eaton Branch, to the amount of $12,181, which is now justly due them; and also that they have a specific lien on the subscriptions of stock, made expressly for that object, which ought in equity to be enforced. But this decree can be of no avail to the complainants, until it is ascertained who are the subscribers to that stock, and the amount due from each. To effect this object the supplemental bill is filed, setting out the names of those subscribers as far as known, and asking the aid of this court in carrying into effect the original decree. And it prays that these demurring defendants may be required to disclose on oath to which of the companies their subscriptions, were made, the amount of such subscription, and the sum due from each, on account of such subscription. These are matters which these defendants have an undoubted right to litigate, and which they could put in issue by their answers. They have, however, declined to answer, and by their demurrer present the question to the court, whether the allegations of the bill are so made as that they can be required to answer.

In support of the demurrer, it is insisted, in the first place, that the bill is defective in not stating with any certainty, whether the stock subscriptions of the defendants were made to the Eaton and Hamilton, or the Louisville and Sandusky Railroad Company, and also in not setting out the sum subscribed by each, and the amount of the indebtedness of each, and the amount now claimed as due from each. And it is also insisted that the bill alleges no sufficient excuse for the vagueness and uncertainty of its averments as to these facts.

As to these subscriptions, it is expressly averred, in the supplemental bill, that these defendants "became and are subscribers to the capital stock of said Eaton and Hamilton Railroad Company, and to the stock of said Louisville and Sandusky Railroad Company," and that "they subscribed their said stock for the special purpose of having the same applied to the construction of said line of road from Eaton to Piqua." The bill further avers, that the said "defendants are indebted on account of said subscriptions, but the complainants do not know and are unable to state the amounts due from them, or either of them," and they pray for an account and discovery, etc. Are these allegations sufficiently certain to put the defendants on their answer? There can be no question that some degree of strictness is required in chancery pleadings, as well as those at law. Judge Story says on this subject: "It may, perhaps, be correctly affirmed, that certainty to a common intent is the most that the rules of equity ordinarily require in pleadings for any purpose." Com. Eq. Pl. 206. In the same work, after stating that the bill should set forth the right and title of the plaintiff, together with the grievance of which he complains, and the relief which he seeks, with accuracy and clearness, he adds, "the other material facts ought to be plainly, yet succinctly alleged, with all necessary and convenient certainty, as to essential circumstances of time, place, manner, and other incidents." Id. 206, 207. Another writer on equity pleadings says, "the plaintiff in his bill is not required to set out all the minute facts of his case." The general statement of a precise fact is usually sufficient, and the circumstances which go to establish it, need not be minutely charged; for they more properly constitute matters of evidence than of allegation; and "general terms are sufficient when the subject comprehends a multiplicity of matter and when the particulars are more fully known to the opposite party." Welford, Eq. Pl 6, 88.

It would seem that this bill contains all the allegations of material facts required by these rules. The fact is distinctly alleged, that these defendants subscribed stock to the Eaton and Hamilton and the Louisville and Sandusky roads for the express purpose of constructing the Eaton and Piqua Branch, and are liable in equity to account to the complainants therefor. These are the material facts which constitute the right of the complainants to enforce the claim asserted by them. The ground of that claim is, that the defendants by reason of these subscriptions subjected themselves to liability, and that such liability now exists in favor of the complainants. And surely it can not be necessary to their defense that the bill should state all the particulars of these subscriptions, including the amount subscribed and due by each one of several hundred persons. This would be unnecessarily and most inconveniently to incumber the record in the case.

And again—the enforcement of the rigid rule of pleading, insisted on in support of this demurrer, would leave the complainants wholly without remedy, and altogether defeat the purpose of their bill. The very prayer of the bill is, that they may have a discovery from the defendants concerning the matters in regard to which the alleged uncertainty exists. If the allegations of the complainants are true, that they do not know, and have not the means of ascertain-

ing these matters, except by a discovery from the defendants, it is very clear they are without any remedy unless they can call on them for a discovery as prayed for in the supplemental bill. The facts about which they are required to answer are within their knowledge, and they can not be taken by surprise in being called upon to answer. They certainly know whether they subscribed stock for the purpose alleged, to which company it was subscribed, how much of it has been paid, and what is now due. And I am at a loss to perceive the hardship of requiring them to disclose these facts by their answers. If they or any of them are not indebted, it is a good defense to the claim asserted against them; and if there is a just indebtedness on account of their subscription, the complainants have an equitable claim for it. True, the defendants, if they prefer that course, may decline to answer, and allow a decree pro confesso to pass against them. In that event, the court, on application, would direct the master to take and report a statement of the indebtedness of each of the defendants. And, if it should be necessary for this purpose, that the master should examine them touching their indebtedness, one of the rules of chancery practice of this court confers ample authority to do so. The 77th rule is referred to, which provides among other things, in cases of reference to a master, that "he shall have full authority to examine the parties to the cause touching all matter contained in the reference, and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto."

The counsel for the demurring parties insist further, that this supplemental bill can not be sustained for the reason that by the decree in the original case, a master was appointed with power to take and state an account of the subscriptions of these defendants, and other matters concerning which the bill prays for a discovery; also, that by the decree a receiver was appointed with authority to take possession of and dispose of all the assets in question. The argument is, that as the complainants have chosen to adopt this course, they are precluded from calling for a discovery by supplemental bill as the two modes of proceeding are conflicting and incongruous. This presents a question of chancery practice altogether new to me, and in regard to which no authorities are cited. I suppose, however, it is clear that if the receiver had actually proceeded under the original decree to reduce into his possession the property or assets, the complainants could not call on the defendants for a disclosure by means of a supplemental bill. But there is nothing before the court showing that either the master or receiver heretofore appointed, have taken any steps in the execution of their appointments touching the matters now in controversy. Indeed, it does not appear that the receiver has accepted the trust, or that he intends doing so. The mere fact that persons were named as master and receiver in the original decree, in the absence of any showing that they have done anything in the performance of their duties, is no bar to the present procedure. Upon the whole, I can see no sufficient reason for sustaining the demurrer to the bill, and it is accordingly overruled.

DUNHAM (EQUITABLE SAFETY INS. CO. v.). See Case No. 10,155.

Case No. 4,151.

DUNHAM v. INDIANAPOLIS & ST. L. R. CO.

[7 Biss. 223;[1] 2 Ban. & A. 327; 9 Chi. Leg. News, 50.]

Circuit Court, N. D. Illinois. June, 1876.

PATENT—RIGHTS OF LICENSEE FROM ONE OF SEVERAL OWNERS.

1. A license by one patentee to use the thing patented, clothes the licensee with the right to use it, and he becomes liable for the contract price for the license.

2. Patentees are tenants in common of the right.

[Cited in Pusey & Jones Co. v. Miller, 61 Fed. 404.]

[This was a bill in equity by William H. Dunham against the Indianapolis & St. Louis Railroad Company for breach of contract.]

Banning & Banning, for plaintiff.

Baldwin & Hanna, for defendant.

DRUMMOND, Circuit Judge. The facts in this case are, that three persons were patentees for an improvement in car-brake shoes, and that the plaintiff, being one of them, made a contract with the defendant for a license to use the invention described in the patent; the price to be paid for the license was a thousand dollars. The plaintiff executed and offered to deliver to the defendant the license signed by himself, but not by the two other patentees, and the defendant refused to comply with the terms of the contract and pay the money, because the license was not signed by all of the patentees. The patentees did not own the right in equal shares; one of them owned a half, and the other two a quarter each, the plaintiff only owning a quarter; and the question in the case is, whether this constitutes a good defense to a suit brought upon the contract made between the plaintiff and the defendant; and I am of opinion that it does not. The material point is, who is to answer, if any one, to the other patentees for the use of the part which does not belong to them when a joint owner uses the improvement, or makes a contract with another person for its use. What is the position of patentees with refer-

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

ence to their right to use the thing patented? The patentees are tenants in common of the right. One of them has no superiority of right over the other. One of them can manufacture and use the article patented without the consent of the others; that is, each has the same right, although one may own a greater share of the thing patented than the other. The grant was, in this case, to the three to use and vend the improved car-brake shoes, and while it is clear that one of the patentees can not grant what does not belong to him, and if he gives a license or makes a contract for the use of the thing patented, he can only grant that which he has himself, and not the rights of the other patentees, still he can clothe his grantee or his licensee with the same right that he has himself, namely, the right to sell or use the thing patented. And it seems to me the better rule is to hold, if there is a liability at all, that where a party owning less than the whole of a thing patented, makes a grant or a license, he shall be answerable to the others, rather than that the other patentees shall look to the grantee or licensee.

There were three cases particularly referred to on the argument. One was the case of Pitts v. Hall [Case No. 11,193], decided by Judge Hall, of the northern district of New York. He seems to hold that if one joint owner of a patent uses or sells his right without the authority of his co-owner, he is liable to an action by such co-owner for an infringement of the patent; and the conclusion, perhaps, to be drawn from his decision is, that if the party to whom he sells uses the thing patented, an action could be maintained and an injunction issued against the grantee or licensee of the co-owner.

Judge Curtis, in the case of Clum v. Brewer [Id. 2,909], seems to hold, and I think that is the true rule upon the subject, that where one of the joint patentees uses or sells the thing patented, or any portion of it, the others can not sue him as for an infringement of the patent.

The most that can be claimed is, that if one uses or sells it to the detriment of the others, he may be held responsible. For example, if he obtains more than his share of the profits from the use of the article, or in issuing licenses he obtains more than his share of the license money, he possibly may be held responsible by the other joint patentees; but Judge Curtis, in that case, held that an injunction should not issue against the use, by one of the joint patentees, of the thing patented, and the principle decided by him is, that one tenant in common of letters patent has the same rights as the others to make, use and sell the thing patented, and a licensee under one tenant in common cannot be enjoined on a bill by aother tenant in common.

A case has been decided in England bearing on this question, Mathers v. Green, 1 Ch. App. 29, and the opinion is given by Lord Chancellor Cranworth. That was a case of letters patent granted to three individuals. The chancellor says:

"The right conferred is a right to exclude all the world, other than the grantees, from using the invention. But there is no exclusion in the letters patent of any one of the patentees. The inability of any one of the patentees to use the invention, if any such inability exists, must be sought elsewhere than in the letters patent. But there is no principle, in the absence of contract, which can prevent any persons not prohibited by statute, from using any invention whatever. Is there any implied contract where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or, if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to risk his skill and capital in the use of the invention on the terms of being accountable for half the profit, if profit should be made, without being able to call on his co-patentee for contribution if there should be loss."

Now while this is the principle announced by the chancellor, it perhaps should be with this qualification: that if one of the patentees obtains more than his share of the profits, he might be held liable under certain circumstances to the others. Certainly I do not wish to be understood as affirming that there is never such liability. Of course we must take into consideration any risk which he may run; any outlay of money which he may make in the manufacture or sale of the article; but if, looking at it upon equitable principles, he has obtained more than his share of the profits arising from the thing patented, either in the use or sale of it, or of licenses, it seems to me he might in certain cases be held accountable to the other joint patentees. But it is not necessary in this case to decide that point. My conclusion therefore is, that the fact that one of the patentees has given a license to the defendant to use the thing patented, clothes him with the right to use it, and having that right, he is liable under his contract for the payment of the one thousand dollars which he agreed to pay for the license.

Judgment will accordingly be entered for the plaintiff.

Case No. 4,152.

DUNHAM v. NEW ENGLAND MUT. INS. CO.

[1 Lowell, 253.][1]

District Court, D. Massachusetts. July, 1868.[2]

RES JUDICATA — DECREE FOR DAMAGES FOR COLLISION — ACTION AGAINST INSURER FOR EXCESS OF DAMAGES—COMPUTATION.

1. A decree of the high court of admiralty in England for damages for collision, though satisfied, is not a bar to a suit against an insurer of the injured vessel, when the amount of the decree is proved to be less than the loss actually suffered.

2. The decree in England is res inter alios and cannot be relied upon in a suit between the insured and the insurer, excepting to show the fact of satisfaction pro tanto. There is no such privity between the underwriter and a third person who may be liable for the same damage as that between joint trespassers or joint contractors. The decree is absolutely binding on all parties and privies and on the res itself; but as between the insurer and the insured can only be invoked to show the amount awarded and paid, and not as evidence of the collision, its causes or its consequences.

3. Wilful or negligent conduct on the part of the insured by which salvage is lost might discharge the underwriter, as fraud certainly would.

4. In such a case the amount recovered from the wrong-doer is to be taken from the gross amount of the damage, and not from the loss adjusted as a partial loss with a deduction of one-third new for old.

Libel in admiralty upon a policy of insurance by which the respondents [New England Mutual Insurance Company] underwrote the libellant's [Thomas Dunham's] bark Albina against perils of the seas, &c., alleging that while so insured the vessel was damaged by collision in the British channel with the ship Donald McKay, for which collision cross-libels were brought in the high court of admiralty in England, and a decree was rendered in favor of the Albina and condemning the Donald McKay as being wholly in fault, and that the libellant has received the damages decreed to him by the court, but that for some reason unknown to him the court did not allow him the whole amount of the losses and expenses actually incurred, and that the respondents are bound to pay him the remainder. The answer set up the decree in England as a bar to this proceeding, and this was the only question submitted to the court at this time.

F. C. Loring, for libellant.

H. C. Hutchins, for respondents.

The libellant had his election to sue us in the first instance. If he had recovered the insurance we should have had our recourse to the Donald McKay, which the libellant could not have released or impaired. Hart v. Western R. Co., 13 Metc. [Mass.] 99; Yates v. Whyte, 4 Bing. N. C. 272. Having elected to proceed against the ship, the libellant has prevented us from having any action of that kind. He has disabled himself from subrogating the underwriters to any other damages than those which he has recovered. We are within the reason of the rule that a satisfaction obtained of one co-trespasser bars a suit against the others, namely, that a satisfaction has been once had. Murray v. Lovejoy, 3 Wall. [70 U. S.] 1. The libellant, in effect asks this court to review the decision in England, and to pick out certain items disallowed there, and say that they should have been allowed. This cannot be done. If the decree there can be opened at all it must be opened in full and the question of fault be examined anew. But in fact that court had jurisdiction of the parties and of the subject-matter, and the libellant and respondents are both concluded by the decree. Peters v. Warren Ins. Co. [Case No. 11,035]; Croudson v. Leonard, 4 Cranch [8 U. S.] 434; Williams v. Armroyd, 7 Cranch [11 U. S.] 423; Imrie v. Castrique, 8 C. B. (N. S.) 405; Loring v. Neptune Ins. Co., 20 Pick. 411.

LOWELL, District Judge. I am of opinion that no good bar to this proceeding is shown. The decree in England is res inter alios, and is admissible in evidence here only to prove satisfaction pro tanto. True, there can be but one satisfaction, but the decree does not prove that full satisfaction has been obtained, because there is no privity between the insurance company and the Donald McKay as joint contractors or joint trespassers which shall make a satisfaction obtained from one a conclusive settlement in favor of the other. Between the assured and his underwriter the former is only bound to good faith and reasonable diligence. If the underwriter pays the loss, he is subrogated to the rights of the assured against third persons. The Monticello, 17 How. [58 U. S.] 155; Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 312; Randal v. Cockran, 1 Ves. Sr. 98; Yates v. Whyte, 4 Bing. N. C. 272; White v. Dobinson, 14 Sim. 273. If the assured recovers of the others he must give credit for the amount recovered, and if he fraudulently refuses to prosecute and attempts to release a trespasser, he must still give credit for all that he might have recovered. Atlantic Ins. Co. v. Storrow, 5 Paige, 285; Hart v. Western R. Co., 13 Metc. [Mass.] 99. And wilfully negligent conduct by which the underwriter had lost his remedy might have the same effect. But it does not follow that the judgment recovered by the assured against the trespasser is conclusive evidence of the amount of the loss. Try it in the reverse case, and suppose the decree not to have been satisfied, without any fault on the part of the assured, would it be evidence against the underwriter of the amount of the loss? Or would a compromise effected in good faith

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

[2] [Affirmed in Case No. 10,155.]

and with reasonable diligence discharge the insurer?

I admit the soundness of the argument that if the decree is to be received as evidence of any fact excepting that it was made and has been satisfied, it should be admitted for one party as well as the other, and in this particular the libel appears to rely upon the decree for more than it will bear. I do not propose to examine that decree. It is conclusive on the res and on all parties to it, including the underwriters, so far as the Donald McKay is concerned, but it is not evidence as between these parties of the fact of the collision, its consequences, or its causes. It is open, as I have said, to the respondents to show that the libellant might have recovered more by due diligence, but in the absence of any such allegation or proof, and upon this hearing as the parties have chosen to arrange it, I cannot admit it as a bar. The case most analogous to this is Pentz v. Aetna Fire Ins. Co., 9 Paige, 568, arising out of the disastrous fire of 1835 in the city of New York. In that case Chancellor Walworth held, overruling the vice-chancellor, that the assured could recover the amount of his actual loss, deducting the damages he had obtained from the corporation on the verdict of a jury assessing the same loss, which the city were collaterally bound to pay under a statute by virtue of which they had destroyed the plaintiff's house in order to check the fire. And see the remarks of Shaw, C. J., in Hart v. Western R. Co., 13 Metc. [Mass.] 105, &c.

By the agreement filed in this cause, it was to be sent to an assessor if any damages were recoverable by the libellant; and in strict compliance with the stipulation I might have contented myself with a simple reference, because it must be conceded, as it was at the argument, that the expenses of asserting the libellant's rights against the Donald McKay would be a just charge against the underwriters, or, what is the same thing, a just deduction from the credit to be made them, and so would any loss of interest that may have occurred during the prosecution of that suit. But as the main question intended to be raised by the agreement would at once recur in making the assessment, I felt bound to express my views upon it. Interlocutory decree accordingly.

After this decree was entered, the parties filed their respective adjustments, and stipulated that these should be treated as alternative reports of an assessor. No evidence was given of any fraud or negligence on the part of the libellant or his agents, but it did appear that for some unexplained reason he had not recovered in the collision suit the whole of his loss. The question of law arising out of the admitted facts, and argued by the same counsel who spoke to the cause before, was whether the damages recovered in England should be deducted from the gross amount of the repairs, or the partial loss should be assessed first and the credit be allowed against it. In the latter case, the assured had already been largely overpaid, by the operation of the rule deducting one-third new for old, while in the former there was a balance due him.

LOWELL, District Judge. The respondents insist that the libellant in this insurance cause must be governed by the law of insurance, according to which his loss is conclusively presumed to have been but two-thirds of the expense of repairing his vessel. It accords better with the truth and justice of the case that the assured should have the benefit of this difference in the rules of damages. In truth the payment by the trespasser, whether of a greater or less sum, is made on account of the gross damages and not of the net, and by the rule governing the application of payments the assured has a right to apply it as it is paid. Suppose the parties had in good faith and with due diligence compromised the dispute, and the alleged wrong-doer had in fact made two-thirds of the repairs, and the assured the remaining third, specifically; or, what is more likely to happen, suppose the admiralty court had found both parties in fault and had given the assured one-half the gross damages, must he credit the sum so recovered as three-quarters of his damages when he receives it as one-half? It is obvious that the respondents are claiming the benefit of both rules, as each happens to work in their favor; it is two-thirds when they are paying, and the whole when they are receiving. They cannot justly object that their rule is so worked as to credit them with two-thirds the gross receipts when they pay but two-thirds the gross costs and expenses of repairs.

A considerable, though not a full and strict analogy is found in those cases which decide that the value of the old materials sold by the assured is to be deducted from the gross repairs. Byrnes v. National Ins. Co., 1 Cow. 265; Brooks v. Oriental Ins. Co., 7 Pick. 259; Eager v. Atlas Ins. Co., 14 Pick. 141. It is urged that if the loss had been adjusted and paid by the respondents in the first instance, they would have been subrogated to the rights of the assured, and might have recovered the whole loss, and that whatever sum they had recovered would have gone to indemnify them in full in the first instance, before any obligation would arise on their part to account to the assured; and that the order in which the suits are brought cannot affect the rights of the parties. No authorities are cited for this proposition, excepting those which establish the general principle of subrogation. Subrogation is a doctrine of courts of equity, and I am not prepared to admit that when a person has paid two-thirds of a debt, he will, in equity, be subrogated to the whole security. No doubt the assured may, if he choose, assign his whole demand against

the wrong-doer to the underwriters, and he may do so, perhaps, by acts and refusals to act as well as in express terms; but in such a case the rights of the parties will depend upon the terms, express or implied, of the assignment itself, and not upon the relations which are created by the contract of insurance. The liability of the trespasser may be likened to a collateral security, not furnished by the underwriters, and in which they have no interest excepting to see it properly applied. The ship-owner has the right to apply it to the loss to which it is properly applicable, namely, the gross loss; and the underwriters have no right to say that it shall be applied to anything else.

Decree for the libellant.

On appeal, the circuit court certified to the supreme court the question whether a proceeding upon a policy of insurance was within the jurisdiction of the admiralty, and this question having been answered in the affirmative [see New England Marine Ins. Co. v. Dunham, 11 Wall. (78 U. S.) 1] the decree of the district court was affirmed on the merits, May term, 1871 [see Case No. 10,155].

DUNHAM (NEW ENGLAND MUT. MARINE INS. CO. v.). See Case No. 10,155.

Case No. 4,153.

DUNHAM v. ONE THOUSAND TWO HUNDRED AND SIXTY-FIVE VITRIFIED PIPES.

[The case reported under above title in 5 N. Y. Wkly. Dig. 194, is the same as Case No. 10,536.]

Case No. 4,154.

DUNHAM v. ONE THOUSAND TWO HUNDRED AND SIXTY VITRIFIED STONEWARE SEWER PIPES.

[The case reported under above title in 15 Int. Rev. Rec. 26, is the same as Case No. 14,280.]

Case No. 4,155.

DUNHAM v. RILEY.

[4 Wash. C. C. 126.] [1]

Circuit Court, D. Pennsylvania. April Term, 1821.

NONSUIT—FAILURE TO PRODUCE PAPERS—PRACTICE.

To entitle the defendant to nonsuit the plaintiff for not producing papers which he was noticed to produce, the defendant must first obtain an order of the court under a rule that they should be produced. But this order need not be absolute when moved for, but may be nisi cause shall be shown at the trial.

[Cited in Russell v. McLellan, Case No. 12,158; Gregory v. Chicago, M. & St. P. R., 10 Fed. 529.]

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

Rule upon the plaintiff to show cause why he should not produce certain books, papers, and accounts at the trial of this cause.

Mr. Binney, for plaintiff.

Chauncey & Peters, for defendant.

WASHINGTON, Circuit Justice. It was stated in the case of Bas v. Steele [Case No. 1,088], decided in this court, that to entitle the defendant to nonsuit the plaintiff at the trial, upon the ground of a non-production of papers, he must first obtain an order of the court, under a regular notice, that the papers should be produced. But the court did not decide whether such order must be absolute in the first instance. We think it need not be so; but that upon the rule to show cause, it may be made nisi; leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them. If the rule be made absolute at the time when it is argued, the court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not. If the case should be simple, and such inquiry should not appear to be necessary, the court may at once discharge, or make the rule absolute. Rule made absolute nisi.

DUNHAM (UNITED STATES v.). See Case No. 15,006.

Case No. 4,156.

In re DUNKERSON et al.

[4 Biss. 227.] [1]

District Court, D. Indiana. June, 1868.

LIEN OF NATIONAL BANK ON SHARES OF STOCK—BY-LAWS — TITLE OF ASSIGNEE IN BANKRUPTCY —RIGHTS OF BANK—BY-LAW IS A CONTRACT.

1. A national bank has power to make a by-law creating a lien on the stock of every stockholder for his liabilities to the bank. And such a lien is created by a by-law which provides that no transfer of the stock of the bank shall be made without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise.

2. An assignee in bankruptcy has the same title to the bankrupt's estate, which the bankrupt himself had before the adjudication of bankruptcy. But an exception to this rule obtains where the bankrupt has transferred his property to defraud his creditors.

3. Under the by-laws of a bank creating a lien on the stock of every stockholder for his liabilities to the bank, a stockholder, owning one hundred and thirty shares in the bank, and being indebted to the bank in $20,000, was adjudged a bankrupt. *Held*, that, under these circumstances, the bank was not bound to transfer the stock to his assignee.

4. *Held*, also, that the lien of the bank on the stock was not defeated by the adjudication of bankruptcy; that the stock should be sold, and the proceeds applied to the payment of the debt

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

due the bank so far as the same would go; and that, for the residue of its debt, the bank might prove its claim with a view to a dividend of the assets of the bankrupt estate.

5. A by-law of a bank is a contract between the stockholders; and the ordinary rules of construing contracts apply in its construction. And, if possible, it should so be construed, "ut res magis valeat, quam pereat."

[In bankruptcy. In the matter of Robert Dunkerson & Co.]

Asa Iglehart, for the bank.

A. L. Robinson, for assignee.

McDONALD, District Judge. This case comes before me for decision under the sixth section of the bankrupt law [of 1867 (14 Stat. 520)]. The contending parties agree on the facts; and consequently the only thing to be decided is the law arising on those facts.

Dunkerson & Co. have been adjudged bankrupts by a decree of this court; and Philip C. Decker has been appointed their assignee. The contesting parties are this assignee and the Evansville National Bank, a corporation organized under the national bank act of June 3, 1864 (13 Stat. 99).

"The facts agreed upon are, that in January, 1865, the said bank was duly organized, by the making of articles of association, signed by R. K. Dunkerson and others, as corporators; that said articles contain, among others, the following provisions, to wit; 'And they (the board of directors) shall also have the power to make all by-laws that it may be proper and convenient for them to make, under said act, for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder, who may be liable to the association, either as principal debtor or otherwise, without the consent of the board;' that the board of directors adopted the following by-law: 'No transfer of the stock of this bank shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise, and certificates of stock shall contain upon them notice of this provision;' that prior to the bankruptcy of Dunkerson, he was the owner of one hundred and thirty shares of the capital stock of the bank, for which he held the certificates of the bank, in the usual form, with the following notice printed on their face: 'And provided that no transfer of the stock herein certified shall be made without the consent of the board of directors, while the owner shall be liable to the bank, either as principal debtor or otherwise;' that at the same time, and before the filing said petition in bankruptcy, the bank was, and still is, the holder and owner of a bill of exchange, which is wholly unpaid, for twenty thousand dollars, discounted at its date, upon which the firm of R. K. Dunkerson & Co., of which R. K. Dunkerson is a member, is the last indorser, and which before the filing of the petition had been dishonored, and duly protested, and notice given to Dunkerson; that Decker was duly appointed, and the register had executed and delivered to him the proper instrument of assignment under the bankruptcy act; that Dunkerson afterwards indorsed and delivered to Decker the certificates of stock, who demanded of the proper officers of the bank permission to have the stock assigned in the regular way on the corporation books, who refused, and claimed a lien upon the stock for the payment of the bill, and demanded to have the stock sold and the proceeds applied upon the bill, and the residue unpaid proven as a claim against the bankrupt's estate, but that the assignee refused to admit the lien claimed by the bank and claimed the stock as free from incumbrance, and that the board of directors never have consented to the transfer of the stock."

On these facts, the question for decision is, Has the bank such a lien on the stock in question for the payment of the said bill of exchange, as entitles it to withhold the stock from the general fund of the bankrupt's estate? And this involves two subordinate questions, namely: 1, had the board of directors of the bank due authority to adopt the by-law above cited? and, 2, if so, does this by-law, on any fair construction, create the lien insisted on by the bank? We will consider these questions.

I. Had the board of directors of the bank due authority to provide by a by-law that "no transfer of the stock of this bank shall be made without the consent of the board of directors, by any stockholder who may be liable to the bank either as principal debtor or otherwise"?

The eighth section of the act under which this bank was organized provides that "its board of directors shall have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred." 13 Stat. 101.

This section gives express power to make the by-law in question, unless it is "inconsistent with other provisions" of the act. Counsel for the assignee Decker have not pointed out any such inconsistency. On a careful examination of the act, I am well satisfied that no such inconsistency exists. Nothing can be more consistent with the act, and, indeed, with financial prudence and honesty, than the by-law under consideration. I should entertain no doubt of its validity, even if there were no authority in support of my view. But I am sustained in this opinion by several adjudications. The case of Child v. Hudson's Bay Co., 2 P. Wms. 207, is a decision in point. By that case, it seems that the charter of the Hudson's Bay Company, in general terms, empowered the corporators "to make by-laws for the better government of the company,

and for the management and direction of their trade to Hudson's bay. Accordingly they made a by-law, that if any of their members should be indebted to the company, his stock in the company should be in the first place liable to the debts which such member should owe the company." Afterwards a stockholder in the corporation became indebted to it, and subsequently became a bankrupt. Thereupon his assignee filed a bill against the company praying a transfer of the stock to him for the benefit of creditors. The company resisted this application on the ground that their by-law gave them a lien on the stock. The assignee objected that the corporation had no power to make the by-law. The case was almost identical with the one under consideration. And Lord Chancellor Macclesfield, in deciding it, said: "This is a good by-law; for the legal interest of all the stock is in the company, who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions or terms. And for the same reason that this by-law is objected to, the common by-laws of companies to deduct the calls out of the stocks of the members refusing to pay their calls, may be said to be void."

So, in the case of Waln's Assignees v. Bank of North America, 8 Serg. & R. 73, it was held that "a stockholder who borrows money of a bank with a full knowledge of a usage not to permit a transfer of stock while the holder is indebted to the bank, is bound by such usage; and neither he nor his assignees under a voluntary general assignment, can maintain an action against the bank for refusing to permit his stock to be transferred." Here without any by-law, a mere usage was held sufficient to create a lien on the stock of a debtor to the bank.

The cases of Union Bank of Georgetown v. Laird, 2 Wheat. [15 U. S.] 390, and Brent v. Bank of Washington, 10 Pet. [35 U. S.] 596, favor the same view.

But it is urged by counsel for Decker, that though the by-law in question may be valid as against Dunkerson, the original stockholder, yet it is not valid as against his assignee, because he represents, as well the interests of his creditors as those of the bankrupt. The general rule is that, in bankrupt cases, the assignee possesses exactly the right—no more and no less—which the bankrupt had before the adjudication of bankruptcy. To this rule I know of but one exception, namely, that in cases where the bankrupt has fraudulently transferred his property with intent to defeat or delay his creditors, the assignee is so far the representative of the creditors that he may recover back such property, though the party making the fraudulent transfer cannot do so. The present case does not fall under this exception, but is within the general rule. If before the adjudication of bankruptcy Dunkerson could not have complained of this refusal to transfer this stock, the assignee cannot now do so.

II. Does the by-law in question, on its face, purport to create a lien on the stock of every debtor of the bank for the payment of his debt?

It is to be observed that the by-law does not in express terms create a lien. Can such a lien be deduced from it by fair construction? The by-law merely says that "no transfer of the stock of this bank shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the bank, either as principal debtor or otherwise." This by-law with the provision on the same subject contained in the articles of association already referred to, must be considered as a contract between all the stockholders and the bank regarded as a corporation. And the rules of construing contracts are therefore applicable to this by-law.

Now, it is a fundamental rule, that contracts shall, if possible, be so construed as to make them valid to some purpose, and not void—"ut res magis valeat, quam pereat." The by-law under consideration can have no validity whatever, and must be utterly vain and nugatory, unless it was intended to create a lien on the stock of the debtor to the bank. What else could have been intended by it? Does not the very fact that it relates to debtors to the bank and to nobody else, raise a fair presumption that it should be beneficial to the bank in relation to such indebtedness? And how could it operate beneficially, except by way of lien to secure the debt?

In the case of Leggett v. Bank of Sing Sing, 24 N. Y. 283, it was held that a provision in the articles of a banking association that the shares of its stock shall not be transferable until the shareholder shall discharge all debts due by him to the association, creates a lien as against an assignee of the stock, who takes it with knowledge thereof while the shareholder is under a contingent liability as indorser. As this decision was made under the free banking law of New York, a law very similar to the act of congress establishing national banks, and exactly like it so far as concerns the question in the present case, I deem it a strong authority in support of the view which I have above expressed. And, upon the whole, I entertain no doubt that the by-law in question, considered in connection with the provision in the articles of association already noticed, creates a lien on Dunkerson's stock for the debt due by him to the bank.

In pursuance of the agreement of the parties, I therefore order and decree that the said bank and assignee sell the said stock; and, in due form, transfer it to the purchaser or purchasers thereof; that the proceeds of such sale be applied first to the payment of the bill of exchange due to the bank by Dunkerson; and that the bank be allowed to make proof of the residue after such pay-

ment, with a view to a dividend for such residue out of the general fund of the estate of the bankrupt.

All which is ordered to be certified.

NOTE. In the case of Evansville Nat. Bank v. Metropolitan Nat. Bank [Case No. 4,573], Judge Drummond held that a transfer of the stock of a banking corporation organized under the act of June 3, 1864, to a bona fide holder was valid, though the seller at the time was indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any shareholder indebted to the bank should be made, without the consent of the board of directors; that such a by-law in effect attempted to create a lien upon stock for debts of the holder, and to accomplish the same result as if a loan were made upon the security of the stock—a transaction forbidden by the 35th section of the act. For a full citation of authorities consult note to above case.

[NOTE. For further proceedings in this case, see Cases Nos. 4157–4159.]

Case No. 4,157.

In re DUNKERSON et al.

[4 Biss. 253; 12 N. B. R. 413.][1]

District Court, D. Indiana. Aug., 1868.

BANKRUPTCY—SECURED CREDITOR.

When a creditor of a bankrupt holds a security for his debt on property which never belonged to the bankrupt, the creditor may prove for his whole debt without first disposing of the security under the provisions of the 20th section of the bankrupt act [of 1867 (14 Stat. 526)].

[Cited in Re May, Case No. 9,327; Re Kinne, 5 Fed. 60.]

[In bankruptcy.

[For prior proceedings, see Case No. 4,156.]

Asa Iglehart, for the bank.

A. L. Robinson, for Lowrey & Co.

McDONALD, District Judge. This case is before me on a certificate of a register in bankruptcy under the 6th section of the bankrupt act.

To develop the matter to be decided, perhaps I cannot do better than to copy the substantial part of the register's certificate. He certifies that:—

"The Evansville National Bank presented to him in due form their deposition, accompanied by a statement in due form, showing that said bankrupts were indebted to said bank, as indorsers of sundry bills of exchange, in the sum of ninety-eight thousand six hundred and sixty-six dollars and sixty-six cents. Copies of the bills of exchange, upon which the liabilities of the bankrupts were founded, accompany the statement and deposition, and show that Watts, Crane & Co., and Watts, Given & Co., and Given, Watts & Co.—all of which firms are wholly disconnected with the bankrupts—are severally and respectively drawers, indorsers, and acceptors of these bills of exchange, upon all of which the bankrupts are the last indorsers. The vice-president of the bank, who makes the deposition, appends this statement: 'That said bank holds a claim against George R. Preston for four thousand five hundred dollars, due January 1, 1869, which was procured upon proceedings supplementary to execution upon a judgment obtained against William Brown (of Watts, Crane & Co.) one of the acceptors of the bills of exchange above set forth; that the claim is of the value of $——; that said bank also holds sundry notes secured by mortgage of which copies are hereto attached, marked B., and which were in May, 1867, the property of Watts, Crane & Co., and which were then given to R. K. Dunkerson of R. K. Dunkerson & Co. (who were the accommodation indorsers for said several firms who are the principal debtors to said bank upon the liabilities herein set out and proven), to indemnify said bankrupts against said indorsements, and also for the better security of the bank as well; that said collaterals were held by and for said bank more than six months before the bankruptcy; that the value of said collaterals is unknown to affiant. The debt claimed by said bank against said bankrupts is the whole amount of said bills irrespective of said claim against said Preston, and irrespective of said collaterals.' But W. J. Lowrey & Co., who are creditors of said bankrupts, and who had proven their claims in due form, objected to the proof of said claim for the full amount or for any amount, unless said bank would surrender said lien upon the claim against said Preston, and said collaterals, or have the same appraised and their value settled by the assignee, who had before that time been appointed, or have the same sold and the value thereof deducted from the amount shown to be due said bank, and the proof allowed for the balance, in accordance with the 20th section of the bankrupt act. But said bank wholly refused to have said claim and said collaterals sold in accordance with the provisions of said section, or to have the same appraised or the value thereof agreed upon in accordance with the provisions of said section, or to release or deliver the same up in accordance with the said provisions of said section; but claimed unconditionally the right to make proof of the whole amount due upon said bills of exchange, so indorsed by said bankrupts."

Upon this state of facts, it appears that the register allowed the entire claim of the bank against the estate of the bankrupts, to the sum of ninety-eight thousand six hundred and sixty-six dollars and sixty-six cents, and placed the same on the list of claims proved and allowed. Whereupon the parties agreed that the register should certify the whole matter to me for my decision.

From the facts certified by the register,

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

I conclude that the only question for decision is the following: Is the bank bound to give up the collaterals named, or to make any arrangement concerning them, before being permitted to prove its whole debt of ninety-eight thousand six hundred and sixty-six dollars against the bankrupts Dunkerson & Company?

It would seem from the register's certificate that the creditors who insist on the affirmative of this question, do so on the sole ground that the 20th section of the bankrupt act requires it. And, as we are aware of no other provision of that act to which the question under consideration is applicable, we suppose that a proper construction of that section must be decisive of the question.

Before proceeding to consider the 20th section of the act, it may be well, however, to inquire what relevancy the note of four thousand five hundred dollars, held by the bank on George R. Preston, has to the merits of the present case. It appears that the bank had coerced that note from William Brown, one of the acceptors of said bills of exchange, and a partner in the firm of Watts, Crane & Co., by a proceeding supplementary to execution. But what connection the bankrupts or any of their creditors, except the bank, have with this note does not appear. The register's certificate, indeed, states that the proceeding supplementary to execution was upon a judgment against Brown, "one of the acceptors of the bills of exchange" on which the claim of the bank for ninety-eight thousand six hundred and sixty-six dollars is founded. But the certificate does not state that this judgment was rendered on Brown's acceptance of those bills; and I cannot presume that it was. I must, therefore, wholly disregard the note on Preston in deciding the question under consideration.

The matter, then, is reduced to this: Divers bills of exchange, amounting in the aggregate to ninety-eight thousand six hundred and sixty-six dollars, are drawn, accepted, and indorsed by several mercantile firms to procure accommodation in the bank. These firms apply to Dunkerson & Co., the bankrupts, for accommodation indorsements of them, and to the bank to discount them. Dunkerson & Co. and the bank ask some collateral security. It is given them by the delivery to the bank of "sundry notes secured by mortgage, and which, in May, 1867, were the property of Watts, Crane & Co., and Given, Watts & Co." Thereupon Dunkerson & Co. indorse the bills, and the bank discounts them. They are dishonored. Dunkerson & Co. become bankrupts. The bank offers to prove the bills as debts against them for dividends out of their assets. Certain creditors object, unless certain things proposed to be done under the 20th section of the bankrupt act are first performed. This seems to be the substance of the whole matter. And it involves this question: When a creditor holds a debt against a bankrupt whose liability arises by his accommodation indorsement of bills of exchange, to secure the payment of which, the drawers and acceptors of the bills have delivered to the creditor "sundry notes," as collateral security, may the creditor prove his whole debt and have it allowed against the estate of the bankrupt without regard to these collaterals?

If this question should be answered in the affirmative, it must be because the provisions of the 20th section of the bankrupt act do not reach the case.

On a careful examination of that section, it will plainly appear that in its letter it does not comprehend the case under consideration. For, so far as it relates to mortgages, pledges, and liens at all, the letter of the section only includes "a mortgage or pledge of real estate or personal property of the bankrupt, or a lien thereon." Now, it is not pretended that the collaterals in question were ever property of the bankrupts, Dunkerson & Co. On the contrary, the register's certificate distinctly states that they were "the property of Watts, Crane & Co., and of Given, Watts & Co. Clearly, therefore, if we are strictly to construe the section according to its letter, it does not extend to the present case, and the register was right in passing the whole claim of the bank.

But it is a very grave question whether this section should be thus strictly construed. Rather, ought we not to construe it liberally and according to its spirit? There are plausible reasons for the latter construction.

In the first place, it is the obvious policy of the bankrupt law to favor equity among bona fide creditors. Equitable principles pervade that law; and "equity loves equality." If we construe the 20th section of the act strictly and literally, we give the bank an advantage over the general creditors of the bankrupts; if liberally and according to its spirit, we may put them all on an equality. We are bound, therefore, if we can without violence to the language of this section, so to construe it as to extend its operation to the case at bar.

Moreover, if in this case instead of Dunkerson & Co., Watts, Crane & Co., who are the principal debtors on these bills, were the bankrupts, it would be very clear that the bank would not be allowed to prove for any part of its debt without first disposing of the collaterals as required by said 20th section. And, since the debt is one and the same, since Watts, Crane & Co. are the principal debtors, and Dunkerson & Co. but sureties for them, is it equitable that facts which would avail to prevent the proof and allowance of this debt as against the former company if they were bankrupts, cannot avail to the same purpose when the latter are bankrupts? As to principal and surety, it is a general rule that the surety may resist

payment on any ground which would be a good defense on the part of the principal.

Furthermore, the same reason which requires a creditor holding a lien for his debt on a bankrupt's property to dispose of that lien according to the 20th section of the act before proving his debt, equally applies where he holds the lien on the property of some other person. The only reason in both cases seems to be that it is not equitable to permit a creditor of the bankrupt holding collateral security for his debt first to prove the whole of it, and share equally with other creditors for the whole of it out of the common fund, and afterwards to resort to his collateral security to put him in a better condition than that of other creditors. The section in question virtually says to the lien-holder, "If you ask equity, you must do equity. Since your lien puts you in a better condition than other creditors, if you want a dividend out of the common fund, you must first deduct from your debt the value of your lien and take your dividend on the residue of your debt; or you must release your lien to the assignee and, thus putting yourself on a footing with other creditors, take the dividend on your whole debt; or, if the property on which you hold your lien is worth more than your debt, you may keep it in satisfaction thereof, and, instead of asking a dividend, pay the excess of its value into the common fund for the use of other creditors."

If we adopt this line of reasoning, we should conclude that the provisions of the 20th section of the act extend to the case at bar. And it must be confessed that such a conclusion is supported by several respectable authorities. Lanckton v. Wolcott, 6 Metc. [Mass.] 305; Amory v. Francis, 16 Mass. 308; Richardson v. Wyman, 4 Gray, 553.

But the conclusion to which this line of reasoning leads is attended with serious, if not insuperable, difficulties. Indeed, I think a construction of the section in question, founded on this reasoning, involves absurdities which cannot be tolerated. Some of these are as follows:

First. This section provides for a sale, in certain cases, of the property on which the lien attaches. Now, whether the property be personal or real, there is generally, in such cases, an equity of redemption. This exists in the person who is the general owner of the property. If he is the bankrupt, a sale of the property under the direction of the court would vest a good title in the buyer, because the holder of the equity of redemption is a party to the judicial proceeding. But if he who holds the equity of redemption is not the bankrupt, but a stranger, no such sale could vest his interest in the buyer. This remark applies only to a sale by agreement of the lien-holder and the assignee, authorized by said section.

Second. This section provides that, in certain cases, the lien-holder may retain the property at its value, and prove for the residue of his debt. This provision evidently contemplates the vesting of a perfect title to the property, including the equity of redemption, in the creditor. But this could not be done unless the property when the lien attached belonged to the bankrupt.

Third. The section under consideration provides that, if the value of the property on which the lien attaches exceeds the debt secured by it, the assignee may "release to the creditor the bankrupt's right of redemption therein on receiving such excess." Obviously this could not be done in the present case, though the collaterals exceeded in value the debt due to the bank. For, as these collaterals never belonged to the bankrupts, they never had any equity of redemption in them. Consequently, the assignee could not release these "bankrupts' right of redemption therein."

Fourth. This section provides that, in certain cases, the assignee shall "sell the property subject to the claim of the creditor thereon," and "shall execute all deeds and writings necessary or proper to consummate the transaction." This plainly means that he may sell and convey the equity of redemption. Clearly he has power to do this whenever the equity of redemption is in the bankrupt; for he officially represents the bankrupt's interest, or rather the bankrupt's interest is vested in him. But if the property on which the lien attaches never belonged to the bankrupt, he never had any equity of redemption in it, and so no such thing could vest in his assignee or be sold or conveyed by him.

These considerations, viewed in connection with the unequivocal language of the 20th section of the bankrupt act confining its provisions to mortgages and pledges "of real or personal property of the bankrupt or a lien thereon," lead me to the conclusion that no reasonable construction of the section can extend its provisions to liens of the creditors of a bankrupt on property of which he was never the owner.

In this conclusion, I am supported by high authority.

Under the English bankrupt law, which does not differ much from our own on the points relating to the question under consideration, the rulings of the judges will be found to agree with the conclusion to which I have come in this case. See Ex parte Bennet, 2 Atk. 527; Ex parte Parr, 18 Ves. 65; Ex parte Goodman, 3 Mad. Ch. 373; Ex parte Plummer, 1 Atk. 103.

My ruling in this case is also in conformity with a decision of Mr. Justice Story under the bankrupt law of 1841 [5 Stat. 440], in the Case of Babcock [Case No. 696]. That case was very much like the present; and the learned judge held that a distinction must be taken between the case of a security given to the creditor by the bankrupt himself of his own property, and the case of a security of a third person transferred to the creditor

by the bankrupt, or otherwise. And he decided that "in the former case, the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent, and then he may prove for the residue of his debt which the security when sold does not discharge. In the latter case, he may prove his debt in bankruptcy without surrendering the security of the third person which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, he does not take, under the bankruptcy and the security, more than the full amount of his debt." In my judgment, precisely so may the Evansville National Bank do in the case at bar.

I am gratified to find that, in the conclusion to which I have come in the present case, I am fully sustained by a late decision of Judge Fox of the district of Maine, in the matter of Nathaniel O. Cram [Case No. 3,343], made under the present bankrupt law. That case was almost in every respect like the present. The Casco National Bank presented a claim against the estate of Cram, the bankrupt, on notes for eighty thousand nine hundred dollars, executed by a manufacturing company and indorsed by Cram. These notes were secured by mortgages on personal and real estate executed by the manufacturing company to the bank. It was objected that proof of the debt in favor of the bank could not be allowed without first deducting the security held by it. And this objection was made, as in the present case, under the provisions of the 20th section of the bankrupt act. But the learned district judge, in an elaborate and exceedingly well-reasoned opinion, overruled the objection and ordered the proof to be taken. I entirely approve his reasoning and his decision.

The doings of the register, Charles H. Butterfield, Esq., in the premises are approved and affirmed, which is ordered to be certified, &c.

For further authorities confirmatory of the above case, see Bank v. Morris, 4 Cush. 99; Ex parte Adams, 3 Mont. & A. 157; Ex parte Peacock, 2 Glyn & J. 27; Ex parte Hedderly, 2 Mont. D. & D. 487. See, also, Richardson v. City Bank, 11 Gray, 261.

[NOTE. For further proceedings in this case, see Cases Nos. 4,158 and 4,159.]

Case No. 4,158.

In re DUNKERSON et al.

[4 Biss. 277.][1]

District Court, D. Indiana. Jan., 1869.

BANKRUPTCY—DISTRIBUTION OF ASSETS—PARTNERSHIP AND INDIVIDUAL DEBTS.

The Bank of Kentucky held drafts drawn by Given, Brown & Co. on R. K. Dunkerson & Co. and accepted by the latter. R. K. Dunkerson was a partner in both the firms. Both were adjudged bankrupts. Dunkerson had separate assets more than enough to pay his individual debts. The bank proved its debt both against Dunkerson individually and against the firm of Dunkerson & Co. In the distribution of assets, the bank claimed the right to a pro rata dividend, out of the separate assets of Dunkerson, equally with his individual creditors, as well as a right to a dividend in the joint assets of the firm. *Held*, that the claim of the bank on the separate assets of Dunkerson's individual estate could not be allowed.

In bankruptcy.

[For prior proceedings, see Cases Nos. 4,156 and 4,157.]

Asa Iglehart, for the bank.

McDONALD, District Judge. In this case, Charles H. Butterfield, Esq., one of the registers in bankruptcy, has certified certain facts for my decision. He certifies:

"That there are two cases pending in this court in which the question is involved, namely, the case of R. K. Dunkerson, Alexander Wilson, and Enoch Schoenlaub—formerly partners as R. K. Dunkerson & Co.—and the case of R. K. Dunkerson. The schedules in the former case set forth the individual liabilities and assets of the said partners, and also the partnership liabilities and assets. The schedules in the latter case set forth the individual liability and assets of Dunkerson, and also his liabilities and assets as a member of the firm of Given, Brown & Co., of which last-mentioned firm said Dunkerson was a member at the time of the filing of his petition for adjudication of bankruptcy.

"The Bank of Kentucky, one of the creditors of R. K. Dunkerson & Co., holds certain drafts, in all amounting to ten thousand dollars, drawn by Given, Brown & Co. (of which firm said Dunkerson at the time of the drawing of said drafts was a member) on R. K. Dunkerson & Co., and by said last-mentioned firm accepted. The Bank of Kentucky has proven the said amount of ten thousand dollars, in due form before the register in bankruptcy in Louisville, Kentucky, against the firm of R. K. Dunkerson & Co., and also against said R. K. Dunkerson—or, in other words, has proven their said claim in both the cases mentioned in the first part of this certificate. And the said Bank of Kentucky now claims that the individual assets of R. K. Dunkerson, which are largely in excess of the claims against him individually, shall be applied so far as they will go to the satisfaction of the claims of the said Bank of Kentucky; and that, for any balance which may be found due said bank, after applying said Dunkerson's individual assets as aforesaid, the said bank shall be allowed to share, pro rata, with the general creditors of R. K. Dunkerson and to which the First National Bank of Evansville—also a creditor of the bankrupts in all said cases—objects, and insists that the said Bank of Kentucky shall only share pro rata with the general creditors of R. K. Dunkerson & Co.;

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and that the individual assets of R. K. Dunkerson, after paying his individual debts, be applied to the payment—so far as they will go—of the claims of all the general creditors of the said firm of R. K. Dunkerson & Co. The firm of Given, Brown & Co. have filed a petition for adjudication of bankruptcy in the United States district court for the district of Indiana, upon which adjudication has been made, and an assignee appointed."

The question to be decided is simply this: Under the circumstances above stated, shall the Bank of Kentucky occupy the same ground in the distribution of assets as all the other creditors of the firm of R. K. Dunkerson & Co., or has the bank a right first to take a dividend out of the individual assets of R. K. Dunkerson & Co., and then for the residue of its debt to share equally with other creditors of Dunkerson & Co. in the joint assets of that firm?

"Equity loves equality." A leading object of the bankrupt law is to make all creditors of a bankrupt share equally. And this obvious and just policy of the law must be followed in every case in which there is no special reason for an exception to the general rule. Does the present case embrace any such exceptions? The drafts in question were drawn by Given, Brown & Co. on R. K. Dunkerson & Co., and by the latter accepted. Does the fact that Dunkerson is a partner in both these companies give the Bank of Kentucky any special claim on Dunkerson's separate assets superior to the claims of other creditors of Dunkerson & Co.? I cannot think so. It is probable, indeed, that the bank will necessarily have some advantage over other creditors of the last-named company; for, as both the companies are in bankruptcy, the bank may, after taking its dividend in the assets of Dunkerson & Co., receive a dividend from the assets of Given, Brown & Co. But this advantage would arise from the fact that both these companies are indebted, as drawers and acceptors, to the bank on the same bills. To give the bank the additional advantage which it asks, would be more than it deserves.

If Dunkerson had individually indorsed these drafts, or in any way incurred a separate individual liability on them, the preference claimed by the bank might perhaps be allowed. At least it is so held under the English bankrupt law. But it is much doubted whether, even in that case, such preferences would be given in the United States. See Mead v. National Bank of Fayetteville [Case No. 9,366]; In re Farnum [Case No. 4,674].

I decide that the Bank of Kentucky must first take its pro rata dividend out of the assets of Dunkerson & Co., equally with the other creditors of that firm, and must afterwards share equally with them in the individual assets of Dunkerson, if any remain after fully satisfying his individual creditors.

Consult In re Bradley [Case No. 1,772]; In re Knight [Id. 7,880]; In re Wiley [Id. 17,656]; In re Dunkerson [Id. 4,157].

[NOTE. For further proceedings in this case, see Case No. 4,159.]

Case No. 4,159.

In re DUNKERSON et al.

[4 Biss. 323;[1] 12 N. B. R. 391; 1 N. Y. Wkly. Dig. 179.]

District Court, D. Indiana. April, 1869.

BANKRUPTCY—DISTRIBUTION OF ASSETS—PARTNERSHIP DEBT.

1. The partnership debts of the bankrupts far exceeded the partnership property, but the individual assets of the partner D. exceeded his individual debts. D. had been a member of another firm or B. & D. which owed the E. N. Bank some $16,000. The bank proved this debt under the proceeding in bankruptcy of D. & Co., and insisted that the surplus of the assets of D., after satisfying his individual debts, should be added to the general assets of the firm of D. & Co.; and that out of the fund thus composed of the assets of both D. and of the firm, the bank should take a dividend equally with the creditors of the firm. *Held*, that the mode of distribution thus claimed by the bank could not be allowed.

2. *Held*, that the proper mode of distribution in this case is as follows: 1. That the individual assets of D. must first go to pay his individual debts in full. 2. That the joint assets of D. & C., must be distributed pro rata to the creditors only to whom the firm was jointly liable. 3. That the individual assets of D., after satisfying in full his individual debts, should be distributed, pro rata, among all the creditors who have proved their claims in the proceeding, and to whom D., at the time of the filing of the petition in bankruptcy, was liable, either as a member of the firm of D. & Co., or of any other firm.

[In bankruptcy.

[For prior proceedings, see Cases Nos. 4,156–4,158.]

Asa Iglehart, for Evansville Nat. Bank.

A. G. Robinson, for assignee.

McDONALD, District Judge. This case comes before me on a certificate of Charles H. Butterfield, Esq., register for the Evansville district. His certificate is as follows:

"This question arises upon the distribution of the assets in said matter, and embraces two classes of liabilities. One class embraces paper upon which the firm of R. K. Dunkerson & Co. is liable; and the other embraces paper upon which R. K. Dunkerson is liable, not individually, but as a member of the firm of Brown & Dunkerson, which last-mentioned firm was dissolved some years before the bankruptcy.

"The Evansville National Bank has proved in this case the following described notes, to wit: One promissory note drawn by Thomas E. Johns, Archie Baugh, and Joe C. Jones, and indorsed by Given, Watts & Co. and Brown & Dunkerson—amount $5,006.30. Al-

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

so three other notes, each for the sum of $5,000, drawn respectively by E. Warfield, Watt F. Johnson, and J. D. Vance, and each indorsed by Given, Watts & Co., and by Brown & Dunkerson—said last-mentioned firm being composed, at the time of said indorsements, of William Brown and Robert K. Dunkerson, one of the petitioners in this matter. Upon these notes, R. K. Dunkerson is the only member of the firm of R. K. Dunkerson & Co. who is liable—his liability arising out of his connection with the firm of Brown & Dunkerson.

"In the distribution of the assets belonging to the firm of R. K. Dunkerson & Co. and the assets belonging to the individual members of said firm, the assignee insists that the dividend shall be made in the following manner, to wit: 1. The individual debts of R. K. Dunkerson shall be paid in full out of his individual assets. 2. The assets belonging to the firm of R. K. Dunkerson & Co. shall be distributed, pro rata, among all the creditors of R. K. Dunkerson & Co. who have proved their debts. 3. The individual assets of R. K. Dunkerson, remaining after paying his individual debts in full, shall be distributed pro rata, among all the creditors proving their claims, to whom R. K. Dunkerson was liable at the time of filing his petition in bankruptcy either as a member of the firm of R. K. Dunkerson & Co., or of the firm of Brown & Dunkerson.

"To this the Evansville National Bank objects, and insists that, after paying Dunkerson's individual debts, the surplus of his individual assets shall be merged in the assets of the firm of R. K. Dunkerson & Co.; and that said bank shall be allowed a dividend upon the amount of the notes above described out of the assets of the firm of R. K. Dunkerson & Co. after the individual assets of Dunkerson, left after paying his individual debt, shall have merged as aforesaid, the same as upon the amount due said bank from the firm of R. K. Dunkerson & Co."

That when a debtor is jointly liable as a partner and separately liable as an individual, partnership property must first go to the payment of the partnership debts and his individual property to the payment of his individual debts, is too well settled to admit argument or to require the citation of authority. In the present case it seems that the separate property of Dunkerson far exceeds his separate liabilities; and that the partnership property of the bankrupts, Dunkerson & Co., is far less than their partnership liabilities. It follows, therefore, that all the individual debts of Dunkerson must be fully paid out of his individual property; and that all the partnership assets of Dunkerson & Co. must be applied, so far as they will go, to pay the partnership debts. This conclusion, I think, nobody will dispute. And, if in this I am correct, the only point to be decided is, whether the said claim of the Evansville National Bank is a debt due by the partnership firm of Dunkerson & Co. This it clearly is not. It is true that the debt due to the bank is a partnership debt; but it is due by the old firm of Brown & Dunkerson. This firm does not appear to have been declared a bankrupt. If it had, no doubt this debt due the bank ought to be paid pro rata out of the assets of that firm. But, so far as the firm of Dunkerson & Co. is concerned, the claim of the bank, beyond all doubt, is not a partnership debt, and is not entitled to any dividend out of the assets of that firm.

The mode of distribution insisted on by the national bank would, therefore, be plainly improper and unjust.

I fully agree with the register in his conclusion, that the individual debts of R. K. Dunkerson must first be paid in full out of his individual assets; that the assets of the bankrupts, Dunkerson & Co., shall be distributed pro rata among all their creditors who have proved their debts; and that the individual assets of R. K. Dunkerson, after first satisfying in full his individual debts, shall be distributed pro rata, among all the creditors who have proved their claims in this case, and to whom R. K. Dunkerson was, at the time of the filing of the petition in this case, liable either as a member of the firm of Dunkerson & Co. or of any other firm. And I direct that the register make the distribution accordingly. And I further order and adjudge that the Evansville National Bank pay the costs of this proceeding.

For full authorities as to the method of marshaling assets for payment of partnership and individual debts, consult In re Knight [Case No. 7,880]; In re Bradley [Id. 1,772]; In re Dunkerson [Id. 4,157]; In re Wiley [Id. 17,656].

Case No. 4,160.

In re DUNKLE et al.

[7 N. B. R. 72.][1]

District Court, E. D. Pennsylvania. Nov. 15, 1870.

BANKRUPTCY—EXECUTION CREDITOR—INJUNCTION—FRAUDULENT PREFERENCE — CONCLUSIVENESS OF ADJUDICATION OF BANKRUPTCY.

1. Where an execution creditor has been enjoined from further proceeding in his execution by an injunction issued out of the circuit court in aid of the bankruptcy proceedings, he may, if he elect so to do, have his claim of priority of payment out of the funds (proceeds of sales of property upon which his execution is alleged to have been a lien) in the hands of the assignee, determined at a general meeting of creditors, under the twenty-seventh section of the bankrupt act [of 1867 (14 Stat. 529)], subject to exception to the district court sitting in bankruptcy.

[Cited in Re Marter, Case No. 9,143.]

2. Procurement to take in execution may be inferred from such relationship between the debtor and creditor and apparent concert of action on their part as would ordinarily be in-

[1] [Reprinted by permission.]

compatible with any other intention on the part of the debtor than that of giving a preference to the creditor.

3. An adjudication of bankruptcy, in invitum, is not conclusive evidence as against such execution creditor as to the allegations in the petition for adjudication, found to be true by such decree.

[In the matter of Dunkle & Dreisbach, bankrupts.]

By J. MASON, Register:

At an adjourned second general meeting of creditors in this matter, held before the register on the thirteenth day of June, eighteen hundred and seventy, the claims of Martin Dreisbach and Elizabeth Dreisbach, (a more particular statement of which will be set forth herein), alleging that by virtue of certain judgments recovered before the commencement of proceedings in bankruptcy, and executions issued thereon, they were entitled to the proceeds arising from the sale of the personal property levied on thereunder at No. 140 North Eighth street, Philadelphia, and which had come into the hands of the assignee, were presented by their counsel, Hon. James Pollock. The deposition, (previously taken,) of a deputy sheriff of the city and county of Philadelphia, was then read in support of said claims. Annexed to said deposition, as an exhibit, was a certified copy of the docket entries in a certain suit in equity in the circuit court of the United States for the eastern district of Pennsylvania, (Lewis Jones v. Oliver R. Dunkle and William Dreisbach, trading as Dunkle & Dreisbach, and Martin Dreisbach: October session, 1869, No. 7,) by which it appeared that an injunction had been granted until further order, upon notice of which the said deputy sheriff stated that the sale of the goods levied on by him under the execution referred to had been postponed from week to week until he had yielded possession to an officer of the United States court. The register stated that he was of opinion that the said claims could not be considered by the meeting while the injunction remained undissolved, or unless some order should be made by said circuit court, directing or allowing the investigation of the validity of the alleged liens, by virtue of said judgments and executions before him in this proceeding. To this decision the counsel for said claimants excepted, and requested the register to certify the question to the court, which was accordingly done.

On the fifteenth day of June, eighteen hundred and seventy, the following order was made by the said circuit court in the suit in equity referred to: "And now, eighteen hundred and seventy, June fifteenth, the defendants renew the motion to dissolve the injunction. The court holds the motion under advisement, making the order which was orally expressed at a former hearing, and should have been drawn up by the solicitors or counsel and filed of record, that is to say that the lien and right of priority of payment, (if any,) of the defendants in equity, as plaintiffs at law to the subject of the execution, as to which proceedings, having delayed by the injunction, shall not be prejudiced, but if the right of priority be sustained, it shall be available against and paid out of the proceeds in bankruptcy of the said subjects. The court is of opinion that unless the assignee in bankruptcy adopts prompt measures to become a party in and to prosecute the present writ in equity, the parties hitherto restrained therein should be relieved of the injunction. But this opinion may become inapplicable if these parties have advisedly elected or shall so elect to make their claim of priority under the proceedings upon the account now pending before the register. In the latter case he will provisionally hear the case, and, subject to exceptions, will report upon the rights of priority, &c." At an adjourned second meeting of creditors, held before the register on the twenty-third day of June, eighteen hundred and seventy, Messrs. Pollock and Orwig announced the election of said Martin Dreisbach and Elizabeth Dreisbach to make their claim of priority under the proceedings upon the account, &c., under the said order. Martin Dreisbach, one of the claimants, and other witnesses were examined at a number of adjourned meetings; the examination of the bankrupt, taken previously, at which Mr. Orwig, one of the counsel for said Martin Dreisbach, had been present and had an opportunity of cross-examining, being also considered in evidence. All the testimony taken being herewith forwarded. The funds in the hands of the assignee arising from the sale of the goods in the store of the bankrupt, No. 140 North Eighth street, in the city of Philadelphia, were claimed by said Martin Dreisbach and Elizabeth Dreisbach by virtue of the liens of the following executions issued out of the district court for the city and county of Philadelphia, prior to the commencement of the proceedings in bankruptcy, viz.: "Bush, Bunn & Co., for the use of Martin Dreisbach v. Dunkle & Dreisbach. Fi. fa. No. 684, September term. R. D. $554 80," by virtue of which the sheriff levied on all the personal property of defendants at No. 140 North Eighth street, in the city of Philadelphia, on the fifteenth day of October, eighteen hundred and sixty-nine, seven days before the petition in bankruptcy was filed against defendants. "Martin Dreisbach v. William Dreisbach. Fi. fa. No. 685, S. T., 1869. R. D. $8,570. D. S. B. No. 287, S. T., 1869. Interest from March 1st, 1869," by virtue of which writ the sheriff levied on all the personal property of defendant at the store No. 140 North Eighth street, on the fifteenth day of October, eighteen hundred and sixty-nine, seven days before the petition in bankruptcy was filed. "Elizabeth Dreisbach and Martin Dreisbach, her husband, for the

use of the said Elizabeth Dreisbach v. William Dreisbach. Fi. fa. No. 712, S. T., 1869. R. D. $2,380 08," by virtue of which the sheriff levied on all the personal property of the defendant at the store aforesaid on the eighteenth day of October, eighteen hundred and sixty-nine, four days before the petition in bankruptcy was filed. "Martin Dreisbach v. William Dreisbach. Fi. fa. No. 713, S. T. 1869. R. D., $1,933 45," by virtue of which the sheriff levied on all the personal property of the defendant at the store aforesaid, on the eighteenth day of October, eighteen hundred and sixty-nine, four days before the petition in bankruptcy was filed. Pending the meetings before the register, on application of the assignee in this case, the execution of Elizabeth Dreisbach, was, on October twenty-second, eighteen hundred and seventy, set aside and her claim by virtue of said execution abandoned.

The acts of bankruptcy alleged in the original petition in this case, were the fraudulent suspension and non-resumption of payment of their commercial paper by the bankrupts within a period of fourteen days, and the assignment or transfer by said bankrupts, trading as Dunkle & Dreisbach, on the twenty-ninth day of July, eighteen hundred and sixty-nine, of the stock of goods and credits of the said firm—the stock of goods having been contained in their store at No. 140 North Eighth street, in the city of Philadelphia—to William Dreisbach, one of said bankrupts, with intent to defeat and delay the creditors of said firm; and in an amendment to said petition, the procuring or suffering by said William Dreisbach, with the further intent to defraud the petitioning creditor, and to give a preference to two of his private creditors, his father, Martin Dreisbach, and his mother, Elizabeth Dreisbach, the said stock of goods to be taken on legal process, viz., under executions issued out of the district court for the city and county of Philadelphia, to September term eighteen hundred and sixty-nine, numbers seven hundred and twelve and seven hundred and thirteen, upon judgments obtained by the said William Dreisbach and the said Elizabeth Dreisbach, of Lewisburg, Pennsylvania, the suits upon which the said judgments were obtained having been brought on the second day of October, eighteen hundred and sixty-nine, after protest of the notes held by the petitioning creditor, the said William Dreisbach having suffered judgment thereon to be obtained for default of appearance, though in suits brought against him by other persons at or about the same time, he caused appearance to be entered, and though even if the said claims had been just ones, which the petitioner did not admit, judgment could not have been adversely obtained for some time thereafter. On the twenty-fourth of November, eighteen hundred and sixty-nine, a decree of adjudication of bankruptcy was made, wherein it was found that the facts set forth in the petition were true.

It is important to consider in the first place whether said decree is conclusive evidence as against Martin Dreisbach, the present claimant, of the allegations in the petition and amendment thereto, or whether, under the order of the circuit court referred to, the question of priority of lien or payment of said claimant is to be considered independently of any proceeding to which he was not directly a party; for if such decree be so conclusive, it would only be necessary to consider as to two of said claims whether the claimant had reasonable cause to believe that the bankrupt or bankrupts were insolvent and that a fraud on the bankrupt act was intended.

In the case of Shawhan v. Wherritt, 7 How. [48 U. S.] 627, it was held by the supreme court of the United States that a decree of a district court of the United States sitting in bankruptcy (referring to the bankrupt act of eighteen hundred and forty-one) whereby a person proceeded against in invitum was declared to be a bankrupt, was sufficient evidence as against those who were not parties to the proceedings to show that there was a debt due to the petitioning creditor; that the bankrupt was a merchant or trader within the meaning of the act, and that he had committed an act of bankruptcy. But it may be doubted whether such would be the case in regard to a decree of adjudication of bankruptcy made under the act of eighteen hundred and sixty-seven, which does not, as does the act of eighteen hundred and forty-one, provide that notice of a creditor's petition should be published at least twenty days before the hearing, that all persons interested might appear and show cause why the prayer of the petitioner should not be granted; for, said Grier, J., in delivering the opinion of the court, "The public notice required by the act having been given, the creditors must be treated as having notice of the proceedings and an opportunity to make their objections to them, and having neglected or refused to do so, they ought not to be allowed to impeach them collaterally, as they are in the nature of a proceeding in rem before a court of record having jurisdiction. Even if the record in the bankruptcy court be not conclusive as against the defendants, it is at least prima facie evidence that all facts necessary to sustain the decree were proved before the court," and it was added, "and lastly the record of the case shows sufficient evidence to sustain the decree on all points."

In Re Schick [Case No. 12,455], Blatchford, J., in making the adjudication of bankruptcy, said: "This proceeding, however, is so far one merely between the petitioning creditors and the debtor. Cowen, (the party to whom the confession of judgment by the bankrupt was found to be an act of bankruptcy,) is no party to it, although examined as a witness for the debtor, and, in the further progress of the matter, if the assignee of the debtor to be appointed should institute proceedings

to realise for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights and maintain, if he can, the integrity of the judgment, and there is nothing in this adjudication to preclude him from so doing."

In Re Drummond [Id. 4,093], it was said by McDonald, J., in making the adjudication of bankruptcy, "a preference being the act of bankruptcy, and indeed, as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any manner affect their interest, excepting so far as it fixes the status of Drummond as a bankrupt."

In Re Dibblee [Id. 3,884], Blatchford, J., in his charge to the jury, an issue having been demanded as to the commission of the acts of bankruptcy by the alleged bankrupts, one of which was suffering their property to be taken in execution, &c., says: "You are not now in any manner trying the question whether Iselin & Co. (alleged preferred creditors) shall be compelled to refund what money they received, or whether Mrs. Krauss (another alleged preferred creditor) shall be compelled to refund the money and securities which she received. These questions are not at all involved here. If these debtors shall be declared bankrupt, and the assignee shall be appointed and he shall bring an action against Iselin & Co., and an action against Mrs. Krauss, nothing that has transpired here, neither your verdict nor the adjudication of the court, if your verdict should be in favor of the creditors, will in any manner whatever determine or affect any question that will be involved in any such suit."

In Re Goodfellow [Id. 5,536], a voluntary case, Lowell, J., held that the adjudication was not conclusive as to a fact which went to defeat the jurisdiction of the court over the supposed bankrupt, saying: "No doubt the petition is conclusive evidence that the debtor is insolvent and decides to take the benefit of the act, and perhaps the fact that he owes three hundred dollars may be conclusively found by the adjudication, but upon a fact which goes to defeat the jurisdiction of the court over the supposed bankrupt, it cannot be so. Such a fact as that may be shown by plea and proof in any court by a person not estopped to show it, and it cannot be that the only exception is of the court in which the void proceedings themselves are pending; nor is the adjudication binding as a judicial decree, which must be impeached, if at all, in a higher court. It is made ex parte, without notice to creditors, and is entirely under the control of this court, upon due proof that it ought to be annulled, at least at this stage of the cause."

On the other hand, in Re Beck [Id. 1,205], the register having submitted an affidavit of one James H. Beck, an alleged lien creditor, and certified the question whether the facts set forth in the affidavit constituted an act of bankruptcy so as to displace the lien of the execution of said creditor and prevent him from claiming the proceeds of the sale of the goods levied upon, your honor said: "If the register had reported the facts, instead of the evidence of them, the certificate would, perhaps, be more regular; but I could not have answered the question in its present form. They may have constituted an act of bankruptcy on the part of the debtor, without necessarily depriving the execution creditor of his lien; because the bankrupt may have intended to give a preference without the creditor's knowledge or intention being such as to implicate him. In the present case, the adjudication of bankruptcy, may, for aught that I recollect, have been pronounced upon the transaction with John O. Beck, without any intimation of an opinion as to the transaction with James H. Beck. The petitioning creditor alleged that the warrant to confess judgment given to James H. Beck, was an act of bankruptcy, and further alleged that the bankrupt procured the property to be taken in execution by the creditor. The latter allegation was that of a distinct act of bankruptcy, which if committed, can scarcely have been committed without the creditor's privity." This would seem to imply that if the adjudication had been pronounced upon the transaction with James H. Beck, it would have been competent evidence as against him in determining the question of his priority of lien; but as the matter then under consideration was more particularly the proper method of investigating the alleged claim of priority, such an implication may be unwarrantable. On the whole, therefore, I am inclined to the opinion that the adjudication in this case does not establish as against the claimant the facts alleged in the petition. It may not be immaterial, also, to consider the effect in this conclusion of the proof of two debts by the claimant against the estate.

It is to be further remarked that if the adjudication avoids the transfer of the partnership assets, in this case, to William Dreisbach, one of the partners, and so far is in the nature of a decree in rem, the execution of the claimant against said William Dreisbach alone, would only be entitled to priority of payment out of so much of the funds in the hands of the assignee as were produced by the sale of the goods levied upon, and which were acquired by said William Dreisbach subsequent to the twenty-eighth day of July, eighteen hundred and sixty-nine, the time of the alleged transfer, and which were not in any way the proceeds of property belonging to the partnership at that time; and perhaps this effect may be conceded to the adjudication, as against the claimant, without any violation of the maxim, "Res inter acta alteri noceri non debet." But however this may be, I will proceed to consider the claims of Martin Dreisbach only upon the testimony referred to as having been taken before me.

The partnership of Dunkle & Dreisbach, (composed of Oliver R. Dunkle and William Dreisbach,) was formed on the seventh day of September, eighteen hundred and sixty-eight, for the purpose of selling dry goods, at No. 140 North Eighth street, in the city of Philadelphia. Dreisbach having purchased the interest of James McCurdy in the firm of J. C. McCurdy & Co., (or as it was also called in the testimony McCurdy & Dunkle,) who had been carrying on the the dry goods business at said place, contributed said purchase as two-thirds of the capital stock, Dunkle to furnish the other one-third. The profits and losses were to be shared in the proportion of three-fifths by Dreisbach and two-fifths by Dunkle. The partnership was to continue two years. As to what consideration Dunkle gave, or was to give, for the one-third interest in the capital stock which he proposed to contribute, or what was his interest in the former firm of J. C. McCurdy & Co., does not appear to have been known to Dreisbach at the time of the formation of the partnership with him. Dunkle, however, appears as against McCurdy "to have waived his right," as he states it, to any interest in the firm of J. C. McCurdy & Co., and was to pay McCurdy one-third of twenty-five thousand dollars, that being the valuation of the stock as by an account taken at the time of the succession of Dunkle & Dreisbach to J. C. McCurdy & Co., or McCurdy & Dunkle. This sum was paid by Dunkle, without the knowledge of Dreisbach, by giving to McCurdy four notes drawn by Dunkle & Dreisbach to the order of Dunkle and by him endorsed, said notes being for about the following amounts: one thousand dollars, one thousand one hundred and thirty-seven dollars and twenty-six cents, three thousand one hundred and six dollars, two thousand two hundred and fifty-one dollars. Dreisbach's interest, about seventeen thousand dollars, appears to have been paid for principally by moneys borrowed from his father and wife, four thousand dollars thereof appearing to have been, or to have become represented by a note to become due January first, eighteen hundred and seventy, endorsed by his father. On the twenty-eighth day of July, eighteen hundred and sixty-nine, Driesbach having first learned of the issuing of the notes for one thousand dollars and one thousand one hundred and thirty-seven dollars and twenty-six cents in the firm name by Dunkle, from the fifteenth to the twentieth of July of that year, an agreement of dissolution was entered into, by which Dunkle, in consideration of the payment of three thousand one hundred and forty-eight dollars and twenty-eight cents, viz.: by the payment by Dreisbach of the two notes last mentioned and the balance on it before January first, eighteen hundred and seventy, sold to Dreisbach all his interest in the firm, he, Dunkle, agreeing by good and sufficient security to secure Dreisbach against the payment of any and all notes, bills of exchange or other obligations given by him, Dunkle, in the firm name for any individual debt, and that he would not engage in the retail dry goods business in the city of Philadelphia, nor be employed in any dry goods store in said city for the period of two years, two thousand dollars being agreed upon as stipulated damages for the violation of said last-mentioned agreement of Dunkle not to engage in the dry goods business, &c. Dreisbach also thereby agreed to pay all partnership debt, and by good and sufficient security to indemnify said Dunkle therefrom, except such partnership notes, bills, or other obligations, not therein specified, that had been or might be given by said Dunkle for his individual debts.

At the time of this agreement the amount of indebtedness of the partnership was as follows:

Outstanding accounts for goods bought	$ 3,515 98
Bills payable for goods bought	5,809 49
And the notes given by Dunkle in the partnership name and which were then known to Dreisbach	2,137 46
	$11,462 73
To which must be added the two other notes given by Dunkle in the firm name, but which were then unknown to Dreisbach, but of course known to Dunkle, $3,106 and $2,251 60	5,357 60
	$16,820 33
At this time Dreisbach estimates the stock to have been worth	$20,000 00
The estimate he stated, however, was not founded "either on cost prices or positive values, but to be a mere estimate."	
Outstanding credits	1,405 25
Cash	556 36
	$21,961 61
Dreisbach's individual indebtedness at that time appears to have been to his father or J. C. McCurdy (his father having become his surety therefor by endorsement)	$ 4,000 00
To his father for money loaned (for $8,570 of which his father had a judgment note, dated about 1st of March, 1869, a time when the firm does not appear to have been in insolvent circumstances or to have contemplated such a state, but at the time of said agreement no judgment had been entered upon it)	10,503 45
To his wife for money loaned (used in part payment for his interest in the partnership)	2,000 00
	$16,503 45

There are also firm notes to the amount of one thousand five hundred and forty-seven dollars and thirteen cents, which his father appears to have paid or to have become liable for, but whether they are included in the statement of bills payable due by the firm does not appear.

Dreisbach's separate property consisted of a mortgage on land in Minnesota for $1,000, but from which he states he subsequently received	$ 964 00
And his household furniture, valued in the appraisement in these proceedings at	208 25
	$ 1,172 25

Dunkle's individual indebtedness (not including that for which the firm notes referred to were given), as returned in his schedule is one hundred and sixteen dollars and fifteen cents; what it was at the time of the said agreement does not appear. He alleges that he had, at the time of the purchase from McCurdy, Western Union Telegraph stock, Western Pennsylvania Railroad bonds, and United States bonds, altogether valued at two thousand five hundred dollars, but from which he only realized about two hundred and ninety-four dollars; but his statements as to this separate property are very confused, and it does not appear what was the value of that in his possession, if any, at the time of his agreement. His only property returned in his schedules, consists of household furniture, valued by the appraisers in these proceedings at three hundred and twenty dollars and fifty cents. The sum agreed by Dreisbach in this agreement of the twenty-eighth of July, eighteen hundred and sixty-nine, to be paid to Dunkle, was arrived at, not by taking an account of stock, but by an appraisement of the net profits taken from the books and adding Dunkle's share to the credit of his account after deducting what he had drawn out.

The amount of capital to the credit of Dreisbach on the books at that time was	$12,833 14
To the credit of Dunkle $2,795 29. His share of appraised profits $290	3,085 29

The securities stipulated for in the agreement were not given by either party thereto, there being a dispute as to the sureties, Dreisbach having tendered a bond with his father as surety and Dunkle one with a person as surety whom Dreisbach was not willing to accept, alleging that Dunkle had agreed to procure certain other persons as sureties. After the twenty-eighth day of July, eighteen hundred and sixty-nine, Dreisbach carried on the business in his own name, notice of the dissolution of partnership being published in the Philadelphia Public Ledger of the twenty-ninth of July of that year; that all debts due to and from the said firm of Dunkle & Dreisbach would be settled by Dreisbach, and sent to every party whose name was on the books of the said firm, and from whom goods had been bought. The signs of the partnership at the store, however, (with the exception of those on the window sills, which were taken away,) remained as before, but it does not appear that any debts are now due for goods purchased by Dreisbach after this time, which are claimed by creditors to have been sold on the credit of an existing partnership. On the first of September, eighteen hundred and sixty-nine, an account of stock was taken which amounted to seventeen thousand five hundred and ninety dollars and eighty-seven cents. On or about the thirteenth of August previous, Dreisbach had borrowed from his mother nineteen hundred dollars U. S. bonds, the market value being about two thousand three hundred and fifty-six dollars and fifty-two cents. On the first of September following he first learned of the note for three thousand one hundred and six dollars given by Dunkle as before stated, and the following week the one for two thousand two hundred and fifty-one dollars. On the eighteenth of September, eighteen hundred and sixty-nine, three suits were commenced against him in the district court for the city and county of Philadelphia, as follows: By Elizabeth Dreisbach and Martin Dreisbach, her husband, (his mother and father,) to the use of said Elizabeth Dreisbach. Number eight hundred and ninety-four, September term, eighteen hundred and sixty-nine. By Caroline M. Dreisbach, (his wife,) by her next friend, Martin Dreisbach. Number eight hundred and ninety-five, September term, eighteen hundred and sixty-nine. By Martin Dreisbach. Number eight hundred and ninety-six, September term, eighteen hundred and sixty-nine. The writs therein were issued September eighteenth, eighteen hundred and sixty-nine, returnable the third Monday of September. William J. McElroy, Esq., one of Dreisbach's solicitors in this proceeding, and whom he appears to have consulted before this time in relation to his affairs, was the attorney for the plaintiffs. A return of nihil habet was made to each writ, but on October second following, alias writs in these suits were issued returnable the first Monday of October, which were duly served and judgments taken on the suits of Dreisbach's father and mother, but not on that of his wife, for want of an appearance. In these alias writs Samuel H. Orwig, Esq., one of the counsel for the present claimant, appears as attorney for the plaintiff. Executions were subsequently issued on these judgments, as before stated, as also upon a judgment for eight thousand five hundred and seventy dollars, (the judgment note before referred to having been entered up on the thirteenth day of October, eighteen hundred and sixty-nine, in said district court of Philadelphia,) and upon a judgment of Bush, Bunn & Co., against Dunkle & Dreisbach recovered October ninth, eighteen hundred and sixty-nine, but which had been purchased by the claimant and marked to his use October eleventh, eighteen hundred and sixty-nine.

From the first discovery of the notes given by Dunkle for his purchase from McCurdy, Dreisbach appears to have kept his father,

the present claimant, fully advised as to the state of his affairs, both by letter and personal communication, he having been in Lewisburg where his father resided shortly after the agreement of July twenty-eighth, eighteen hundred and sixty-nine, and his father having been in Philadelphia in September following. The object of his visit to his father was to obtain his signature to the bond as surety, stipulated to be given by him in said agreement, and also to get his father to "sign note" to be used in carrying out said agreement. The father appears to have signed a bond for ten thousand dollars and notes to the amount of two thousand dollars. At this time the partnership difficulties were explained to the father. In September, having informed his father of the other notes given by Dunkle, viz.: those for three thousand one hundred and six dollars and two thousand two hundred and fifty-one dollars, and that he thought it would cause trouble, his father came to Philadelphia to consult an attorney about his interests. His son then informed him, or had done so previously, that he (the son) had employed Mr. McElroy. Mr. Orwig, whom the father desired to consult, being out of town, he, in company with his son, went to Mr. McElroy's office. This, however, the father does not appear to have done for the purpose of consulting Mr. McElroy himself, but merely in company with his son, who desired to see Mr. McElroy on his business; but the father states that while there, he thinks he did state something about his matters. When the father was in Philadelphia he stayed at his son's house, and his son generally accompanied him in the transaction of any business. There can be no doubt, therefore, that the father was fully aware of the son's financial condition, and he admitted "that if he had not received word from his son that he was in trouble, he would not have entered up his judgment, and that it was in consequence of what his son communicated to him that he entered up his judgment," because his son had informed him that there was a lot of firm notes that he had not known of, and it might make trouble—that otherwise he should not have thought of it. After the executions were issued, the father was again in the city. During this visit, he states, he thinks that his son was present with him when he saw one of the deputy sheriffs, and that he talked somewhat about the son's affairs, and he thought maybe the object of this interview with the deputy sheriff was to make arrangements to secure a quiet sale of the personal property without any exposure. In this the son alleges that his father was mistaken, and the two deputies of the sheriff to whom the executions appear to have been intrusted, deny that they ever had any communication with the claimant. By the testimony also of the deputy sheriff by whom the levies were made, it appears that an inventory of the stock in the store was made by the son, (in which the stock is valued at eight thousand two hundred and sixty-four dollars and three cents, and the outstanding credits at two thousand and forty-eight dollars and forty-three cents;) that no watchman was placed upon the premises, and the defendant was allowed to sell as in the ordinary course of business—he promising to account for such sales to the sheriff. To the defendants thus selling no objection was made on behalf of the execution creditors, whose counsel was informed of what the deputy sheriff had done. The sheriff's sale was adjourned from time to time, after notice of the injunction by the circuit court was served, until the taking possession by the marshal as messenger. By a memorandum in the inventory just referred to, there appears to have been sales made pending the levy to the amount of three thousand four hundred and twenty-four dollars and forty-nine cents.

The total amount received by the assignee arising from sale of stock, by his account, is.....	$ 8,502 34
Collection of book accounts.....	552 12
Book accounts unpaid at the time of filing account by assignee, June 6, 1870.....	359 76

Having thus stated the facts as developed by the testimony, I propose first to consider whether the agreement of July twenty-eighth, eighteen hundred and sixty-nine, was directly or indirectly a procurement to have property attached or taken on legal process within the meaning of the thirty-fifth or thirty-ninth sections of the bankrupt act; for said agreement was certainly not a transfer, assignment, or conveyance, (if it operated as such at all,) directly to the present claimant. I see no reason to doubt that the object of Dreisbach in making this agreement was to free himself from a partner, who at the very commencement of the business had been guilty of a most flagrant breach of good faith, and in so doing, to protect himself against the consequences of his partner's act, but at the same time to provide for all obligations of the partnership then known to him. Even taking into consideration the obligations upon all the notes given by Dunkle, (and whether these notes were really such would of course depend upon the bona fides, with which they had been received by their holders,) it does not appear that the partnership was at that time actually insolvent. It is true that Dreisbach's separate indebtedness was very large, but his separate creditors were not only not pressing for payment, but their assistance was such as to leave no doubt of its object; for from one of them, his father, he obtained the security stipulated to be given by the agreement, and his signature to notes to help him carry out the provisions thereto, and from another, his mother, he subsequently obtained the sum of two thousand three hundred and fifty-six dollars and fifty-two cents. Such a state of facts seems to me altogether inconsistent

with an intention on the part of Dreisbach at the time of this agreement to render the partnership assets his separate property, in order that they might be taken in execution for the debts due his father, for if the securities had been exchanged as contemplated by the agreement, his father would have become liable for all firm indebtedness, other than that which had been incurred by Dunkle for his individual benefit, part of which also, viz., the notes for one thousand one hundred and thirty-six dollars and twenty-seven cents, and one thousand dollars his father would have become liable for; for he signed or endorsed two notes with which his son expected to provide therefor. The security to be given by Dunkle was to provide for any other notes given by him for his individual indebtedness in the partnership name. Of course the intention of Dunkle in making the agreement could not have been to procure the partnership assets to be disposed of for the benefit of Dreisbach's separate creditors. I feel, therefore, constrained to answer this question in the negative.

I proceed next to inquire, whether subsequently to the agreement, there was such a procurement to have his property taken on legal process, on the part of Dreisbach, (for subsequently to this time Dunkle appears not to have had any connection with the business,) as is contemplated in said sections of the bankrupt act. That there was such procurement, I think there can be no reasonable doubt, if due effect be given to all the circumstances attending the relations of the claimant with his son from the first discovery by the son of the notes for three thousand one hundred and six dollars, and two thousand two hundred and fifty-one dollars, early in September, about the first or second week thereof. His father alone of all his creditors was fully informed as to his business. The expressions made use of, that it was thought that these notes would cause trouble, &c., have been before fully stated and need not be here repeated. The same attorney who had been consulted by the son brings three suits against him. Service is not made of the original writs in these suits, but alias writs are subsequently issued by another attorney. It is reasonably inferred that the object of issuing the alias writs was to disconnect the action of the claimant from that of his son. To the alias writs no appearance was entered; judgment was obtained for want of appearance, and executions immediately issued. Then the conduct of the defendant in the executions was certainly such as to oppose no obstacle in the way of his father. The succession of events in this respect has been before fully stated. That the claimant had reasonable cause to believe that his son was insolvent is clearly evident. The claim, by virtue of the execution issued on the judgment purchased from Bush, Bunn & Co., it is contended, is in a different position from that of the others. But however it would have been in the hands of Bush, Bunn & Co., I think it must, in the hands of the claimant, share the same fate as the other alleged liens, for the purpose for which it was purchased was to subserve the interests of the others. The testimony of the claimant in this respect is as follows: "Mr. Orwig, my counsel, drew on me for the amount; I paid it at the Lewisburg National Bank on his draft. Mr. Orwig stated this was the only judgment ahead of mine, and I had better pay this judgment, then I would have the first claim. Mr. Orwig suggested that I had better do this. It was through his suggestion I agreed to pay the judgment." Even if as to it, there was no procurement on the part of Dreisbach, the bankrupt, to have his property seized thereon, I am of opinion that he suffered his property to be taken in execution thereon within the meaning of the thirty-ninth section referred to. And this brings me to consider another question, viz.: whether, (and this as to all the claims,) if the circumstances before stated did not amount to a procurement to take in execution, they were not a suffering so to be taken within the provisions of said thirty-ninth section.

In Re Black [Case No. 1,457], Blatchford, J., uses the following language: "In regard to the question of suffering property to be taken on legal process. There was no such language in the act of eighteen hundred and forty-one. It was by the first section of that act made an act of bankruptcy for a person to willingly or fraudulently procure his goods to be taken in execution. The word 'suffering' in this connection was not used in the act of eighteen hundred and forty-one. There is a clearly recognised legal distinction between 'procuring' and 'suffering.'" The act of 6 Geo. IV. c. 16, § 3, provides, that if any trader should suffer himself to be arrested for any debt not due, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money or chattels to be attached, sequestered or taken on execution, he might be brought into bankruptcy. In Gibson v. King, Car. & M. 458, a creditor had brought an action against the bankrupt for a debt, and judgment had been suffered to go by default, and no execution had been issued on it on which the bankrupt's goods had been taken, and the question arose whether suffering the judgment to go by default in the action, and suffering the goods to be taken on the execution in the judgment, was procuring the goods to be taken in execution within the statute. The court held, that the bankrupt had suffered the goods to be taken in execution, but had not procured them to be so taken. The same view of the distinction between the two words in the English act was taken in Gore v. Lloyd, 12 Mees. & W. 463. The distinction there maintained by Baron Alderson, was, that the bankrupt procured his goods

to be taken in execution, when the initiation of the proceedings came from him, when he was the person who began to procure, when he caused the thing to be done in the ordinary sense of the word; but that the signing, reluctantly, under strong pressure from a creditor for a warrant to confess judgment under the stipulation that the warrant should not be unnecessarily put in force, was suffering, and not procuring goods to be taken in execution, which were taken on the execution issued upon the judgment entered upon the warrant. The English and other decisions as to pressure by a creditor, and as to what it is to procure, have no application to the question of suffering. Denny v. Dana, 2 Cush. 160. Congress, in view of the provisions of the act of eighteen hundred and forty-one and of the decisions of the supreme court under it in regard to the meaning of the words "procure" and "suffer," and in regard to the effect of pressure or suit by a creditor upon the question as to whether the debtor procures to be done the act, which secures the preference to the creditor, must be regarded as having intended, by the use of the words "insolvency" and "contemplation of insolvency" and "suffer" in the connection in which they are found in the act of eighteen hundred and sixty-seven, to strike at the root of all preferences obtained by a creditor, when his debtor is insolvent or in contemplation of insolvency by the taking of the debtor's property on legal process, whether the taking be by an act of procurement or on an act of sufferance on the part of the debtor, where there is an intent on the part of the debtor to give such preference and the creditor has reasonable cause to believe that the debtor was insolvent. In Re Craft [Case No. 3,316], the same judge, in affirming the decision of the last case, says: "Suffering property to be taken on legal process. This was added for a purpose and with an intent. To say that there can be no suffering when there is pressure by a creditor, is to destroy the plain meaning of the words. To suffer or permit implies pressure and action from without. Pressure being thus an inherent element of sufferance, to say that when there is pressure there can be no sufferance, is to utter a fallacy. Where a person permits what he can prevent, he suffers or allows the thing to be done whether he is threatened or pressed or not. A debtor who is threatened or pressed, can prevent the taking of his property on legal process by going into voluntary bankruptcy. If he does not, he clearly suffers or allows or procures the taking." The allowance of an amendment to the petition in this case was afterwards affirmed in the circuit court by Nelson, J. [Id. 3,317], but the principle of the decision as to suffering property to be taken on legal process does not appear to have been considered.

In Re Dibblee (before cited), Blatchford, J., in his charge to the jury, held, that if a debtor was insolvent or contemplated insolvency at the time of a levy by an execution creditor, and refrained from going into voluntary bankruptcy, it was suffering property to be taken on legal process, and if he knew that he was insolvent or contemplated insolvency when so suffering property to be taken in execution in a manner that necessarily resulted in giving a preference to the execution creditor, then he intended such preference in judgment of law, and committed an act of bankruptcy. In Re Wells [Case No. 17,388], the same doctrine is held by Baldwin, J., of the district of Nevada, and again by Blatchford, J., in Hardy v. Clark [Id. 6,058], and also in Re Davidson [Id. 3,599]; by Drummond, J., in Campbell v. Trader's Nat. Bank of Chicago [Id. 2,370]; and by Miller, J., in Re Terry [Id. 13,835]. In Re Davidson, just referred to, the objection that under this principle of decision, an insolvent debtor who has not committed any act which would subject him to be proceeded against as an involuntary bankrupt, might practically set his creditors at defiance, because they would be deterred thereby from taking his property on legal process, and no remedy would be open to them; it was answered, that as the penalty upon a creditor provided for by the thirty-ninth section, of not being allowed to prove his debt in bankruptcy, is enforceable against him only in case he compels the assignee to resort to legal proceedings to recover the property transferred in violation of the act,—citing In re Montgomery [Id. 9,728],—the creditor may proceed, and after taking the property of his debtor on legal process, can himself throw his debtor into bankruptcy for that act, and can then voluntarily turn the property over to the assignee. But in Re Kerr [Id. 7,728], it was held by Krekel, J., that creditors holding judgment may order execution to issue, and levy upon and sell the property of their debtors, and the bankrupt law will protect them in the advantage thus secured, although they may have had at the time of ordering execution, doubts as to the solvency of the debtor. This last case, although it may be an authority against the general doctrine of the preceding cases, is very different in its circumstances from the one under consideration. I am therefore of opinion that William Dreisbach, being insolvent, suffered his property to be taken on legal process with intent to give a preference to his father, Martin Dreisbach, who had reasonable cause to believe that his son was insolvent and intended to give such preference, and thereby commit a fraud on the bankrupt act, and that the claims of Martin Dreisbach to priority of payment out of funds in the hands of the assignee should be disallowed.

After reading the foregoing report at an adjourned second general meeting of creditors, held on the second day of November, eighteen hundred and seventy, Mr. Orwig, of counsel for the claimant, stated that he de-

sired to take the deposition of Mr. McElroy in regard to the issuing of the writs by him in the three suits referred to. At an adjourned second general meeting of creditors, held on the ninth day of November, eighteen hundred and seventy, said deposition was taken and is forwarded with the other testimony. The explanation given by Mr. McElroy, and the admissions in behalf of the assignee, would seem to invalidate the inference that the alias writs in these suits were issued for the purpose of disconnecting the action of the claimant from that of his son, but this additional testimony does not, in my opinion, weaken, but strengthens the evidence of procurement by William Dreisbach to have his property taken on legal process. I therefore see no reason to change the conclusion to which I have already come.

Exceptions of Martin Dreisbach to the foregoing report of the register:

1. To all that part of the report which assumes the right of the circuit court of the United States to enjoin against the execution of writs of fieri facias issued out of a state court of competent jurisdiction, and while the record in the state court remains unimpeached.

2. To the conclusion that Martin Dreisbach is responsible for the issuing of writs of summons by William J. McElroy, Esq., attorney for William Dreisbach, and, therefore, not entitled to the lien of his executions adversely procured in suits brought by his (exceptant's) counsel.

3. To the conclusion that if William Dreisbach, without the knowledge of his father, Martin Dreisbach, attempted to procure his (William's) property to be taken in execution for his father, which attempt, if made, entirely failed, yet, therefore, Martin Dreisbach is not entitled to the benefit of his executions adversely procured by his (exceptant's) counsel.

4. To the conclusion that Martin Dreisbach had no right to issue executions against his son, William Dreisbach, because he, Martin Dreisbach, knew that William was "in trouble" in consequence of Oliver R. Dunkle having fraudulently issued the notes of Dunkle & Dreisbach to pay his (Dunkle's) private debts.

5. To the conclusion that the execution of Bush, Bunn & Co., for the use of Martin Dreisbach against Dunkle & Dreisbach, is not entitled to priority of payment.

6. To the general conclusion that this exceptant, who is the plaintiff in said executions, has not the right to priority of payment by virtue of said executions.

After argument by Messrs. Orwig & Pollock on behalf of Martin Dreisbach, and Messrs. Morgan, Penrose & Jenkins for assignee and creditors, the court, Cadwalader, J., on December twenty-first, eighteen hundred and seventy, made the following provisional order: "If Martin Dreisbach desires an immediate decision upon his exceptions in order to obtain a revision by appeal or certificate, the exceptions will be dismissed and the claim of this creditor rejected; but of the matters not thus pressed the court will suspend its final decision as to this creditor until definitive adjudication as to the proofs on the notes of which the consideration between the original parties may be inquired or questioned."

Orwig & Pollock, for Martin Dreisbach.

Morgan, Penrose & Jenkins, for assignee and creditors.

NOTE. The provisional decree of the court in this case cannot be considered as either affirming or disaffirming the doctrine of the cases cited in the report of the register, that where a creditor who has reasonable cause to believe his debtor is insolvent, proceeds (wholly adversely) to execution, the sufferance by the debtor of the levy thereunder is an act of bankruptcy, and the lien of the execution may be avoided at the suit of the assignee, in which case if it is not surrendered before final judgment or decree in such suit, the creditor will not be allowed to prove his debt.

[NOTE. For further proceedings in this case, see Case No. 4,161, and also Bush v. Crawford, Id. 2,224.]

Case No. 4,161.

In re DUNKLE et al.

[7 N. B. R. 107.][1]

District Court, E. D. Pennsylvania. April 19, 1871.

BANKRUPTCY OF PARTNERSHIP — PARTNERSHIP NOTES GIVEN FOR INDIVIDUAL DEBTS—CONTRACT OF DISSOLUTION.

1. Where one partner fraudulently as to the other partner, gave notes in the name of the partnership for the payment of his individual contribution of capital, it was *held* that the accommodation endorser of said notes, who had paid them, (although the partner making said notes, during the course of his conversation with the said endorser when procuring the endorsement, had represented that they were to be given for goods purchased by the partnership,) was, nevertheless, under the peculiar circumstances of the case, taking into consideration the effect of the whole conversation, and of a previous interview some months before between said partner and said endorser, at which the former had stated that "he would perhaps want a favor" from the latter, or words to that effect, chargeable with notice of the fraudulent issue of the notes, and had no claim upon them against the partnership estate in bankruptcy.

2. Where several notes had been fraudulently given by one partner in the name of the firm for his separate debt, and the partner defrauded, upon learning of the issue of two only of said notes, by an agreement of dissolution of the partnership, purchased from his copartner his interest in the firm for a certain sum of money, payable by appropriation of portion thereof to the payment of the said two notes, and the balance on or before a certain stipulated time, and the partnership was subsequently adjudged bankrupt, but any claim against the partnership estate, upon any of the notes fraudulently issued was disallowed, it was *held* that the effect of the said agreement of dissolution, as to the said two notes referred to therein, was not a ratification of the said notes by the defrauded

[1] [Reprinted by permission.]

partner as firm obligations, but an assumption of them as his separate debts upon a consideration, which had not failed in whole or in part, the claims upon said two notes remaining also separate debts of the partner who had issued them.

[In the matter of Dunkle & Dreisbach, bankrupts.]

The notes referred to in the preceding provisional order of the court [Case No. 4,160] as to the claims of Martin and Elizabeth Dreisbach had been given by Oliver R. Dunkle to his former partner, James C. McCurdy, in payment of the interest purchased by said Dunkle from McCurdy, and which formed Dunkle's contribution to the capital stock of the new firm of Dunkle & Dreisbach. These notes were signed by Dunkle with the firm name of Dunkle & Dreisbach, and were as follows: One dated December first, eighteen hundred and sixty-eight, for three thousand one hundred and six dollars, at ten months, to the order of Oliver R. Dunkle, endorsed by said Dunkle and one Van Camp Bush. One other of same date as last for three thousand one hundred and thirty-seven dollars and twenty-six cents, drawn and endorsed as last mentioned. (Upon the maturity of the latter note as will hereafter be more particularly stated, one thousand dollars was paid on account thereof, and two notes, one for one thousand dollars at two months, the other for one thousand one hundred and thirty-seven dollars and twenty-six cents, at three months, were given, drawn and endorsed as the one for three thousand one hundred and thirty-seven dollars and twenty-six cents.) One dated November first, eighteen hundred and sixty-eight for two thousand two hundred and fifty-one dollars and sixty cents, at twelve months, to the order of Oliver R. Dunkle, and by him endorsed. The endorsements by Van Camp Bush were accommodation ones, and the notes so endorsed, after having been given to James C. McCurdy, as before stated, were endorsed by him with the firm name of Tillett, McCurdy & Hayes, of which he was a member, and then sold, the one for three thousand one hundred and six dollars to Joseph E. Temple; the one for three thousand one hundred and thirty-seven dollars and twenty-six cents to Lewis Jones. The note for two thousand two hundred and fifty-one dollars and sixty cents, (not endorsed by Bush) after endorsement by James C. McCurdy and Tillett, McCurdy & Hayes, became the property of Sarah B. Van Syckel. The proceedings in bankruptcy were instituted by Lewis Jones on the notes given in part renewal of the one for three thousand one hundred and thirty-seven dollars and twenty-six cents. All of the notes thus endorsed by Bush were subsequently taken up by him, and he sought to prove the same as partnership debts of Dunkle & Dreisbach. The note held by Sarah B. Van Syckel was proved by her and subsequently taken up by James C. McCurdy, who by reason thereof, claimed to stand in the place of said Sarah B. Van Syckel. These claims were resisted by the assignee on the ground that under the circumstances of the case the claimants had notice that Dunkle had fraudulently used the firm name for the purpose of payment of his individual debt. This objection as to the claim of McCurdy was conclusively established by the testimony.

The testimony taken before the register was quite voluminous, but as to the claim of Bush, the following portions of his deposition contain substantially the facts upon which the opinion of the court was founded.

"Sometime during the summer of eighteen hundred and sixty-eight, it must have been August, I suppose, he (Dunkle) met me or called at our store, I can't say which, and spoke of the change in their business; that he was getting a very good partner—stated that it was Mr. Dreisbach, of, I think, Union county; said his father was very well off, and had money himself—in other words, he was a first-rate partner, and had a prospect of getting Mr. McCurdy out on very favorable terms. That is the substance of it. I don't pretend to report the language and he might want a favor. I didn't say whether I would grant any favors or not. I see from our books—Bush, Bunn & Co.—we sold the firm of Dunkle & Dreisbach goods to an amount of three hundred and fifty dollars between November twenty-third and thirtieth, eighteen hundred and sixty-eight.

"In December of eighteen hundred and sixty-eight, I give that as the date because the notes, which I endorsed bear date December first, Mr. Dunkle called on me at our store on Market street, and exhibited two notes. I can't say whether he sat down and signed those notes at our office, or whether they were signed when he brought them, as he had been sitting there sometime, waiting for me to be disengaged. I don't remember whether he signed them in my presence or not. At all events he asked me to endorse those two notes. They were for about three thousand dollars each. They were notes signed by himself individually. I asked him for an explanation. He stated that these notes were for Mr. McCurdy, for the balance of the stock. I asked him why the notes were his individual notes or that in substance, and asked him who purchased the goods. He said the firm of Dunkle & Dreisbach. I asked him who was to pay the notes. He said the firm of Dunkle & Dreisbach. I then went into a general investigation of his affairs,—asked him how the firm of McCurdy & Dunkle stood when they commenced business. He said he had in the concern eight thousand dollars, and McCurdy had fifteen thousand dollars. I asked him how they stood when they relinquished business and changed into the firm of Dunkle & Dreisbach. What I meant by it was, when the business changed hands from one firm to the other, and it was so understood in our conversation

fully. He said their stock of merchandise and fixtures amounted to about twenty-nine thousand dollars, and their entire indebtedness was about seven thousand dollars. When I testified before I did so from memory, but since then I have found in an old memorandum book a memorandum that I took at the time as to this point. I have that memorandum with me here. It is in accordance with what I have just stated. I asked him then how the new firm of Dunkle & Dreisbach would stand. He said the same as before; that Mr. Dreisbach took the place of McCurdy as to capital—that he had put in some considerable amount. I don't now just remember the amount. At all events his conversation was such as convinced me the firm was perfectly solvent. It was understood all through in this conversation that Mr. Dunkle's capital in the new concern was eight thousand dollars, and Mr. Dreisbach's to be fifteen thousand. I stated to him that they hadn't made much money—that is their old firm—as the capital invested was twenty-three thousand dollars, liabilities seven thousand dollars and assets one thousand dollars less. Mr. Dunkle enumerated the heavy depreciation in their stock of merchandise, and the low valuation put on the store fixtures, which cost them a great deal more, and thought the showing wasn't very bad. I thought myself it was very fair, and it gave me entire confidence in the new firm, which I hadn't before known much about. He said if I would endorse these notes as he had promised Mr. McCurdy, in order to get a good—intimating a good bargain out of it—say good terms—that I would never hear tell of them again, and I believed, from all that I had learned, that that would be the case. I neglected to state before that I asked him why he was going to give his individual notes, when they were for the firm to pay, and the firm received the goods. I had asked him this at an earlier period in the conversation. He made some kind of remark like this, that he didn't know that it made any difference. I stated to him what the difference would be to a man who endorsed them—that a firm debt always had to be paid before a personal. He said he didn't know that, and it was after this particular part of the conversation that I had all this other talk about the condition of the firm all through, and particularly the firm of Dunkle & Dreisbach. I merely asked the questions with reference to McCurdy & Dunkle to get at his condition at that time—that is December first—the time I was endorsing the notes. He said that he would buy a great many goods of us, pay us promptly, and that they would be very good customers. He drew or had drawn up two other notes after this conversation at that interview, to the amount of about three thousand dollars each, signed by the firm of Dunkle & Dreisbach, in my presence, and I endorsed them. He did buy of us between December first, eighteen hundred and sixty-eight and July, eighteen hundred and sixty-nine, merchandise to the amount of eleven hundred and fifty dollars. These purchases were for the firm of Dunkle & Dreisbach. I heard nothing more of the notes until sometime during the spring. A Mr. Joseph E. Temple, who I understood as being a note buyer, called on me and said he was offered a note of Dunkle & Dreisbach, with my endorsement, and wanted to know if I had endorsed it. I told him I had endorsed two. He said he had a notion to buy this note and conferred with me, asked me if I would not rather it was out of the market, as I was in business, and it would do me no good having a note going about in that way. I told him I had rather it was taken off the market. Next after that the second note fell due, and I received notice of its protest. I was called on by Mr. Hughes, Thomas Hughes, of Chestnut street, soon after, and Mr. Hughes asked me to pay it, for all that I recollect. I told him that I had simply endorsed the note as an accommodation, and I would rather he would wait on Dunkle & Dreisbach and try to make some arrangement with them—that of course I didn't try to get clear of my responsibility to him, as I had endorsed the note. He then, in a day or two, came to me with two new notes, amounting to about one thousand dollars less, and said that Dunkle & Dreisbach had paid one thousand dollars, and he had given them that much time on the balance—I think it was sixty or ninety days, and that he thought from what they said after being in their store on Eighth street, that they would be met at maturity. I endorsed these two notes, and he had with him the old note. I took my endorsement off of that. These new notes, he said, were drawn, and I believe they were, and endorsed as the former ones, by McCurdy, Tillett & Hays, but their endorsement was after mine, but I don't know that, the notes will show for themselves. I suppose that was the first note that matured. It was the note that Temple didn't buy. I understood Mr. Hughes that a man by the name of Jones owned the note. I didn't know Mr. Jones. I knew Mr. Hughes. Mr. Hughes is in the dry goods commission business, on Chestnut street, and I always had a good opinion of him—believed that he was a very fair man, and believe so still.

"When the renewed notes came due, Mr. Dreisbach called on me for the first time. That was the first time I ever knew him. He said these notes were not for the firm to pay, and that, I think, George Pollock it was, told him he never need pay them. I told him I didn't know anything about that—that that was news to me, &c. He then said if I didn't pay them, that he would have his father come in and take everything. His father had borrowed the money for him that he had put in business, and that he had given him judgment notes. I don't know whether he said note or notes. I had, a short time previous to that, been told that Mr. Dreis-

bach had stated, for the purpose of obtaining credit, that the capital in business was his own. I asked him if he hadn't done so. He said he had, and then said, 'I don't say that I will do what I said I would,' that is, let his father come in and take everything. I may have had conversation with him more than once in our store, but I think this is the last time I ever saw him on the subject until after the bankruptcy proceeding. After bankruptcy proceedings I offered to make a loss with him, rather than go on with a long law suit. I offered to take up these two notes if he would take up the other, the note which had been purchased by Mr. Temple. He was with me at Mr. Bullitt's office. Mr. Bullitt said he would advise him to do it. Afterward Mr. Bullitt or his young man, said he could do nothing with him, that he didn't seem to be disposed to do anything. After that I never tried to negotiate a settlement. .I told Mr. Dreisbach that in bankruptcy proceedings he would lose everything, and I would lose also. He said he would see about that, or to that effect. I could get no satisfaction out of him at all. He (Dunkle) spoke to me some time during the summer, of wanting me to do him a favor—probably August, as stated before, and never again until he called on me on the occasion that I endorsed. In fact, I hadn't thought of it. He reminded me of having spoken about it. Of course I then recollected it.

"Q. Was the favor that you were to do for him to be for himself as you understood it in August? A. No sir. I didn't understand anything to be personal. I didn't talk to him in that way, nor he to me. I mean by personal, individual, not firm. I understood the favor to be for the firm of Dunkle & Dreisbach. Of course, at the first, I didn't know whether there would be a firm or not, nor didn't think anything special about it. He merely spoke to me of getting a partner, saying it was a good thing, &c. Q. Did he mention the name of his expected partner, in August? A. Yes, sir. I am not positive that it was in August, but it was some time in the summer while the negotiations for the formation of a proposed partnership was going on. I fix the date at that time for that reason. Q. What was the precise language which he used—the words—with reference to this favor? A. I can't use the precise language. Q. Did he say, 'I will want you to do me a favor,' or 'I will want you to do the firm a favor?' A. I don't think he used either of those expressions. He conveyed to me an idea, which was, that in order to get good terms of Mr. McCurdy, he had promised Mr. McCurdy my endorsement. He merely at that time said he might want a favor from me. I understood what it meant, from the fact that he was talking about McCurdy going out, and somebody else going in. Q. Did he at that interview say that he would want you to endorse a note for him, in order to get better terms from McCurdy? A. No, sir. He didn't put such a question to me in any way. I, however, understood that he wanted me to endorse for that purpose. I can't recollect the words of the conversation in August. It was very indefinite, and I thought nothing more of it—would never have thought of it again, in all probability, if he hadn't come to me in December. Q. How long did your interview in December last? A. I should think it lasted some considerable time. I should think probably twenty minutes or a half hour. I know it was long enough for me to understand all the points. I wanted to know that I was safe in endorsing, as also of course, could judge whether to sell them goods or not. Q. What was your reason or motive for endorsing the notes? A. I had no reason or motive. He was represented always to me as being a very correct man—a worthy man, and I naturally had a little feeling of friendship towards him—thought that if that was going to do him any good, and cost me nothing, as he said it would not, and I believed it would not from the statement made, that I ought to do it. Q. Did Mr. Dunkle tell you how much he was to pay McCurdy for his interest in the old firm, and how much Dreisbach was to pay McCurdy? A. No, sir. He said he had nothing to pay—that his was in and remained in. He didn't say that Mr. Dreisbach was to pay McCurdy anything. He merely said that Mr. Dreisbach was to put so much in the firm, and he, Dunkle, had eight thousand dollars in, which would make their capital in the new concern the same as it was in the old. I went over this ground with Mr. Dunkle until I had fully understood it. Q. How much did you understand was to be paid to Mr. McCurdy for his, McCurdy's, interest in the firm? A. That I didn't understand at all. I was only arriving at their goodness, that was all I was after—of the firm—and to understand why they were good, and I understood that by the capital they originally had in. I didn't inquire, but Mr. Dunkle had told me that Dreisbach invested, or would put in fifteen thousand dollars. I didn't understand him that Dreisbach had anything to pay to McCurdy. I understood it was the firm of Dunkle & Dreisbach had to pay McCurdy for his interest in the stock of goods. Mr. Dunkle distinctly said that it was the firm that had to pay for the goods, and had received the goods. I asked him those questions very distinctly. Q. Did you understand that Mr. Dreisbach had put in fifteen thousand dollars in cash? A. No, sir. I didn't understand that it was all in. In fact I understood that it wasn't all in. Just how much wasn't in I don't now remember. The stock of goods had been bought on long credit, at least these notes were on a long credit, and of course, as is customary on such occasions, the cash would be used for other purposes, buying goods for cash. Q. Did you understand that Mr. McCurdy's interest in the

firm was about fifteen thousand dollars? A. His capital was—it was fifteen and eight when they commenced—there was evidently a loss of a thousand dollars. How they divided that I didn't ask Dunkle, but I didn't think it material as to the point of credit, which I was inquiring about. Q. You endorsed for Mr. Dunkle notes to the amount of about sixty-two hundred dollars, which were to be given to Mr. McCurdy. How did you understand that the rest of the purchase money was to be paid to Mr. McCurdy for his interest? A. I understood these notes were for the balance of what was due McCurdy. I had no knowledge of how the rest was to be paid. I didn't ask it that I recollect of. Q. Did you understand that it had been paid? A. Yes, sir. I understood this to be the balance. I didn't know there was any other note out until after these bankruptcy proceedings. Q. What reason did Mr. Dunkle give you for proposing to give his own note with your endorsement to Mr. McCurdy, in payment of what you state you understood to be the indebtedness of Dunkle & Dreisbach to McCurdy? A. When Dunkle exhibited the notes of his own I asked him why—that is in substance, I don't pretend to give the language—he gave his own notes? He said he didn't know it made any difference whose notes he gave. That was the commencement of my whole conversation. Said I, who is to pay the notes? who is to receive the goods? He said the firm of Dunkle & Dreisbach. I told him that of course it was Dunkle & Dreisbach's notes that I was to endorse if I endorsed any, but it was from the fact that he first had the personal notes that I went into all this explanation or investigation. Q. Did you at that time seek out Mr. Dreisbach and investigate from him any of these matters? A. No, sir. I never knew Mr. Dreisbach until he called on me after the renewal notes were protested. Q. Is Mr. Dunkle a reasonably intelligent man, or a stupid business man? A. I always believed him to be reasonably intelligent, but I don't now. Q. Why were these notes, which you did endorse, made to the order of Oliver R. Dunkle instead of to the order of the firm? A. I stated to him that all of our firm notes I drew up to the order of myself, then they were good for nothing until I had endorsed them, and it didn't matter whose order they were drawn to. So I proposed that he should just draw them to his own order. At the conversation in August, he (Dunkle) spoke of the advantages that would be gained by getting Mr. Dreisbach in, and that he might want me to do them a favor. I can't say that he said do him a favor or them. I know it left on my mind that he wanted me to endorse."

William Dreisbach, one of the bankrupts, denied having used the expressions alleged by Mr. Bush, as to threatening to let his father take everything. He also stated that he had given Mr. Dunkle a check for one thousand dollars, signed with the firm name, at a time when Mr. Dunkle had given him a check for the sum of nine hundred and ninety-four dollars of Tillett, McCurdy & Hays—but denied having any knowledge at that time, of the existence of the note issued by Dunkle, which was partially paid by said check; or any knowledge that the check was to be used for such a purpose.

Register's opinion:

Upon consideration of the foregoing testimony, I am of opinion the claim of Van Camp Bush on the three notes, particularly therein described, has been duly proved. The partnership of Dunkle & Dreisbach, (a trading firm,) having been formed some months prior to the endorsement of the said notes, (or of one of which two of the said notes were in part a renewal,) Oliver R. Dunkle, a member of said partnership, was fully competent to perform all acts within the scope of its business, and consequently to borrow money on its credit. Dunkle being vested with such authority, Bush, the claimant, when applied to for the loan of his credit, had a right to reply upon Dunkle's representations in regard to the purposes for which the money sought to be raised was to be used, there being no evidence of mala fides on the part of Bush in the transaction.

It was contended, however, by the counsel for the assignee in this matter, that there is no general implied authority in one partner to raise money for the purchase of the capital stock of the firm, although such partner is authorised to raise money for the purchase of merchandise, after the partnership shall have actually commenced its business; and in support of this distinction, he cited the cases of Fisher v. Tayler, 2 Hare, 218; Greenslade v. Dower, 7 Barn. & C. 635. These cases, it is true, (although as to the last named it may be doubted whether it was a case of partnership, it certainly not being one for the purpose of trade,) would seem to establish the doctrine that if money is borrowed by one partner for the declared purpose of increasing the partnership capital, or of raising the whole or part of the capital agreed to be subscribed by the individual partners in order to start the firm, the firm would not be bound, unless some actual authority of ratification can be proved. The distinction between such cases and the one under consideration is set forth in the following observations in Lindl. Partn. 218: "Connected with the subject of borrowing money, is increasing capital. A sole trader who borrows money for the purpose of his trade, cannot with propriety be said to increase his capital; but if two or more persons are in partnership, and each borrows money on his own separate credit, and the money is then thrown into the common stock, the capital of the firm as distinguished from the capital of the persons composing it, may

with propriety be said to be increased. But in this case, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money, so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore, it is said that one partner has no implied power to borrow on the credit of the firm for the purpose of increasing its capital, what is meant, is, that one partner, as such, has no power to borrow, on the credit of himself and copartners, money, which each was to obtain on his individual credit, and then to bring into the common stock. Unless the expression means this, it means nothing." As one partner may assign the whole of the partnership effects, if the transaction be bona fide (Hennessy v. Western Bank, 6 Watts & S. 301; Deckard v. Case, 5 Watts, 22; Sloan v. Moore, 1 Wright [37 Pa. St.] 223), it would seem to follow that he may purchase that which is to form the principal part, or even the whole of the stock of merchandise, in which the partnership proposes to trade.

The note upon which the claim of Sarah B. Van Syckel was founded, appears by the deposition of James McCurdy to have been taken up by him, (he having been an endorser thereof) and is now held by him. Mrs. Van Syckel has therefore now no claim upon said note against the bankrupt's estate. Mr. McCurdy has not made the deposition required by the twenty-second section of the bankrupt act, his counsel contending that it is not necessary for him to do so; that under the nineteenth section of said act, he is entitled "to stand in the place" of Mrs. Van Syckel. Whether the clause in the nineteenth section referred to is intended to dispense with the deposition required by the twenty-second section, it is not necessary to consider; for as this note was given to McCurdy for the separate debt of Dunkle, McCurdy knowing such to be its consideration, no claim made by him upon it against partnership assets or individual assets of William Dreisbach in the hands of the assignee can be allowed.

The assignee excepted to the foregoing opinion.

CADWALADER, District Judge. The register's view of the question is correct in the abstract, but, I think, inapplicable to the peculiar case of a transaction, which, as the prior conversation and form of the notes originally tendered, apprised Mr. Bush, concerned capital of one partner, and was unconnected with current business of the firm. His own reasoning, rather than any prudent inquiry, convinced him that he might get the partnership paper, and induced Dunkle to commit a fraud upon his partner, in giving it. Mr. Bush, if he did not wilfully shut his eyes, adopted a course by which they were closed; and although he may have intended no wrong, is the party who should suffer. The exceptions are sustained. But the effect of the agreement of dissolution as to the notes, which it specifies, requires consideration. Through the decision that the exceptions are sustained, Mr. Dreisbach has not suffered any injury from the frauds of Dunkle. At all events none is now apparent. If none has been suffered, his engagement to pay two of the notes may be in force. This the register will consider. It may be necessary, perhaps, to give a two-fold effect to the agreement; first, as a ratification pro tanto, of the notes otherwise not binding the firm, and secondly as an independent, separate engagement of Mr. Dreisbach. On these points no positive opinion is expressed.

To the foregoing decision an appeal was, on the twenty-ninth day of April, eighteen hundred and seventy-one, taken to the circuit court by Van Camp Bush, and is still depending in said court.

Report of the register as to the effect of the agreement of dissolution of partnership, upon the portion of the claim of Van Camp Bush, represented by two certain notes:

I, the undersigned register, to whom the above matter was referred, in pursuance of the opinion of the court of April nineteenth, eighteen hundred and seventy-one, referring to my consideration the effect of the agreement of dissolution of partnership between the said bankrupts upon the claim of Van Camp Bush, by virtue of two notes, one for one thousand dollars and the other for one thousand one hundred and thirty-seven dollars and twenty-six cents, more particularly set forth in the deposition for his proof of claim, would respectfully report:

That I am of opinion that the effect of said agreement was the assumption by said William Dreisbach of the payment of said notes, in consideration of the relinquishment of Dunkle's interest in the copartnership at that time. The said agreement of dissolution of partnership was made on the twenty-eighth day of July, eighteen hundred and sixty-nine, said Dreisbach, appearing "from the fifteenth to the twentieth of July," to have first learned of the issuing of any notes by Dunkle in the partnership name, for the purpose of providing for the payment of his (Dunkle's) original interest in the firm, and was as follows: Dunkle, in consideration of the payment by Dreisbach of three thousand one hundred and forty-eight dollars and twenty-eight cents, viz: by the payment by Dreisbach of the two notes before referred to, and the balance of said sum on or before January first, eighteen hundred and seventy, sold to Dreisbach all his interest in the firm, he, Dunkle, agreeing by good and sufficient security, to secure Dreisbach against the payment of any and all notes, bills of exchange or other obligations given by him, Dunkle, in the firm name for any individual debt, and

that he would not engage in the retail dry goods business in the city of Philadelphia, nor be employed in any dry goods store in said city for the period of two years, two thousand dollars being agreed upon as stipulated damages for the violation of said last mentioned agreement of Dunkle not to engage in the dry goods business, &c. Dreisbach also thereby agreed to pay all the partnership debts, and by good and sufficient security to indemnify said Dunkle therefrom, except such partnership notes, bills or other obligations not therein specified, that had been or might be given by said Dunkle for his individual debts. The securities stipulated for in this agreement were not given by either party thereto, there being a dispute as to the sureties, Dreisbach having tendered a bond with his father as surety and Dunkle one with a person as surety whom Dreisbach was not willing to accept, alleging that Dunkle had agreed to procure certain other persons as sureties. After this, however, Dreisbach appears to have had full control of the business and assets of the said partnership, and Dunkle appears to have relinquished all right thereto.

By the opinion of the court referred to, no other such notes, indemnity against which was promised by Dunkle, had been allowed as claims either against Dreisbach's separate estate or the partnership estate in bankruptcy, and therefore there has been, in fact, no failure of consideration for the agreement of dissolution upon the part of Dunkle. I do not think that said agreement of dissolution can be considered as a ratification by Dreisbach of the act of Dunkle in issuing these two notes as an act binding the firm; for it in terms prescribes that the price of the interest of Dunkle in the firm as then ascertained, was to be used by Dreisbach in the payment of these notes. They must now be considered as having been, at the time of the dissolution, separate debts of Dunkle, and if the agreement had accomplished the purpose for which it was intended, all the assets would have vested in Dreisbach as his separate estate, and perhaps this may be the case, notwithstanding the adjudication of bankruptcy (Ex parte Williams, 11 Ves. 3), and the only effect it could have as to these notes, would be that already stated, viz: an engagement on the part of Dreisbach to pay them as separate debts of Dunkle, in consideration of the transfer of his interest in the firm. They are therefore not partnership debts of Dunkle & Dreisbach, but provable as separate debts of each partner against their respective separate estates.

For a fuller statement of the circumstances attending the dissolution and the object of Dreisbach in making it, I refer to my report as to the claims of Martin and Elizabeth Dreisbach in this matter, filed November twenty-first, eighteen hundred and seventy.—May 29th, 1871.

Exceptions to the foregoing report were made both by Van Camp Bush and the assignee.

(July 7, 1871.)

CADWALADER, District Judge. Lord Wensleydale, when considering certain relations of the law of partnership said, in very general words, that it is a branch of the law of principal and agent. 8 H. L. Cas. 312. Partners have often been called agents, each of the other. They are more accurately designated as each an agent of the partnership, to administer its proper affairs. Story, Partn., cited by Lord Wensleydale, ubi supra, and Code Nap. art. 1859, No. 1.

The principal's ratification of an unauthorised act of an agent, validates it retroactively, and requires no new consideration. The like rule applies to a partner's unqualified adoption of an act of his copartner which was originally unauthorised. Thus, if Mr. Dreisbach had simply recognised the two notes in question as acts of the firm, or had promised to pay them as such, though he might have at the same time declared them to have been at first wrongfully issued, the ratification would have so inured to the benefit of Mr. Bush, the holder, as to render them partnership debts from their date. But, in the actual case, Mr. Dreisbach's only recognition of the notes was by the agreement of dissolution. I say "only" recognition, because the subsequent conversation must be understood as referential to that agreement. The provisions of the agreement on the subject are special and qualified. The value, a liquidated sum, of Mr. Dunkle's interest in the firm, was to be paid to him as retiring partner. The agreement shows that this conventionally ascertained value exceeded the amount of the two notes in question, which he had unauthorisedly issued in the name of the firm for his individual account. The language of the agreement indicates no less clearly that if the excess had been the other way, Mr. Dreisbach would not have engaged to pay the notes, or, at all events, would not have engaged to pay any part of such excess. In equity, these two notes, being together of less amount than Mr. Dunkle's interest in the firm, were, as against him, rightfully payable out of that interest. His interest in the firm was, therefore, appropriated by the agreement for their payment, that is to say, they were expressly made payable out of it. But as all the assets were at once transferred to Mr. Dreisbach, he assumed the payment of the two notes to their holder as a payment of so much of the interest of Dunkle. Neither more nor less than this appears to have been intended by the agreement. Now if it had contained no such express appropriation, and such an appropriation had, by a distinct act, been afterwards made by Mr. Dunkle of part of the money which he was thus to receive from Mr. Dreisbach, the case would in principle have been the same. In that case, would the notes in question have been thereby partnership debts?

Justly, they could not have been with relation to other partnership creditors, because, with relation to the firm, such creditors ought to have been paid in full before Mr. Dunkle could receive any payment on account of his share; and Mr. Bush, representing Dunkle, should not stand on any better footing. Therefore, the notes, which otherwise were not partnership debts, did not become such through this special agreement of Mr. Dreisbach to pay them. The effect of the agreement was to make him in equity a separate debtor from its date for their amount to their holder, without any merger of the former relation of Dunkle, who until their payment, continues to be also a separate debtor. To this conclusion as to Dreisbach it is for him objected that the frauds of Dunkle in issuing paper in the name of the firm for his individual account, prevent the engagement of Dreisbach in the agreement for dissolution from being obligatory upon him. To this objection the answer is that Mr. Dreisbach has not sustained any injury from the fraud, either as to the two notes particularly in question, or as to any other such paper, and therefore the consideration of his engagement has not, in whole or in part failed. That "fraud without damage gives no cause of action, but both must concur," may be considered an established rule or maxim of both law and equity. In its application, there has occasionally, for centuries, been more or less difficulty. In the present case, it is urged that although circumstances have precluded and will preclude any successful assertion of a joint liability upon any of the notes, yet their fraudulent issue by Dunkle was of injurious effect in creating a moral necessity for the dissolution of the firm, and that all or many of the unfortunate occurrences chronicled in this case were secondary consequences. If so, the damage or injury is too abstract or too remotely consequential for judicial cognisance.

The case is recommitted to the register, whose report is confirmed, so far as may consist with these views. The exceptions are overruled, so far as they do not consist with the same views. I adhere to my former opinion that Mr. Bush does not stand on the footing of a holder of negotiable paper who received it without notice that it was wrongfully issued.

From this decision an appeal was, on the seventeenth day of July, eighteen hundred and seventy-one, taken to the circuit court by Van Camp Bush, and is still depending therein. [The circuit afterwards reversed the order, disallowed the exceptions to the register's report, and confirmed the same. See Bush v. Crawford, Case No. 2,224.] Since the provisional order of the court upon the register's report as to the claims of Martin and Elizabeth Dreisbach, no further action has (at this date, July fifth, eighteen hundred and seventy-two) been taken either by the court or the claimants in regard thereto.

DUNKLE (PRYOR v.). See Case No. 11,458.

Case No. 4,162.

DUNKLE et al. v. WORCESTER et al.

[5 Biss. 102.] [1]

Circuit Court, N. D. Illinois. June, 1869.

SUPPRESSING DEPOSITION—JURISDICTIONAL WORDS.

1. A deposition must be suppressed when it does not affirmatively appear that the witness resided more than one hundred miles from the place where the cause was to be tried.

2. It is not competent for the court to supply a jurisdictional word, though the omission may appear to be merely clerical.

Motion by defendant to suppress a deposition for a clerical omission of the word "reside" in the certificate of deposition taken de bene esse, in New York, the certificate reading "that the witness in New York."

DRUMMOND, District Judge. The motion to suppress this deposition, taken in New York, for the reason that it did not appear by the statement of the officers what the reasons were for which the deposition was taken, it being an ex parte deposition, must be sustained, although I suppose it is a clerical error in the certificate of the officer. "And I certify that the reason for taking such deposition is, and the fact is, that the said witness in the city of New York, more than one hundred miles," etc. Probably the word left out is "resides," the statute authorizing depositions to be taken where a witness lives more than one hundred miles from the place where the cause is to be tried. But I believe the supreme court have held that it is not competent for us to supply any omission of this kind. It is strictissimi juris. It must affirmatively appear on the face of the certificate, or in some way, that the cause specified in the statute actually existed. It is a technical point of the greatest nicety, I admit, but if we commence supplying words, the question is, where shall we stop? It may be that the witness, instead of living in the state of New York, was simply there for the time being, and it might happen, therefore, that an Illinois or Chicago witness might temporarily have been in New York, and that his deposition might have been taken while he was there. As the counsel said, we can supply the word that the witness "was in" New York aforesaid, more than a hundred miles, etc. That illustrates the danger of supplying an omission of this kind, and although it is most probable that the word "reside" was the word intended to be inserted by the officer, still, we must take it as it stands.

Deposition suppressed.

NOTE. The act of congress allowing testimony to be taken de bene esse when the witness

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

resides more than one hundred miles from the place of holding court, was repealed by the act of May 9, 1872 (17 Stat. 89). Now reasonable notice in writing must be given of the witness' name, the time and place of taking, etc.

DUNKLEE (HILL v.). See Case No. 6,489.

DUNLAP v. DAKIN. See Case No. 4,163.

DUNLAP (GREATHOUSE v.). See Case No. 5,742.

DUNLAP (IRWIN v.). See Case No. 7,083.

DUNLAP (McKINDER v.). See Case No. 8,863.

DUNLAP (MANNY v.). See Case No. 9,047.

Case No. 4,163.

DUNLAP et al. v. PYLE et al.

SAME v. DAKIN et al.

[5 McLean, 322.][1]

Circuit Court, D. Ohio. Oct. Term, 1851.

CONSTRUCTION OF WILLS — POWER OF EXECUTOR TO SELL LANDS—UNAUTHORIZED SALES—LIMITATION OF ACTIONS.

1. In 1812 a citizen of Kentucky made his will, in which he said, "I give and bequeath every part of my estate, of every kind whatsoever, to be equally divided (by sale or otherwise, as may seem best), between my loving wife and my children, not heretofore named, and their heirs forever, having particular regard to the education of my children, not as yet educated." His wife, two of his sons, and son-in-law were named in the will as executors. The wife only took out letters testamentary. The above will did not authorize the executors to divide or sell the real property of the estate in Ohio.

2. Especially it did not authorize the husband of the widow, to whom she was afterwards married, to sell and convey these lands as agent. The sale and also the deeds executed by him are void.

3. The devisees being non-residents, the statute of limitations does not run against them, except against John Boyce, who was within the state when the land was sold.

4. A right which subsequently fell to him, on the death of a brother and sister, is not barred.

[This was a suit of ejectment by Doe, ex dem. Dunlap and others, against Pyle and others, and same against Dakin and others.]

Robertson, Probasco & Mickle, for plaintiffs.

Harlan & Corwin, for defendants.

OPINION OF THE COURT. This case was submitted to the court at the last term, but not receiving the argument on both sides, I did not examine the papers until the present term.

Major William Boyce, the ancestor of the plaintiffs, and under whose will they claim the land in controversy, died in Fayette county, Kentucky, early in 1812. He was, at his death, seized of three surveys of land in the state of Ohio, which he devised as follows: After naming his elder children who had received from him their just proportion of his estate, he declares, "As my estate lies in various parts of the world, and of various descriptions of property, so that I cannot make equal distributions in my will among the rest of my children, who have as yet not received their patrimony, by pointing out to each their kinds of property, in order to do equal justice to them and my loving wife, I give and bequeath every part of my estate, of every kind whatsoever, to be equally divided (by sale or otherwise, as may seem best), between my loving wife and my children, not heretofore named, and their heirs forever, having particular regard to the education of my children, not as yet educated." "I constitute, ordain, and appoint, my loving wife Elizabeth, my executrix, my sons, John and William, and Thomas Wrenn, my son-in-law, the whole and sole executors of this my last will and testament." The will was proved in February, 1812, and on the 11th of August ensuing, Elizabeth Boyce, the executrix, took the oath, and gave security for the faithful performance of her duties, in the sum of sixteen thousand dollars. No other one of the executors named was qualified to act as such. About seven months after the death of the testator, his widow was married to Gerard McKinney, who took upon himself the settlement of the estate of Boyce, and sold the lands now in controversy, under which sales the defendants claim.

The principal questions which arise in the case, are: 1. Did the will confer a power on the executors to sell the land in controversy? 2. If it did, has the power been properly executed? 3. What effect has the statute of limitations upon the rights claimed by the plaintiffs?

It is intimated in the argument that the plaintiffs must claim as heirs, and not as devisees. And so claiming, that their legal interests are in common with the other children of the testator. That the plaintiffs, not being vested with the legal estate of the lands claimed by them, have an exclusive right only to the proceeds after they shall be sold. This could not have been the intention of the testator. He bequeathed every part of his estate, of every kind, to be equally divided, by sale or otherwise, as may seem best, &c. The lands were given to the devisees, to be divided in equal parts among them; but if it should be deemed best to sell them, the proceeds to be divided equally. The title to these lands was vested in the devisees. Did the testator require these lands to be sold? He required them to be equally divided or sold, "as may seem best." Now, who was to determine this matter? The executors? That is the argument of the defendants. It must be observed that the lands are not given in trust to the executors to be sold. This is the usual course, when a testator authorizes a sale of his real estate for distribution among his devisees, or to

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

pay debts. There is no power given to the executors in the will to sell these lands, unless it can be inferred from the clause which authorizes a division of them, by sale or otherwise, "as may seem best." Could the executors have made legal partition of these lands among the infant heirs? A partition which would have bound them when they were of age. Such a duty is not ordinarily performed by executors. It in fact is never done, and cannot be done by them, unless the power to do so be expressly given in the will. There is no such express power given in this will. Can it be inferred from the above clause?

The defendants argue from the necessity of selling the land to educate and support the devisees, all of whom, except two, were under ten years of age, the power to sell by the executors, must be inferred, as within the intention of the testator. This argument rests on an assumption not sustained by the facts. The testator bequeathed the whole of his property to the devisees. Not only these lands, but his entire estate, which he says "lies in various parts of the world, and consists of various descriptions of property." That he had a large personal property may fairly be presumed, from the amount of security required to be given by the executrix. If the executors could not make a legal partition of the lands, could they sell them? "as may seem best," they may be divided or sold. Now, is there any distinction in regard to the power of the executors, in the one alternative or the other? They are equally within the provisions of the will, and it would seem, if there be no power to partition, in the executors, there can be no power to sell. How are the rights of infants to be protected? Not by executors or administrators, but through the agency of guardians who are appointed by the courts, and who are required to give bonds, and whose acts are subject to the supervision and control of the courts. Suppose the sale of these lands had been necessary for the support of the family, could that have influenced the construction of the will? We suppose not. On application to the court in the county where the lands are situated, by the guardian of the infants, showing that the sale was necessary for their maintenance, a sale would have been ordered, and a legal title made, in this mode, to the purchasers. To whom, then, may we presume, the testator referred in saying that the lands should be divided or sold, "as may be deemed best"? The lands belonged to the heirs, and could not be made subject to the debts of the estate, unless there had been a deficiency in the personal assets. In that event, and in no other, could the lands, ordinarily, come under the control of the executors, by virtue of an order of court. The testator must have referred to those who should have the legal guardianship of the infants, and their property, and who were responsible to them, and acting under legal restraints. Or he must have referred to the infants when they should be capable of acting for themselves. He could not have referred to the executors who had no agency over the lands by the will. Their interests, as the result has most unfortunately shown, were antagonistic to those of the infants. The reference was to those who had the power to partition the lands, or sell them, either by their own acts, or through the agency of the proper tribunal. Now, the executors under the will had no power to make partition of the lands, nor to sell them.

It is said if the executrix could not sell these lands, she had nothing to do. The personal property was held in trust by her, to pay debts, &c. With the real estate she had nothing to do.

Suppose the power to sell was given to the executors, has that power been properly exercised? The husband of the executrix was rightfully associated with his wife in the administration of the estate. But could he act alone? Could he act as the agent of the executrix, without her concurrence? If she was authorized to sell the lands, or divide them among the heirs "as might seem best," it was a special trust and confidence, which she only could discharge. She could substitute no agency to determine whether the lands should be divided or sold. Her own judgment was to be exercised on the subject, being vested with the power to decide this matter by the will.

The conveyances made to the purchasers are not among the papers. But it is proved that the sale was made, and also the conveyances, by McKinney. It is satisfactorily shown that at the time the deeds were executed, the executrix was in Kentucky, and the deeds were executed in Ohio. The name of the executrix is affixed by her husband, as agent. This is illegal. He could neither contract to sell the lands, nor convey them as her agent. If, then, the power to sell were unquestionable, it has not been properly exercised. McKinney, by his marriage, had no more power to execute the trust than a stranger. Nothing short of a signing and a due acknowledgment by the executrix, could devest the title of the heirs. So far as the individual interest of Mrs. McKinney was concerned in the lands, she had a right to sell and convey them. And a deed duly executed, would have conveyed a title to that extent.

What effect has the statute of limitations on the rights of the devisees? It is admitted by their counsel, that John Boyce, who was in Ohio at the time the deeds for the lands were executed, is barred by the statute. He is dead, but his heirs cannot claim by reason of the bar against their ancestor. But the residence of the other devisees is shown to have been in Kentucky, and there is no proof that any of them have been in Ohio. They must be considered, then, as non-residents,

and the statute must be applied to them in that relation. At the time this suit was commenced, the limitation was twenty-one years. By the statute of the 1st of April, 1846, the saving of non-residence was repealed. And it is contended that by this repeal the rights of the devisees must stand, as though there had been no saving in behalf of non-residents. Some countenance is given to this argument by the decisions in the cases of the Whitney v. Webb, 10 Ohio, 513; and in Ridley v. Hettman, Id. 524, in which the court say, "The death of a person while laboring under disability, is entirely unprovided for." "The only alternative then to which we can cling, is to say that such person stands upon the same footing as resident of the state, and that the lapse of twenty years, from the time the cause of action accrued, will be a bar to the assertion of the right." But these decisions were explained in the case of Carey v. Robinson, 13 Ohio, 181. By that decision the statute begins to run against the heirs of a deceased non-resident, from the time of his death. The proviso in the act of 1846 embraces the case of the devisees. The statute after declaring that the disability of non-residence shall not exist, so far as relates to the action of ejectment, provides, that all persons whose cause of action had accrued, at the date of the statute, their right to sue should be extended to the 4th of July, 1847. The actions under consideration were brought in 1846, within the limitation; and no bar exists, except as to the right of John Boyce, under the will. But his interest, which descended to him on the death of Daniel and Caroline, his brother and sister, is not barred. This being an action at law, we can only look to the legal title. If there be any equitable circumstances arising out of the application of the money for which the lands were sold, or on other grounds, they cannot be considered in this case.

The plaintiffs are entitled to recover all their original rights under the will, except John Boyce's heirs, and the plaintiffs are entitled to recover the rights descended to them by the deaths of their co-heirs. Judgment accordingly.

Case No. 4,164.

DUNLAP et al. v. STETSON.

[4 Mason, 349.][1]

Circuit Court, D. Maine. May Term, 1827.

FEDERAL COURTS — JURISDICTION — ENJOINING JUDGMENT—ORIGINAL BILL— ASSIGNABILITY OF AN EQUITY IN LANDS — BOUNDARIES — GRANTS FROM STATE—FRAUD AND MISTAKE.

1. A bill in equity to enjoin a judgment lies in the circuit court where the judgment is given, although the original plaintiff resides in, and is a citizen of, another state.

[Cited in Hatch v. Dorr, Case No. 6,206; U. S. v. Parrott, Id. 15,998; Jones v. Andrews, 10 Wall. (77 U. S.) 333; Amory v. Amory, Case No. 334; Paine v. Caldwell, Id. 10,674; Re Sabin, Id. 12,195; Cortes Co. v. Thannhauser, 9 Fed. 228; Hauf v. Wilson, 31 Fed. 390; Hardenberg v. Ray, 33 Fed. 814. Applied in Webb v. Barnwall, 116 U. S. 197, 6 Sup. Ct. 352.]

2. Such a bill is not an original suit, within the sense of the 11th section of the judiciary act of 1789, c. 20 [1 Stat. 78].

[Cited in Williams v. Byrne, Case No. 17,718; Babcock v. Millard, Id. 699; Merchants' Nat. Bank v. Leland, Id. 9,452; Christmas v. Gaines, 14 Wall. (81 U. S.) 81; Paine v. Caldwell, Case No. 10,674; French v. Hay, 22 Wall. (89 U. S.) 252; Cortes Co. v. Thannhauser, 9 Fed. 228.]

3. A release to a third person of the right to the land in controversy in the original suit, is not an extinguishment of the right to maintain such a bill for an injunction and relief, where the equity is a mere possibility or constructive equitable trust, created by the decree of the court of equity. Such an equity is not assignable, for it has no existence but by the decree of the court, subsequently made.

[Cited in Mason v. Crosby, Case No. 9,234.]

4. Such an equity is not, in a correct sense, "any right, title, or interest in the land" itself, so as to pass by a conveyance with those words of grant.

[Cited in Doggett v. Emerson, Case No. 3,962.]

5. A judgment may be enjoined in part, and allowed to proceed for the residue.

[Cited in Veazie v. Williams, 8 How. (49 U. S.) 161.]

6. A deed of land, bounding the land "beginning at a stake and stones on the west bank of Penobscot river near a thorn-bush, marked on four sides, &c. &c.; thence to a stake and stones on the same bank of said river; thence running on the western bank of said river to high-water mark to the first mentioned bounds," conveys the land only to the high-water mark on the bank of such river, and does not include the flats below.

[Cited in Thomas v. Hatch, Case No. 13,899.]

7. The owner takes the bank as it is, and may continue to be, by alluvion, or decrease, by the flow of the river.

8. A. purchased ninety-nine hundredths of a tract of land of one hundred acres, belonging to the state, under a settler, and the state granted the one hundred acres to the settler, and the settler had granted one acre to B. Afterwards A. obtained from the state, with full knowledge of B.'s title, a grant of the whole land, the same being excepted in his own deed from the settler. *Held*, that B. was entitled in equity to have the one acre conveyed to him.

[Cited in Foxcroft v. Mallett, 4 How. (45 U. S.) 376; Yeatman v. Bradford, 44 Fed. 538.]

9. Construction of the resolve of 1801, in favor of the inhabitants of Bangor, and of the authority of the commissioners appointed to adjust the same.

10. Mistakes and fraud are equally relievable in equity.

[Cited in Warner v. Daniels, Case No. 17,181.]

This was a bill in equity brought [by John Dunlap and others against Amasa Stetson] to obtain an injunction and general relief against a judgment rendered in this court at May term, 1825, in favor of the present defendant, and against the present plaintiffs,

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

for the recovery of a moiety of certain parcels of land. The original action was a writ of entry sur disseisin, upon a supposed disseisin of one William McGlathry, under whom the plaintiffs derived title as tenants of the freehold. The substance of the bill was as follows: "That a verdict and judgment were rendered in this court, May term, 1825, on a writ of entry, on the disseisin of one William McGlathry, brought by the defendant against the plaintiffs for an undivided moiety of a parcel of land in the town of Bangor. A part of the land, demanded in that suit, was disclaimed, and the residue defended. That before the disseisin by McGlathry, and before January 1, 1784, one James Budge was an inhabitant of the town of Bangor in Maine, and a settler on 100 acres of land, holding, claiming, and residing upon it as an estate in fee simple. That, April 19, 1798, for the consideration of $100, Budge conveyed the whole of the land described in the writ of entry, including the parcel defended, as before mentioned, by deed of bargain and sale, recorded May 7, 1798, to William McGlathry to hold in fee. That McGlathry thereupon entered under his deed, and held and made improvements on the land till Jan. 10, 1807, and on that day, for the consideration of $450, by deed of bargain and sale, conveyed that part of the said demanded premises, which in the plea was defended, to David Coffin and Richard Pike, who entered and improved. That Coffin released to Pike, and, June 14, 1820, Pike sold to John Dunlap, who died seised and possessed, July 30, 1824, having devised the premises to the plaintiffs, his only children and heirs, who entered under the devise, and held and improved the premises till evicted by the judgment. That after the purchase by McGlathry, March 13, 1799, Budge sold by deed to John Peck the hundred acres of land before mentioned, except the said demanded acre sold to McGlathry; same day Peck sold to Daniel Wild with the same exception. March 3, 1801, Wild sold an undivided moiety to Stetson, same exception. That the land, excepted in the above conveyances, is the same, whereof a moiety is demanded in Stetson's suit before mentioned. That, at the several times when Budge conveyed to McGlathry and to Peck, all the legal estate in the land was vested in, and held by, the state of Massachusetts. That, March 5, 1801, the legislature of Massachusetts passed a resolve, declaring, that all the settlers in the town of Bangor and their legal representatives, who actually settled before the first day of January, 1784, should be entitled to a deed of their respective lots of 100 acres each, by paying into the state treasury $8.45; and the committee of said state, for the sale of eastern lands, were, among other things, by the resolve, directed to cause the several lots of land in Bangor to be surveyed and run out, by a surveyor by them to be appointed, to each settler respectively; his doings to be returned to the committee by the first day of November then next; six months allowed to each settler after the return of the survey, to pay for their lands. That the committee appointed Park Holland a surveyor under the resolve. That he performed the service, and made his return of the before-mentioned hundred acres of land, in the words and figures, or to the purport and effect following: 'I the subscriber being appointed by the committee for the sale of eastern lands, agreeably to a resolve of the general court, passed March 5, 1801, for the purpose of confirming the settlers in the town of Bangor, in the county of Hancock, the lots of land on which they have settled respectively, do hereby certify, that I have laid out by metes and bounds, conformably to said resolve, to Robert Lapish and others, assignees of James Budge, one hundred acres of land in said town of Bangor, butted and bounded as follows, viz. beginning at a stump with stones about it standing on the bank of the river, being the southwest corner of lot No. 12, and from thence north seven degrees, west sixty rods to a pine stump marked; thence north two hundred and thirty-one rods to a stake marked; thence west fifty-seven rods to a fir tree marked; thence south about two hundred and twenty-seven rods to a stake standing in the county road, one rod east of an oak stump, in said road; thence west four rods to the stream; thence on said stream, on the bank thereof and on the bank of Penobscot river, to the first bounds; which lot was taken up and settled upon before the first day of January, 1784, the same being lot No. 11, on a plan made and subscribed by me, dated the 30th day of November, 1801. Park Holland, Surveyor.' That the tract, described in the survey, contains the acre conveyed from Budge to McGlathry, and the parcel demanded in Stetson's suit, which came from Budge through McGlathry by purchase, to the plaintiffs, as before stated, which defendant in equity ought to have permitted them to enjoy, but seeks to enforce and execute the judgment. Plaintiffs offer to bring into court and pay defendant the costs of his suit at law. But so it is, that defendant having no right to the premises he demanded, as a settler or assignee, or legal representative of a settler, combining, &c. pretends he comes within the description of persons provided for in the resolve, and had a prior right; the contrary is charged; pretends he purchased without notice of McGlathry's equitable estate, and those claiming under him, for an adequate consideration; notice charged; pretends McGlathry delayed beyond six months from surveyor's return to pay for the land; charge, that defendant fraudulently prevented him from obtaining his land by obtaining a deed for himself in four months; that he falsely alleged to the land committee, that McGlathry was not the assignee or legal representative of Budge of

the land demanded by defendant, but that himself and confeuerates were the assignees thereof, and as such had a right to a deed of the same; that by means of his false affirmation, he obtained a deed of the premises from the committee for the sale of eastern lands, and on the trial of his action aforesaid, adduced in evidence the aforesaid resolve and survey, and the deed obtained by his false representations, and adduced no other material evidence, at the trial. Prays, that defendant may disclose whether Budge was, or was reputed to be, an inhabitant of Bangor, and was a settler on the aforesaid 100 acres of land, before Jan. 1, 1784; whether Park Holland surveyed and returned his survey, and when; whether Stetson received a deed, of the premises he demanded, from James Budge, or any one claiming through or under him or his assigns, reciting or expressing, that the said demanded premises had been sold by Budge to McGlathry, and what is the language of such deed, and the exception therein in favor of McGlathry; whether, March 2, 1802, McGlathry was in possession of the premises, or any part, by himself or agent; whether defendant, while McGlathry was in possession, obtained a deed, of the land committee, of the demanded premises, in virtue or by reason of the original settlement of James Budge, as a settler thereon, before Jan. 1, 1784, or any conveyance thereof by him, or any person holding under him or his assignees; whether he paid for the demanded premises; whether he represented himself or confederates, to the land committee, to be the legal representatives, or to have a good right to receive a deed of the demanded premises, conveying the title of the state therein; what pretences he did make, whereby he procured a deed thereof; and whether the said resolve, survey, and deed, by him obtained of the committee, were the only evidence given in support of his title on the trial of his action; whether that part of the premises demanded, which is described in the plaintiff's plea, ever was, or now is, of a greater value than $500, and of what value the same was and now is.

"Prays an injunction and other relief."

A plea to the jurisdiction of the court was put in by the defendant, stating, "that he was a citizen of the state of Massachusetts, and resident at Dorchester in said state; and that the subpoena, in this case, was served on him within the district of Massachusetts, and that the jurisdiction of this cause belonged, and of right accrued, to the circuit court, holden within and for the district of Massachusetts, and not to the circuit court, holden within and for the district of Maine."

The answer was in substance as follows: "Insisting on the plea to the jurisdiction, and alleging and showing, that since the rendition of the judgment in the bill mentioned, and before the filing of the bill, the said Dunlaps, by their deed of bargain and sale and release, duly executed, had sold and conveyed all their interest in the demanded premises, to one Richard Pike, of Newburyport, in the commonwealth of Massachusetts, a citizen thereof; that, at the time of filing the bill, he was, ever since has been, and is, sole party plaintiff in interest in the subject matter of this suit, of which fact defendant, at the time of filing his plea, had no knowledge. Says that defendant never was resident, nor to his knowledge within the town of Bangor, till after the committee's deed to him and others, March 2, 1802; seldom there till about the year 1816; once absent five years in succession; knows nothing of original settlement of the land by Budge, or circumstances relating thereto, except what he heard from Budge and others; has been informed and believes, that Budge was an inhabitant of Bangor, and a settler on the land, in the year 1784; that he lived on it before Jan. 1, 1784, with one John Smart, his brother-in-law. Defendant did believe Budge was a settler before Jan. 1, 1784, but after the deed from the committee, went to Bangor, and was then first informed, that John Smart was considered the original settler; that in April, 1784, Smart conveyed to Budge and removed, leaving him in possession. Has been informed and believes, that, while living on the land, Budge, for a valuable consideration, by deed of mortgage, conveyed the land to Robert Treat and James Ginn, to hold in fee as security for a certain sum of money due from him to them. That afterwards, April 12, 1794, Budge mortgaged land for £272. 6s. 0d. to John Lee. Sept. Term, 1798, Lee recovered judgment for possession, and entered in virtue of a writ of possession, Dec. 18, same year. Premises redeemable by law in three years. That, March 13, 1799, Budge sold his land to John Peck for the consideration of $3000, described as follows, viz. 'a certain tract or parcel of land on the Condeskeig point, known by the name of Budge's farm, containing one hundred acres, which is bounded as follows; begining on the east corner of Penobscot river; from thence running north one mile adjoining the land formerly owned by Francis Rogers, deceased; thence west fifty rods on the land belonging to the commonwealth; thence south to the Condeskeig; thence on the land owned by one Harlow; from thence down the Condeskeig stream to Penobscot river; and from thence up the said Penobscot river to the place of beginning; meaning to contain one hundred acres, excepting one acre sold to William McGlathry, as by his deed, dated the 19th day of April, A. D. 1798, recorded libro 5, folio 354, subject, however, to a certain balance due on a bond of mortgage given by me to John Lee, for £272, in April, 1794, on which bond there is indorsed $678.03, as will appear by the said bond to the said Lee,

and his account, settled 5th June, 1798, including a dwelling house, barn, store, and all other buildings thereon standing or in any wise appertaining;' to have and to hold in fee with covenants of seisin in fee, freedom from incumbrance and general warranty. That, March 23, 1799, Peck conveyed to Daniel Wild the same land with the same exception of the acre sold to McGlathry; Nov. 21, 1800, Wild sold one undivided half of the same premises, with the same exception, to Robert Lapish and Zadock French, and the other moiety to the defendant, with the same exception, and by the same boundaries as in the deed of March 13, 1799, from Budge to Peck, before recited. That, before April 19, 1798, as Budge, in his life-time, told defendant, McGlathry was his creditor in a large amount; unable to pay him; was threatened with an arrest and imprisonment; to avoid which, without consideration he executed the deed of April 19, 1798, to McGlathry of an acre of upland, but not including, as defendant avers, the flats, or land below high-water mark; admits part of the premises, defended by plaintiffs, in the writ of entry, is contained in the deed to McGlathry, which, in that deed, was bounded as follows, viz. 'beginning at a stake on the west bank of Penobscot river, near a thorn-bush marked on four sides, running north eleven rods to a stake and stones; thence southerly to a stake and stones a corner; thence south nine rods to a stake and stones on the same bank of the same river; thence running on the western bank of said river to high-water mark sixteen rods, to the first mentioned bounds, with all the privileges of water and landing to the same belonging.' That, according to defendant's knowledge or belief, McGlathry never entered into the acre of land, nor caused fences or improvements to be made, nor exercised any acts of ownership, till long after March 2, 1802, but suffered it to lie waste till about the year 1805, when defendant found one Wilder in possession of a piece of land near the demanded premises, which he claimed under McGlathry. That defendant and other owners were desirous of promoting settlements, and willing to give Wilder the piece of land he possessed if he would live there. That the land was of little value at that time, and therefore they did not remove Wilder therefrom. That, June 5, 1801, Lapish, to protect the title of himself and defendant, and French, as assignees of Peck, and to prevent John Lee from holding the land by his mortgage, obtained of him, for a valuable consideration, a conveyance of the mortgage, and all his title under it; and October 19, 1801, Lapish, by defendant's procurement, executed a deed of release, intended to operate to the sole benefit of Lapish, French, and Stetson, as assignees of Peck. That, prior to Oct. 5, 1803, Peck, to protect the same title against Ginn and Treat, as mortgagees, for a valuable consideration, obtained Treat's release of his right, and from Ginn a release of his right, to the use and benefit of Lapish, French, and Stetson.

"Insists that Peck procured the releases of the mortgage to Treat and Ginn, and assisted in obtaining a release of the mortgage to Lee, in pursuance of an agreement at the time of the sale by Peck, for the benefit of his grantees. That, at the date of the releases, Budge was insolvent, and unable to discharge the mortgages, and the releases were obtained to secure the title of Lapish, French, and Stetson, and not that of McGlathry, or any holding under him. Insists further, that the releases of Lee, and of Treat and Ginn, are a bar to this suit. That about Nov. 1, 1800, and until after March 2, 1802, Lapish was a settler, and actually resided on the 100 acres, claiming as tenant in common with French, and Wild, and Stetson, respectively, the title being then in the state of Massachusetts. That before March 1, 1801, many lands, belonging to Massachusetts, were occupied by actual settlers. That they became the objects of state bounty. That to designate them, a resolve was passed, June 25, 1789, providing, that the term, 'settler,' should be construed to extend to such persons only, as, before Jan. 1, 1784, went upon some lot or tract of the land of said commonwealth, for the purpose of clearing and cultivating the same, and making it the place of his settled abode, and actually resided on such lot by himself, or some person under him, before said time, and cleared it for mowing and tillage, at least one acre of land, and built a dwelling-house thereon, and still continued at the passage of said resolve, to reside on the same. That, March 5, 1801, a resolve passed, confirming all actual settlers in the town of Bangor, before Jan. 1, 1784, and their legal representatives, and authorizing a deed of 100 acres of land to be given to each settler by the committee for the sale of eastern lands, on the payment of eight dollars and forty-five cents; the lots to be first set out by metes and bounds, by a surveyor appointed by the committee; his return to be made by Nov. 1, 1801, and each settler to have six months, after the surveyor's return, to pay for the land. That, in divers cases, a legal construction has been put upon the resolve, and the powers vested in the committee, by the supreme court of Massachusetts, who adjudged the grant to settlers to be an act of bounty, and that the committee were the sole judges to determine the objects of that bounty, whose decision was conclusive, and not subject to subsequent revision or control. That many titles in this state are held by this tenure, the people of the state not doubting the validity of such titles, either in law or equity. That Park Holland was appointed surveyor, and made his return of the sur-

vey, Nov. 30, 1801; survey made at the expense of Lapish, French, and Stetson, and his certificate as stated in the bill. That in January, 1802, defendant exhibited his deed from Wild, with the exception of McGlathry's lot, to the committee, and requested a deed. That one Nathaniel Harlow, a settler on an adjoining lot, having disputed the defendant's title, the committee took time to advise on the subject, and as defendant believes, referred the subject to learned counsel, and after a hearing, on March 2, 1802, determined, that defendant, Lapish, and French, were the legal representatives of Budge, and gave them a deed of the 100 acres, settled on by Budge, including the McGlathry acre, one fourth to Lapish, one fourth to French, and one twelfth to defendant; under which they entered, and quietly enjoyed the whole, till the year 1805, when Luke Wilder had possession of part of the lot; but defendant cannot answer with certainty, whether he held a part of the McGlathry acre or not. That, at the time of defendant's purchase, and long after, it was for the interest of defendant and his co-tenants to to encourage settlers, and they permitted them to go upon their lands, and erect buildings, and occupy, at low rents in some instances, and without rent in others, and defendant supposes some persons might have occupied some part of the McGlathry acre; but defendant, at that time, made no distinction in his own mind between that acre and any other part of the whole lot; and does not know whether any part of the acre was so occupied till Wilder occupied. And defendant avers, it is not his intention to deprive the occupants of their buildings or improvements, but that he has been always willing to pay them the value, and has accordingly paid divers occupants, on their yielding quiet possession. That the land demanded is not wholly included in the deed from Budge to McGlathry, but the part below high-water mark in excluded, and the bill does not show a right to the same in law or equity, or a reason why defendant ought not to have execution of that part. And as to the matters particularly interrogated in the bill, according to defendant's belief, McGlathry was not in possession by himself, agent, attorney, or tenant, of any part of the acre. The deed of the state of Massachusetts to defendant and cotenants was made to them as the true and proper assignees of Budge, within the meaning of the resolve; and defendant believes McGlathry was not in possession before, or at the time the deed was executed by the committee. That defendant represented all things truly to the committee, and the existence of all the deeds before mentioned, as far as the same were within his knowledge, and particularly the deed containing the exception of the McGlathry acre, and that he suppressed nothing and misrepresented nothing, as he believes. That at no time did he use any pretence, art, or deceit, to procure the deed, nor did any other person to his knowledge, but in all things conducted himself uprightly. That, at the trial of the suit at law against the said John Dunlap and others, he adduced in evidence the resolve of March 5, 1801, the surveyor's return, and the deed from the committee, upon which evidence alone the legal title was found in defendant."

Mr. Orr, for plaintiffs.
Mr. Greenleaf, for defendant.

STORY, Circuit Justice. I do not think it necessary to go over the pleadings at large in this case, but shall content myself with an exposition of those facts only, which bear upon the main points suggested at the argument.

The first point raised is, whether the suit itself can be maintained, the defendant being a citizen of Massachusetts, and not resident in Maine, and the subpoena having been served upon him in the state of Massachusetts. The exception has been taken by way of plea to the jurisdiction, and has also been relied on in the answer, and must of course now be disposed of, before we can enter upon the merits. The judiciary act of 1789, c. 20, § 11, has declared, "that no civil suit shall be brought before either of the said courts (of the United States) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." This has always been deemed a personal privilege of the party defendant, introduced for his benefit, and which he is at liberty to waive, and not, strictly speaking, a question of the jurisdiction of the court. But the defendant has chosen, on this occasion, to take the objection in due season; and the question is, whether the present suit is such an original process as is contemplated by the act. I believe, the general, if not the universal, practice has been, to consider bills of injunction upon judgments in the circuit courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress, as equity and good conscience required. Although a circuit court in another district might act in personam upon the party, and so far grant an equitable relief, the suit could not be effectual to bind the circuit court in which the judgment was rendered. And it is easy to perceive, that many embarrassments, as well to the remedy, as to the title under the judgment, might arise

from this conflict and separation of jurisdictions. And if the party obtaining the judgment should, in the mean time, become a citizen of the same state, as the other party, there would, in many cases, be an entire failure of all equitable relief, contrary to the plainest principles of justice. Considerations of this sort have, as I am informed, satisfied the minds of some of the most enlightened judges, that the act of congress never was intended to apply to bills for relief upon judgments rendered in the circuit courts. They are deemed to be, not original suits, but branches growing out of the original suits, and dependent upon them, and very much in their nature, like those hearings in equity authorized by our laws, in cases of the confession of forfeiture upon the penalties of bonds, mortgages, and other agreements, with collateral conditions. There has always appeared to me to be great weight in this reasoning; and I should not hesitate to follow it, unless some stubborn authority stood in my way. I know of no such authority. On the contrary, the case of Logan v. Patrick, 5 Cranch. [9 U. S.] 288, if it did not decide the very point, has never been construed, as questioning it. The form of the certificate in the cause was (apparently in answer to the first question put), "that the said circuit court can entertain jurisdiction of the cause."

A second point is, that the present suit is not maintainable, because, since the rendition of the judgment, and before the filing of the bill, the plaintiffs sold and released to one Richard Pike all their right and title to the land in controversy. In fact, the land was originally purchased of Pike by the ancestor of the plaintiffs, from whom they derived their title, under a deed of general warranty. The argument is, that Pike is now the real plaintiff in interest, and being a citizen of Massachusetts, he could not now maintain any bill in equity in the circuit court against the defendant, who is a citizen of the same state. If this be so, there is an extinguishment of all remedy in equity, in respect both to Pike and the present plaintiffs upon the judgment, for there is no state court of chancery, to which the parties can apply. There is another difficulty not adverted to at the argument, and that is founded on the 11th section of the judiciary act of 1789, ch. 20, which provides, that no district or circuit court shall have "cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." Now, upon the ground assumed by the defendant, the present plaintiffs could not maintain an injunction bill in this district to this judgment; and supposing the conveyance to Pike to operate as an assignment of their rights, the latter also would be precluded from the same resort. These are inconveniences, which cannot escape the most superficial observation. They furnish no reason for assuming jurisdiction, where it is not given; but they furnish some reason against the extension of general words to cases, which, it is not easy to believe, could have been within the legislative intention.

But it is not necessary to rest this question on any considerations of this nature. The judgment in the writ of entry was a conclusive bar to the title of the plaintiffs, so far as it was of a legal nature. It was a complete recognition of the defendant's right of recovery, and an extinguishment pro tanto of the plaintiffs' title. It was not necessary to perfect the title of the defendant, that he should have been put into possession of the land by a writ of seisin. He might enter into possession without any such execution, for his title was complete by the judgment. So are the authorities recognized by our own courts.[2] This being so, there is no pretence to say, that the deed to Pike did or could convey any legal estate to him against the defendant. It was as little competent to pass any equitable estate in the premises; for in a correct sense the plaintiffs had no such estate. If the plaintiffs are entitled to any redress upon the present bill (and the circumstances therein stated constitute their whole equity), it is most obvious, that it is not because they possess any equitable estate in the land, but because they possess an equitable claim upon the defendant, personally, for relief. This is not the case of an express or implied trust, created or admitted by the parties themselves. It is a naked equity, which is set up upon the ground of a constructive trust created by a court of chancery, because there has been some mistake, or fraud, or accident, or other claim, acting upon the conscience of the party. Until the equity has been established by the decree of a court of equity, it has no positive existence. It is the creature of the court itself.[3] Now, admitting that choses in action, and even possibilities of interest, are in general assignable in equity,[4] it would be difficult to establish, that such a mere naked possibility of equity, as this, is assignable, or would be recognized and enforced in a court of equity in a suit by the assignee. The cases of Jacobson v. Williams, 1 P. Wms. 383, 385, and Spragg v. Binkes, 5 Ves. 583, admonish us, that courts of equity entertain some reserves on this subject; and without a positive authority in its favor, I should feel no inclination to sustain it. Nothing approaching to such an authority can, as far as my researches extend,

[2] Com. Dig. "Execution," A 1; McNeil v. Bright, 4 Mass. 282; Gilbert v. Bell, 15 Mass. 44; Co. Litt. 34b.

[3] Brace v. Duchess of Marlborough, 2 P. Wms. 491; Gilman v. Brown [Case No. 5,441].

[4] Thomas v. Freeman, 2 Vern. 563, and Raithby's notes; Wind v. Jekyl, 1 P. Wms. 572; Higden v. Williamson, 3 P. Wms. 133.

be found.[5] I cannot perceive how the assignee of such a constructive trust, or naked equity, as is here set up, could sustain a bill to enjoin the judgment. And if he could, it would not necessarily follow, that it might not also be maintainable in the name of the plaintiffs for the benefit of the assignee. But the deed to Pike contains no such assignment. It is a mere conveyance and release of all the "right, title, and interest (of the plaintiffs) in and to the lots of land," &c. free from the claims of all persons, claiming by, through, or under them. Now, this naked equity constitutes no right, title, or interest in the land itself. A judgment creditor has a lien on the land of his debtor; but it is neither jus in re, nor jus ad rem; and though he releases all his right to the land, he may afterwards extend his execution upon it.[6] So a release of a right to land does not extinguish a bare authority in an executor to sell it.[7] Both of these cases are much stronger than the present; and to carry the interpretation of the words of the deed to the extent of operating as an assignment of the possible equity of the plaintiff, would be, not to enforce, but to defeat the intention of the parties to it. It would be a much more rational interpretation to construe it (as is contended for by the plaintiff's counsel), as intended to operate as a release or extinguishment of the covenants of warranty of Pike, in his original conveyance to their ancestor. For these reasons, I am of opinion, that this objection is unsustainable.

There is another objection to the bill, which may as well be disposed of in connexion with the preceding. It is, that if the defendant is entitled to any part of the land, the judgment cannot be enjoined; for relief in equity will be granted only, when the fraud goes to the whole of the judgment, and not where it is but of partial application. This objection is founded upon a mistake of the real intent of the authorities, which have been relied on to support it. A court of equity will grant relief to the extent of the injury, which the party seeking the injunction had suffered. If that applies only to part of the land recovered, there is nothing in the principles or practice of the court, which prohibits it from restraining or modifying its relief accordingly.

We may now approach the merits of the case. Both parties claim title under one James Budge, who became entitled, in the manner which will be hereafter stated, to one hundred acres of land in Bangor, of which he sold one acre to one William McGlathry by a deed dated in April, 1798, describing the same by certain metes and bounds. The remaining ninety-nine acres confessedly belong to the defendant, and Messrs. Lapish and French, in undivided moieties, through intermediate conveyances from Budge. The whole contest between the parties respects the title to this one acre. It is bounded and described, in the deed from Budge to McGlathry thus: "A certain lot of land, lying and being in Bangor, on Condeskeig point, so called, bounded and described as follows, to wit, beginning at a stake on the west bank of Penobscot river, near a thorn bush marked on four sides, running north eleven rods to a stake and stones; thence southerly to a stake and stones, a corner; thence south nine rods to a stake and stones on the same bank of the same river; thence running on the western bank of said river to high-water mark sixteen rods, to the first mentioned bounds, with all the privileges of water and landing to the same belonging." The colonial act of 1641 declares, "that in all creeks, coves, and other places, about and upon salt water, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above one hundred rods, and not more, wheresoever it ebbs further." The question is, whether by the terms of the present deed, McGlathry as riparian proprietor took the flats to low-water mark, in front of the land, or whether, as against Budge, and all claiming under him, he is limited to high-water mark on the western bank of Penobscot river. It appears to me very clear, that the deed bounds McGlathry by the western bank of the river at the high-water mark. Assuming Budge to have been an original riparian proprietor, entitled, by the operation of law, to the adjacent flats, it was certainly competent for him to sell the upland and reserve the flats. The only question is, what is the true construction of his deed in this particular. It is to be observed, that it is not a deed bounding the grantee on the river, or the stream of the river, generally, where the flats might pass by implication; but the boundaries are specific and definite. The land conveyed is marked out, by certain stakes and stones, on the west bank of the river; the beginning point is on the same bank near a thorn-bush; and the line along the river runs on the west bank of the river to high-water mark to the first bound. The limitation throughout is by the bank of the river, and with reference to known objects on that bank; and the words, "to high-water mark," can have no other rational meaning, in the connexion in which they stand, than as indicating the front line of the bank itself. The subsequent words, "with all the privileges of water and landing to the same belonging," do not extend the bounds of the land conveyed; but merely secure to it the easements and privileges of water and landing, which may well consist with a reserve of the flats to the grantor. Such, upon principle, is the construction of the deed, to which my mind is irresistibly led. And the authorities

[5] See Robinson v. Macdonnell, 5 Maule & S. 228.

[6] Brace v. Duchess of Marlborough, 2 P. Wms. 491.

[7] Co. Litt. 265; Com. Dig. "Release," B 3.

are equally conclusive in its favour. It is only necessary to refer to Storer v. Freeman, 6 Mass. 435; Hatch v. Dwight, 17 Mass. 289; and Hasty v. Johnson, 3 Greenl. 282.

Then, it is suggested, that since the period of the grant, there has been an encroachment upon the bank, by the gradual wear of the stream of the river. If this be so, the grantees under McGlathry must be confined to the line of the bank as it now actually exists. It is like the common case of alluvion, where something is gradually added to land by an imperceptible increase. What is taken from the bank is an imperceptible increment to the flats, and passes to the owner of it, in the same manner, as if there had been a like increment to the bank, it would have passed to the riparian proprietor. He takes the title, subject to those common incidents, which may diminish or increase the extent of his boundaries. This is common learning, laid down in Mr. Justice Blackstone's Commentaries (2 Comm. 261), and has been fully recognized in Adams v. Frothingham, 3 Mass. 363, and very recently acted upon by the king's bench in a case strikingly in point (Stratton v. Brown, 4 Barn. & C. 485). The plaintiffs then must be deemed to be limited in their title to the bank of the river, as it now exists, and have no legal or equitable title to any portion of the front, which now constitutes flats.

But the principal inquiry yet remains to be considered; and that is, whether the plaintiffs have made out any ground whatsoever for equitable relief, so as to entitle them to a decree of the court. To understand the nature of the objections urged against them, it will be necessary to state some of the leading facts, asserted in the pleadings, and established in the proofs. Budge was a settler on the one hundred acres of land before the first day of January, 1784, and continued in possession, until he made conveyances to the parties respectively. The land, however, belonged to the commonwealth of Massachusetts, and consequently, Budge had no legal title to maintain his possession against the government. On the 5th of March, 1801, the legislature of Massachusetts passed a resolve, on the petition of the inhabitants of Bangor, praying for a confirmation of the respective lots, on which they had settled before the 17th of February, 1798. It provided, "that all the settlers in the town of Bangor, or their legal representatives, who actually settled before 1st of January, 1784, be entitled to a deed of their respective lots of one hundred acres each, by paying into the treasury of this commonwealth eight dollars and forty-five cents," &c. It further provided, "that the committee for the sale of eastern lands be, and they hereby are directed to cause the several lots in the town of Bangor to be surveyed and run out by metes and bounds to each of the settlers in said town, agreeably to this resolve, by some faithful surveyor, &c. and a return thereof to be made to said committee by the first day of November next; and that six months be allowed to each settler, after the return of the surveyor, to pay for their lands, the settlers paying interest, from this date, upon the money for their respective lots." Long before this period, to wit, in 1787, and while he was in possession of his lot, Budge mortgaged the same jointly to Robert Treat and James Ginn. He afterwards, in April, 1794, mortgaged the same to one John Lee, who obtained a judgment for possession of the same in September, 1798, on which execution was issued, and possession taken in January, 1799. In March, 1799, Budge conveyed the same lot to Peck, with the following reserve, "excepting one acre sold to William McGlathry, as by his deed, dated the 19th of April, 1798," and also subject to the mortgage to Lee. Peck, on the same day, as collateral security for the fulfilment of the terms of the sale, re-mortgaged the lot back to Budge. A few days afterwards, Peck sold and released the same lot with the same exception of McGlathry's acre, to one Daniel Wild. In November, 1800, Wild conveyed one moiety of the same lot to Zadock French and Robert Lapish; and in March, 1801, he conveyed the other moiety to the defendant. Each of these deeds also contains the like exception of the one acre of McGlathry. Budge released to Peck the mortgage given to him by the latter, in February, 1801, and in June, of the same year, Ginn released to Budge his right in the mortgage to him and Treat; and afterwards Treat released his share of the mortgage to Peck, and confirmed it in October, 1803. In June, 1801, Lee assigned his mortgage and judgment thereon to Robert Lapish; and in October of the same year, Lapish released to Budge all actions, causes of action, and demands, on account of that mortgage, with a proviso which will be hereafter noticed. In November, 1801, the surveyor, appointed by the commissioners, made a return, that he had "laid out by metes and bounds, conformably to the resolve, to Robert Lapish and others, assignees of James Budge, one hundred acres of land," and proceeded to state the boundaries. In March, 1802, the commissioners made a conveyance, according to law, to Robert Lapish, Amasa Stetson, and Zadock French, "assignees of James Budge, who settled in said town of Bangor, before the 1st of January, 1784," of all the right, title, and interest of the commonwealth in and to the same lot of land. Such is the deraignment of the title of the defendant to the moiety of the lot. It is most manifest, that the deed of the commissioners, in 1802, conveyed to the grantees the whole lot, supposing them to be the assignees of Budge of the whole one hundred acres. It is as manifest, that they never were assignees of the one acre conveyed by Budge to McGlathry, and that the very deeds, under

which they claim, all contain an express exception of that acre, so that they had the most perfect and complete notice, not only, that they had themselves no title to it, but who the party was, that did possess the title.

Under such circumstances, it is natural to inquire, upon what ground the defendant can assert any claim whatsoever, in justice or equity, to the acre of McGlathry. He never become the purchaser of it; it never was assigned to him by Wild; he had full notice of the existence of the title of McGlathry; and his own title to the ninety-nine acres is precisely of the same nature under Budge, as that of the plaintiffs to the one acre. He has, however, with Lapish and French, procured the legal title to the whole lot from the commonwealth, and he has, at law, recovered his moiety of this acre, under that title, against the plaintiffs, who are in possession under the original title of McGlathry. He now contends, that he has a right to hold it discharged of all the equity of the plaintiffs; and that their claim, whatever it was, is utterly extinguished. I was curious to ascertain, how this was to be made out, as a matter of general justice, and listened at the argument for some explanation of the merits of such an assertion of right. None was offered; and therefore it stands drily upon the naked point of superiority of legal title; and it must, if maintainable at all, prevail on this account and on no other. Let us then proceed to the consideration of the objections raised to defeat the relief, under this aspect of the case.

The defendant and Lapish and French have, it is true, obtained from the commonwealth the legal title to the whole lot. And much was suggested at the argument, of the sacredness of titles derived from the commonwealth, and of the danger of disturbing them. This court is not insensible of the value of such titles; and has never felt the slightest inclination to bring them into jeopardy. This suit involves no consideration of that sort. The question here is not, whether the commonwealth had, or did convey, a title, perfect at law, but whether that title has gone to the proper object of its bounty. Would it be pretended, that if a man should fraudulently procure from the commonwealth a title to lands, intended for another, either by its bounty or its contract, by misrepresenting himself to be that person, or his assignee, that he should possess the land, thus procured by his fraud or misrepresentation, free of all claims of the injured party? That because his deception had been complete, therefore it should constitute and perpetuate an unimpeachable title? A court of law would not hesitate to set aside such a conveyance. No conveyance is so sacred, that, if infected by fraud, it may not be overturned. And in a court of equity, whose very institution is to enforce good faith and honest dealing, it would not admit of a moment's doubt, that the court would betray its duty, if it did not repudiate such a transaction; if it did not look behind the form, and arrive at the substance. I do not mean to insinuate, that the present is such a case. I am very far from thinking so; and I should be sorry indeed to be obliged to decree relief against the defendant upon such an obnoxious ground. But how was the title obtained from the commonwealth for the whole lot? It was upon the express suggestion, that the defendant and his co-grantees were the assignees of Budge of the whole title. So the surveyor's return states it; so also the deed to them of the commissioners. It is a conveyance to them as assignees of Budge, and in no other character. Budge was the original object of the bounty of the commonwealth, as a settler in Bangor; and by the resolve of 1801, he and his representatives only, were entitled to the bounty of the 100 acre lot. The commissioners had no right to convey to the defendant and Lapish and French, but as the representatives of Budge in the character of assignees. If they conveyed the whole lot to them, it was because it was understood, that they were the assignees of the whole. It was of no consequence, whether McGlathry was a settler or not, any more than whether the defendant was a settler or not. The title turned solely upon Budge's being a settler, and upon the validity and sufficiency of the assignment of his right to others. How, then, has it happened, that the conveyance of the commissioners has, against the express legislative intention, as to this one acre, been made, not to Budge, or his assignee, but to persons, who now are admitted never to have been assignees, and who had full knowledge of the fact of their total want of title, at the very time of the conveyance? It must be either, because there has been some fraud or mistake, or an implied trust for the real assignee. In either case, the power of a court of equity to administer relief is, in my judgment, incontrovertible. These are the very classes of cases, in which its jurisdiction is ordinarily, and most beneficially exercised. I have already said, that, in my judgment, fraud ought not, in this transaction, to be imputed to the defendant and his co-grantees. It would, in any case, be a harsh supposition, where the circumstances did not necessarily lead to it. The whole of this transaction is perfectly explicable upon other grounds. The defendant and Lapish and French were the real owners of ninety-nine out of the one hundred acres, and legally represented it. The commissioners, either by mistake supposed them assignees of the whole, or, knowing the facts, and willing to execute the authority confided to them by the legislature, conveyed the whole to them with an implied trust, that they would convey to McGlathry his share, or extinguish his right. The grantees could have no objection to such a course; for they could not insist upon separate titles to

their portions of the land, and might be delayed, by the outstanding title of McGlathry, from receiving their deed. When they received the conveyance from the commissioners they must have known the mistake, if it was one; or they must have taken the conveyance upon the implied trust, that they would hold the one acre for McGlathry's benefit. In no other way can their conduct be reconcilable with good faith; for if they represented themselves as the sole owners; or, knowing the mistake of the commissioners, if they took the deed, intending to defraud McGlathry, the transaction, both at law and in equity, would be pronounced void for the fraud, and the deed be set aside on that account, as well against McGlathry and his assignees, as against the commonwealth. Under such circumstances the defence might have been set up in a writ of entry, or other action, touching the realty, as well as in a court of equity; for it would go to the validity of the whole conveyance. It would prove it bad in its origin. But the view, which is taken by myself, of this part of the cause, is, that it presents, not a case of fraud, but a clear case of mistake, or of implied trust; and either way it is within the acknowledged jurisdiction of a court of equity.

It is further objected, that the bill is brought more than twenty years after the deed was given by the commissioners, and that it is now, upon general principles, too late to institute such a suit. If there had been an uninterrupted possession by the defendant and his co-grantees, of the land during all this period, there would have been great force in the argument, from lapse of time, against entertaining an original suit. But, here, there is no pretence of any such possession. On the contrary, McGlathry and his assignees have had an actual or constructive possession of the land during a considerable portion of this period; and the judgment, against which relief is now sought, was the first disturbance of the plaintiffs' right of possession. While the plaintiffs were left in possession of the land, they might well repose upon their equitable title; and the injunction now prayed for, is the result of a necessity imposed upon them by the procurement of that judgment. The circumstance of there not having been an ouster during all the intermediate period, is not insignificant in expounding the defendant's own opinion of the nature of his own title to the land.

It is further objected, that, under the resolve of 1801, no person could be entitled to claim as a settler, or as the representative of a settler, unless the possession was continued down to the time of the passage of that resolve. That this resolve has a tacit reference to the resolve of 28th of June, 1789, where the legislature has defined, who shall be deemed settlers, entitled to relief on the cases therein provided for; and that by the terms of the latter resolve settlers are to be construed to be such persons only, as, before the 1st of January, 1784, went on some tract or lot of land, for the purpose of clearing and cultivating the same, and making it the place of their settled abode, and actually resided on such lot by themselves, or some person under them, before the said time, and cleared, fit for mowing and tillage, at least one acre of land, and built a dwelling house thereon, and still continue to reside on the same. Looking to the other provisions of this resolve, and the provisions of the resolve of 1801, I confess that my own opinion distinctly is, that they have no common object or connexion. The resolve of 1801, gives the bounty to all the settlers in the town of Bangor, or their legal representatives, who actually settled before the 1st of January, 1784, without annexing any qualifications or limitations, like those inserted in the resolve of 1789. The object was, a special relief to the inhabitants of a particular town, upon their petition; and there is not the slightest reference, in the resolve, to any antecedent resolve. It seems to me a very strained construction to incorporate, by implication, the provisions of the resolve of 1789, into this resolve, when there is no necessary connexion between them, and no reference, which leads the mind from the one to the other. If the case turned upon this consideration, I should feel very great difficulty in adopting such a construction. I am aware, that in Lambert v. Carr, 9 Mass. 185, there is an expression in the opinion of the court, delivered by Mr. Justice Sewall, which lends countenance to it. With all my unaffected respect for that able judge, the dictum seems to me wholly uncalled for by the case, and not to have been sufficiently considered. I agree with that decision, that the legislature did not intend, that any person should take, under the resolve of 1801, except those who were settlers, and whose settlements had not been abandoned, but had been continued down, by themselves or their legal representatives. This appears to me a just exposition of the language of the resolve of 1801, standing wholly by itself. A settlement, which had been abandoned, and under which no person claimed a continuing, derivative title, could not have been an object of the legislative bounty. The facts of that case distinctly showed, that Smart's settlement had been abandoned many years before. But, whether this point were correctly decided or not, is, in my view of the present case, not material. The question, here, is not, as there, who were original settlers, entitled to the legislative bounty. Neither McGlathry, nor the defendant and his co-grantees could pretend to be such settlers. Their whole claim is derivative from Budge, as an original settler, and any other title would be repugnant to the whole facts of the case. The acts and proceedings of the commissioners are conclusive on this point.

They decided, that Budge was an original settler, entitled to the bounty, and incidentally, of course, that his settlement was so preserved as to be deemed a continuing settlement down to the passage of the resolve. If a settlement for any part of the land, it was for the whole lot, for his title was recognised for the whole; and whether that possession was personal, or by his assignees, is wholly immaterial now, because the decision of the commissioners is conclusive, upon the state of his title. The assignees of Budge cannot now gainsay such possession or title; and they are estopped from disputing it. If McGlathry or Lapish had a possession, actual or constructive, of any part, it enured for the benefit of the whole lot. I can perceive no evidence of abandonment of their claim to the one acre, either by Budge or McGlathry, or his grantees. On the contrary, the possession has been upheld, through all the intermediate grantees, upon this title alone. But it is said, that the decision of the commissioners was conclusive upon all parties. But of what was it conclusive? I agree, that they had the sole right to ascertain who were the original settlers, entitled to the bounty lots; and to ascertain the boundaries of those lots. Their deeds were conclusive on these points. But I cannot admit, that their authority was conclusive as to who were the legal representatives of any particular settler. Least of all, can I admit, that they had a right to convey the whole to any persons, who were confessedly the grantees or representatives of a part only. They might be deceived, or they might mistake the state of the facts; but any adjudication of the whole, to persons entitled to but a part, would be an excess of their jurisdiction, and however it might be binding between the commonwealth and the grantees of the lot named in the deed, could not bind the equitable rights of third persons, as to those grantees. The cases of Lambert v. Carr, 9 Mass. 185, and Harlow v. French, Id. 192, do not impugn this doctrine. There was no question in either of these cases, whether either party was the true representative of an original settler. The rights set up were conflicting rights under adverse settlers. The like answer applies to the case of Bussey v. Luce, 2 Greenl. 367. It would be so manifestly unjust, that any person should derive a title by his own wrong, or by mistake, to the whole land, when he had purchased with an exception of a part, and could pretend no right to that part, that nothing but the clearest authority would lead me to affirm such a principle. I know of no such authority. On the contrary, I consider the doctrine in Wilson v. Mason, 1 Cranch [5 U. S.] 45, 100, strictly applicable. "He who acquires a legal title," say the court, "having notice of a prior equity of another, becomes a trustee for that other to the extent of his equity." No man can doubt the equity of McGlathry and his assignees to the one acre, under the resolve of 1801; and the defendant had the fullest notice of it. There is also another salutary principle in equity, of which Lord Redesdale has taken notice in Bateman v. Willoe, 1 Sch. & L. 201, 205, that where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, equity will either put it out of the way or restrain him from using it. Under one aspect of the present case, there might have been difficulty in escaping from the proper application of this jurisdiction.

It is further objected, that the plaintiffs are not entitled to relief, because the defendant and Lapish and French are the owners of the legal title to the one acre under the mortgages of Budge to Treat and Ginn in 1787, and Budge to Lee in 1794, which the defendant asserts to be still subsisting mortgages, of which they are the assignees, and he has a right in equity to set them up against the plaintiffs. Now, it is perfectly clear, that, as the conveyance by Budge to McGlathry of this one acre was with covenants against incumbrances and of general warranty, McGlathry or his grantees are entitled to be relieved, as against Budge, from both of these mortgages. When Budge conveyed the one hundred acre lot in March, 1799, to Peck, it was with an express exception of the acre conveyed to McGlathry and subject to Lee's mortgage. It appears from William Hammond's testimony, that it was a part of the contract of sale, that Peck should discharge those mortgages; and, indeed, as to Lee's, this is apparent from the very face of the conveyance by Budge to Peck. The defendant and Lapish and French, were perfectly conusant of Peck's title, and there is no pretence to say, that they have any better right than Peck would have. Nor does the answer of the defendant set up any superior equity or title in the defendant. It stands upon Peck's title in respect to these mortgages. What then is the state of the facts on this point? In June, 1801, Lee assigned his mortgage and judgment to Lapish; and afterwards, in October of the same year, Lapish made the release of the same mortgage to Budge, which has been already alluded to. This release purports, in consideration of five dollars, to release "all actions, causes of action, and demands, for or upon account of a certain mortgage deed, made by said Budge to John Lee, of a certain tract, &c. which said mortgage deed was afterwards, by said Lee, duly assigned to me, said Lapish." Then comes this proviso: "Provided, however, that this release shall not be considered as in anywise affecting any right or title, which is or may be claimed by me or any other person by any other deed from or under said Budge, the true purpose and intent hereof being to secure to those who claim the premises under John Peck a good title to the same." It appears

to me, that the real object of this proviso is incapable of being misunderstood. It is merely to operate as an extinguishment, in favor of Budge, of the very mortgage which Peck was bound to discharge under the conveyance to him by Budge, and which equitably devolved upon Peck's grantees. The proviso is designed to protect these grantees from any implication of an intention to release their title to the premises derived under Peck. What were these premises? Not the whole one hundred acres; but the whole, excepting McGlathry's acre. The release, therefore, was an execution of the original contract of Peck, and extinguished the mortgage in favor of Budge, as well to the acre of McGlathry as to the residue conveyed to Peck; and thus relieved Budge from his warranty to McGlathry. Lapish has the full security intended by the release in the extinguishment of the mortgage, as to the premises derived from Peck; and it would be a violation of justice to revive an extinct mortgage to the prejudice of the parties, who, in the contemplation both of Peck and Budge, were to be relieved from it.

The case is, if possible, still plainer as to the mortgage of Ginn and Treat. In June, 1801, Ginn, in consideration of five dollars, released his title to the whole lot to Budge; and in October, 1803, Treat also, for the consideration of five shillings, released his title in the mortgage to Peck. The very instruments themselves demonstrate the intention of all the parties, that these mortgages should be extinguished; and are consistent only with the supposition, that the extinguishment of them by Peck or his grantees constituted a part of the original contract between him and Budge on the original sale. The consideration of the conveyances by Lapish to Budge, and Ginn to Budge, and Treat to Peck, are all merely nominal, and indicate, in the most unequivocal manner, that the parties considered them as securities, that were to be deemed extinguished as foundations of right or title against Budge or his grantees. To revive them would, in my judgment, be a total departure, as well from the principles of law as of equity. It would be gross injustice to the plaintiffs. There is this additional circumstance, which is decisive against the defendant's right to put forth this defence, that he has shown no title to any part of the premises derived under Lapish, or under the assignment of the mortgage of Lee to him, or under the release of Ginn to Budge, or of Treat to Peck. His title to the premises is independent of all these transactions, and he is in no just sense a privy in the estate under them. It may also be observed, that until the release in 1801, Budge was, by virtue of the mortgage of Peck to him in 1799, so far as respects Peck's grantees, the conditional owner of the whole lot.

It is further objected, that McGlathry's conveyance from Budge was a fraud upon the latter, and ought not now to be upheld as a foundation of title. If this objection were well founded in point of fact, it would not avail the defendant. He has derived no title to the one acre by grant from Budge; and it is very clear, that in a case of this sort none, but a party or privy in estate, could set up a fraud upon the grantor, as the origin of an adverse title. But the evidence of the asserted fraud is too loose and unsatisfactory to be relied on for a moment. And the supposition of its existence is negatived, in the strongest manner, by the subsequent conveyances and conduct of Budge. It is to the last degree improbable, that, if the deed to McGlathry had been fraudulent, Budge would have recognized it in the subsequent deed to Peck; or that he and his heirs would have acquiesced in it, without any serious struggle, up to the present time.

These are the principal points, upon which I deem it necessary to make any observations. There are some other suggestions, which, it is only necessary to say, have not escaped the attention of the court; but they do not seem to me to require any minute answer.

My judgment accordingly is, that as to all the land included in McGlathry's deed, which extends only to the present bank of the river, the plaintiffs are entitled to relief, and the defendant ought to be perpetually enjoined from claiming any title thereto; and as to all the rest of the land recovered by the judgment, the defendant is entitled to a writ of seisin. But this decree ought to be upon the terms, that the plaintiffs shall pay to the defendant all equitable charges, which he has upon the land of the plaintiffs, for expenses, for purchase money paid to the commonwealth, or taxes or other charges, with interest, to be ascertained by a master, in case either party shall request it. The district judge concurs in this opinion, and therefore a decree is to be entered accordingly. Decree for plaintiffs.

DUNLAP (WATSON v.). See Case No. 17,282.

DUNLAP, The A. R. See Case No. 513.

Case No. 4,165.

DUNLEVY v. MOWRY.

[2 Bond, 214.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1868.

PRINCIPAL AND AGENT — FALSE ACCOUNTING BY AGENT—LIMITATION—RUNNING OF STATUTE.

1. Where the evidence shows that certain bonds were placed in the hands of defendant by plaintiff, to be disposed of by him on the same terms as his own bonds, and that he sold the same for fifty cents on the dollar and accounted to the plaintiff at the rate of thirty-seven and a

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

half cents on the dollar, such defendant is liable to the plaintiff for the difference between the two rates, subject only to a deduction for reasonable charges.

2. The statute of limitations does not commence running until the plaintiff is apprised of the fact that the bonds were sold at a higher rate than that at which the defendant accounted to the plaintiff for them.

3. The statute of Ohio fixes the bar at six years, but that period not having elapsed between such discovery and the commencement of this action, the plaintiff's claim is not barred.

[This was an action at law by Francis Dunlevy against A. L. Mowry.]

R. M. Corwine, for plaintiff.

Burnett & Follett, for defendant.

CHARGE OF THE COURT. The material facts touching the controversy between these parties are not in dispute. The facts seem to be, in substance, that in the year 1859, the plaintiff was the holder and owner of twenty-one thousand dollar bonds of the Covington and Lexington Railroad, secured by the third mortgage on the road. The defendant, at the same time, was the owner of sixty-one bonds of $1,000 each, which he desired to sell. The plaintiff transferred to the defendant the twenty-one bonds held by him, with the understanding, as he claims, that the defendant was to account to him for the amount for which the bonds should be sold. The plaintiff alleges that in September, 1859, the defendant made a sale of eighty-one bonds, including the twenty-one transferred by him, at the rate of fifty cents on the dollar; and that defendant reported the sale at only thirty-seven and a half cents on the dollar, at which rate he settled with the plaintiff.

The claim in this action is for the difference between fifty and thirty-seven and a half cents on the dollar on the twenty-one bonds transferred by the plaintiff to the defendant. The defendant has filed the plea of the general issue, which denies the cause of action, and also a plea of the statute of limitations. Both the parties have testified as witnesses in the case, and the only question for the decision of the jury is, whether from the facts in evidence there was an absolute sale of the twenty-one bonds to the defendant at the rate he might be able to effect a sale in the market, or whether they were put into his hands, as the agent or bailee of the plaintiff, with the implied understanding that the defendant was to account for the proceeds at the rate at which a fair sale should be effected. The jury have heard the evidence adduced by the parties bearing upon this issue. It is not the intention of the court to detain the jury by any detailed statement of the facts in proof. They will decide for themselves upon the weight and conclusiveness of the evidence. And it will be only necessary for the court to remind the jury, that if, as claimed by the defendant, there was a positive sale by the plaintiff of the twenty-one bonds at a price agreed on, the absolute property in the bonds was thereby vested in the defendant, and he had a perfect right to sell them at the best price he could procure, and he can not be held liable to the plaintiff beyond the rate agreed to be paid. If he purchased at thirty-seven and a half for the dollar and sold at fifty cents, the advance or profit belongs to him. On the other hand, if the jury find that without any price named or agreed on when the twenty-one bonds were delivered to the defendant, he took them as the agent or bailee of the plaintiff, it is beyond dispute that he is bound to account for the actual price for which they were sold, subject only to a deduction for reasonable charges for commission. And here it is suggested as worthy of the consideration of the jury, whether the evidence of the defendant establishes the fact of an absolute sale of the bonds. If his statement was understood by the court, it was to the effect that the bonds were placed in his hands by the plaintiff to be disposed of on the same terms as his own. And if the jury find this to be the true character of this transaction, and that the bonds were sold at fifty cents on the dollar, and that the defendant accounted to the plaintiff at the rate of thirty-seven and a half cents on the dollar, it follows clearly as a legal result, that the defendant is liable to the plaintiff for the difference between those two rates.

It is not necessary to discuss the question arising on the plea of the statute of limitations, for the statute can not be held to commence running until the plaintiff was apprised of the fact that the bonds were sold at a higher rate than that at which the defendant accounted to the plaintiff. The claim for the difference, for which this action is brought, dates only from the time when the plaintiff became acquainted with the actual price for which the bonds were sold. The statute of Ohio fixes the bar at six years, but six years had not elapsed between that discovery and the commencement of this action. In this view, it is clear the plaintiff's claim is not barred.

DUNLEVY (TURBETT v.). See Case No. 14,241.

DUNLOP, Ex parte. See Case No. 1,735.

Case No. 4,166.

DUNLOP et al. v. ALEXANDER.

[1 Cranch, C. C. 498.][1]

Circuit Court, District of Columbia. July Term, 1808.

LIMITATION OF ACTIONS—WAR—INTEREST.

1. The statute of limitations is not a bar to a British debt contracted before the treaty of peace.

2. Rule for settling interest accounts.

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

This was an action [by Dunlop and Wilson against Alexander's administrator] for a British debt contracted before 1775, for goods sold to the defendant's intestate by a British factor; the balance was agreed in 1784, and acknowledged often afterwards as a just debt.

The counsel agreed that the statute of limitations might be given in evidence on non assumpsit, if it could avail if pleaded specially.

E. J. Lee, for plaintiff. The statute of limitations is one of the legal impediments to the recovery of debts, which were removed by the treaty of peace, and the convention of 1802. Hopkirk v. Bell, 3 Cranch [7 U. S.] 454, and 4 Cranch [8 U. S.] 164.

THE COURT was of opinion, under the authority of the two cases of Hopkirk v. Bell, in February term, 1806, and 1807, 3 Cranch [7 U. S.] 454, and 4 Cranch [8 U. S.] 164, that the statute of limitations is no bar; it being a legal impediment removed by the treaty of peace and the convention of 1802.

THE COURT said that the correct way of settling interest accounts, is, in case the payment is equal to, or exceeds the interest, to add interest to principal up to the time of the payment, and deduct the payment from the sum of interest and principal; but if the payment does not equal or exceed the interest, the payment is not to be deducted till the time of settlement.

DUNLOP (BANK OF COLUMBIA v.). See Case No. 866.

DUNLOP v. HEPBURN. See Case No. 6,389.

DUNLOP (MOORE v.). See Case No. 9,759.

Case No. 4,167.

DUNLOP v. MUNROE.

[1 Cranch, C. C. 536.][1]

Circuit Court, District of Columbia. June Term, 1809.[2]

POST-OFFICE — NEGLIGENCE OF DEPUTY-POSTMASTER — CIVIL ACTION — PLEADING AND PROOF — ACTS OF CLERKS — DEPOSITIONS — COMPETENCY OF WITNESS — PAROL EVIDENCE — POLLING JURY.

1. The instructions of the postmaster-general to the deputy-postmasters, may be given in evidence in an action on the case against a deputy-postmaster for negligence.

2. An averment that the defendant neglected to send forward a letter, "as it was his duty to do," is only an allegation that the defendant was bound to send it by the mail; not that he did not send it by the next mail.

3. If the allegation be that the defendant did not send on the letter, it is a sufficient answer to say and prove that the defendant did send it on; and he is not bound to prove that he sent it on in a reasonable time. A deputy-postmaster and his clerks are only bound to use such care and diligence in the discharge of their duties, as a prudent man exercises in his own affairs.

4. Deputy-postmasters are civilly liable for the acts of their servants and clerks; but the neglect of the servant or clerk cannot be given in evidence upon a count charging the loss to have been incurred by the neglect of the deputy-postmaster himself.

5. A count charging the loss to have been by the misfeasance of the defendant or some other person employed by him, is not bad upon general demurrer.

6. An averment that a letter, containing bank-notes, was fraudulently and improperly secreted, withheld, and taken in the post-office by the defendant, is not a charge of felony, so as to deprive the plaintiffs of their civil remedy.

7. When a plea is pleaded to certain enumerated counts, the plaintiff may reply to it specially as it applies to some of the counts, and demur to it as it applies to other counts.

8. Hypothetical pleas, which neither admit nor deny the matter charged, are bad upon general demurrer.

9. A deposition taken, without notice and not upon interrogatories, under a commission issued by consent, cannot be read in evidence.

10. The plaintiff's clerk who puts the letter into the post-office is a competent witness for the plaintiffs, without a release.

11. Parol evidence is admissible to prove that A B, before whom a deposition was taken, was a justice of the peace.

12. It is to be presumed, prima facie, that a sworn officer has discharged his duty faithfully.

13. The court will not permit the jury to be polled unless some reason be assigned therefor.

This was an action on the case [by James and John Dunlop against Thomas Munroe] to recover from the postmaster at Washington, the value of bank-notes lost in the course of the mail. The cause first came before the court in December, 1807. The declaration then contained only two counts: 1st, for fraud. 2d, for negligence of the defendant himself in not sending on the letter, with its contents, to Petersburg, as it was directed, "and as it was his duty to do," whereby the plaintiffs lost the money.

THE COURT (nem. con.) permitted the plaintiffs to give in evidence to the jury the printed circular instructions given by the postmaster-general, to the deputy-postmasters according to the post-office law of 2d March, 1799 [1 Stat. 733], to show the forms of transacting the business in the office, and the duties of the defendant: And, upon the prayer of Mr. Jones and Mr. Morsell, for the defendant, instructed the jury that, upon the 2d count, it was incumbent upon the plaintiff to satisfy the jury, by evidence that the letter and its contents were received by the defendant at his office, and that he did not send them to Petersburg; and that the loss happened in Washington; being of opinion that the words "as it was his duty to do," were only an allegation that the defendant was bound to send on the letters by mail, and did not amount to an averment that the letter was not sent on in the next mail.

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

[2] [Affirmed in 7 Cranch (11 U. S.) 242.]

THE COURT refused to instruct the jury that the plaintiff could recover upon the facts stated unless the defendant could show that he sent on the letter and notes in reasonable time after he received them. The ground of the refusal was, that the declaration charged a specific act of negligence, viz. that the defendant did not at any time send on the letter and notes, and that it would be a good defence to this count if the defendant could show that he had sent on the letter and notes in the mail at any time before the action brought.

Mr. Jones, for defendant, prayed the court to instruct the jury that the defendant is not liable for the mistakes of his sworn clerks, nor for theft by a casual visitor, unless the defendant was guilty of gross negligence in admitting improper visitors, nor for such negligence of his said clerks in admitting such visitors.

C. Lee, F. S. Key, and P. B. Key, for plaintiffs, contra, contended that if the defendant can defend himself in this action by the acts of his clerks when he is charged with his own negligence, he is liable for their negligence, and that it is immaterial whether the letter and notes were lost by his own negligence, or that of his clerks.

THE COURT (DUCKETT, Circuit Judge, absent) refused to give the instruction as prayed, but instructed the jury, that if they should be satisfied by the evidence that the letter and notes were received in the defendant's office at Washington, and were not sent on to Petersburg, and that the defendant, and his clerks and servants exercised with respect to the said letter and notes that degree of care and diligence which a prudent man would have taken of his own property, the defendant is not liable in this action for any loss which happened by reason of not sending on the same to Petersburg. A bill of exceptions was taken by the plaintiffs' counsel, but a juror was withdrawn; the plaintiffs had leave to amend, and the cause was continued till the next term.

June 20th, 1808. The cause came on again for trial upon the amended declaration, which charged the defendant with the loss, whether it happened in Washington, or between Washington and Petersburg.

Mr. Jones, for defendant, prayed the court to instruct the jury that the defendant is not liable, under the first count, for the embezzlement or fraud of his clerks, provided he used due diligence and caution in appointing clerks of good repute for fidelity and honesty, and of fair reputation, who took the oaths required in the postmaster-general's instructions; unless such misconduct was known to the defendant in time to have prevented it. He relied upon the case of Whitfield v. Lord Le Despencer, Cowp. 754.

BUT THE COURT (FITZHUGH, Circuit Judge, contra) refused the instruction, being of opinion that the defendant was civilly liable for the acts of his servants or clerks, as much as if those acts had been done by himself.

Mr. Jones, for defendant, then prayed the court to instruct the jury, that upon the counts charging the loss to have arisen from the personal negligence of the defendant, the plaintiffs cannot recover without proof of such personal negligence.

C. Lee and F. S. Key, contra, contended that those counts might be supported by proof of the negligence of the defendant's clerks, and cited Esp. 657, 703, and Brucker v. Fromont, 6 Term R. 659.

Mr. Jones, in reply, cited Esp. 651.

THE COURT (nem. con. but with some hesitation) gave the instruction as prayed, notwithstanding the case of Brucker v. Fromont. The judges in that case did not, on reason and principle, approve their own decision, but considered themselves bound by the case of Turberville v. Stampe, 1 Ld. Raym. 264, which case, in the opinion of this court, does not justify the inference drawn by the judge in Brucker v. Fromont. It is certainly most convenient and just that the plaintiff should set forth his cause of action as it really is, and the court thinks that the plaintiffs ought to be holden to the strict proof of their declaration. The plaintiffs, then, had leave to amend their declaration, on payment of the costs of the term, and a continuance if the other party should desire it; whereupon a juror was withdrawn, and the cause was again continued.

February 2d, 1809. This cause came on again upon the amended pleadings, the plaintiffs having filed a new declaration, consisting of nine counts, to which the defendant pleaded eighteen pleas, to some of which the plaintiffs demurred, and upon others joined issue; for a particular statement of which, see 7 Cranch [11 U. S.] 242.

THE COURT decided all the demurrers in favor of the plaintiffs. The first was special, and was to so much of the fifth plea as virtually denied the defendant's personal liability for the acts of his clerks, provided he had used due precaution, diligence, and circumspection, to have the business of the office well conducted, by appointing and employing as clerks, none but persons of competent skill and knowledge, of fair character, of known good repute for fidelity and honesty, and who had taken the oaths required by law, and by the instructions of the postmaster-general. The plaintiffs contended that the defendant was personally liable for the acts of his clerks, and that it was immaterial whether the loss happened through their neglect or his. The defendant contended that the first and second counts, to which alone the fifth plea was applicable, were bad, because they charged that the letter and bank-notes were secreted and taken by the defendant, or some other person employed by him, which was too uncertain a charge, even if the defendant was liable for the acts of his clerks, which he

denied, unless those acts were done with the knowledge and consent of the defendant. He contended that the clerks of the deputy-postmaster bear the same relation to him, as the deputy-postmasters do to the post-master-general. They are all equally sworn officers of the United States, and each liable only for his own acts in the discharge of his several duties, as appears by various provisions of the post-office law of 2d March, 1799. He also relied upon Whitfield v. Lord Le Despencer, Cowp. 754, and Lane v. Cotton, 1 Ld. Raym. 647.

The plaintiffs relied upon the general rules of law, applicable to the relations of master and servant, and principal and agent, and cited 1 Salk. 18, 282, 440, 441, 637; Rowning v. Goodchild, 3 Wils. 443, and Dyer, 238b, pl. 38. The case of Whitfield v. Lord Le Despencer, is not an authority for this case, because the letters patent by which the defendants in that case were appointed, expressly declare that they shall not be "responsible for the officers appointed by them" —"save only for their own voluntary defaults or misfeasances," which the act of congress does not. The inferior officers were established by the act of parliament. The officers gave bond to the king for his use. They were to take the oaths of allegiance and supremacy, and to receive payment for their services from the receiver-general, and not from the postmaster-general. The revenue arising from postages, was to be applied to the public use. But in the present case, the offices of the clerks of the deputy-postmasters, are not created by the act of congress; they are his private clerks and servants; they give no security to the United States; they receive no pay from the United States, but are paid by the postmaster out of the revenues of the office.

Although all persons "employed in the care, custody, or conveyance of the mail," are required by the second section of the act of 1799, to take an oath "faithfully to perform all the duties required of them, and abstain from every thing forbidden by the laws," &c.; yet this does not constitute them independent officers, or in any manner alter the relation between them and their employers. As to the alternative charge in the first and third counts, it is certain to a common intent, and if the postmaster is liable for his clerks, it is sufficient upon general demurrer. But the plea is also bad because it is hypothetical, and does not admit or deny the fact that the letter and bank-notes were received in the defendant's office, or lost or embezzled by the defendant or his clerks, but only says if, &c., then such embezzlement was without any participation or connivance of the defendant.

THE COURT (FITZHUGH, Circuit Judge, contra,) was of opinion, that the defendant was liable for the negligence of his clerks, and that therefore the plea was bad, and that the declaration was not faulty in substance, on account of the alternative averment, which, they thought was substantially an averment of embezzlement by the defendant and his clerks. The next demurrer was to the seventh plea, pleaded also to the first and second counts, and which was grounded upon the supposition that the facts stated in those counts amounted to felony.

THE COURT, however, (DUCKETT, Circuit Judge, contra,) was of opinion that the facts stated in those counts did not amount to felony and adjudged the plea bad.

THE COURT, also, (nem. con.) was of opinion, that all the hypothetical pleas were bad, on general demurrer. The fourteenth plea was pleaded to the second, fourth, fifth, sixth, seventh, eighth, and ninth counts. As it applied to some of these counts, the plaintiffs replied specially, and as to the other counts to which it was pleaded they demurred.

To this course, Mr. Jones, for defendant, objected, and contended that as the plea was pleaded to all those counts jointly, the plaintiffs could not apply it severally to each count.

BUT THE COURT (DUCKETT, Circuit Judge, contra,) overruled the objection, and said that the plaintiff might demur to the plea as it applied to some counts, and reply to it as it applied to other counts. And as it was one of the hypothetical pleas, it was adjudged bad upon the demurrer.

April 10th, 1809. THE COURT (DUCKETT, Circuit Judge, absent,) was of opinion that the sixteenth and seventeenth pleas were bad, because they neither admit nor deny that the letter arrived at the defendant's post-office on the first of August, in time to be sent on to Petersburg by the mail of the next day; and that the eighteenth was bad because it was hyphothetical and argumentative, &c.

June 19, 1809. Upon the trial of the issues of fact, which occupied a whole week, a great number of bills of exceptions were taken. Those taken by the plaintiffs are stated in 7 Cranch [11 U. S.] 242, &c. But, as there was a general verdict for the defendant upon all the issues, the points ruled against the defendant, are not there reported.

C. Lee offered to read a deposition taken in Philadelphia, under a commission issued by consent, but without interrogatories filed, and without evidence of notice to the defendant of the time and place of taking it. The defendant's counsel objected, and THE COURT sustained the objection.

Mr. Jones, for defendant, objected to the testimony of Mr. Stevens, the plaintiff's clerk, who delivered the letter into the post-office in Philadelphia, that he was interested, as by fixing the loss on the defendant, he would exonerate himself.

C. Lee, for plaintiffs, cited Peake's Evidence, 101, and THE COURT overruled the objection. THE COURT permitted parol evidence to be given that John Townes, be-

fore whom a deposition was taken in Virginia, was a justice of the peace, upon the authority of Turner v. Fendall, 1 Cranch [5 U. S.] 117, and U. S. v. Böllman, 4 Cranch [8 U. S.] 75.

Mr. Jones, for defendant, moved the court to instruct the jury, that the neglect to re-mail the letter by the first mail, does not make the defendant liable, unless the loss happened in consequence of such neglect, and that such neglect was wilful and amounted to gross negligence;—which instruction THE COURT refused to give, but instructed the jury in effect, that the defendant and his clerks were bound to exercise that degree of care and diligence which a prudent man usually exercises with regard to his own affairs; and that a non-compliance with the instructions of the postmaster-general as to the time of making up the mails, &c., might be excused by circumstances. That the time allowed by the act of congress for making up the mails is prima facie a reasonable time, and that the burden of proof is on the defendant to justify a non-compliance with the act in that respect. And upon the prayer of the defendant's counsel, THE COURT further instructed the jury that the defendant, being a sworn officer, is to be presumed to have done his duty faithfully until the contrary is proved. And THE COURT refused to permit evidence of the negligence of the defendant's clerks to be given on the issues joined upon the sixth and tenth pleas to the fifth and ninth counts, which charged the loss to have been incurred by the defendant's own negligence. Upon the coming in of the jury with their verdict, the counsel for the plaintiff moved the court that the jurors should be polled, that is, asked individually if they had agreed to the verdict. 3 Bac. Abr. Juries, G; 2 Hale, P. C. 299; 29 Assizes, 27; 40 Assizes, 10.

CRANCH, Chief Judge, said there had never been such a practice in this court; and that it was strongly impressed on his mind that such an application had been made and refused; but he could not recollect in what case.

Mr. Key mentioned a case of assault and battery in Frederic county, in Maryland, where it was conceded that the jurors might have been polled, and the only doubt was, whether the right had not been waived by the question having been put to them generally, in the usual form, whether they had agreed on their verdict.

Mr. Lee also mentioned a case in the Winchester district court in Virginia, where it had been done.

FITZHUGH, Circuit Judge, asked whether in those cases there had not been a suspicion, or suggestion of improper conduct in the jury.

Mr. Key stated that there was no direct suggestion in the case alluded to by him; but one of the jurors having been sick, it was suspected that possibly the verdict had been agreed to be rendered without his full assent. It, however, seemed then to be a demand of common right.

THE COURT (DUCKETT, Circuit Judge, absent,) said it was not a matter of common right to poll the jury, and they would not fix a precedent by which either party might capriciously insist on polling the jury without assigning any reason therefor.

FITZHUGH, Circuit Judge, added, that the want of practice is strong evidence of the want of right. An extraordinary case should be made out to justify a departure from the ordinary course of proceeding.

Verdict for the defendant upon all the issues.

[NOTE. On a writ of error sued out by plaintiff, the judgment was affirmed by the supreme court. See Dunlop v. Munroe, 7 Cranch (11 U. S.) 242.]

Case No. 4,168.

DUNLOP et ux. v. PETER et al.

[1 Cranch, C. C. 403.][1]

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

TRIAL—ORDER OF ARGUMENTS.

The party upon whom the burden of proof is thrown by the issue is to open and close the argument.

[Cited in Carrico v. Kirby, Case No. 2,442.]

Issue upon the orphans' court to ascertain the sanity of a testator. It was made a question who was to open and close the argument.

Mr. Mason and F. S. Key, for defendants.

The plea is that the testator was of sound mind, and of this they put themselves on the country; the affirmative of the issue is with the defendants.

P. B. Key and Mr. Jones, contra.

He who has the burden of proof is to open and close. Every man is presumed to be sane, until the contrary is proved. The plaintiffs were the original libellants, and the general rule is that the plaintiff is to open and close unless special circumstances make the other rule necessary. The affirmative of the issue is with us, not the mere form of words, but the substance; we have the burden of proof.

PER CURIAM. The substance of the affirmative of the issue is with the plaintiffs, the original libellants. They are the party who wish to alter the existing state of things. The defendants can offer no evidence until the sanity of the testator is impeached. The defendants have nothing to do. The plaintiff is the mover, the actor, and on him the

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

burden of proof lies. It is his business therefore to open and close the argument.

DUCKETT, Circuit Judge, absent.

Case No. 4,169.

DUNLOP v. SILVER et al.

[1 Cranch, C. C. 27; 1 Cranch (5 U. S.) Append. 367.] [1]

Circuit Court, District of Columbia. July Term, 1801.

NEGOTIABLE NOTES—ACTION AGAINST REMOTE INDORSER—NOTICE—PAYMENT—EVIDENCE—COMPARISON OF HANDWRITING.

1. In Virginia the indorsee of a promissory note may recover at law against a remote indorser; and it is not necessary that he should have given the defendant notice of the non-payment by the maker, nor of his insolvency. If the holder receive an inland bill for the money due by the note, it is a discharge of the note unless the parties otherwise agree.

[Cited in Riddle v. Mandeville, Case No. 11,807.]

[See, contra, Mandeville v. Riddle, 1 Cranch (5 U. S.) 290.]

2. Comparison of handwriting is admissible evidence in civil cases.

Assumpsit by an indorsee against a remote indorser of a promissory note.

James Cavan made a promissory note by which he promised to pay to [William] Silver et al., or order, sixty days after date, six hundred dollars for value received, negotiable at the Bank of Alexandria. Silver et al. indorsed the note to Downing and Dowell in these words: "Pay the contents to Downing and Dowell." Downing and Dowell indorsed "Pay the contents to John Dunlop or order." Dunlop brought suit against Cavan, in due time, as the jury thought, and recovered judgment, and sued out execution, upon which Cavan was taken, and took the oath of an insolvent debtor. It was proved on the trial that Cavan had given Dunlop an order on some person in Philadelphia for the money due on the note, which order was returned protested and delivered back to Cavan. The declaration had two counts,—1. A special count stating the making and indorsing the note, the suit, judgment and execution against Cavan, and his insolvency. 2. Indebitatus assumpsit for money had and received to the plaintiff's use. The plaintiff offered to prove the handwriting of one of the indorsers, by comparing it with the signature of the bail-bond filed in this case; and contended that as it was a bond taken by a sworn officer and filed in court, it could not be denied.

This evidence was admitted by KILTY, Chief Judge, and MARSHALL, Circuit Judge. CRANCH, Circuit Judge, contra, because the bond itself was not proved to be signed by the defendant.

On the trial four points were made on the part of the defendants:—1. That notice of Cavan's refusal to pay was not given by Dunlop to Silver et al. 2. That no notice was given by Dunlop to Silver et al. that suit had been brought against Cavan and that he had taken the oath of an insolvent debtor. 3. That an action at law will not lie by an indorsee against a remote indorser. 4. That the debt due by the note was discharged by Dunlop's taking an order on Philadelphia.

As to the 1st and 2d points the court was of opinion (under the authority of the case of Lee v. Love, 1 Call, 497, and in conformity to what was understood to be the practice of Virginia,) that notice was not necessary. That the liability of the indorser did not arise until the maker had been sued and proved to be insolvent upon the execution. That notice is of no use to the indorser, for he cannot be called upon until the maker's insolvency is proved; and that the maker's simple refusal to pay was an immaterial fact.

As to the 3d point it was agreed that the verdict of the jury, if for the plaintiff, should be subject to the opinion of the court upon the question whether an indorsee can maintain an action against a remote indorser of a promissory note payable to order.

Upon the 4th point the court directed the jury that if they should be of opinion from the evidence that a draft on Philadelphia was received by Dunlop for the money due by the note, it should be considered as a discharge of the note, at least as to the indorsers, unless it should appear to the jury from the whole evidence in the case that there was an agreement of the parties at the time that it should not be a discharge, or only a discharge if paid.

A verdict was found for the plaintiff, and upon argument on the point reserved, it was contended by

Mr. Jones, on behalf of the defendants,

That there was no privity of contract between an indorsee and the remote indorser, that the custom of merchants does not apply to bonds and promissory notes, and perhaps not to inland bills. Kyd, c. 8, p. 175; Lambert v. Oaks, 1 Ld. Raym. 443; Mackie's Ex'rs v. Davis, 2 Wash. (Va.) 219.

Swann, contra.

No privity of contract is necessary on either count.

If the paper is negotiable the obligation goes along with it. Even the money due upon a respondentia bond has been held to be assignable with the consent of the obligor, and the assignee has recovered in his own name. Fenner v. Meares, 2 W. Bl. 1269. The action for money had and received does not depend upon privity. If a man gets money into his hands to which I am in equity entitled, I may have the action. Moses v. Macferlan, 2 Burrows, 1012; Tatlock v. Harris, 3 Term R. 174; Grant v. Vaughan, 3 Burrows, 1516; Ward v. Evans, 2 Ld. Raym. 930.

KILTY, Chief Judge, and CRANCH, Circuit Judge, were of opinion that the action

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

for money had and received was supported. MARSHALL, Circuit Judge, contra.

Judgment for the plaintiffs. Overruled by the supreme court of the United States, in Mandeville v. Riddle, 1 Cranch [5 U. S.] 290.

See the grounds of this opinion at length in 1 Cranch [5 U. S.] Append. 367.

Case No. 4,170.

DUNLOP et al. v. WEST.

[Brunner, Col. Cas. 27;[1] 2 Hayw. N. C. 346.]

Circuit Court, D. North Carolina. 1805.

SHERIFF—LIABILITY FOR NEGLECT TO SELL AFTER EXECUTION.

Where a sheriff after seizing property on execution neglects to sell it, he is liable in damages.

PER CURIAM. If the sheriff or marshal seizes property in execution, and neglects to sell it, and is sued for his neglect, the plaintiff shall recover damages to the amount of what the property would have produced had he sold it.

DUNLOP (WHETCROFT v.). See Case No. 17,506.

Case No. 4,171.

In re DUNN.

[25 How. Pr. 467.][2]

District Court, S. D. New York. Sept., 1863.

HABEAS CORPUS—SUSPENSION — RETROACTIVE EFFECT.

The proclamation of the president of the United States, dated 15th September, 1863, suspending the writ of habeas corpus, appears to be retroactive in its operation. That is, it suspends all proceedings pending upon habeas corpus, which was issued and served prior to the date of the proclamation.

A writ of habeas corpus was issued in the above matter, by Judge Betts, on the 10th day of September, returnable on the 12th, and on the 12th adjourned to the 15th, for the purpose of allowing General Canby, the party on whom the writ was served, to make a return, and by order of the court the proceedings were further adjourned to the 19th instant, and prisoner was ordered to be confined in the Park barracks, city of New York.

Thomas E. Pearsall, for petitioner.

Samuel J. Glassey, opposed.

BETTS, District Judge. The papers in the above matter having been this day laid before the court, and the counsel for the petitioner thereupon moving the court to command the release and discharge of the said John Dunn, by virtue of the said writ of habeas corpus and the proceedings thereupon, from his previous imprisonment and detention in the military service of the United States, and the proclamation of the president of the United States, bearing date September 15, 1863, being argued in objection and bar to said motion by counsel for the military authorities having custody of the prisoner sought to be released by the aforesaid writ of habeas corpus, and counsel for the respective parties being heard and the premises understood by the court:

It is considered and adjudged by the court, that the proclamation aforesaid of the president of the United States is valid and efficient in law, and that by force thereof all authority and right, in this court to act further in the within matter of the said writ of habeas corpus is suspended and stayed.

Whereupon, it is ordered by the court that the motion of the counsel for the petitioner be denied, and that the party to whom the aforesaid writ was directed from this court be acquitted and discharged from further obedience thereto.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[2] [Reported by Nathan Howard, Jr., Esq.]

Case No. 4,172.

In re DUNN.

[2 Hughes, 169;[1] 11 N. B. R. 270.]

District Court, E. D. Virginia. 1877.

BANKRUPTCY — JURISDICTION — JUDGMENTS IN STATE COURTS — INJUNCTION—LACHES OF CREDITOR.

1. Judgments which have been rendered in a state court cannot be corrected or annulled upon appeal or petition in this court, nor can it inquire into the allegations of such a petition filed here to restrain the sale of real estate.

2. Petition dismissed with costs, and leave granted the bankrupt to apply here for the proper injunction to stay proceedings, when he shall have taken steps to set aside or reverse the judgments in the state court.

3. A judgment creditor for thirteen years who has all the while failed to secure a lien by recording his judgment in the county where the debtor's lands lay, who afterwards fails to prove his judgment before a commissioner of court appointed to inquire of and report liens and their priorities, who fails to file exceptions to such commissioner's reports, and who allows a distribution of funds arising from the sale of the lands to satisfy reported liens upon it to be made, will not after such laches [be allowed] to assert his claim against more diligent creditors.

[In bankruptcy. In the matter of James H. Dunn.]

HUGHES, District Judge. The petition of this bankrupt, filed on the 9th day of November, 1874, prays that the order for the sale of his real estate, free of liens, heretofore made, should be set aside on the ground that the said real estate had been exempted by this court, August 1st, 1873, as a homestead; and that the judgment liens, for the satisfaction of which the sale is ordered, were upon judgments obtained in the county court of Washington county, which were illegal, in-

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

valid, false, and fraudulent. The court holds that, inasmuch as some of the alleged judgments for large amounts have not been impeached in the court which rendered them, or in the appellate courts of the state having jurisdiction to correct errors in said judgments, and inasmuch as this court is not competent to correct or annul proceedings in the state courts upon appeal or petition, and could not hear the allegations of this petition in any event except upon bill and answer in chancery, it cannot inquire into the allegations of the petition or restrain the said sale of real estate for any cause set forth in the same. Ordered, therefore, that the petition be dismissed with costs, with leave to the bankrupt, if and when he shall have taken steps in the proper forum of the state to set aside or reverse said judgments, to apply here for the proper injunction to stay proceedings.

Upon petition for the revision of a subsequent order in this case, that order of the district court was affirmed by the chief justice (April term, 1877) in the following decision:

WAITE, Circuit Justice. The facts as presented upon this petition are as follows: Wadsworth, Turner & Co., the petitioners, recovered judgment at the March term, 1860, of the county court of Washington county, Virginia, against Dunn, the bankrupt, for $393.58, with interest from October 5th, 1858, and costs $6.81, subject to a credit, November 12th, 1858, of $275. This judgment was a lien upon certain lots in Abingdon, but as the judgment was not docketed in accordance with the requirements of the laws of Virginia, subsequent purchasers were not chargeable with notice of the lien. At the time of the rendition of this judgment, Dunn resided in Abingdon, but he afterwards removed to Prince Edward county, and, while residing there, was, in 1873, adjudicated a bankrupt upon his own petition by the district court for the eastern district of Virginia. Wadsworth, Turner & Co. are not named as creditors in his schedules, and, although residing in Richmond, did not, as they allege, have any actual knowledge of the proceedings in bankruptcy until late in August, 1875. If the requisite notices under the bankrupt law [of 1867 (14 Stat. 517)] were published, they did not attract their attention. In due course of proceeding an assignee was appointed, who applied to the bankrupt court for leave to sell the lots in Abingdon, free from incumbrances. A special commissioner was appointed to take an account of the liens, who, after full notice of the time and place of hearing, given according to law, reported two outstanding liens by judgment rendered in 1868, one in favor of Greenway's administrator, and the other in favor of Heiskell's trustee. No actual notice of this hearing was given to Wadsworth, Turner & Co., and they did not appear before the commissioner to present their claims; neither did they except to the report. At a proper time after the filing of the report, the bankrupt court ordered a sale of the property in accordance with the request of the assignee, and it was subsequently sold to one Johnston, who paid one-third the purchase-money in hand, and gave two bonds for the residue. This sale was afterwards confirmed by the court, and an order entered that the proceeds be paid to the lien creditors as they had been reported by the commissioner. Johnston was a creditor both of Greenway's administrator and Heiskell's trustee, for professional services rendered them respectively. Desiring to make his bonds, given for the purchase-money of the property, available in settlement of his claims, he petitioned the court to direct the assignee to assign the bonds to the lien creditors, which was done, with the consent of the creditors, August 16th, 1875. Pursuant to this order the requisite assignment was made to the creditors, and a conveyance of the lots executed to Johnston. August 30th, 1875, Wadsworth, Turner & Co. made proof of their claim against the estate of the bankrupt, claiming a lien upon the property under their judgment, and on the 7th of September filed their petition in the bankrupt court, asking that they might be allowed to assert their lien, and that the assignee might be directed to pay the amount due them out of any money still in his hands, or if there should not be sufficient then remaining for that purpose, that the creditors to whom the bonds had been transferred might be required to return such sum as should be required to meet the deficiency. At this time the notes were still in the hands of the lien creditors, no adjustment of the accounts between them and Johnston having actually been made, though there was an agreement for the desired application.

Upon the filing of this petition the court directed the assignee to refrain from disbursing the money in his hands, and Johnston from paying his bonds until further orders. The several lien creditors answered the petition, and, October 30th, the court ordered as follows:

"This cause came on this day again to be heard upon the papers formerly read, and was argued by counsel. Whereupon the court being of the opinion that the laches of Wadsworth, Turner & Co. in not proving their claim in this proceeding, nor asserting their claim before Leonidas Baugh, who was appointed special commissioner to take an account of all liens binding upon the real estate of the bankrupt, of the taking of which account the said commissioner gave full notice according to law, and the said Wadsworth, Turner & Co. having also failed to docket their judgment as provided by the laws of Virginia, and thereby failed to make it binding upon subsequent purchasers without notice, and the said Wadsworth, Turner

& Co. having failed to except to the report of the said special commissioner for thirty days after its filing in this court; and the said report having been confirmed, and a sale of certain of the real estate having been made under it and that sale confirmed, and the purchaser of the same having bid for it on the faith that the two debts, one due to the estate of John C. Greenway, deceased, and the other to William K. Heiskell, deceased, were of the highest dignity, all several months before the said Wadsworth, Turner & Co. filed their petition herein asserting their claim, therefore this court doth order that the assignee shall out of the proceeds of certain real estate sold by him in this cause first pay off the debts due the estates of John C. Greenway and William K. Heiskell, deceased, and after that apply such of the same as shall remain to the claims of Wadsworth, Turner & Co."

The object of the present proceeding is to obtain a reversal of this order. For this purpose a petition for review has been filed under the supervisory jurisdiction of this court, in which, besides stating the case as presented below, new facts and new grounds of relief are urged upon our consideration. No proof, however, has been submitted in support of these new allegations.

The evidence submitted below has not been sent here. The parties are content to present the case upon the petition and answer filed there, and the findings of the district judge as embodied in his order. Nothing else can therefore be considered by us.

The petitioners had a lien upon the property sold, but it was a lien of which neither the assignee nor any other person was bound to take notice. A sale by the assignee to a purchaser without notice would pass the title free from the incumbrance. Their right in the land was by the sale transferred to the purchase-money, and it could be enforced against the money so long as that remained undisposed of. The petitioners were not entitled to consideration by the bankrupt court until they proved their judgment, and made known their interest in the property. This they could have done, but failed to do until the fund had been paid to others who had proved their debts and asserted their liens. Those creditors having been more diligent have protected themselves, unless the court is required, upon the showing made, to set aside its orders of distribution, and recall the fund which has been paid over in pursuance thereof. The case is not different in principle from what it would have been if the purchase-money had been collected in cash and then paid over. The creditors had the right to receive the bonds as cash, and the court was not required by law to retain them until maturity, and then collect the money for the use of the creditors. The single question, therefore, presented for our consideration is, whether those creditors who have received their money in due course of proceeding are bound to restore it to the assignee for the benefit of the petitioners who had failed to present their claim in time to reach the fund while in court. We think they are not. If instead of being lien creditors, they had received the proceeds of the sale as general creditors on account of dividends duly declared and paid, it would hardly be contended that the payment should be recalled for the benefit of a secret lienholder who had failed to present his claim in time to protect himself before the distribution. But in principle the claim of a lien creditor who secures the benefit of his lien, is not different from that of a general creditor who takes his share of the estate upon a proper order of distribution. So, too, if these junior lienholders had levied their executions upon the property before bankruptcy, and received the proceeds of a sale duly made, the court from which the execution issued would not recall the purchase-money for the purpose of applying it to the payment of the prior undocketed judgment of the petitioners, in the absence of proof of actual notice to the junior judgment creditors of the existence of the older lien. By their appearance in the bankrupt court to assert their lien, these junior creditors have enforced their judgments against the property in the only way it could be done after the adjudication of bankruptcy, and it is difficult to see why they should not have the same protection in the bankruptcy suit that they would otherwise have had under their execution.

There is certainly nothing in the case of the present petitioners to entitle them to special consideration. Their judgment was obtained thirteen years before the bankruptcy of their debtor. It does not appear that during all that time any attempt whatever was made to collect it, and the petitioners did not think their lien of sufficient importance to give notice of its existence in the manner required by law. Eight years later other judgments were entered, which also became liens such as might, if enforced, appropriate the property to the exclusion of their claim. Their debtor went into bankruptcy and his property passed to an assignee without notice of their lien, who in due time instituted proceedings for its sale. All the usual publicity was given to what was done, and although the court in which the suit in bankruptcy was pending was held in Richmond, where the petitioners resided and transacted business, no notice was taken of it, and they utterly failed to appear and assert their claim until other and more diligent creditors had by due course of proceeding appropriated the fund to their own use. It is true that the bankrupt omitted their names in his schedule of creditors, and for that reason they were not personally served with the notices which the law prescribes in such cases, but they knew or ought to have known that they were creditors, and that to protect their lien, which they voluntarily permitted to re-

main secret, they must be watchful of all their debtor's movements in respect to the property covered by it. If he had sold and conveyed the property to a bona fide purchaser their lien would have been lost. The same would have been the case if the junior judgment creditors had sold the property under their judgments to a purchaser without notice, and had applied the purchase-money to their own use. Such is the effect of what has been done. Neither Johnston nor the creditors are shown to have had actual notice of the prior judgment and, therefore, Johnston's title to the land, as well as the creditor's title to the money, is complete and cannot be divested in favor of these less diligent petitioners. The order of the district court is affirmed, and an order to that effect may be prepared and entered.

Case No. 4,173.

In re DUNN et al.

[9 N. B. R. 487;[1] 12 Blatchf. 42.]

Circuit Court, S. D. New York. May, 1874.

BANKRUPTCY—TESTIMONY—HOW TAKEN.

1. Section 30, act of 1789 (1 Stat. 88), authorizing testimony in the United States court to be taken de bene esse, and the act of 1817 conferring power to take testimony (3 Stat. 350), and of 1872 (17 Stat. 89), before commissioners of the circuit court, do not apply to proceedings in bankruptcy.

2. Testimony in bankruptcy proceedings can only be taken on commission, and cannot be taken on notice.

WOODRUFF, Circuit Judge. A petition has been filed in the district court for the northern district of Ohio, by creditors of R. A. De Forrest et al., charging acts of bankruptcy. The debtors deny the commission of such acts; a trial has been had and a verdict of the jury rendered in favor of the debtors. Such verdict has been set aside and the proceedings continued with a view to another trial. The petitioning creditor, Wild, now seeks to procure testimony. He has applied to a commissioner and given notice of the intention to take the testimony of Dunn and others, (respondents in this application,) de bene esse under the act of 1789, § 30 (1 Stat. 88), and the subsequent act of 1817, conferring power to take testimony on commissioners of the circuit court (3 Stat. 350), and of 1872 (17 Stat. 89), and to that end subpoenas were issued and served on the proposed witnesses. They did not attend in obedience to the subpoena, and this court is now moved to grant an attachment against them for their disobedience. Ex parte Humphrey [Case No. 6,867]; Ex parte Judson [Id. 7,561].

While on the one hand I am of opinion that, had the act to establish a uniform system of bankruptcy been silent upon the subject, proceedings under that statute must have been deemed a civil cause pending in a court of the United States within the meaning of section 30 of the act of 1789, yet, on the other hand, I am decidedly of opinion that such proceedings have, by the bankrupt act, been regulated with such minute detail as a statutory proceeding, that, as to matters which are the subject of specific regulation, its provisions must be held exclusive. Section 38 of the bankrupt act, in terms, declares how evidence may be taken to be used in "any of the proceedings" under the act. And to meet the precise case of the creditor now applying to this court, it authorizes the taking of testimony on commission. By that means these witnesses may be examined. I think that provision excludes the taking of testimony on mere notice as provided in the act of 1789, and that it was so intended. The applicant should resort to a commission. Motion denied.

[1] [Reprinted by permission.]

DUNN (BUCKNAM v.). See Case No. 2,096.

Case No. 4,174.

DUNN v. COMMONWEALTH INS. CO.

[1 Flip. 379;[1] 3 Ins. Law J. 631.]

Circuit Court, N. D. Ohio. April Term, 1874.

LIFE INSURANCE—COMPROMISE—FRAUD AND MISREPRESENTATION—IMMATERIALITY—IRREGULARITIES.

1. Where facts are within knowledge of both parties, or can be known by the exercise of reasonable diligence by the party complaining, they cannot be used as the foundation of a suit by the latter, though falsely represented by the other party. Mere irregularities do not invalidate the policy.

2. The allegation that the compromise and settlement were obtained by representing that the policy was lapsed for non-payment of premiums is a conclusion of law, and not material.

3. The allegation that the defendant had reinsured one-half of the policy in another company, and that the plaintiff would have to incur the expense of another suit, is the assertion of something in futuro of the nature of a threat, and fraud in law is not applicable in such cases.

Suit was brought to compel payment of a life policy of $10,000 on life of husband of plaintiff [Fanny Dunn].

Among other things, the defense was that the defendant had settled said policy with the plaintiff by the payment of $4,500 on compromise.

Reply was made that the settlement had been procured by false representations of the person acting at the time as agent of the defendant, which were: 1st—That said policy was not regularly issued, because not signed by the proper officers. 2d—That it was lapsed by the fact of unpaid premiums. 3d—That the agent of defendant and intestate had colluded together and procured the policy by false representations as to the health of

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

the applicant. 4th—That defendant had reinsured one-half the risk in the Continental Life Insurance Company—that said company would not pay on this suit, and that plaintiff would have to bear the expense of suing said companies.

Defendant moved to strike out the alleged misrepresentations as set out in the reply Nos. 1, 2, 3 and 4.

W. J. Boardman and Geo. Willey, for the motion.

W. E. Lowe, against motion.

WELKER, District Judge. The court holds that the motion should be granted. That the first representation, if made, was in a legal sense liable to the objection that it undertook to state a matter of law instead of fact, and moreover that the plaintiff by the terms of the policy in her own hands, could know, with reasonable diligence, that the policy could not be invalid for any mere irregularities; that the second, as well as third, alleged representation was liable to a like objection, to wit: that the plaintiff would be bound to know as to the truth of the representation, so far as it asserted matter of fact, and that so far as it asserted a conclusion of law it was immaterial, as all were presumed to know the law; that the fourth alleged misrepresentation was no representation of which the law could take cognizance, it being no representation of a past or existing fact, but an assertion of something in futuro in the nature of a threat or discouragement, which was not a fraud in the law applicable to such cases.

Motion granted, with leave to amend reply.

Case No. 4,175.

DUNN et al. v. DUNCAN et al.

[1 Law & Eq. Rep. 402; 2 Wkly. Notes Cas. 480.][1]

Circuit Court, E. D. Pennsylvania. April 6, 1876.

CONFLICT OF LAWS—FOREIGN ATTACHMENT — INTERLOCUTORY JUDGMENT — COMPUTATION OF TERMS.

A writ of foreign attachment, issued from the state court, against A. & B., trading as A., B. & Co. The court subsequently allowed an amendment, adding the name of C. (who was at the time of issuing the writ a partner in the firm of A., B. & Co.,) as defendant, as of that time. The case was subsequently removed to the United States circuit court, and on the third term of the state court after the amendment had been allowed, being the second term of the United States court, thereafter a motion was made for judgment, for default of an appearance, against C. in accordance with the state law. *Held*, that as in such cases the state law permits judgment to be entered on the third term after the attachment had issued, and as the case came originally from the state court, the motion for judgment was not prematurely made, and that the court would compute the terms as if the action had continued in the state court.

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

Motion for judgment in foreign attachment.

This action had been begun in the court of common pleas, of Philadelphia county. 2 Wkly. Notes Cas. 81. The writ of foreign attachment was issued in September term, against W. B. Duncan, and W. Watts Sherman, trading as Duncan, Sherman & Co. It having afterwards ascertained, that one Francis H. Grain was, at the time of issuing the attachment, a partner in the defendant firm, the court, on the 11th of October, permitted an amendment adding his name to the writ, as of that date, without prejudice to the right of the garnishee and all others introducing interests. The case was subsequently removed to the district court for the eastern district of Pennsylvania. The defendants Duncan and Sherman appeared and pleaded. No appearance was entered by the defendant Grain. A motion was now made for an interlocutory judgment against the latter for default of an appearance, in accordance with the practice, explained in Willard v. Graham, 1 Wkly. Notes Cas. 241, and the act of assembly of Pennsylvania of June 13, 1836, § 53 (Purd. Dig. 719. pl. 13).

The questions were: 1. Whether Grain had had constructive notice of the suit by the amendment adding his name to the writ. 2. Whether the motion for judgment was premature, it being the third term of the state court in which the action had been originally begun after the allowance of the amendment, but only the second term of the United States court after the allowance of that amendment.

Held, that as the right to judgment was under a state law, governing the United States court, and as the action had been begun in the state court, 1. That the effect of the amendment was to include Grain in the writ of attachment, with the same effect from the time that the amendment was made as if his name had originally been upon the writ. 2. That the terms should be computed according to those of the state court in which the proceedings had been originally brought, and as this was the third term of that court after the amendment was made, the motion for judgment was not premature.

[1] [Reprinted from 1 Law and Equity Reporter by permission. 2 Wkly. Notes Cas. 480, contains only a condensed report.]

Case No. 4,176.

DUNN v. GAMES et al.

[1 McLean, 321.] [1]

Circuit Court, D. Ohio. July Term, 1838.[2]

DEEDS—CHRISTIAN NAMES — CONVEYANCE PURSUANT TO DECREE—RECORD — IDENTITY OF GRANTEE — QUESTION FOR JURY — DELIVERY — TAX DEED AS EVIDENCE—LIS PENDENS.

1. The law knows of but one Christian name, and the omission or insertion of the middle name, in a conveyance, is immaterial.

2. Where a decree required the patentee to convey and the conveyance is executed, as stated in pursuance of the decree, it is unnecessary to produce the record of the decree. The decree is not necessary to the validity of the deed—the fee being in the patentee.

3. Where there is any doubt as to the identity of the grantee, it may be a matter of evidence for the jury, under the instruction of the court. The court may state their opinion to the jury on a matter of fact, to which the jury may give the weight they may think it is entitled to. The delivery of a deed need not be proved in the acknowledgment, but the fact of delivery may be proved expressly or by circumstances. Possession of the deed is prima facie evidence of delivery.

4. Before the act of 1824, a deed given on a tax sale could not be received as prima facie evidence of title. The person claiming under such deed must show, that all the legal requisites of the law have been compiled with.

5. A record from the books of the county auditor, must show the transactions as they occurred, to be evidence. A historical account of the events, is not a record within the statute.

6. The statement of the auditor that the land was regularly entered for taxation, was charged with certain penalties and interest, and legally advertised and sold, cannot be received as evidence. The facts must be stated, to enable the court to judge.

7. The pendency of a suit cannot operate as a notice, until after the service of process or publication.

8. The proof of boundaries, where the consent rule has been entered into, by a special rule of court, is dispensed with.

Mr. Fox, for plaintiff.

Mr. Brush, for defendants.

OPINION OF THE COURT. This action of ejectment is brought to recover possession of a certain tract of land in the Virginia military district, claimed by the lessor of the plaintiff, and of which the defendants are in possession. To show his title the plaintiff gave in evidence a patent for the land from the United States, to David Buchanan. And then offered in evidence a deed from David Carrick Buchanan to Walter Sterling, dated 22d May, 1825. In this deed the grantor stated that he had been formerly called David Buchanan, and that it was executed in conformity with a decree of the circuit court of the United States for the fifth circuit, in the Virginia district. The deed was executed at Glasgow, in Scotland, and its execution was proved by the two subscribing witnesses, who swore "that they saw the grantor seal as his own proper act and deed, and in due form of law, acknowledge and deliver this present conveyance." This oath was administered by the lord provost, and chief magistrate of Glasgow, and which he duly certified under his seal of office.

The defendants objected to the admission of this deed: 1. That it does not appear to have been executed by the patentee. 2. That it purports to have been made in pursuance of a decree of court, and the record of that decree is not in evidence. 3. That the acknowledgment of the deed contains no sufficient evidence of its delivery.

The patent issued to David Buchanan, and the deed to Sterling is executed by David Carrick Buchanan. Now it is for the jury to determine whether the grantor and the patentee are the same person. And this they will have a right to determine from the statement on the face of the deed, and other circumstances of the case. In 5 John. 84, and [Strother v. Lucas] 12 Pet. [37 U. S.] 456, it is said, the law knows of but one Christian name; and that the omission of the middle name or the initial letter of it, cannot be material. The party may show that he is known as well by the one name as the other. The deed will, therefore, be admitted as evidence.

The second objection, that the record of the decree is not offered in evidence, cannot be sustained. The recital in the deed that it was executed in pursuance of a decree, &c. was unnecessary to the validity of the instrument. It may be considered surplusage, or as a reason why the deed was executed to Sterling. The fee was vested in Buchanan, and, of course, he had a right to make the conveyance.

The other objection, is not to the execution of the deed, but that the acknowledgment contains no evidence of its delivery. It is not necessary that the delivery should be proved in the acknowledgment. The fact of delivery may be shown expressly, or it may be proved by circumstances. Generally the possession of the deed by the grantee, is sufficient evidence of its having been delivered. At least, this is prima facie evidence. On this ground, therefore, the deed to Sterling cannot be excluded from the jury. Sugd. Vend. 418; Verplanck v. Starry, 12 Johns. 536; Goodrich v. Walker, 1 Johns. Cas. 250; Hatch v. Hatch, 9 Mass. 307; Ruggles v. Lawson, 13 Johns. 285; 1 Johns. Ch. 240. A deed was then offered in evidence from Sterling to the lessor of the plaintiff, to which the same objection, as to the want of proof of delivery in the acknowledgment was made, and it also, was overruled.

This closed the evidence of the plaintiff; and the defendants then offered in evidence a certified copy of a paper purporting to be a deed from the auditor of Brown county, to John S. Wills, dated the 22d April, 1824,

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

[2] [Affirmed in 14 Pet. (39 U. S.) 322.]

for two hundred acres of land in the tract claimed by the plaintiff, which the court overruled on the ground that the deed purported to have been given on a tax sale, and there was no proof that the requisites of the law, in such cases, had been complied with. The defendants then offered the same deed, accompanied by the following duly certified copy of the record of the proceedings at and before the sale of the land for taxes, dated 9th May, 1828, certified by Hezekiah Lindsey, county auditor of Brown, within which the land was situated. "Be it remembered that the following lands, as herein set forth, advertised for sale in the names of the persons to each tract annexed, were regularly entered on the duplicates for taxation, by the auditor of Brown county, for the year 1821; the tax whereon not being paid for said year, the collector of said county returned the same as delinquent therefor; whereupon the said county auditor made out and transmitted to the auditor of state, a list of said lands, with the amount of taxes, penalty, and interest charged thereon, which was transmitted by the auditor of state to the county auditor of said county; whereupon a copy thereof was published three weeks in succession in a newspaper printed in Georgetown, Brown county, Ohio, in general circulation in said county; and afterwards the county auditor, in making out the duplicate for said county the succeeding year, to wit, for the year 1822, charged each tract, in addition to the tax for said year 1822, with the tax, interest, and penalty of the preceding, and sent the same out a second time for collection; the tax on said land not being paid for the year 1822, they were a second time returned delinquent for the non-payment of the tax, penalty, and interest charged thereon; a list of which was again transmitted to the auditor of the state; that afterwards the said auditor of state did transmit," &c. This, together with the advertisement published six weeks before the sale of the land, is the only evidence produced to show the proceedings in regard to the sale. Although the above, in the caption, is stated to be a certified copy of the record of the proceedings at and before the sale of the land, yet it is manifestly a history of the proceedings after the events had transpired, and not a copy from a record where they were entered as they occurred.

By the act of the 8th of February, 1820, and an amendment thereto, of the 2d of February, 1821, the county auditor is required to make out from the books or lists in his office, every year, a complete duplicate of all the lands listed in his office subject to taxation with the taxes charged thereon. In this duplicate he is required to state the number of entry, for whom originally entered, the quantity of land contained in the original entry, the county, water-course, number of acres, whether first, second or third rate land, and the amount of taxes charged thereon. The matters of description are to be entered in separate columns opposite the names of the proprietors. And the auditor is required to keep a book for that purpose, and to record, in the form above specified, the lands entered in his county for taxation. If the tax be not paid in the county by the 20th November, or to the state treasurer by the 31st December, in each year, the lands are to remain charged with all arrearages of taxes and lawful interest thereon, until the same shall be paid; to which there shall be added a penalty of twenty-five per cent. on the amount of tax charged for each year the same may have been delinquent. The auditor of state is required to compare the list of defalcations transmitted from each county auditor, with the duplicates sent to his office from said county, for the same year; and to record in a book kept for that purpose, the delinquent lands, and charge the same with penalties and interest. When lands are returned delinquent for two years, the penalty and interest are to be charged for each year by the state auditor, who is required to transmit the same to the county auditor; and he is forbidden to enter lands, a second time delinquent on the duplicate for the current year. On receiving this list of lands a second time, the county auditor is required to advertise the same six weeks successively, in a newspaper printed in the county; which advertisement shall state the amount of the tax, interest and penalties due on each tract, and the time of sale, &c. All sales are to be made by the county auditor; and on such sale being made, he is required "to make a fair entry descriptive thereof, in a book to be provided by him for that purpose," and shall "record in said book all the proceedings relative to the advertising, selling and conveying said delinquent lands; which record shall be good evidence in all courts holden within this state."

Now the question is whether the paper certified to be a true record from the books of the county auditor, shows a substantial compliance with the requisites of the law. It states the fact that the land was "regularly entered on the duplicates for taxation, by the auditor of Brown county, for the year 1821," but how was it entered? This is the first step, and if the land be not entered in conformity to law, the subsequent proceedings in regard to the sale are invalid. The law requires the "name of the proprietor to be stated, the number of survey, for whom originally entered, the quantity of land contained in the original entry, the county, water course, number of acres, whether first, second, or third rate, and the amount of taxes charged thereon." And subsequently, if the land be returned delinquent, interest and a certain penalty are to be charged. Now is it enough for the auditor to say that these things were legally done? Must he not show how they were

done, that the court may judge of their legality? The record, if it may be called a record, substitutes the judgment of the auditor for the judgment of the court. On receiving the delinquent list from the auditor of state, charged with the penalty and interest, the county auditor is required by the law to publish the same three weeks in some newspaper of general circulation in his county. This the county auditor states was done. But how was it done? Should not the record show that an exact copy of the duplicate received from the auditor of state, as the law requires, was published? Is the mere statement by the auditor, that the thing was done, sufficient? Why is it not then sufficient for the clerk of this court to state in the record the fact, that a judgment was entered, omitting the form in which it should be entered? It is not the opinion of the county auditor that the thing was legally done, which is made evidence by the statute, but the transaction itself. It would scarcely be contended, if the auditor, instead of stating at length the advertisement on which the land was sold, showing the time and manner of it were conformable to law, had simply declared the fact that legal notice had been given, that it would have been sufficient. And yet, if the mere statement of the fact, that the land was regularly listed for taxation, the three weeks notice given on receiving the delinquent list from the auditor, and that the penalties and interest were regularly charged, be received as evidence, on the same principle, the same kind of evidence should be received as to the notice and sale. The record of the auditor, if kept as the law requires, must show the entry of the land and all the other material facts in the case, and a certified copy from this record is made evidence by the statute. It must be a copy from the book, and not a historical account of what was done. We think the paper offered as a record cannot be so considered. That instead of being copied from the record, it has evidently been drawn from an inspection of it, giving, perhaps, a short account of what appears upon its face.

By the act of 1824, the deed in pursuance of a tax sale is made prima facie evidence of title. This throws, in some degree at least, the burden of proof to invalidate the sale, on the person who contests the tax title. But the present deed does not come under this law, and of course cannot be governed by it. In [Hughey v. Horrel] 2 Ohio, 233, the court say "the requisitions of the law are substantial and useful, and cannot be dispensed with. Tax sales are attended with greater sacrifices to the owners of land than any others. Purchasers at those sales seem to have but little conscience. They calculate on obtaining acres for cents, and it stands them in hand to see that the proceedings have been strictly regular." And in the case of Holt's Heirs v. Hemphill's Heirs, 3 Ohio, 232, the court decided that a deed from a collector of taxes is not available to transfer the title, without proof that the land was listed, taxed and advertised, &c. In the supreme court of the United States, it has been held in several cases that a person who claims under a tax title must show, to make his title good, that all the requisites of the law had been complied with. McClung v. Ross, 6 Wheat. [19 U. S.] 116; Thatcher v. Powell, Id. 119; Runkendorf v. Taylor's Lessee, 4 Pet. [29 U. S.] 549. And this is the settled rule in this state.

The defendants also gave in evidence a duly authenticated transcript of the record, of the proceedings and decree, of the supreme court of Ohio in the case of White's Heirs v. Buchanan, deceased, in his life time, defendant; and his unknown heirs, after his death, made defendants by bill of revivor, wherein the title of the premises in question, and other lands, were decreed to complainant. On this last evidence the court are asked to instruct the jury, by the defendants, that the pendency of this suit against Buchanan and his heirs was constructive notice to Sterling. This the court refused to do and instructed the jury, that unless the process in the chancery suit had been served, or publication made, before the deed was executed from Buchanan to Sterling, the latter could in no respect be chargeable with notice.

The court were also requested to charge the jury by the defendants, that as the lessor of the plaintiff had introduced no evidence to show his beginning corner, or the other calls in his deed, he could not recover. But the court instructed the jury that in entering into the consent rule, under a special rule of the court, the defendants are bound to admit on the trial, that they are in possession of land claimed by the plaintiff. That in this case there could be no mistake as to the extent of this admission, as the boundaries of the plaintiff's patent are set out in the declaration. And as to the fact of the patentee, being the same person that made the deed to Sterling, the jury were instructed that they might ascertain it, from the recital in the deed, and the other facts and circumstances of the case. And the court stated to the jury their opinion that David Buchanan the patentee, and David Carrick Buchanan the grantor to Sterling were not two persons, but one. But they were informed this opinion was not given to them as matter of law, but in reference to a matter of fact, the truth of which they must determine.

The jury found the defendants guilty, on which verdict a judgment was rendered.

This case was taken to the supreme court by a writ of error, and the decision of the

circuit court on all the points was affirmed. [Games v. Stiles] 14 Pet. [39 U. S.] 322.

[NOTE. At the December term, 1840, a hearing was had upon defendants' motion to set aside the proceedings of a jury under the occupying claimant's law, and the motion was denied. See Case No. 4,177.]

Case No. 4,177.

DUNN v. GAMES et. al.

[2 McLean, 344.] [1]

Circuit Court, D. Ohio. Dec. Term, 1840.

EJECTMENT—OCCUPYING CLAIMANTS' LAWS — ADMINISTRATION IN FEDERAL COURT —ASSESSMENT BY JURY—DEFECTIVE RETURN—COSTS.

[1. A return by a jury of an assessment made by them under the Ohio occupying claimants' law of 1831 will not be set aside in a federal court because the return is under their hands only, while the statute requires the addition of their seals, for the federal court will follow the statute in its substance only, and not in matters of form, where that is impracticable.]

[2. It is no ground for setting aside the return that it neither makes an assessment of waste, nor returns that there was no waste, for the absence of any assessment under this head authorizes the presumption that there was no waste.]

[3. The costs of the proceeding under the statute follow the judgment.]

[This was an action of ejectment by the lessee of Dunn against Games and Gillet.]

At the last term, a judgment having been entered that the lessors of the plaintiff recover their term, &c., in the premises [see Case No. 4,146], on motion of Mr. Hamer, on behalf of defendants, a venire was issued to the marshal, under the occupying claimant law of the state, of 1831, directing him to summon a jury in the neighborhood of the land, and cause them to go upon it, examine witnesses, &c., and estimate the value of the improvements made by the tenants, the rents, waste, &c., and the value of the land in its natural state, in all things as the statute requires; and that return be made of their proceedings to the present term.

And at this term the marshal made return of the proceedings of the jury, under their hands, from which it appears that the permanent and valuable improvements amount to twelve hundred and fifty dollars; that the rents amount to the sum of five hundred and forty dollars; and that the land, in its natural state, is worth the sum of two thousand one hundred and ninety two dollars.

Mr. Hamer, in behalf of the defendants, moved the court to set aside the proceedings of the jury: First: Because they did not return their assessment, under their seals, as the statute requires: Second: Because the jury assessed no damages for waste, nor have they returned that no waste was committed.

The statute requires the jury to return their assessment under their hands and seals; but in this return their seals are omitted. In every other respect the return conforms to the statute.

This statute is not made obligatory on this court by adoption under any act of congress, but it is adopted as a fit and proper mode of proceeding by the court. In every respect, however, this court can not conform to the statute, as in the selection of jurors, &c. But the mode of proceeding is conformed to, so far as the organization and powers of this court will permit. And whilst, of necessity, the forms of procedure are somewhat different, effect is given to the principles of the statute.

The return of the jury is under their hands, but their seals are not annexed, as the statute requires. This we do not think material under the rule of the court. The objection does not go to the substance of the return, but to the form. And if this be sufficient to set aside the assessment, it will be impracticable for this court to proceed under the statute. For this court, as before remarked, have not the means of carrying out the formal parts of the statute. We carry into effect the principles of the statute, and that is all we can do. On this ground, therefore, the return will not be set aside.

Nor will the assessment be set aside on the second ground. If waste had been committed the jury were required to assess the amount of damages. But they have made no assessment under this head, and the fair presumption is that no waste has been committed. It is somewhat singular that the defendants should object to the report on this ground.

The lessors of the plaintiff then, by Mr. Wright their attorney, gave notice, that they would relinquish the title to the land in favor of the defendants, on their paying to them its value, in its natural state, as assessed by the jury. And this option is given to the lessors by the statute. They may thus relinquish the land, or take out their writ of possession on paying to the tenants the excess of the improvements over the rents.

And THE COURT directed that the defendants should pay the assessment of the jury aforesaid, to the lessors of the plaintiff, within six months; and, in default thereof, that the writ of possession may issue.

A motion was then made that the costs of the inquest be taxed to the lessors of the plaintiff. But THE COURT held that the costs of this proceeding follow the judgment. Had a judgment been entered against the lessors of the plaintiff for the improvements, as the statute authorizes, the costs of the inquest might have been taxed in that judgment.

DUNN (KIBBE v.). See Case No. 7,753.

DUNN (UNITED STATES v.). See Case No. 15,007.

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

Case No. 4,178.

DUNN v. The YOUNG AMERICA.

[37 Leg. Int. 30;[1] 14 Phila. 532.]

District Court, E. D. Pennsylvania. Jan. 9, 1879.

TOWAGE CONTRACT—DUTY OF CONTRACTOR—COMMON CARRIERS.

A. contracted with the libellant to tow his ship from the sea, and to dock her at Philadelphia. *Held*, that it was the duty of the contractor to furnish a tug fully competent to perform the service with safety, and, if one was not sufficient, to add another. The responsibility was upon A. to determine the amount of force needed, and to perform the service with the care and skill required by the circumstances. He is not a common carrier, and the libellant must show failure on his part, either as respects the boat furnished, or the management of it.

[Libel by James Dunn against the steam tug Young America to recover damages for negligent towage.]

H. G. Ward, for libellant.

Henry Flanders, for respondent.

BUTLER, District Judge. The owners of the steam tug Young America, George W. Pride and others, through their agent, the master of the Pioneer, contracted with the libellant to tow his ship (1,311 tons burden, and 132 feet long), the Lord Cairns, from the sea, and dock her at Philadelphia. She was brought up by the Pioneer, and left at anchor, opposite Greenwich, on the 12th of April, 1879. The wind was fresh from the northwest, and the tide flood. The ship was in ballast trim, and lay across the stream, with the Norwegian bark Zorida, a short distance above. Her master called at the office of Mr. Pride, and requested to have his ship taken in. The Pioneer was absent, and the Young America was despatched on the service. The libellant seems to have entertained some doubt of the capacity of this boat for the work; he referred to the wind, and, as he was leaving (and probably before), requested the aid of a second boat. Mr. Pride called Captain Taylor, and inquired whether he could perform the service with the Young America, and was answered that he "thought" he could. When the boat reached the ship, a hawser was taken out on the port bow, the anchor raised, and the tug started forward. Very soon she "slacked up," and the ship drifted sternways toward the Zorida. Whether she "slacked up" more than once the witnesses do not agree. The weight of the evidence is that she did so twice. On the first occasion her anchors, which were dropped, held her off the bark. On the second occasion, she struck the bark, and sustained the injury for which she now sues.

Is the respondent liable? It was the duty of Mr. Pride and his co-contractors to furnish a tug fully competent to perform the service which they had undertaken, with safety; and, if one was not sufficient, to add another. The responsibility was on them to determine the amount of force needed, and to perform the service with the care and skill required by the circumstances. They are not common carriers, and are not therefore insurers. The libellant must show failure on their part, either as respects the boat furnished, or the management of it. He charges failure in both. Whether the boat was sufficient—in view of the circumstances existing at the time—is open to doubt. There is a good deal of testimony bearing on the question. The witnesses called by the respondent (most of them employés of Mr. Pride) say she was. Her action on the occasion, as well as the answer of her captain, when appealed to by Mr. Pride (before starting out), might, I think, justify a doubt; and the intelligent gentleman, Captain Gallagher, consulted on this point, as assessor, says (from his personal knowledge, as well as the respondent's description of her) that she was not sufficient.

As respects her management I think the case is free from doubt. She "slacked up" and lost control of the ship twice, after starting. It is quite clear that had she not done so the second time, the accident would not have occurred. On the first occasion collision was avoided by means of the ship's anchors. Might it have been avoided on the second by the same means? If it might, the libellant cannot recover. The several witnesses from the ship say the anchors were dropped immediately on the boat slacking up, on this occasion, as they had been on the former, but that the Zorida was now too close to be thus avoided, while those from the boat testify that the ship's anchors were not let go until after she struck. I feel no hesitation in accepting the statement of the libellant's witnesses respecting this point. They are much more likely to know what was done on the ship, than those on the boat are. Some of them say they saw the anchors let down, and others that they not only saw this, but themselves let them down. The inferences from surrounding circumstances all support this statement. The safety of the ship demanded such action; a seaman would resort to it, under the circumstances, instinctively; and the evidence shows that the master was on the alert. When at Mr. Pride's office he manifested anxiety respecting the movement of his ship, and testifies that he was "all over" the vessel as it moved. He had, just before, resorted to this means of saving his ship from similar danger. I can entertain no doubt that the anchors were used on the second occasion, as they had been on the first.

Thus we are brought to the question: Was the tug justified in "slacking up," on the second occasion, under the circumstances then existing? The respondent says she was, for two reasons: First, that he was commanded to do so, from the ship; and, second, that the hawser was fouled with the martingale,

[1] [Reprinted by permission.]

and likely to break it. Unless he has proved one or the other of these allegations, he must be held responsible for the accident. The first is a question of fact, purely; and the weight of the testimony is against the respondent. The witnesses from the ship say, not only that he was not ordered to "slack up," but on the contrary was directed to "go ahead," both the captain and the mate saying they so shouted, and telegraphed with their hands, when they saw he was stopping, and others that they were by, and heard it. One of the respondent's witnesses testifies to the same effect. And this statement is reasonable and probable. No good cause can be suggested why those on board the ship should desire the tug stopped. If the hawser was fouled, endangering the martingale, it could be righted (as the respondent has clearly shown) from the ship, without interfering with the tug. But the testimony shows that the martingale was in no danger. There was therefore no occasion to interfere with the movements of the tug, while, on the other hand, strong reasons existed for desiring her to go forward, and avoid the danger which must otherwise be encountered.

The remaining allegation involves a question of fact,—was the hawser fouled? and also one of nautical skill and experience,—supposing the hawser to be fouled (as asserted), did this justify the tug in stopping when and where she did? In the view I entertain of the second question, the first becomes unimportant. That the duty was on the ship to keep the hawser clear, as Mr. Pride and other witnesses for the respondent state, and thus protect its martingale, may be granted. If she failed in this, and sustained injury, she must bear the consequences without complaint. She could best see and estimate the danger arising from such cause, and was able to remove it without aid from the tug. If she did not see and remove it, and the martingale was broken, and loss sustained thereby, she must bear it. No responsibility would attach to the tug under the circumstances. Her duty was to go forward, regardless of such danger to the martingale, unless ordered to do otherwise. It follows that the respondent was not justified in stopping when he did, for the cause stated; and especially was he not, in view of the certain danger to which the ship must necessarily be subjected thereby, in consequence of the Zorida's proximity and the direction of the tide. The accident was the natural and inevitable consequence of this mistake, which proper intelligence and proper care would have avoided. (This conclusion has the support of the assessor's judgment, as will be seen by reference to his answers filed herewith.) Whether, therefore, the boat was sufficient for the service on which she was sent, or not, the manner in which she was handled, and the service performed, require that the respondent shall be held accountable for the loss.

DUNNAHO (MOSES v.). See Case No. 9,873.

DUNNAHOO (BURR v.). See Case No. 2,189.

Case No. 4,179.

DUNNELL v. MASON.

[1 Story, 543;[1] 4 Law Rep. 141.]

Circuit Court, D. Rhode Island. June Term, 1841.

FACTORS — SALES UNDER DEL CREDERE COMMISSION — PAYMENTS IN DEPRECIATED CURRENCY — ACCOUNTING.

Where a consignee, with a del credere commission, sells goods for his principal at a certain price, and afterwards, upon a suspension of specie payments in the state, receives payment in bank notes of the state banks at a depreciated value, he is not entitled to deduct the amount of the depreciation from the debt, but must account for the full price, at the specie, or par value, to his principal.

This was an action on the case [by Jacob Dunnell against Robert M. Mason] to recover a balance of account claimed by the plaintiff, under the following circumstances. The plaintiff was a calico printer, at Providence; the defendant, a commission merchant, of the firm of Otis & Mason, at New York. In the year of 1838, the plaintiff contracted with the firm of Otis & Mason to print for them a large quantity of cotton cloth, at a rate fixed by the contract, and to receive payment for the said printing in the cloth, furnished by the plaintiff, at a price ascertained by the contract. The entire parcels of these prints were to be consigned to Otis & Mason, they to charge the plaintiff, on his proportion of them, the ordinary commission and guaranty, and the usual small charges. Instead of a division of the prints into parcels, one for the plaintiff, and one for the house of Otis & Mason, it was agreed, in order to secure fairness in the sales, that the plaintiff should be entitled to that proportion of the proceeds of the whole of the sales, deducting commission, guaranty, and the usual small charges, which his (the plaintiff's) proportion of the prints bore to the entire parcels. Sales of these prints were effected at Baltimore and Philadelphia by Otis & Mason, before and after the suspension of specie payments by the banks of those cities, in October, 1839. In making up the account with the plaintiff, the defendant's firm, in addition to charges of commission, guaranty, &c., charged against the plaintiff the difference of exchange between the cities of Philadelphia, Baltimore, and New York, at rates varying from 6 to 10 per cent. To this charge for the difference of exchange on sales, effected before the suspension of the banks, the plain-

[1] [Reported by William W. Story, Esq.]

tiff objected. The objection was urged on the ground, that this was, in effect, the result of a composition by the defendant's firm with the purchasers of the prints, inasmuch as Otis & Mason appeared to have preferred taking the depreciated currency of the banks of the cities of Philadelphia and Baltimore in payment, rather than take the risk of the delay of payment, which would have been the consequence of exacting specie or its equivalent. This, however, was no matter of concern to the plaintiff, who was protected by the guaranty of Otis & Mason, as well from a partial, as a total loss. The plaintiff allowed in his statement of the account for the difference of exchange on sales made after the suspension. This he allowed to be fair, as the price of the goods was probably enhanced by the price being fixed under a depreciated currency, out of which enhancement he could afford to allow the difference of exchange. But, as to the charge for difference of exchange on sales before the suspension, he insisted, that the guaranty protected him from that in fairness and in justice, as well as at law. If the firm of Otis & Mason had preferred taking payment for the sales made in Baltimore and Philadelphia under a specie basis, after the suspension in a depreciated currency, rather than risk delay, or incur the expenses of a suit, or hazard some other loss, that was their concern, not the concern of the plaintiff, who was protected from all these accidents by Otis & Mason's guaranty. For the defendant, it was contended, that this was a partnership in joint adventure. This difference of exchange was a loss not contemplated by the parties to the contract at the time it was formed, and it ought therefore to be borne equally between the parties. As the difference of exchange was a loss, which did not originally enter into the contemplation of the parties, it could not have been embraced within the objects of the guaranty.

Mr. Ames, for plaintiff.
Whipple & Rivers, for defendant.

STORY, Circuit Justice, in delivering the opinion of the court, said: If the plaintiff and defendant were originally partners in the goods, it would make no difference. The defendant acted under a del credere commission, and is therefore bound to account to the plaintiff, as his principal, for the full price, for which the goods were sold, the sale having been at the specie or par price. The plaintiff has nothing to do with the mode, in which the defendant collected the debt. If the purchaser had been totally insolvent, the defendant must have paid the full specie value to the plaintiff under his guaranty; and, receiving the amount in a depreciated currency is a pro tanto loss, for which the defendant is accountable to the plaintiff.

Case No. 4,180.

DUNNING v. PERKINS.

[2 Biss. 421.] [1]

Circuit Court, N. D. Illinois. Jan., 1871.

BANKRUPTCY—SECURED CREDITOR—RIGHT OF ASSIGNEE TO SECURITIES.

1. When a merchant stops payment on his commercial paper, and the holder commences suit thereon, to which there is no defense, he has reasonable cause to believe the debtor is insolvent.

2. If afterwards, knowing that the debtor is obliged to ask extensions, he, within the time designated in the act, takes security and dismisses the suit, then the securities can be recovered by the assignee in bankruptcy.

In bankruptcy. Replevin by Seth M. Dunning, assignee of John D. Rice, bankrupt, for securities deposited with defendants by the bankrupt as collaterals. On the 26th of June and 11th of August, 1858, the defendants, as attorneys for Hendrickson, Doll and Richards, commenced, in the superior court of Chicago, suits against John D. Rice, a merchant then doing business in Chicago, upon his promissory notes then dishonored. Rice had no defense to the notes, and early in September went to the defendants, stated to them that he was indebted in the aggregate to the amount of about five thousand dollars, and that, although he could not meet his paper as it came due, if he could procure an extension from his creditors by giving them security, he could pay all he owed. On the 14th of September he deposited with the defendants the securities, to recover which this suit was brought, and thereupon they dismissed their suits against him. On the 13th of December in the same year he filed his petition in bankruptcy in this district, was afterwards adjudged a bankrupt, and on the 19th of February, Dunning was appointed assignee. Case tried by the court.

Charles L. Easton, for plaintiff.
J. A. Cram, for defendants.

DRUMMOND, Circuit Judge. The fact that the two notes given by Rice, he being a merchant or trader within the meaning of the bankrupt act, were not paid, was enough to excite distrust as to his pecuniary condition. When a creditor is compelled to bring suit against a merchant for nonpayment of notes bearing the character of commercial paper, and to which there is no defense, that is sufficient to create a suspicion in his mind that the debtor is insolvent, and it is the duty of the court under such circumstances to scan closely all methods of obtaining a preference by one creditor over another. The only argument that can be used in behalf of the defendants is that they had no reasonable ground for supposing that Rice was insolvent. But if they believed that he had property sufficient to liquidate all

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

his indebtedness, why take this security? I do not mean that because a man takes security it always follows that he has reason to believe the debtor insolvent; but when, as in this case, the creditor has brought suit upon commercial paper, to which there is no defense, and then by arrangement with the debtor the suit is dismissed and security is taken, and the fact is that the debtor at the time was insolvent, this makes out a strong case. If a creditor under such circumstances takes security, he does so at his peril. The plaintiff must recover.

Case No. 4,181.

DUNSTAN v. The R. R. KIRKLAND.

[3 Hughes, 641.][1]

District Court, E. D. Virginia. Oct. 21, 1879.

ADMIRALTY JURISDICTION — DAMAGES TO PERSON BY COLLISION — STEAMER BACKING—LOOKOUT—SAIL—PLEADING—WAIVER OF VARIANCE.

1. Damages to the person of one on board of a vessel, resulting from collision, may be recovered by libel in admiralty from the vessel in fault.

[Affirmed in The Manhasset, Case No. 4,295.]

2. It is the duty of a steamer, in the act of backing, to keep a lookout in the stern of the vessel.

3. It is fault in a steamer, when about leaving a wharf, not to give the usual signal of three long whistles.

4. It is too late to take advantage of a supposed variance between the proofs and the allegations in the pleadings after the evidence is closed and the argument for the defence is begun; and, in any event, the evidence must be material.

5. Steamers must keep out of the way of sail-vessels, whenever there is possible danger of collision.

In admiralty. Libel [by P. C. Dunstan against the R. R. Kirkland] for damages to the person from the collision of two vessels. The amount of damages claimed was $8000. At about half past three in the afternoon of the 1st of March, 1879, the sloop Annie Clarke, in charge of her owner and master, the libellant in this case, with two other experienced seamen on board, was crossing the harbor of Norfolk, southwardly from the Old Dominion Steamship wharf, on the Norfolk side, towards Peters & Reed's wharf on the Portsmouth side, which is the next wharf south of another one on that side leased by the Old Dominion Steamship Company. When the sloop was within a hundred yards of the latter wharf, and abreast of it, the ferry-boat came out ahead of her from her dock in Portsmouth to cross over to Norfolk, and was about twenty yards from her, a circumstance which made it impracticable for the sloop to change her course to her port side. As the sloop approached the wharf of Peters & Reed in these circumstances the steamtug R. R. Kirkland, which had shortly before touched at the Old Dominion wharf next adjoining, backed off from the latter wharf nearly at right angles, and continued backing for a distance of some seventy-five yards, without heed to the passing sloop. In doing so the tug's stern collided with the sloop, and her "eye-bolt" punched a hole three inches large in the hull of the sloop, which placed her in a sinking condition. The two men jumped off the sloop on board the tug, but the leg of Dunstan, the master, was caught between the tug and the sloop's cabin and greatly bruised and injured. Dunstan was lifted on board the tug. From this injury he was entirely disabled for about six weeks, during part of which time he suffered a good deal of pain. He has since been crippled with a stiff knee, and may be so afflicted for the rest of his life. The tug had no lookout on her stern when she backed out into the channel, and previously to backing out neglected to give the usual signal of three long whistles to indicate that she was about to leave her wharf. Though the sloop was under sail and plainly visible, she was not seen by the master of the tug before the collision, and the tug took no measures to keep out of her way. Dunstan, the libellant, is a poor man, thirty-five years old, with a wife and large family of children dependent upon his labor. This is the second year of a lease he has for three years upon a trucking farm near Norfolk. The physician intimated that libellant's injury would be permanent in all probability.

Garnett & White and Sharp & Hughes, for libellant.

W. H. C. Ellis, for owner of the Kirkland.

Brief of libellant's counsel:

I. The Burden of Proof.—In a collision between two steamers or two sail-vessels the burden of proof is on the libellant. But in a collision between a seamer and a sail-vessel, the burden of proof is on the steamer, irrespective of who is the libellant. Every presumption is against the steamer. In this case the burden of proof is on the steamtug R. R. Kirkland. See The Washington Irving [Case No. 17,243]; Seaman v. Crescent City [Id. 12,581]; The Oregon v. Rocco, 18 How. [59 U. S.] 570; Pope v. The R. B. Forbes [Case No. 11,275]; The Fannie, 11 Wall. [78 U. S.] 238.

II. Relative Degree of Caution Required as between Steamers and Sail-Vessels.—It is always the duty of the steamer to avoid the sail-vessel. All that the sail-vessel has to do is to keep her course. If she does not alter her course and a collision occurs the steamer is in fault. Desty, Shipp. & Adm. § 357, and cases there cited; Id. § 375, and cases cited.

III. The Want of a Lookout is Fatal.—The tug had no lookout or watchman on her stern, or aft, when backing. McGrew v. Melnotte [Case No. 8,812]; The State of New

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

York [Id. 13,327]; The Morning Star [Id. 9,817]; The Comet [Id. 3,051]; The Empire State [Id. 4,474].

IV. Remedy in Rem for Injuries to Person.—Miller v. The W. G. Hewes [Case No. 9,594]; The New World v. King, 16 How. [57 U. S.] 469; The Sea Gull [Case No. 12,578]; The Gregory and The Washington [Id. 4,100], affirmed 9 Wall. [76 U. S.] 513.

V. Error in Extremis.—It is no defence to this action to say, as the answer does, that the men on the sail-vessel might have gotten out of the way, even after they saw that a collision was inevitable. Acts done in the excitement of the moment are not faults, and are not sufficient to exonerate the vessel by which the danger was first brought about. Such acts are excusable. Desty, Shipp. & Adm. § 381, and cases cited.

VI. Amount of Damages.—Rule: "Restitutio in integrum." Loss of time, injury to the vessel, all kinds of expenses incurred, such as doctor's bill, expenses of nursing, etc., are to be estimated; physical or mental pain and suffering caused thereby are grounds for damages, even for heavy damages. The D. S. Gregory [supra]; Curtis v. Rochester & S. R. Co., 18 N. Y. 534.

HUGHES, District Judge. It seems plain to me from all the evidence in the case, that the tug was at fault in three respects, namely: 1st. She failed to give the usual signal of three long whistles, to announce her intention of leaving the wharf at which she had touched. 2d. She had no lookout in that end of her which was moving foremost. It is just as incumbent upon a steamer backing to keep a lookout well aft, as upon a steamer moving on to keep a lookout well forward. 3d. She did not "keep out of the way" of the sailing vessel, as she was required to do by the 20th rule of navigation, established by act of congress. See Rev. St. U. S. p. 818. Indeed the answer in this cause seems virtually to consider that the tug was in fault, not only in its admissions of fact, but in its omission to negative the implication of fault in the respects just set out. It is proper for me to notice an objection made in the argument by the learned counsel of the claimant, that, although the libel alleges that the sloop was bound for the Old Dominion wharf in Portsmouth, yet the proofs showed that she was aiming for Peters & Reed's wharf; and he claimed that there was a fatal variance between the allegata and probata of the plaintiff's case. I think the objection is untenable, for the reason that it was made too late, and that the variance is not material. The evidence shows that the two wharves lie next each other; the chart of the harbor shows that the course of a vessel sailing from an opposite point on the Norfolk side to one or the other of these wharves on the Portsmouth side would not vary half a point of the compass; and the proofs establish that the collision occurred irrespectively of the circumstance that the sloop was moving on a course half a point away from the one pointing to the Old Dominion wharf adjoining Peters & Reed's. The variance in this case, therefore, is not material. The variance between the proofs and the allegations, whether of the libel in setting out its case, or of the answer in stating its case, in order to defeat either party to the pleadings, must be "essential in its character." The Washington Irving [supra]. Moreover, in order to entitle either party to the benefit of a variance, objection must be taken when the evidence is offered at the trial, and comes too late if made after the evidence is closed and the cause is under argument. Roberts v. Graham, 6 Wall. [73 U. S.] 578.

These matters being disposed of I come now to deal with the question of the amount of damages to be awarded the libellant, no objection being raised to the jurisdiction of an admiralty court to award damages to a person injured by the collision of two vessels against the vessel in fault. It must be confessed that the ascertainment of damages by a judge in a court of admiralty is not only an unpleasant but a difficult task, and is liable to great abuse. I regret that it cannot be referred to a jury of twelve men, that best of all tribunals for the assessment of damages between man and man. I shall approach a conclusion on the subject by careful steps, and endeavor to arrive at a result that will commend itself to the approval of any impartial, well-balanced, and practical mind. It was not shown in the evidence that the sloop was permanently injured by the collision. The injury was promptly repaired by the owner of the Kirkland, and I think an item for repairs can have no rightful place in the account of damages now to be made up. Nor is there anything due on the score of medical bills. These have been paid by the claimant, and were quite inconsiderable in themselves, amounting to less than $25.

We have, therefore, only to consider what is to be allowed for the three following items, viz., for pain and suffering; for loss of time and wages; and for permanent disability; these being the grounds of allowance for which we have precedents in the reported cases.

1. The suffering of the libellant in consequence of his wound, though doubtless severe for a few days, was soon greatly assuaged, and I think a liberal allowance on this score would be $250.

2. The loss in farming operations resulting to the libellant, while quite serious for a poor man, cannot in this case be estimated at the very high figures which we see reported in many cases in this country and England. True, the injury occurred at an important season of the second year of his three years' lease of the trucking farm on which he lived, which was a year in which

he expected, with reason, to make up in profits for the unremunerated labor and preparation of the first year. True that the legitimate expectation for this second year was, that the results should compensate for the labor and investment of both years. But yet I do not think I would be justified in estimating these profits from one man's labor, on a small farm of indifferent fertility, at more than $500 for the two years named.

3. We come, last, to the permanent effect of the injury sustained by the libellant, the damages allowable for which are the more difficult of ascertainment for the reason that they can be little other than conjectural. The knee upon which the bruises which were suffered concentrated, is now still enlarged and stiff, seriously impeding the movements of a laboring man. While the physician who attended the libellant and who testified at the trial would not express the positive opinion that it would continue so permanently, yet all that he said seemed to indicate a belief on his part that the probabilities were on the side of a permanently stiff and enlarged knee. The libellant is a poor man, with a large family to support. He is thirty-five years of age, and has a long "expectation of life." The conditions of his case are, therefore, such as appeal strongly for a liberal allowance. I therefore feel authorized by established precedents and by considerations of natural justice to award damages, on this score, to the amount of $1000.

A decree may, therefore, be taken for $1750.

Case No. 4,182.

DUPAS v. WASSELL.

[1 Dill. 213.][1]

Circuit Court, E. D. Arkansas. 1870.

PUBLIC LANDS—HOT SPRINGS RESERVATION—PUBLIC POLICY — IMPROVEMENTS ON PUBLIC LANDS SALEABLE.

1. Congress specially reserved the tract of land on which the "Hot Springs" were situated from sale, "for the future disposal of the United States," and declared in the act that the same "should not be entered, located, or appropriated for any other purpose whatever:" *Held* that the lands thus reserved became segregated from the public domain, and could not be lawfully settled upon, and that a "squatter" thereon could not recover against his lessee ground rent for the use of such lands, because such lease was void by reason of being in violation of the abovementioned statute, and against public policy, and the lessee was not estopped to deny his landlord's title.

2. Such a case is distinguishable from those which hold that improvements made upon public lands may be sold, and that the sale constitutes a good consideration for a promise to pay therefor. (Per Caldwell, J., arguendo.)

S. R. Harrington, for plaintiff.

C. B. Moore, for defendant.

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

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

CALDWELL, District Judge. By consent of parties this cause was tried before the court.

The action is brought to recover for the use and occupation of a parcel of ground, comprising part of what is known as the "Hot Springs Reservation." It is not any part of the quarter section of that reservation to which parties have for many years been asserting title by pre-emption, and a New Madrid location.

The plaintiff's own evidence discloses the fact that he has no title, legal or equitable, to the parcel of ground in question, and no pretense of right or claim other than a mere "squatter" on the reservation.

The act of congress [of 1832] reserving this land from sale (4 Stat. 505), is in these words: "That the Hot Springs in said territory, together with four sections of land including said springs, as near the centre thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever."

The plaintiff "squatted" on this reservation subsequent to the passage of this act. In 1866 the plaintiff assumed to grant a ground lease of part of this reservation to one McGraw, reserving rent at the rate of three hundred dollars per year. The lease was verbal, and McGraw entered upon the land under it, and erected a hotel building. Subsequently the improvements put upon the land by McGraw were sold at execution sale and purchased by the defendant, who entered and occupied the improvements under his purchase at the execution sale.

No rule is better settled than that a tenant shall not during his possession of premises, be permitted to dispute the title of the landlord under whom he entered. And this rule extends to an under tenant, or assignee, or other person claiming under the lessee, and is applicable to every species of tenancy, whether for years, at will, or by sufferance. And one who purchases a tenant's right at execution sale is bound by this rule, and is liable for the rent reserved in the same manner as the original tenant.

The plaintiff insists that, applying these rules of law to the facts in this case, he is entitled to judgment. Every agreement that parties may make does not, in law, amount to a contract having a binding obligation. Contracts to do an illegal act, and contracts against good morals and public policy are void; and the law will not lend its aid to either party to such a contract to compel its performance or enforce any right claimed under it. Leases are not exempt from the operation of this rule. A lease of premises for the purpose of prostitution or for any other immoral object, is a contract against good morals, and absolutely void. Tayl. Landl.

& Ten. § 511. And the same is true of leases that contemplate the doing of an act in violation of law and the settled public policy of the country. The lease in this cause falls within this last category. The reservation was not public lands in the ordinary and common acceptation of these words. These lands could not be entered, located, or appropriated for any purpose whatever. This was the law when the plaintiff "squatted" on them. He was a trespasser, and might have been criminally punished for his trespass. He had no right, and could acquire no right to treat this government property as his own; and in attempting to do so, he was acting in violation of law; and any lease he may have granted to any portion of the reservation was utterly void.

We have not overlooked the cases of Pelham v. Wilson, 4 Ark. 289; Cain v. Leslie, 15 Ark. 312; Hughes v. Sloan, 8 Ark. 146; McFarland v. Mathis, 10 Ark. 560,—and other cases of that class, where it is held that parties making improvements on the public lands have title to them which the law will recognize and protect against all the world, but the United States; and which they may sell, and a sale of which constitutes a good consideration.

It is not necessary in this case to pass upon the soundness of the rulings in these cases. There are decisions to the contrary. Carr v. Allison, 5 Blackf. 63. And see Turley v. Tucker, 6 Mo. 584, and Hatfield v. Wallace, 7 Mo. 112. In the last case cited, one Eiler, who was entitled to a right of pre-emption to a quarter section of land, under the act of congress of June 1, 1840 [5 Stat. 382], leased the same to the plaintiff for ninety-nine years. The act of congress under which Eiler was entitled to pre-empt the land, declared that all transfers of such right made before the issuance of the patents should be void. Judge Scott, in delivering the opinion of the court, said: "I have no doubt about the invalidity of the lease. So bold a contrivance to evade the law ought not to be countenanced, and to enter into an argument to show its invalidity, would be treating it with a dignity of which it is altogether unworthy."

The act of congress of March 3, 1807 (2 Stat. 445), prohibits persons from taking possession of, or making settlement on, any of the public lands, or "causing such lands to be thus occupied, taken possession of, or settled," and declares that "such offender shall forfeit all his right, title, and claim, if any he hath, of whatsoever nature, or kind, the same shall or may be, to the lands which he may have taken possession of or settled or caused to be occupied."

The language of this act is quite as strong as that of 1840, on which the judgment of the court was based in Hatfield v. Wallace, supra. The lease the plaintiff assumed to make to McGraw is in the very teeth of this act. The sole object of the lease was to induce the lessee to take possession of, and to occupy this government land, and to pay the plaintiff, who was himself a trespasser, and on the land in violation of law, a ground rent on account of such possession and occupancy.

The rulings in the cases relied on by the plaintiff, go upon the ground that it was the policy of the government to encourage settlement and improvements on the public lands; and in these cases the lands on which the improvements had been made were public lands, that is, lands subject to pre-emption, entry, or purchase. But it is not so in this case. By the act of 1832, this land was segregated from the public domain, and after that time was no more public land in the usual sense of these words, than are the arsenal grounds in this city, or the Fort Smith military reservation.

And in this case there was no lease or sale of improvements—it was a ground lease of the unimproved lands of the government, reserving a ground rent. To uphold such a transaction would be to invite trespassers on the public lands; and encourage and reward fraud and violence. It would be offering a premium to those who were daring and reckless enough to assume the attitude of landlord over the government lands.

One who assumes dominion over public lands expressly reserved from settlement and sale, as this land was, and invites others to trespass thereon, by presuming to grant them ground leases thereof, stands in a diferent attitude from a bona fide settler on public lands, subject to pre-emption or entry, and whose settlement and improvements are made with a view and expectation of pre-empting or entering the same.

The plaintiff is not within the reason or equity of the cases referred to, and the lease he assumed to make was utterly void, and cannot be the foundation of an action in any court.

Judgment for the defendants.

Case No. 4,183.

In re DUPEE.

[2 Lowell, 18;[1] 6 N. B. R. 89.]

District Court, D. Massachusetts. April, 1871.

BANKRUPTCY — POWER OF COURT TO RECALL DECREE—UNAVOIDABLE ABSENCE OF COUNSEL.

1. A district court, sitting in bankruptcy, has the power to recall a final decree, granting a discharge to a bankrupt, upon application made during the term of court at which the decree was passed. It seems that the court has the power to do this after the term has passed.

[Cited in Allen v. Thompson, 10 Fed. 124.]

2. This power will be exercised in a case in which counsel opposing the discharge was prevented by a sudden and overpowering accident from being present at the hearing, if it should

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

be made to appear that the opposing creditors were in fact prevented by the accident from presenting their case, and that they believed they had a good case upon the merits, showing actual fraud in the bankrupt.

In bankruptcy. In this case, the firm of Stephen, Hill & Stevens, creditors of the bankrupt [John E. Dupee], filed specifications of objection to his discharge; and a day was set by notice to the debtor, agreed to by the creditors, for a hearing before the court, neither party having asked for a jury. On the day appointed the debtor attended, and just before the adjournment of the court asked for his discharge, and made proof of the notice and agreement. The creditors not appearing, the order was passed, and the discharge was issued in due form. Soon after, within the same term, the creditors filed a petition, setting forth that they were contesting and intending to contest the discharge, and that their counsel was unavoidably prevented from being present, or from informing them, in order that they might obtain a postponement; they therefore prayed that the order might be rescinded and the discharge recalled. The debtor appeared and opposed the petition.

W. W. Warren, for petitioners.

G. A. Somerby and W. N. Mason, for debtor.

LOWELL, District Judge. There is nothing in the bankrupt act [of 1867 (14 Stat. 517)] which bears directly upon this case, excepting section 34, authorizing the court to set aside a discharge for certain causes and under certain circumstances, one of which is, that the creditor asking for such reversal had no knowledge of the facts before the discharge was granted; a circumstance which these petitioners cannot truly allege. They therefore invoke the power which they say every court has to vary or annul its decree, when justice requires it. This power is denied by the bankrupt. No decisions were referred to by either party, excepting those in the southern district of New York, in which the court reheard the case after refusing a discharge. The power of the court does not seem to have been brought in question in those cases; nor does it appear very clearly that any final decree had been made in them before the rehearing. In this case, a final decree was rendered under section 32, and a certificate thereof was given, and the case in bankruptcy was closed.

This would seem to be the termination of the jurisdiction which by section 1 is to last until the close of the proceedings in bankruptcy. Still I think the court must have the same inherent power as all other courts to recall its own decrees, or to vary or amend them, as justice may require. All the courts claim and exercise this power, when it is the only remedy for the party aggrieved. It has been admitted in criminal as well as in civil cases that the court may vary its judgment and impose a different sentence at any time during the same term. Com. v. Weymouth, 2 Allen, 144. And see the cases cited in that decision. In admiralty, the time and mode of opening a final decree in a defaulted action are regulated by a general rule of the supreme court; but this is not understood to take away the right to rehear cases not falling within the rule. 2 Conk. Adm. 360. See Ex parte Lange, 18 Wall. [85 U. S.] 163.

It is not necessary to define the limits of the power, or the precise mode of its exercise, excepting to this extent, that the courts have uniformly admitted and exercised the power of rehearing a cause, and changing or reversing the judgment or decree during the term in which it was made. Even the supreme court will exercise this power on suitable occasions, although, in an appellate court, where there is little liability to accident in the trial, those occasions are rare. That court has held that this power, when exercised summarily, must be invoked during the term, even in equity, though, in general, the proceedings in equity have little relation to terms of court. After the term has passed, there must be plenary proceedings by bill or libel of review. Here the term is still open, and no very formal proceedings would seem to be required. It is not a case for the supervisory power of the circuit court, and I do not see that there is any other remedy than the one now asked for.

If, however, no injustice has been done, or if the petitioners were not, in fact, prevented from trying their case by the accident referred to, they ought not to be permitted to litigate anew. If they shall file affidavits showing that they were prepared with evidence to substantiate the specific charges of fraud alleged by them, and that they would have been ready to try those questions on the day appointed, and that they believe they have a good case on the merits in respect to those charges of fraud, I will reopen the decree so far as such frauds are concerned. I do not think I ought to do so for any mere technical matter, such as an inaccuracy in book-keeping without fraud.

Ten days to be allowed for the petitioners to file affidavits.

Case No. 4,184.

DU PONT et al. v. BOSHONG et al.

[1 Wkly. Notes Cas. 378.]

Circuit Court, E. D. Pennsylvania. April 17, 1875.

INJUNCTION—RAILROAD — MORTGAGE OF — SHERIFF'S SALE OF — RECEIVER — CORPORATION ACT (OF ASSEMBLY) OF APRIL 7, 1870 — JUDICIARY ACTS (OF CONGRESS) OF MARCH 2, 1793, AND MARCH 3, 1875.

1. Whether sheriff's sale is a proceeding in court under Act March 2, 1793, c. 22, § 5, v. 1 (Rev. St. 136), quaere.

[2. A railroad ran between two points in different states, and bonds, secured by a mortgage on its franchise, etc., had been negotiated; semble, that a sheriff's sale of that part of the road lying in one state, under a levy on a judgment obtained by a bondholder on his bonds, would be an unjustifiable abuse of a legal right, and restrained on a bill filed against him by another bondholder.]

Motion for an injunction to restrain sheriff's sale of part of a railroad. The bill, which was brought by a citizen of Delaware, averred that a mortgage upon its franchises, road-bed, etc., had been executed by the Wilmington and Reading Railroad Company, which ran from Wilmington, Delaware, to a point near Reading, Pennsylvania, to secure coupon bonds of said company to the amount of $1,750,000, which had nearly all been negotiated. By the terms of the mortgage provision was made for selling the mortgaged property on default of payment of interest on these bonds. Default was made in the payment of the interest of the bonds, which became due January 1, 1874. The defendants, citizens of Pennsylvania, who were bondholders, sued the company upon the coupons in the common pleas of Berks county, and obtained judgment thereon, and thereupon issued a writ of fieri facias, under which the sheriff of Berks levied on all that portion of the Wilmington and Reading Railroad lying in his county, its franchises, etc. The bill prayed for an injunction on behalf of the plaintiff, who was a bondholder, and that of other bondholders, to restrain said sale.

Sydney Biddle and Mr. McMurtrie, for the motion.

1. The effect of this sale will be to render the security of the mortgage on the railroad worthless, for it will dissever the ownership of a property, the nature of which will diminish enormously its value when owned by different parties. Moreover, a judicial sale on a judgment on a coupon will, under the doctrine of the Pennsylvania cases, discharge a mortgage, securing the payment of that coupon, on that portion of the railroad sold. McCall v. Lenox, 9 Serg. & R. 302; Com. v. Wilson, 34 Pa. St. 63. And the proviso in the act of assembly of April 7, 1870, § 1 (P. L. 58; Purd. Dig. p. 291, § 52), is unavailing, for it is evident from the above cases that this does not apply where the mortgage is a security for the debt upon which the property is sold. The only security left for the other bondholders will be the mortgage on that part of the road not levied on and sold, and this will be so depreciated as to be practically worthless. The defendants, by becoming holders of bonds secured by the mortgage, must be held to have contracted with the other bondholders not to use any of their securities, or rather (according to the Pennsylvania doctrine) a portion of the same security, so as to injure them.

McKENNAN, Circuit Judge. I have no doubt of your equity, if this court has jurisdiction.

CADWALADER, District Judge. The judiciary act of March 2, 1793, is a direct bar to our interference, unless that act be repealed by the recent act of March 3, 1875, or the absence in the latter of the restriction contained in the former act be regarded as repealing that restriction.

2. The act of March 2, 1793, provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. St. p. 136, § 720. Now this bill does not seek to restrain a "proceeding in any court of a state," but a private person, for the defendant need not have levied even after obtaining his writ of execution, and he could now order the sheriff to stay the execution. Besides, the act of 1793 was meant to apply only where the person seeking the injunction was or could have been a party to the suit in the state court; and the decisions only go to this extent. The restrictive section, being an exception to the general rule, must be strictly construed. Watson v. Jones, 13 Wall. [80 U. S.] 719, 720.

3. But this provision is absent from the act of March 3, 1875 [18 Stat. 470], and as this act is intended to embrace and take the place of all preceding legislation on the subject, the restriction must be considered as repealed.

Mr. Baer, of Reading, and Mr. Bullitt, contra.

The act of 1793 is a bar to the jurisdiction of the court. Peck v. Jenness, 7 How. [48 U. S.] 625. We admit that the proviso in the act of 1870 does not save this mortgage.

THE COURT (McKENNAN, Circuit Judge,) said that this was a very peculiar case, and, without deciding the question of jurisdiction, asked whether some amicable arrangement could not be made between counsel.

Mr. Bullitt suggested that a receiver should be appointed, and gave notice that he would move to that effect next week, and in the meantime agreed that the sale should be adjourned.

See Chapin v. James, 11 R. I. 86; Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604].

DUPONT (MUNNS v.). See Case No. 9,926.

DUPONT (MUNS v.). See Case No. 9,931.

Case No. 4,185.

DUPONTI et ux. v. MUSSY et al.

[4 Wash. C. C. 128.][1]

Circuit Court, D. Pennsylvania. April Term, 1821.

EQUITY PLEADING—SPECIAL REPLICATIONS—AMENDMENT OF BILL—SURPLUSAGE.

Special replications are disused in chancery. If the plaintiff finds it necessary, from the answer, to prove new matter, the practice is now to amend the bill. But if a special replication is filed, denying all the material parts of the answer, and also charging new matter, the new matter will be considered as surplusage at the hearing.

[Cited in Wren v. Spencer Optical Manuf'g Co., Case No. 18,062.]

The cause was set down for hearing, on bill, answer and replication, and when the pleadings were opened, it was discovered that the replication was special, and contained new matter. The defendants [John Mussy and others] then applied to the court to return the cause to rules, in order to afford the defendants an opportunity to rejoin.

C. J. Ingersoll, for plaintiffs.
Mr. Brown, for defendants.

WASHINGTON, Circuit Justice. Special replications are quite out of use, and have long been so. If the plaintiff discovers from the answers, that it will be necessary for him to set forth new matter, in order to oblige the defendants to answer it, and to afford himself an opportunity of proving such new matter, the practice is to apply to the court for leave to amend the bill. Nevertheless, if the replication contains the essential qualities of a general replication, being a denial of such parts of the answer as are not intended to be admitted, and also new matter; the court will consider such new matter as mere surplusage, if the parties go on to a hearing; in which case, the plaintiff will lose the benefit of it, although it should be supported by proof. If it be material to the plaintiff, he should move to amend his bill, and to state it therein. In this case, the replication does not deny some material allegations in the answer, and consequently if the plaintiff insists upon the hearing in the present state of the pleadings, the court will consider those allegations as admitted, which must be fatal to the plaintiff's case. I should, therefore, advise the plaintiff to withdraw this replication, and either to file a general replication, or to ask leave to amend his bill.

The plaintiff adopted this advice, and the cause was continued.

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

Case No. 4,186.

DURAND v. HOLLINS.

[4 Blatchf. 451;[1] 43 Hunt, Mer. Mag. 583.]

Circuit Court, S. D. New York. Sept. 13, 1860.

NAVAL OFFICERS—DESTRUCTION OF PROPERTY BY BOMBARDMENT—CIVIL LIABILITY—PROTECTION TO CITIZENS ABROAD—EXECUTIVE DISCRETION.

1. It is a defence to an action of trespass brought against an officer of the navy of the United States, for destroying property by the bombardment by a naval vessel of the United States, of which he was in command, of a town in a foreign country, that he caused the place to be bombarded in his capacity as such officer of the navy, by virtue of lawful and public orders from the president of the United States and the secretary of the navy.

2. The interposition of the president to protect abroad the lives and property of citizens of the United States, is a matter resting in his discretion; and, in all cases where a public act or order rests in executive discretion, neither he nor his authorized agent is personally civilly responsible for the consequences.

This was an action of trespass, brought to recover damages for the destruction by the defendant [George N. Hollins] of property at San Juan del Norte, Nicaragua, otherwise called Greytown, on the 13th of July, 1854. The defendant, among other defences, pleaded that he was a commander in the navy of the United States, and, as such, commanded a vessel of war called the Cyane, and was bound to obey the orders of the president of the United States, and of the secretary of the navy; and that, by virtue of lawful and public orders of the president and secretary, he did cause the place called Greytown, by the naval force of the United States to be bombarded and set fire to, and which are the same alleged trespasses set forth in the declaration. There was, also, a plea setting forth, in addition to the facts above stated, that the community at Greytown had forcibly usurped the possession of the place, and erected an independent government, not recognized by the United States, and had perpetrated acts of violence against the citizens of the United States and their property, and had, on demand for redress, refused it, and that the defendant, under public orders from the president and secretary, as a commander in the navy, and then in command of the Cyane, did cause the place to be bombarded and set on fire, as he lawfully might for the cause aforesaid. To these pleas the plaintiff [Calvin Durand] demurred, and the defendant joined in demurrer.

William Tracy and John A. Manning, for plaintiff.
John McKeon, Dist. Att'y, for defendant.

NELSON, Circuit Justice. The principal ground of objection to the pleas, as a de-

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

fence of the action, is, that neither the president nor the secretary of the navy had authority to give the orders relied on to the defendant, and, hence, that they afford no ground of justification.

The executive power, under the constitution, is vested in the president of the United States (article 2, § 1). He is commander-in-chief of the army and navy, (Id. § 2), and has imposed upon him the duty to "take care that the laws be faithfully executed" (Id. § 3). In organizing a government under the constitution, an executive department, called the "Department of Foreign Affairs," was established, and a principal officer, called the "Secretary for the Department of Foreign Affairs," placed at its head, to "execute such duties as shall, from time to time, be enjoined on or intrusted to him by the president of the United States, agreeable to the constitution, relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the president of the United States shall assign to the said department; and, furthermore, that the said principal officer shall conduct the business of the said department in such manner as the president of the United States shall from time to time order or instruct." Act Cong. July 27, 1789, § 1 (1 Stat. 28). By a subsequent act, this department has been denominated the "Department of State," and the head of it the "Secretary of State." There was also established another executive department, denominated the "Department of the Navy," the chief officer of which is called the "Secretary of the Navy," "whose duty it shall be to execute such orders as he shall receive from the president of the United States, relative to the procurement of naval stores and materials, and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." Act Cong. April 30, 1798, § 1 (1 Stat. 553).

As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a department of state and a department of the navy.

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

I have said, that the interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion; and it is quite clear that, in all cases where a public act or order rests in executive discretion neither he nor his authorized agent is personally civilly responsible for the consequences. As was observed by Chief Justice Marshall, in Marbury v. Madison, 1 Cranch [5 U. S.] 165: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts, and, whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive." This is a sound principle, and governs the present case. The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the secretary of the navy.

Judgment for defendant.

Case No. 4,187.

DURAND et al. v. LAWRENCE.

[2 Blatchf. 396.][1]

Circuit Court, S. D. New York. July 1, 1852.

CUSTOMS DUTIES — ACTION TO RECOVER BACK — PROTEST—APPRAISEMENT—PENALTIES.

1. In an action to recover back duties as having been illegally exacted, no ground of objection to the payment of the duties can be taken, which was not specifically and distinctly stated in a protest made at the time of paying the duties.

[Cited in Muser v. Robertson, 17 Fed. 502.]

2. Where the protest merely protested against the payment of the duty, but stated no ground of objection: *Held* that, on the trial of an action to recover back the duty paid, the plaintiff could not question the validity or accuracy of the appraisement on which the duties were paid.

[Commissioners of Sinking Fund of Louisville v. Buckner, 48 Fed. 539.]

3. Where the invoice valuation of goods imported by the manufacturer is increased on appraisement by more than ten per cent., the collector has no authority to impose the penalty prescribed by the 8th section of the act of July 30, 1840 (9 Stat. 43).

[See Belcher v. Lawrason, 21 How. (62 U. S.) 123.]

This was an action [at law by Francis Durand] against [Cornelius W. Lawrence] the late collector of the port of New York, to recover back duties paid on an entry of wines, and also the amount of a penalty which had been imposed at the custom-house. On the trial in November, 1850, a verdict was taken by consent for the plaintiffs for $4,803.48, subject to the opinion of the court upon a case to be made, "with liberty to either party to turn the same into a bill of exceptions or special verdict, and also subject to adjustment." There was no stipulation that the court might adjudge the facts of the case.

The plaintiffs took the owners' oath to the invoice in France, and consigned the wines to Messrs. Aymar, of New York, who entered them, as consignees, for the plaintiffs. The oath did not state that the plaintiffs were the manufacturers of the wines. It only stated that the wines were invoiced at their fair market value in Perpignan at the time the same were manufactured, and the oath of their agent there, (Richards,) appended to the invoice, stated that the wines were purchased for account of the plaintiffs.

Three separate warehouse entries were made by the consignees on the 16th of October, 1848, and, the invoice prices of the wines having been raised by appraisement more than ten per cent., duties were laid on the increased valuation, and a penalty of 20 per cent. thereon was imposed. A protest was made, in writing, on each of the entries, by the consignees. On one, the protest was this: "The additional duty and penalty we claim to be paid under protest against the justice of the demand, and hold you responsible." On another, it was this: "We protest against the additional duty and penalty hereon, and shall pay the same from time to time as required, under this our protest." On the third, it was this: "We protest against the additional duty and penalty charged hereon, and shall pay any amount from time to time under protest." Ten withdrawal entries were afterwards made, as the wines were taken from the warehouses, and on each one a protest in some of the following forms was written by the consignees: "We hereby protest against the payment of the additional duty and penalty charged on this entry, and shall hold you responsible for the same;" "We protest against the payment of the amount charged in this entry for additional duty and penalty, and hold you responsible for the same."

Robert J. Dillon, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The same points discussed in the case of Thomson v. Maxwell [Case No. 13,983], were raised in this case. The counsel on both sides regarded the wines as having been manufactured by the owners and importers, the evidence being that the raw wines were purchased from the producers and then brought to a state for exportation by some process of preparation or manufacture on the part of the owners.

But, whether the wines were procured by the plaintiffs as purchasers or as manufacturers, the court is not informed by the case, nor whether the invoice or the appraisement represents their true value in the foreign market. This question should have been submitted to the jury, and although, in reviewing the testimony on that point, we may have no doubt as to what the finding of the jury ought to have been, we are not authorized to decide the fact ourselves. If the object of the plaintiffs was to try the question of fact as to the market value of the wines in the foreign market, they could have proposed giving evidence in regard to it, and, if the defendant objected to the proof on the ground of the insufficiency of the protests to that end, the court could have been properly applied to, to determine the scope and effect of the protests in that respect.

The cause was tried, on both sides, obviously with the intent to ascertain the validity of the appraisement and proceedings under the revenue laws, and not to settle, as between the report of the appraisers and the judgment and knowledge of witnesses, the true value of the wines in France. If such an inquiry be an open one (Rankin v. Hoyt, 4 How. [45 U. S.] 327), it is one exclusively for the jury to determine.

But, if it were competent for the court to pass upon that point, the plaintiffs have not stated, in any of their protests, specifically or distinctly, the ground of objection now urged. Whether the payment of the addi-

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

tional duty is objected to for this cause, or for other causes of a different character, is not specified in the protests. If the protests authorize this inquiry, they would clearly also permit the regularity of the proceedings of the appraisers and the collector, both in the steps preliminary to an appraisement and in the conduct of the appraisement, to be examined and determined. We considered this latter question in the case of Thomson v. Maxwell, before cited, and decided that the protest must point out specifically the particulars constituting the invalidity of the appraisement, and that the importer will not be permitted to raise that question under a general protest.

Both parties submit this case to the court as one coming within the facts and principles involved in that of Thomson v. Maxwell, except only as to the tenor of the protests. Assuming, therefore, that the importation was made by the manufacturer of the wines, we decide in this case, as we did in the one referred to, that the plaintiffs are not entitled, under their protests, to contest the validity or accuracy of the appraisement, and also that the collector had no authority to impose a penalty, because of undervaluation in the invoices, on goods imported by the manufacturer and not by a purchaser.

It is important to merchants and to the government that it be understood that this court will hold the merchant, in his objections to the payment of duties, to strict proof that his protest apprised the collector of the exact nature of his objections.

Judgment must be entered for the plaintiffs for the amount of the penalty exacted from them, with interest from the time of its payment, and for the defendant on the claim for the repayment of additional duties imposed.

DURANT (GARD v.). See Case No. 5,216.

Case No. 4,188.

DURANT v. HOSPITAL LIFE INS. CO. OF MASSACHUSETTS.

[2 Lowell, 575; 16 N. B. R. 324; 15 Alb. Law J. 436.] [1]

District Court, D. Massachusetts. May, 1877.

BANKRUPTCY — INCOME IN TRUST FOR BANKRUPT AND HIS WIFE AND CHILDREN.

1. Money was deposited with a trust company by A., and the company agreed to pay the income during the life of B., the son of A., and, after his death, during the life of B.'s wife, C., if she should survive him, "the income to be applied to the support of said B. and of his said wife, C., and the education and support of their children," and to cause said payments to be made yearly to B. or C. in the order and for the purposes above stated, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due, and declared the principal and the annuity to be inalienable, and not to be subject to debts. *Held*, that B. took the annuity as a sub-trustee, and was bound to apply it to the purposes named, and therefore, upon his bankruptcy, his assignee did not take it.

2. The court could not apportion the annuity and give the assignee an aliquot part, B. having a wife and seven children.

This was a bill in equity, filed by [W. B. Durant] the assignee in bankruptcy of the estate of S. K. Williams, the younger, asking that a certain annuity, or some part of it, might be decreed to belong to the complainant, as such assignee. In 1873, S. K. Williams, of Boston, deposited $10,000 with the defendant company, upon trusts, declared as follows: "The said company shall and will, yearly and every year during the natural life of Samuel K. Williams, Jr. (son of said Samuel K. Williams), and after his decease during the natural life of his wife Lucy Williams, if she should survive him, the income to be applied to the support of said Samuel K., Jr., and of his said wife Lucy, and the education and support of their children, of Cambridge, in the state of Massachusetts, pay or cause to be paid to the said Samuel K. Williams, Jr., or to his said wife Lucy, in the order and for the purposes above stated, in yearly payments, on the first days of January in each and every year, during the natural lives of the said Samuel K., Jr., and of his wife Lucy, upon his or her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof, and not subject to their debts or control, the first payment to be made on the first day of January next, the same rate of interest as the said company shall actually make and receive upon their capital stock," &c.; with careful stipulations concerning the management, and other terms, not affecting the question raised in this case; and they agree that after the death of S. K. Williams, Jr., and his wife, they would pay the principal to the executors or administrators of the father, to be by them distributed among all his grandchildren.

Mr. Williams, the elder, made a similar deposit for each of his seven children, and died in 1874, leaving a will, by which a large estate was devised in trust for his children and grandchildren, with full discretion to his trustees as to the mode of applying the income for the benefit of the persons intended to be benefited thereby.

In June, 1876, S. K. Williams, the son, became bankrupt; and the complainant was appointed assignee of his estate, and brought this bill, asking the court to declare him entitled to the annuity, or to so much thereof as should be found not necessary for the purposes named. The bankrupt has a wife and seven children.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 15 Alb. Law J. 436, contains only a partial report.]

W. B. Durant, pro se.

All rights in equity pass by the assignment: Rev. St. § 5046.

(a.) Trusts cannot be created with a proviso that the interest of the cestui que trust shall not be alienated, or be liable for his debts. Lewin, Trusts (6th Ed.) 89; 'Rugely v. Robinson, 10 Ala. 702; Robertson v. Johnston, 36 Ala. 197; Dick v. Pitchford, 1 Dev. & B. Eq. 480; In re Jones' Will, 23 Law T. (N. S.) 211; Rochford v. Hackman, 9 Hare, 475; Graves v. Dolphin, 1 Sim. 66; Bank v. Davis, 21 Pick. 42; Sanford v. Lackland [Case No. 12,312]; Brandon v. Robinson, 18 Ves. 429; Heath v. Bishop, 4 Rich. Eq. 46.

(b.) Bankruptcy is not an alienation under such a proviso. Lear v. Leggett, 2 Sim. 479; Whitfield v. Prickett, 2 Keen, 608.

(c.) Such trusts, to be effectual, must be protected by a clause of cesser, limitation over, or absolute discretion in the trustee. Snowdon v. Dales, 6 Sim. 524; Lewin, Trusts, 90 and cases; Sanford v. Lackland, Graves v. Dolphin, ubi supra.

(d.) A trust for clothing or support is no exception. Green v. Spicer, 1 Russ. & M. 395; Younghusband v. Gisborne, 1 Colly. 400; Havens v. Healy, 15 Barb. 296; Smith v. Moore, 37 Ala. 327. The distinction in Twopeny v. Peyton, 10 Sim. 487, and Godden v. Crowhurst, Id. 642, is, that the trustees were themselves to apply the funds.

(e.) This annuity is not a trust for support; the words only explain the purpose or motive of the founder. Spooner v. Lovejoy, 108 Mass. 529; Thorp v. Owen, 2 Hare, 607; Harper v. Phelps, 21 Conn. 257; Lambe v. Eames, L. R. 6 Ch. App. 597; Paisley's Appeal, 70 Pa. St. 153. We maintain that there cannot be a trust upon a trust, and, therefore, that the bankrupt takes the income, during his life, discharged of all trusts.

(f.) If the bankrupt takes the income in trust, we are to have his part of it. Rippon v. Norton, 2 Beav. 63; Mason v. Mason, 2 Sandf. Ch. 432; Rugely v. Robinson, ubi supra. The costs of all parties should be paid out of the fund. Younghusband v. Gisborne, ubi supra; Abbott v. Bradstreet, 3 Allen, 587.

H. C. Hutchins and E. W. Hutchins, for defendants.

1. So far as this income is to be applied to the support of the bankrupt's wife and children, it is inalienable by him, and not liable for his debts. Chase v. Chase, 2 Allen, 101; Raikes v. Ward, 1 Hare, 445; Crockett v. Crockett, Id. 451; Woods v. Woods, 1 Mylne & C. 401; Broad v. Bevan, 1 Russ. 511, note.

2. We go farther, and say, that, where the trust is to maintain the husband jointly with the wife and children, the assignee of the husband will not be entitled to anything. Rob. Bankr. (3d Ed.) 397; Godden v. Crowhurst, 10 Sim. 642. It is impossible for a master to say what is necessary, and still more what may hereafter become necessary, for a large and growing family.

3. By the American decisions a trust may be made for the settlor's son and grandchildren, without power of alienation and without liability for the son's debts. White v. White, 30 Vt. 338; Bramhall v. Ferris, 14 N. Y. 41; Wetmore v. Truslow, 51 N. Y. 338; Locke v. Mabbett, 3 Abb. Dec. 68; Pope v. Elliot, 8 B. Mon. 56. The leading case is Brandon v. Robinson, 18 Ves. 429; and the reasoning is not satisfactory, and has not been accepted in this country. See, besides cases above cited, Nicholas v. Eaton, 91 U. S. 716; Rife v. Geyer, 59 Pa. St. 393; Wells v. McCall, 64 Pa. St. 207. The case cited from New York has been overruled. Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361; Genet v. Beekman, 45 Barb. 382.

LOWELL, District Judge. How far the law of this country generally, or of Massachusetts in particular, conforms to the doctrine of Brandon v. Robinson, 18 Ves. 429, I do not care to consider. The question is at this time before the supreme judicial court of this state, if I am rightly informed, and is likely to be settled in due course; but I consider this case to be governed by Nichols v. Eaton, 91 U. S. 716.

The annuity given to the bankrupt was given him in trust for the uses set forth in the contract with the defendant company. It was argued that those words were the expression of a motive, or a wish, on the part of the donor; but they are the language of command, and there is nothing precatory about them. The payments are to be made to the bankrupt, and after his death to his wife, "the income thereof to be applied to the support of said Samuel K., Jr., and of his said wife, and the education and support of their children;" and, again, the company agree to pay the income to the bankrupt or his wife, "in the order and for the purposes aforesaid." No doubt his receipt is a discharge, and the company take care not to be responsible for the application of the money; but that application is ordered, and the wife and children, or any of them, could maintain a bill against the bankrupt for its enforcement. Whiting v. Whiting, 4 Gray, 236; Chase v. Chase, 2 Allen, 101; Loring v. Loring, 100 Mass. 340; Cole v. Littlefield, 35 Me. 439; Wright v. Miller, 8 N. Y. 10; Lucas v. Lockhart, 10 Smedes & M. 466. The point is well put by Mr. Perry, in his excellent work on Trusts (section 117) that the question to be decided is, whether the settlor intended to impose an obligation, or only to assign the motive for an absolute gift. And I say again, the language is not at all doubtful here; the son, in the first instance, and his widow, if she should survive him, are to take this income and apply it to the purposes mentioned. I agree with a note of Mr.

Perry's to the same section, that the tendency of the later cases is to seek, somewhat less astutely than formerly, to discover trusts in precatory words; but in no case, late or early, that I have seen, are words like those in this case treated as precatory.

A doubt was suggested in argument whether a trust could be grafted on a trust. Some inconveniences in the working of such a sub-trust were mentioned in a Massachusetts case (Rich v. Rogers, 14 Gray, 174), but the court, in the later case of Chase v. Chase, 2 Allen, 101, found them not insuperable. And in all the cases above cited in which an annuitant or life-tenant has been held to be a trustee, the corpus of the property was already in trust, and he was only a sub-trustee, as he is called in Chase v. Chase, ubi supra.

Nor is there any difference between a settlement inter vivos and a will, in the creation of a trust, excepting that a greater latitude of construction is allowed in ascertaining the intent of a testator, who is supposed to labor under some disadvantages for expressing his meaning, as compared with one who is drawing up a marriage settlement, or entering into one of the more deliberate transactions of life. As there is no obscurity in the language of this instrument, the difference is unimportant.

Then the question remains: What interest have the creditors of S. K. Williams, Jr., in this annuity? It was conceded at the argument, and is the law, that whatever Williams could have assigned, or his creditors could have reached by any proceedings in equity, can be made available by his assignee for the payment of his debts. There are cases in which the courts have inferred from the terms of the settlement, or from the situation of the parties, that the beneficiaries were to take equal shares, per capita. One of the earliest of these cases is Rippon v. Norton, 2 Beav. 63; but the propriety of the decree in that case was questioned in Wallace v. Anderson, 16 Beav. 533; and such an artificial mode of division could not have been contemplated, and would not be just, in the existing circumstances of this family There are other cases in which an inquiry has been ordered before a master into the necessities of the wife and children, with an intimation that whatever was not wanted for their support and education would belong to the assignee. Where, however, the trustees have a discretion by which they may deprive the debtor of income altogether, I understand the modern doctrine in England to be that the assignee in bankruptcy will take only what, if any thing, the trustees actually appropriate to the debtor. Lord v. Bunn, 2 Younge & C. Ch. 98; Kearsley v. Woodcock, 3 Hare, 185; Trappes v. Meredith, L. R. 10 Eq. 604, reversed on another point, L. R. 7 Ch. App. 248.

In England, the assignees in bankruptcy formerly acquired all the debtor's property, present and future, until his discharge; and even now they take it until his discharge, or the close of the proceedings in bankruptcy, whichever event may first occur; and, by the insolvent law, under which some of the decisions were made, his person only was discharged, and the assignees took the whole property, until the debts were fully paid. Under this system it was possible for a court of equity to shape its decrees from time to time to meet events as they occurred. If, for example, the children died or were emancipated, and the trusts as to them were accomplished, it could decree a larger amount to the assignee; and, if more children were born, might vary the decree in an opposite sense. But the assignee under our bankrupt law takes at once whatever interest is assignable, and must sell it promptly in his turn; and what I have to decide is, whether I can decree that any specific part of this annuity has come into his hands to be disposed of in that way.

In principle and reasoning, this case, as I have already said, is governed by Nichols v. Eaton, 91 U. S. 716. There the trustees had a full discretion how to dispose of the income; and it was held that the assignee took nothing. I think the debtor in this case has such a discretion, from the very necessity of the case. The trust does not depend upon the person of the trustee; and I am inclined to think that the supreme judicial court would have power to appoint some other person to receive this income, if it were shown that by reason of his insolvency and its consequences, or for any other reason, the debtor had become unfit to fill the office of trustee; and I think such a new trustee would have a full discretion in the appropriation of the income.

If this is not so, but the bankrupt is entitled to some part of this income, yet I think it impossible for any court to say what that part is; for the reason that it may be a constantly varying quantity, and that it would be both impracticable and unjust for me to undertake to decree to the assignee an interest for the life of the bankrupt in any such aliquot part. It is plain that if I cannot do that, I cannot give him any thing which will be of value to the creditors. No doubt this amounts to saying that the bankrupt will have some benefit from the trust; but this is the actual result of the English decisions concerning discretionary trusts, which is approved and followed in Nichols v. Eaton, ubi supra. This effect is pointed out by Mr. Robson, in his work on Bankruptcy (3d. Ed., p. 396), and I do not see how a court can prevent it.

The case is a hard one for the creditors; and I shall be willing to hear the parties further on the question of costs, which was but very briefly touched upon in the argument. Bill dismissed (question of costs reserved).

Case No. 4,189.

DURANT v. IOWA COUNTY.

[1 Woolw. 69.][1]

Circuit Court, D. Iowa. May Term, 1864.

COUPONS NO PART OF PRINCIPAL DEBT — EFFECT OF SUITS AND DECREES ON HOLDERS OF BONDS.

1. Coupons attached to bonds, providing for the yearly interest on the sum named in the bond, do not form part of the principal debt.

2. The five per centum valuation, mentioned in section 3, art. 11, of the Iowa constitution, does not include such coupons.

3. Bonds and the coupons attached, issued by counties, payable to bearer, possess all the qualities of commercial paper.

4. The pendency of a suit to restrain the transfer of such securities, and a decree in such suit that they be delivered up to be cancelled, are inoperative as respects a bona fide holder for value.

[Cited in Warren Co. v. Marcy, 97 U. S. 107. Applied in Stevens v. Railroads, 4 Fed. 103.]

5. But if he have actual knowledge of proceedings when he becomes the owner and holder, he is concluded by them.

The defendant subscribed for stock in the Mississippi and Missouri River Railroad Company, and in payment therefor issued its bonds with coupons attached for the yearly interest. This action was brought upon certain overdue coupons, by the plaintiff, as the bearer thereof. At the time the bonds were issued, the constitution of the state of Iowa contained the following provision: "Article XI.—Miscellaneous. . . . Section 3.—No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

The defendant pleaded two special pleas to the plaintiff's declaration. In the first, it was averred that the whole amount of the bonds issued by the county, together with the interest which had accrued thereon and remained unpaid, exceeded, at the time of bringing this suit, 5 per centum of the value of the taxable property within the county. In the second plea, it was averred that the county had instituted a suit in equity in the state court against a former holder of the bonds to which the coupons here sued on were attached, alleging that they were issued without authority of law and fraudulently, and praying that he might be enjoined from selling, negotiating, or suing upon them, and might be decreed to deliver them up to be cancelled; that he appeared to the suit, and that such proceedings were had thereon, that a decree was rendered declaring the bonds void, perpetually enjoining the defendant from selling, negotiating, or suing on them, and decreeing that he deliver the same up to be cancelled; and the plea further averred, that at the time that suit was commenced, and also during its pendency, and at the time the decree was rendered, the coupons here sued on belonged to the former holder, and afterwards came to this plaintiff. To each of these pleas there was a demurrer.

Mr. Edmunds, for plaintiff.

Mr. Templin, for defendant.

MILLER, Circuit Justice. The demurrer to the first plea must be sustained. The real debt incurred by the county was the principal sum named in the bonds. The coupons attached to the bonds were promises to pay the annual instalments of interest. Their form, and the fact that they might be detached from the principal obligation, do not change their character. They do not form part of the debt, any more than would a provision for interest yet to accrue incorporated in the body of the bond. If the defendant's counsel were correct in his position, the bonds when issued were legal, because it is not pretended that the amount secured by them exceeded the 5 per centum of the value of the taxable property in the county; but by lapse of time, as the interest has come due and remained unpaid, they and their incidents, the coupons, have become illegal. The absurdity is manifest.

The section of the constitution relied on, by its terms refers us to the time when the bonds were issued, to determine whether their amount exceeds the limit prescribed in it. There is no pretence for saying that the interest thereafter to accrue was a debt within the meaning of the section.

The demurrer to the second plea presents a question of more difficulty. Were it of the first impression, I should incline to sustain the plea. Considerations which appear to me just support that view. But the authorities are the other way, and I feel constrained to submit to them.

It must now be considered as settled, that bonds and coupons of the character now under consideration, possess all the qualities of commercial paper. They pass by delivery; the holder of them has a full title; and the county cannot set up against one who has taken them in good faith equities which might be available against the original payee, providing they were not utterly void in their inception. Moran v. Commissioners of Miami County, 2 Black [67 U. S.] 722; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Gelpeke v. Dubuque, Id. 176, 206; Murry v. Landner, 2 Wall. [69 U. S.] 110.

The question of the effect upon commercial paper of judicial proceedings has most frequently arisen in cases of garnishment, by which process the maker of such paper has been sought to be held for some debt of the payee. The general current, and decidedly the weight of authority, is in favor of

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

the doctrine that such process is inoperative, in respect of such paper. Thus in Kieffer v. Ehler, 18 Pa. St. (6 Harris) 388, Lowrie, J., speaking for the court, says, that such securities "have a legal quality which renders the hold of an attachment upon them very uncertain. Unlike all other property, they carry their whole evidence on their face, and the law assumes the right of him who obtains them, for a valuable consideration, by regular indorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as would lead to inquiry. . . . It has always been held that an attachment is unavailable against a bona fide holder, for value, of negotiable paper, who obtained it after attachment, without notice and before maturity." See, also, Winston v. Westfeldt, 22 Ala. 760, and Drake, Attachm. § 577 et seq., where many cases are cited.

The principle on which these cases proceed is equally applicable to cases in equity, when the same object is sought by means of an injunction and decree. In Murry v. Lylburn, 2 Johns. Ch. 444, Chancellor Kent holds, that a lis pendens is notice, to an assignee of a bond and mortgage, of a latent equity in a third person; but at the same time expresses the opinion, that "the safety of commercial paper would require the limitation of the rule," so far as not to extend to commercial paper not due. And in Stone v. Elliott, 11 Ohio St. 252, the question came up in precisely the form it does here. A bill in chancery had been filed by judgment creditors or the holder of the note, and before its transfer a decree was had against the maker, to compel its payment to the complainants; and yet that decree was held to be no defence to an action brought by a subsequent bona fide holder, without notice and for value. In a well-considered opinion, it was held, that the doctrine of lis pendens did not apply to negotiable paper before due.

It is insisted that, in this view, proceedings to enjoin the transfer of such securities are futile. Not so. An injunction will prevent the transfer of the securities during the pendency of the suit, and a decree that they be delivered up to be cancelled, if enforced at once, will protect the parties. A neglect to take out an injunction, or to enforce such a decree, is the fault of the plaintiff, not of the law.

The demurrer to the second plea must be sustained.

The defendant, at a subsequent day in the term, amended its second plea, by alleging that the plaintiff had, at the time he became the owner and holder of the coupons sued on, full knowledge of the proceedings in the suit in equity. To this amended plea the plaintiff demurred.

MILLER, Circuit Justice. The effect of the plea is to charge the plaintiff with actual knowledge of the pendency of the suit to avoid the bonds and coupons. He then purchased with notice of the rights of the defendant. He is not an innocent and bona fide purchaser of the paper, and is entitled to no protection as such. He can occupy no better position than his vendor or indorser.

The plea as amended is good, and the demurrer must be overruled.

Demurrer overruled.

Case No. 4,190.

DURANT et al. v. RITCHIE.

[4 Mason, 45.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1825.

DEEDS OF MARRIED WOMEN — JOINDER OF HUSBAND — CONVEYANCES TO USES — OPERATION OF STATUTE.

1. In Massachusetts a feme covert may convey her estate by deed, joining with her husband, as fully as the same could be conveyed in England by a fine or recovery.

2. A. and B. his wife conveyed her estate to C. and his heirs, to the use of A. and B., during their joint lives, and to the use of the survivor in fee simple. *Held*, that this deed operated as a feoffment, and the uses were well raised out of the seisin of C., and were executed by the statute of uses.

Writ of entry. The cause came on to be argued upon a statement of facts in the nature of a special verdict, which was as follows, viz.: "That said Andrew Ritchie and Maria Cornelia, his wife, were at Boston, in said district, on the thirteenth day of September, A. D. 1819, lawfully seized in fee, in her right, of the lands and tenements demanded in the declaration; and that thereafter, on the same day, said Andrew and Maria Cornelia, being so seized in her right, entered into the same, and being then of full age, made and executed the deed or instrument for the consideration therein mentioned, including and comprising the said demanded lands and tenements, conveying the same to John Knapp therein mentioned, who is not a relation by blood or marriage to either of the grantors. A copy of which deed or instrument is hereto annexed, and makes part of this case; which deed was afterwards duly acknowledged and recorded in the registry of deeds for the county of Norfolk. Afterwards, to wit, at Paris, in France, on the third day of December, in the same year, the said Maria Cornelia died, without ever having had issue. It is agreed that the demandants are two of the next of kin, and heirs at law of the said Maria Cornelia; and if the lands and tenements demanded, did by law, on her decease, descend to said heirs, would be entitled to recover two undivided ninth parts of the same lands and tenements. Therefore, if the court are of opinion, in the foregoing statement, that the said lands and tenements did not descend

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

to said heirs, then judgment shall be given for the defendant. But if the court shall be of opinion, that the said lands and tenements descended, notwithstanding said deed, to the heirs at law, then judgment shall be given for the demandants. It is further agreed, that this statement of facts shall, at the pleasure of either of the parties, be turned into a special verdict."

The deed referred to in the above statement was as follows: "This indenture, of two parts, made by and between Andrew Ritchie, of Boston, in the state of Massachusetts, Esq. and Maria Cornelia, his wife, on the one part, and John Knapp, of said Boston, Esq. on the other, witnesseth, that whereas said Andrew Ritchie and Maria Cornelia are seized in fee in her right of certain lands and tenements hereafter described, and they are mutually desirous of settling the same in manner hereafter mentioned. Now, therefore, said Andrew Ritchie and Maria Cornelia, in consideration of said marriage had between them, and for the settlement of said lands and tenements to the uses in this indenture mentioned, and also in consideration of the sum of five dollars paid them by said John Knapp, do hereby grant, bargain, sell, and convey to said John Knapp, his heirs and assigns, the several lands and tenements here following, viz. (Here follows a description of the several parcels of land conveyed.) To have and to hold the above lands and tenements to him said John Knapp and to his heirs and assigns for ever, but to the use of said Andrew Ritchie and Maria Cornelia, for and during their joint lives, and to the use of the survivor of them, during his or her life, and of the heirs of such survivor in fee simple. And said John Knapp, in consideration of the premises, hereby receives the aforesaid conveyances to the said uses. In testimony whereof, the said parties of the first and second parts, have hereunto interchangeably set their hands and seals, this thirteenth day of September, in the year of our Lord one thousand eight hundred and nineteen." This deed was duly executed and acknowledged by said Andrew and Maria Cornelia Ritchie and John Knapp, and recorded in the Norfolk registry of deeds.

Mr. Metcalf, for demandants, argued:

1. That by the common law a married woman could not bar herself, or those claiming under her, of any estate in her own right, or even of her dower, by joining with her husband in any deed or conveyance whatever. Co. Litt. 124a, note 1; Cruise, Dig. tit. 35, c. 10, § 4. That she could not convey by feoffment, excepting where there was a special custom to warrant it (1 Wood. Conv. 169; Shep. Abr. c. 109, § 12); nor by bargain and sale, although she might be privately examined (2 Inst. 673; Keilw. 4a); nor by acknowledgment of deed enrolled, which would be void as to the wife (Brown, Faits. Enroll. 14; 7 Edw. 4, 5; 21 Edw. 3, 24). Nor would the wife be bound, after the death of the husband, by an exchange of her land, executed with her husband, and the land received in exchange, aliened by fine. 1 Leon. 285; Cruise, tit. 35, c. 10, § 10. That a letter of attorney, made by husband and wife, to deliver their lease on the land, would be a void delivery as to the wife, and must be pleaded as the demise of the husband only. Wilson v. Riche, Yel. 1. That the rule was only evaded in England by an indirect means, which was by a conveyance by fine and recovery. It was however conceded, that this rule of the common law was so far changed here, that a husband and wife might convey the lands of the wife to a stranger.

2. That there was, however, another rule of the common law applicable to this case, and which was also the law of this state, viz. that the wife should in no way convey her lands, either by deed or devise, to her husband; and that the deed to Knapp, in this case, was an attempt, by the husband and wife, to convey her lands to the husband by a single instrument of conveyance, which could neither be legally done in England nor here. That if this instrument could take effect, it must be as some known species of conveyance, but that there would be found objections to classing it with any of them. That it was not a feoffment, because husband and wife could not make a feoffment but by custom. Nor was this instrument in the form of a feoffment; the words of a feoffment were "grant, bargain, sell, alien, enfeoff, and confirm" (Bridg. Conv. 264, 298), or "grant, bargain, sell, alien, enfeoff, and confirm" (3 Wood, Conv. 247). That it could not operate, according to the intention of the parties, as a bargain and sale to Knapp, to the use of the husband and wife, because that would be a use upon a use. It could not be considered as a covenant to stand seised, because Knapp was not of the blood of either of the grantors.

3. That it must then be considered as some anonymous instrument of conveyance, authorized by our usages. But was there any usage which would authorize it? There had been a usage for husband and wife to execute a bargain and sale to a stranger, who (if the parties so pleased) might reconvey to both, or to the husband alone, but that there was no custom to effect this circuitous operation by one instrument, nor did the law allow of it. That there was only one analogous case, the deed of Moses Gill and wife to John Scott; and the accounts of this case were so different and uncertain, that it could not afford a foundation for future adjudication.

4. That it might perhaps be said to be a trust; but there was no indication of any intention to create a trust; and although the husband may convey to the wife by the intervention of a trustee, there was no authority for the wife to convey so to the

husband. That a conveyance by way of trust, or by use, was as much a direct conveyance to the husband by the wife, as a conveyance by feoffment or bargain and sale.

Mr. Prescott, for tenant.

The case finds, that the plaintiffs are the heirs at law of Cornelia Maria, the former wife of said Andrew; that she was, during her coverture, seised of the demanded premises, and if she did not, in some lawful manner, divest herself of the same in her life time, they will be entitled to recover. The tenant contends, that she did not divest herself by the deed set forth in the case agreed; and he says,

1. That this deed operated as a feoffment with livery, and the statute executed the uses.

2. That if it should be considered by the court, not as a feoffment, but as a bargain and sale, still that the estate passed by force of it from Mrs. Ritchie, and she was therefore divested of it in her life time.

Husband and wife may, in this state, by a joint deed, acknowledged and recorded, convey the wife's estate in fee, or for any less estate. This is probably founded on the statute of W. & M. c. 48; Col. Laws, p. 303, re-enacted in St. 1783, c. 37; 1 Mass. Laws, 110.

The wife, by the common law, had authority to convey her lands, and this statute has only prescribed the manner of doing it. Whatever may be the origin of this power, it is now established by a uniform usage from the first settlement of the country, and by a series of judicial decisions; and half the estates in the country are held under titles so made. Fowler v. Shearer, 7 Mass. 20; Dudley v. Sumner, 5 Mass. 463; Osgood v. Breed, 12 Mass. 531. But whether this authority is derived from the statute or from usage, is unimportant.

If, then, husband and wife have such power to convey her inheritance, the next question is, as to the operation and effect of the deed in this case. The tenant contends, that it has the operation and effect of a feoffment with livery of seisin in England. In that country there are two classes of conveyances, one of which operates a transmutation of possession, and the other does not. Feoffments with livery, fines, and recovery, and bargain and sale and release are of the first class. Co. Litt. 271; Plowd. 300; Cruise, 107. Deeds of bargain and sale and covenants to stand seised, are of the latter. 2 Saund. 42, 43; Cruise, 107.

Our ancestors, bringing with them the common law, that real estate was alienable, very early prescribed by statute the manner in which it should be done. Col. Laws, c. 28, p. 85. The statute of William & Mary, afterwards adopted by the statute of 1783, c. 37, points out the mode of conveyance by deed, acknowledged and recorded. This deed is to pass the lands to the grantee, and not the use merely. This deed took the place of livery of seisin. The framers of the statute knew that livery of seisin was necessary in England. They meant to dispense with it, and they substituted acknowledging and registering. This is the construction that has been put on our deeds by the best conveyancers in the state, and by courts of law. The case of Thacher v. Omans [3 Pick. 521] was settled, after argument and great consideration, by the whole court. Sull. Land Tit. 208. In Marshall v. Fisk, 6 Mass. 32, Parsons, C. J., says, "a conveyance by deed, acknowledged and recorded, is to be considered as a feoffment without entry," &c. This has stood for more than thirty years the law of the land, settled by the highest judicial tribunals. It has become a common assurance, and therefore not to be shaken. 2 Bl. Comm. 339. If this deed, acknowledged and recorded, is to be considered as a feoffment with livery and seisin, then it passes the estate, and transfers the possession to the grantee. The deed passes the estate to the grantee to hold to the uses limited in the deed, and the statute transfers the possession to the use. 3 Salk. 386; 2 H. Bl. 328. The grantee has a seisin to support the use, and the possession is immediately united to the use, so that nothing is left in the grantee. It is not a limitation of a use upon a use; for there is but one use, that expressed in the deed. The land, and not the use, is conveyed by the deed. If a husband and wife may, in England, convey her lands by fine to his use, or to their joint use, they may do it here by this deed. A fine is but a feoffment of record, and a feme covert conveys here by a deed acknowledged and recorded, instead of a fine. It is said, that in this way a wife conveys directly to her husband; but this is not so; the husband and wife convey to a stranger. The estate passes to the stranger, and the statute transfers the possession to the husband and wife. This question also was settled in the case of Thacher v. Omans. It was there held, that the estate followed the use, and vested in Gill and wife, and in him as survivor. The authority of this case, in this particular, was afterwards recognized in Marshall v. Fisk, and has been ever since, as well as before, acted on as a rule of property.

2. If this deed should be construed by the court to be a deed of bargain and sale, the estate passed by it from Mrs. Ritchie. By the execution of this deed Ritchie and wife became seised to the use of Knapp, and the statute transferred the possession to him. Cruise, 66; 2 Inst. 672; 4 Reeves, 161; 2 Bl. Comm. 338, 137; Plowd. 301. The deed itself did not transfer the legal estate to Knapp, but was only a covenant to convey it. The statute vested the possession. The bargain and sale vests the use, and the statute the possession. Bl. Comm. 338; Cro. Jac. 690.

The fee then was vested in Knapp, but a further use was limited over, which is a use upon a use, which is not allowed. This last use cannot be supported in a court of law; it is a mere nullity. 2 H. Bl. 335. But although void as a use, it will be supported in a court of equity as a trust. Saund. 113; Shep. Touch. 505, 67; Cruise, tit. 12, c. 2 §§ 11, 12, 24; 11 Johns. 530. This court therefore, as a court of equity, will support it. But if the court will not support the last use as a trust, nevertheless the legal estate passed out of Mrs. Ritchie for a valuable consideration. The deed to Knapp was not void, nor wholly inoperative, but only void as to the second use.

Stearns, in reply.

Two positions are taken by the tenant. 1. That the deed in this case is to be deemed a feoffment, or equivalent to a feoffment with livery of seisin. The use limited to the feoffors executed by the statute of uses. 2. That if necessary, it is to be considered a bargain and sale; the first use to Knapp executed, so as to vest the fee in him; the second use limited to the bargainors not executed, but creating a trust, to be protected by the court; at all events, that the fee passed from Mrs. Ritchie, and she did not die seised.

It is admitted, that by the law of England a feme covert cannot make a deed to pass her estate, except by fine or recovery. But it is said, that there is an immemorial usage in New England for married women to join with their husbands in a deed. It is not to be questioned, that there is a usage for femes covert to convey, but this custom is to be strictly followed. What kind of deed should be made, and what is the custom of the country, must be determined by referring to the law of England and the law and usage here. Mr. Reed resolved this custom into New England common law, and Judge Trowbridge attempted to derive it from the statute of 9 Wm. III. But from whatever source derived, such conveyances by husband and wife were not deemed feoffments. In Higbee v. Rice, 5 Mass. 352, Parsons, C. J., says, "a conveyance by deed, duly acknowledged and recorded, is by our statute of inrolments equivalent to livery of seisin;" but he does not say that it is a feoffment, or to operate like one. But the authority chiefly relied on by the tenant is the case of Thacher v. Omans, determined by the supreme court in the year 1792. The opinion of Chief Justice Dana takes the same positions which are contended for by the tenant in the case at bar, and supports it with the same course of reasoning. Judge Trowbridge found insuperable difficulties to considering that conveyance a feoffment, and called it a bargain and sale, or a covenant to stand seised. Chief Justice Dana found equal difficulties in considering it a bargain and sale, or a covenant to stand seised, and concluded, that it must operate as a feoffment, and derives it from 9 Wm. III. But I conceive, a different construction is to be put upon that statute. That statute had two objects; one was to give immediate operation to deeds; the other to require recording at length; but there was no intention to change the nature of the deed. But admitting the construction of the statute, as to common cases of deeds by other persons, still it is not to be extended to the case of a feme covert. Considering the conveyance as a bargain and sale, the use could not be executed, and would avoid the deed. It cannot be considered as a trust, because there was no intention to create one by the parties. I conceive, therefore, that by this conveyance the land was not passed out of Mrs. Ritchie, and she died seised.

STORY, Circuit Justice. This cause has been argued with great learning and ability, and the topics brought into discussion have been in a great measure exhausted. The question is, whether the deed of Mr. and Mrs. Ritchie was, under the laws of Massachusetts, sufficient to convey her estate in the land in controversy to the uses expressed in the deed; if it was, then the demandants are barred; if not, then they are entitled to recover as heirs at law. If this question were to be tried solely upon principles of the common law, it might be easily disposed of; for, except in some places, where peculiar customs prevail, and have been sanctioned, the wife can make no valid conveyance of her estate but by fine or common recovery, which are matters of record. In these cases she is examined by the court, and her assent, without the compulsion of her husband, is ascertained. When a fine or recovery of the wife's estate is had, she may join her husband in the deed to lead or declare the uses. She cannot alone declare them; but if her husband alone declares them, it will be presumed to be with her consent. Comyn, Dig. "Baron & Feme," G 1, 2, 4; 1 Bl. Comm. 444; 2 Bl. Comm. 293, 355; Cruise, Uses, pp. 132, 133, arts. 195, 196, 198; 1 Rop. Husb. & Wife, 53; Shep. Touch. p. 39.

A feoffment or other grant, by the husband and wife, of the wife's estate, not being matter of record, is therefore held, not merely to be voidable, but absolutely void. 2 Bl. Comm. 293; Shep. Touch. 54, 200. What was the original ground, upon which this general disability of femes covert was established at the common law, it is not perhaps very easy to determine. It may have arisen from the artificial rule, that her separate existence is merged or suspended during the coverture; Co. Litt. 112a, 187b; Comyn, Dig. "Baron & Feme," D.; or, what is more probable, from the fear, that her acts during the coverture might be exacted by the influence or compulsion of her husband. The exception introduced in favour of fines and common recoveries, countenances the latter supposition. For though doubtless in their origin these were presumed to be adversary suits; yet the principal reason, assigned in the books for their

conclusiveness upon the estate of the wife, is, that her voluntary assent is ascertained by the secret examination of the court. 2 Bl. Comm. 351, 355; 1 Bl. Comm. 444; Comyn, Dig. "Baron & Feme," G 1, 2, 4, H; Shep. Epitome, p. 734; Shep. Touch. 38. Be this as it may, the rule and the exception are equally well settled, and cannot now admit of controversy.

But the present case it to be decided, not by the common law, but by the local law of Massachusetts; and this court is bound to decide all controversies, touching the titles and transfers of real estates, by the same rules as the judicial tribunals of the state. In this respect it administers merely the lex loci. By the law of Massachusetts a feme covert may convey her estate by deed, duly executed by herself and her husband. This is not disputed, and indeed has so long prevailed as an uncontested principle, that it would be a waste of time to trace its recognition in our courts. Fowler v. Shearer, 7 Mass. 21; Dudley v. Sumner, 5 Mass. 463; Osgood v. Breed, 12 Mass. 525. The origin of this principle has been matter of some discussion; and very learned minds have differed in opinion on this subject; some resolving it into a mere New England usage in very remote times; and others deeming it a just construction of the statute of conveyances of 9 Wm. III. c. 7. When our ancestors came to this country, they brought with them, and adopted so much of the common law, as was applicable to their situation. Fines, as a mode of conveyance, do not appear ever to have been adopted in the country; and common recoveries, though resorted to for other purposes, are not known to have been used for the transfer of the estates of femes covert. In England they could in general only be passed in the court of common pleas; and neither the court of king's bench nor exchequer were competent to entertain them. Shep. Touch. 8, 9, 39; Comyn, Dig. "Fine," D; 2 Bl. Comm. 349-351; Comyn, Dig. "Courts," C. And it is not surprising that a jurisdiction, exclusively exercised by one court there for a particular purpose, should not have found an early place in our jurisprudence. The alienation of land was, however, generally favored in the colony; and it would be matter of astonishment, if some mode was not in practice, by which femes covert could convey their estates. No express mode is pointed out by any colonial statute; and there does not exist, even to the present day, any general statutable regulation on the subject.

In 1640 the colonial legislature passed an act, declaring that no mortgage, bargain, and sale, or grant of any houses, lands, &c. when the grantor remained in possession, should be of force, except against him and his heirs, unless the same should be acknowledged before some magistrate, and recorded in the county court; and the recording, as provided by the act of 1641, 1642, does not seem to have been intended of the whole deed at large, but of "the names of the grantor and grantee, the thing and estate granted, together with the date thereof." In 1652 another act was passed, declaring, "that henceforth no sale or alienation of houses or lands, within this jurisdiction, shall be holden good in law, except the same be done by deed in writing, under hand and seal, and delivered, and possession given upon part, in the name of the whole, by the seller or his attorney, so authorized under hand and seal; unless the deed be acknowledged, and recorded according to law." Here, the first part of the enactment provides for a livery of seisin, and thereby makes the conveyance a feoffment; and the latter part substitutes, as an equivalent of equal notoriety and effect, the acknowledgment and record of the deed. So that by the latter, the conveyance becomes, as to all legal purposes, either a feoffment, or a conveyance of equal power to transmute the possession and title. This is the substance of the colonial legislation. After the charter of 1692, the subject was again taken up by the legislature; and by the provincial act of 9 Wm. III. c. 7, it was declared, "that henceforth all deeds or conveyances of any houses or lands within this province, signed and sealed by the party or parties granting the same, having good and lawful right or authority thereto, and acknowledged by such grantor or grantors before a justice of the peace, and recorded at length in the registry of the county, where such houses or lands do lie, shall be valid to pass the same, without any other act or ceremony in the law whatsoever." This statute remained in force until after the Revolution; and having been revised by the act of 1783, c. 37, remains in substance the present law of this commonwealth.

It is observable, that this statute of 9 Wm. III., dispenses entirely with livery of seisin, by declaring, that the deed or conveyance, duly executed, acknowledged, and recorded, shall be valid to pass the estate "without any other act or ceremony in the law whatsoever." See Pidge v. Tyler, 4 Mass. 541; Higbee v. Rice, 5 Mass. 352; Marshall v. Fisk, 6 Mass. 24. The act or ceremony, here alluded to, doubtless is livery of seisin, without which a deed of feoffment at common law was not sufficient to pass an estate of freehold. 2 Bl. Comm. 311. The statute gives no description of any particular kind of deed or conveyance, such as feoffment, bargain and sale, lease and release, &c., nor does it express anything as to the operative words which it shall contain. Any deed, any conveyance, granting the estate by any words, expressing a clear intention to transfer the same, is sufficient. The statute looks not to the particular form of the deed, but to its substance, as conveying the title of the grantor; and gives it full effect by its own transcendent authority. It transmutes the title and possession as perfectly as it could be done by any kind of conveyance. In short, as has been observed by a very learned

judge (Chief Justice Dana), to whose opinion I shall have occasion more fully to refer hereafter, "this statute was evidently made to introduce a new mode of creating or transferring freehold estates in corporeal hereditaments" (i. e. new to the common law), "viz. by deeds, signed, sealed, acknowledged, and recorded, as the statute mentions. It does not prescribe any particular kind of deeds or conveyances, but is general, and extends to all kinds of conveyances." The deed operates in such manner as may best effectuate the intention of the parties. It may operate as a feoffment, a bargain and sale, a covenant to stand seised to uses, a release, or a confirmation, as the circumstances may require. This has been the uniform construction put upon the statute by our courts; and perhaps our deed of conveyance may most aptly be denominated, in the largest sense of the common law, a grant. See Co. Litt. 284a, note, 1301b; Shep. Epitome, c. 93, p. 625; Dudley v. Sumner, 5 Mass. 472; Livermore v. Bagley, 3 Mass. 487; 2 Saund. 96, and note 1. In Marshall v. Fisk, 6 Mass. 24, 32, Chief Justice Parsons said, "A conveyance of land may here be considered as any species of conveyance necessary to effect the intent of the parties, and not repugnant to the terms of it." "It may have the effect of a feoffment, without an actual entry of the grantee." See, also, Knox v. Jenks, 7 Mass. 488. It is farther observable, that the statute uses the expression, deeds, &c. signed, &c. by the party, &c. "having good and lawful right or authority thereto." It was upon this clause, that the late Judge Trowbridge founded his opinion, that the authority of the husband and wife to convey her estate was derived from this statute. The argument was to this effect. By the common law, husband and wife can, by a particular mode of conveyance, viz. fine or recovery, pass her estate; they are therefore persons "having good and lawful right or authority thereto," and consequently grantors entitled to convey within the purview of the statute. Fowler v. Shearer, 7 Mass. 14, 21. To me there appears much force in this reasoning. But Chief Justice Parsons has thought this opinion ill-founded. "One objection to this reasoning is (says he), that according to the practical construction of the statute it proves too much. For tenant in tail can convey by common recovery; yet it was never supposed, that under this statute he could convey, so as to bar his issue, or those in remainder or reversion." Id. Now the force of this objection is somewhat diminished by the consideration, that this construction of the statute, as to tenants in tail, does not appear ever to have passed under judicial cognizance; and probably never became matter of controversy, as from very early times common recoveries were used in the province to bar entails. It is not to be presumed, when a known and approved mode of barring entails was practised, that another mode, which was open to question, would be resorted to. But the case of tenant in tail does not strike me to be, to all intents and purposes, ad idem. There are at least some distinctions, which would deserve consideration, if the point were now in judgment. A feme covert, having the fee in herself, is absolute owner of the whole estate; and when she parts with it by fine or recovery, she parts with no more than her present title to the estate. But it is not exactly so in respect to tenant in tail. He is not absolute owner, but he is special owner, per formam doni. If he is of perfect capacity, and sui juris, his deed will convey no more than a base or voidable fee, and will not exclude his heirs, per formam doni. Comyn, Dig. "Estate," B. 22, 24, 33; Id. "Discontinuance," A 4, B; Machil v. Clark, 2 Salk. 618; Martin v. Strachan, 5 Term R. 107, note. Even a fine by a tenant in tail bars only his own issue; it does not affect subsequent remainders; but creates a base or qualified fee, determinable upon the failure of the issue of the person, to whom the estate was granted in tail; upon which event the remainder man may enter. 2 Bl. Comm. 355–357, and Christian's note 3; 5 Term R. 108. It is true, that if he omits to enter within five years after his title accrues, he is barred by statute, if the fine be levied with proclamation. But this is true also as to strangers; and it operates by the same reason, as other statutes of limitations. A common recovery by tenant in tail admits indeed of a very different consideration. A fine operates only as an extinguishment of the estate tail, and passes a base or qualified fee. But a common recovery does not operate in that manner; for a common recovery passes not a base fee, but a full, absolute, unlimited, and rightful fee, and is to be considered as the proper conveyance of a tenant in tail, and passes the fee in the same manner, as the fee is passed by a feoffment of tenant in fee. Such is the language of Lord Chief Justice Lee, in delivering the opinion of the court in Martin v. Strachan, 5 Term R. 107, note. But this proceeds upon a fiction of law of the recompense by the recovery over against the vouchee. So that, as the same learned judge said on the same occasion, a common recovery may be considered, in several respects, as to a tenant in tail, and as to a remainder man. As to tenant in tail, it is a conveyance by consent; and as to the remainder it is a bar involuntary. As to tenant in tail it is a grant in the per; as to the remainder, it has the credit of a recovery upon title; and therefore a tenant in tail alone limits all the uses upon such recovery, and he in remainder, nolens volens, is bound. At the common law a tenant in tail had a fee simple conditional, and the donor had only a possibility. He might alienate by feoffment before issue born, and the donor could not enter for a forfeiture, and this feoffment barred the issue. After issue born

he might alienate, and thereby bar both issue and donor. By having issue the condition was considered as performed to three purposes, to alienate, to charge, and to forfeit. The statute de donis took away the power of alienation; but it did not change the nature of the estate, or the course of descent. Under that statute the judges held, that the tenant in tail had not a fee simple; but they made dividual estates, a particular estate in the donee, and the reversion in the donor. But when common recoveries were introduced, these in effect revived the old law, and reduced the estate of the donor, or remainderman, again to a mere possibility. Martin v. Strachan, 5 Term R. 107, note; Co. Litt. 19; Comyn, Dig. "Estates," B 27.

The cases then of tenant in tail, and feme covert, are not necessarily to be governed by the same principle. She is, to all intents and purposes, the absolute owner of the fee without any remainder in others. He has not, strictly speaking, the absolute ownership of the fee, although he has, by a common recovery, the power of acquiring or passing it; but until such recovery he holds for the issue per formam doni, and there is a subsisting estate in the reversioner or remainderman, whether it be esteemed an interest or a mere possibility. She is not disqualified by the common law from conveying; but her conveyance is required to be by some solemn act of record, whereby her consent, upon examination, may be known to be free and voluntary. The tenant in tail, on the other hand, though competent by the common law to alien the fee, is, by the statute de donis, deprived of that power; and has re-acquired it only by a fiction of law, an imaginary recompense, whereby he is enabled to defeat the title of his own issue and those in remainder. It is not strictly the exercise of a right; but the exercise of a power, which by consequence defeats the rights of others. Now I do not say, that a court might not, in the exercise of a liberal construction, hold a tenant in tail, within the statute of 9 Wm. III., as a party "having good and lawful right and authority" to grant the estate in fee, upon the ground, that the law would enable him so to do by a common recovery. But there might be considerations growing out of the peculiar nature of his estate and the rights of third persons, which might induce a court to pause, when it might readily allow a feme covert to be within the clause. And the very circumstance, that common recoveries have always been in use in the province to bar entails, and never to pass the estate of a feme covert, would go far to show, that such a distinction, having some grounds to support it, had in fact prevailed. Judge Trowbridge's opinion, as to the origin of the usage of femes covert to convey, is not therefore overturned by the objection, that it proves too much. Chief Justice Dana evidently inclined to the same opinion as Judge Trowbridge. Other eminent persons have, however, entertained a different view of the subject, and resolve the usage into mere New England common law, the origin of which is unknown. Fowler v. Shearer, 7 Mass. 14, 21; Dudley v. Sumner, 5 Mass. 463; Osgood v. Breed, 12 Mass. 531. It would ill become me to attempt the difficult task of reconciling these diversities of judgment, magnas componere lites; nor should I have thought it necessary to enter at all into an examination of the matter, if a strong argument had not been pressed for the demandants, upon the ground of its being a mere usage, unauthorized by statute. If I might, however, be permitted to hazard a conjecture, it would be, that the practice of femes covert conveying their estates by deed prevailed antecedently to the provincial statute of Wm. III., and possibly was grounded upon the general terms of the colonial act of 1652; and that being then well known, the words of the statute "having lawful right, &c." were inserted to comprehend and affirm it. But be the origin of the usage what it may, it has prevailed beyond the memory of man, and has become a common assurance in the country, and cannot now be shaken without overturning innumerable titles, and the most solemn adjudications of our courts. This is admitted by the counsel for the demandants; and it is now necessary to examine the objections taken by them to the deed, under which the tenant claims.

The first objection is, that though a feme covert may convey her estate by deed jointly with her husband; yet this is by usage merely, and the usage has extended only to conveyances to third persons, and not to conveyances, where the uses were reserved to the husband, or the husband and wife, in the same deed; and that by the common law the husband cannot convey to the wife, nor the wife to the husband. In respect to the common law, the unity of persons, which arises from the relation of husband and wife, certainly prohibits a direct and immediate conveyance from one to the other from having any legal effect. Co. Litt. 112a, Comyn, Dig. "Baron & Feme," D 1. But either may, at the common law, indirectly convey to the other through the medium of a trustee, or by any conveyance, which operates a transmutation of possession. Thus, a man may make a feoffment, or other conveyance, to the use of his wife, and the estate will be executed in her by the statute of uses of 27 Hen. 8. Co. Litt. 112a; 1 Saund. Uses, c. 2, § 5. And by a fine or recovery the husband and wife may declare the uses of the wife's estate, either to the husband, or husband and wife, as well as to any third person. Lusher v. Banbong, 3 Dyer, 290a, and cases, note k. In short, they have as effectual power to declare the uses in such case, as any third persons can have; for the old estate is gone by the fine or recovery, and the use is a new estate having operation by the statute of uses. Cruise, Uses, p. 132, §§ 195, 196, &c.; Beckwith's Case,

2 Coke, 56; Bac. Uses, 70, and note of Rowe, 150; 2 Bridg. Conv. 170. So that, so far as the objection rests on a general disability by the common law, it is not sustained, for it does not exist. The estate of the feme covert, whenever it can be conveyed by her at all, can be conveyed to any uses whatsoever; and as well to the use of her husband, as to any other use. And if the present conveyance had been by fine or common recovery, the uses declared by the deed would have been good and effectual in law.

Then, as to the other part of the objection in respect to the extent of the usage, it is admitted, that the case must be brought within the usage. But what is the usage? It is, that the husband and wife, joining in a deed, may convey her lands so as to bar her and her heirs. It is not confined to any particular kind of conveyance, or to any particular persons. Whatever is the conveyance, and whoever are the parties, if it is, in point of law, competent in other respects to pass the estate to them, the usage gives it complete validity. It is incumbent upon those who set up an exception to the generality of the usage, to establish its existence. If not established, then the court must deal with it by analogy to other well known principles. There seems to be no reason, why, if a feme covert may convey her estate to any uses whatever by fine or feoffment in England, she may not convey her estate to the like uses here by her deed. The law, in each case, gives her the general authority to convey her estate, and there is no more reason for restricting it in the one case, than in the other. If indeed a restriction exists, it must be submitted to; but the usage embodies none in its general form; and since it leaves the wife at liberty to pass her estate by deed, it leaves the conditions, uses, and limitations, in like manner, at the option of the parties. Indeed, the objection itself admits, that by two separate deeds, one from the husband and wife to a stranger, and from him back to the husband and wife to uses, the estate of the wife might, consistently with the usage, pass to the same uses, as are contained in the present deed. If so, then the usage admits the competency of the wife to pass her estate by deed to the use of her husband; and the question then resolves itself into this, whether the deed is in a competent form to pass the possession of the estate from the wife, so as to create a proper feoffee or grantee to uses. It is upon that ground, and that ground only, that the necessity of two deeds can, in a legal point of view, be admitted.

And this leads me to the consideration of the objection made to the nature and operation of the deed in the present case. It divides itself into two heads: 1. That in effect, upon its true construction, it is a direct conveyance from husband and wife to the use of themselves, and therefore void. 2. That at most, it is a bargain and sale, attempting to create a use upon a use, and as this is void at law, Mr. Ritchie can take no estate by way of use; and to give effect to the deed, as a trust, would be not in furtherance, but in destruction of the intent of the parties.

Before proceeding to consider this objection, it may be necessary to say a few words as to the doctrine of uses, and the different kinds of conveyances known to the common law. Before the statute of uses, all uses were held but as trusts and confidences annexed to the land; and not legal estates recognized at the common law. The feoffee to uses was deemed the legal owner of the land; and the use, with some exceptions, introduced by statutes, was deemed a trust, which could be alone enforced in the court of chancery. Then came the statute of uses, which ordained, that such as had the use of lands should, to all intents and purposes, be reported and taken to be absolutely seised and possessed of the soil itself. 2 Bl. Comm. 137, 331. So that the interest of cestui que use was, by this means, changed from an equitable, into a legal estate; for the statute executed the use to the possession, and made cestui que use complete legal owner, to all intents and purposes, annihilating the intermediate estate of the feoffee. But the courts of common law in the construction of the statute, soon adopted a narrow and illiberal mode of interpretation, and held that a use could not be limited on a use. So that if A. made a feoffment to B. and his heirs, to the use of C. and his heirs, in trust for D. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity; thereby throwing all such trusts back again into equity. This consideration made it very important to examine the operation of different modes of conveyancing upon uses. There are two modes of conveyancing by which uses may be raised. The first is such as operates by a transmutation of the estate of the grantor, such as a fine, feoffment, recovery, or deed of lease and release. By these a seisin is immediately transferred to the grantee, out of which the uses may be served. The other mode operates, not by a transmutation of the estate of the grantor, but the use is served out of the grantor's seisin, and then the use is executed by the statute. Of the latter description are bargains and sale, and covenants to stand seised to uses. Bargains and sales were introduced before the statute of uses; but they were then considered, not as a conveyance of the estate of the bargainor, but as a mere contract to convey, which created a trust in favour of the bargainee. When the statute of uses came, this trust was immediately executed, and thus the use was united to the estate in the bargainee. But no further or secondary use could be limited upon such conveyance; for it was the limitation of a use upon a use, and therefore such limitation was deemed repugnant and void. 2 Bl. Comm. 335; Co. Litt. 271b;

Plowd. 301; 4 Cruise, Dig. tit. 32 c. 12, § 28, p. 193. The same doctrine applies to covenants to stand seised, this latter conveyance being principally distinguished from a bargain and sale by the fact, that a bargain and sale arises upon a pecuniary consideration, and a covenant to stand seised, upon the consideration of blood or marriage.

With these principles in view, which are indeed common learning, let us now proceed to the consideration of the objection, as to the nature and operation of the deed of Ritchie and his wife to Knapp. The object of the deed is perfectly clear. It is to convey the estate of the wife, so that it shall be for the use of the husband and wife during their joint lives, and for the use of the survivor, in fee simple. It is not in form a direct conveyance between husband and wife to and for each other; but it is a conveyance to a stranger both by blood and marriage (for such Knapp is agreed to be), purporting to be in consideration of the marriage, and also of a pecuniary consideration paid by Knapp to the grantors. If we hold the deed utterly void, we defeat the manifest intent of all the parties. It leaves the estate in the wife without creating any of the uses, for which the parties executed the deed. If it has any operation whatsoever, it operates either to convey the estate of the wife to Knapp, as a use created by the deed, and executed in him by the statute of uses (which forms a part of the common law of our land); or as a conveyance, transmuting the possession and seisin to Knapp, under our statute of conveyance, and therefore creating a seisin in him sufficient of itself to serve the uses of the deed. In either view it cannot be said to be a direct conveyance from Ritchie and his wife to themselves, for in both views there is a stranger, who is the grantee, and for a valuable consideration. It is said, that the deed must operate in some way known to the common law, or not at all. If by that it be meant, that it must arrange itself distinctly, as one of the kinds of conveyances classed by the common law, the doctrine is not admitted. For, as has been already intimated, though a deed be not formally a feoffment, or bargain and sale, &c. &c.; yet if it be sufficient in legal construction to pass the estate, under our statute of conveyances, it is good, and binds all persons. In such case, if it be not a feoffment, it has an operation equivalent to it; and if it be not a bargain and sale, it has a like validity. It may be construed, if not in fact, yet in potency and substance, as any conveyance which most fully accomplishes the intention of the parties. If, however, by the argument is intended no more, than that the deed must be construed, as to its terms and effects, by the rules of the common law, that is not questioned. The deed has not been contended to be a covenant to stand seised; and probably could not be sustained in that aspect. The difficulties are, that it has a pecuniary consideration, and that the grantee is a stranger both by blood and marriage. However, I desire not to be absolutely bound by this intimation, as there really seems much reason for holding, that, where the grantee is a mere conduit or instrument for uses, which do in fact arise from blood and marriage, and he himself takes no interest, the deed shall work effectually to the use of persons included within the consideration of blood and marriage. Jackson v. Sebring, 16 Johns. 515; 2 Saund. Uses, p. 90; 3 Salk. 384; Plowd. 307; Comyn, Dig. "Covenant," G 3. Then again it is said, that it cannot operate as a bargain and sale, for that will be against the intention of the parties; for it will be a conveyance to the use of Knapp, and then the subsequent use to the husband and wife, being a use upon a use, will be void.

Now in construing deeds, we must take the whole together; and if any rational exposition can be made to give effect to the deed, that exposition ought to be adopted, "ut res magis valeat, quam pereat." Clanrickard's Case, Hob. 277; 2 Saund. 96, and note 1. The intention here is clear to convey to Knapp; the pecuniary consideration paid by him, is sufficient to raise a use to him, and make the conveyance a bargain and sale. Why then, since it may have this operation, ought not the court to give it? The reason assigned, is that the parties intended no use to him, but a legal use to the husband and wife. In my judgment this is assuming a particular, to defeat the general intention. The parties must be presumed to know the legal effect of their own instrument. If they meant it to be a mere bargain and sale, then the second uses to husband and wife, though void at law as uses, yet are good in equity as trusts. No one can now doubt, that it is competent to parties in this state to create fiduciary estates, and that conveyances for this purpose are valid in law. There is no absurdity and no repugnancy to any intention expressed in the deed, in considering the use to be by way of trust. It is not declared, that, if the conveyance cannot operate so as to create a legal and executed use in the grantees, the deed shall be utterly void. On the contrary, if the deed can operate only as a bargain and sale, then if the parties are to be presumed conusant of and bound by the law, they meant in fact to create a trust estate under the denomination of a use; that is, they meant to create a use upon a use, which is perfectly good in equity, and not prohibited by any rule of law. In this view of the case, though the tenant could not, if he were demandant, recover the land in a suit at law; yet he could maintain a suit in equity to enforce the trust; and the title of the demandants by descent would be completely cut off. So that, at all events, they would not be entitled to recover in the present suit. If I were driven to con-

strue the present deed a mere bargain and sale, I should not entertain the slightest doubt of its validity, and that it passed the estate by an executed use to Knapp. And whether the uses ever could be enforced or not, as they were not illegal, they could not avoid the legal operation of the conveyance to him. It is by no means true, that because a deed cannot have operation by law to the full extent intended, it shall have no operation at all. On the contrary, it has been held, that if a covenant be made to stand seised to the use of a person related to the covenanter by blood or marriage, and of a stranger, the whole use will vest in the relation. 2 Rolle Abr. 783, pl. 4; Id. 784, pl. 5; Comyn, Dig. "Covenant," G 3, G 5. See also Shep. Touch. 512, 513; 3 Salk. 385; Plowd. 307; 2 Saund. Uses, 92. But in my judgment the present deed may well be construed as a feoffment; and in that view, by transmutation of the possession, Knapp became seised of the estate, so as to serve the subsequent uses out of his seisin, and they became, by the statute of uses, executed in Ritchie and his wife. The words of the conveyance are, "grant, bargain, sell, and convey." Now the word "grant" is nomen generalissimum. It concludes all sorts of conveyances. In Co. Litt. 301b, it is said, that the words "'dedi' or 'concessi,' may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c.; and it is in the election of the party to use, to which of these purposes he will." See, also, 2 Saund. 96, and note 1. The word "convey," is, at least, of as general an import. No precise words are necessary to a feoffment; and therefore a conveyance by other words, as well as by the word "enfeoff," amounts to a feoffment. Comyn, Dig. "Feoff. A. 3; 2 Rolle, 73. Even a conveyance by the words "bargain and sell," if accompanied by livery of seisin, has been held a feoffment. Comyn, Dig. "Feoff." A 3; 6 Mass. 24; 1 Leon. 25. And therefore these words, in Massachusetts, may well operate as a feoffment, if it will best effectuate the intention of the parties, since livery of seisin is here dispensed with, and an acknowledgment and registry of the deed is substituted for it. Id. In the old charters of feoffment, the word "enfeoff," is not found; but "dedi" and "concessi." 2 Bl. Comm. 369; Id. Append. i.

Why then shall not the present deed be construed as a feoffment, since thereby complete effect is given to the intention of the parties in the very way, which avoids any trust, and creates uses capable of being executed by the statute? The only objection stated at the bar is, that a feme covert cannot, by the common law, convey her estate by feoffment. Neither could she, by bargain and sale, lease or release, or in short by any other deed in pais. This objection therefore, if well founded at all, goes entirely to overthrow the established usage of the country, that a feme covert can convey by deed, and otherwise than by fine or feoffment. The usage enables her to convey her estate, and to transmute by deed the uses in, and possession, to the grantee. She must therefore have as much right to convey by feoffment, as by any other mode of conveyance by deed. And if even the deed be deemed anomalous, and a nondescript, still if its efficacy is, as it must be admitted to be, to transfer her estate to another, when such is the intent, it gives the grantee a complete seisin, possession, and title, and these are sufficient to serve the uses. Whether, therefore, it operates as a feoffment, or quasi feoffment is immaterial. The transfer of the estate is the substance; the method is unimportant. If transferred in fact, then by operation of the well settled principles of law, the grantee may be seised to the other uses. Nay more, if it were not true, that her conveyance may operate as a feoffment, or quasi feoffment, she could not transfer her estate, to such uses as the present, by the operation of double deeds, which power is not denied. And for myself I am free to say, that I can discern no legal difference between a single deed, which, at the same time, transfers the estate and declares the uses; and two deeds executed at the same time, one of which transfers the estate, and the other gives it back to the same uses. Both of these deeds must be construed together as parts of one transaction. If there be any distinction, it is only so far as they may be supposed to indicate a difference of intention; but supposing no difference of intention, then their legal effect ought to be the same. If indeed they are executed at different times, they may admit of very different considerations.

My judgment accordingly is, supposing the point to be res integra, that the present deed is effectual, and operates as a feoffment to Knapp, and raises the uses expressed therein, so that Ritchie and his wife became seised of the estate by the execution of the uses, and in the events which have happened, he is now the sole legal owner of the fee. But this is not res integra. The same questions arose, and were decided, in the case of Thatcher v. Omans, before the supreme court in Plymouth county, in May term, 1792. The suit grew out of a deed made by Moses Gill and wife, to John Scott, in December, 1770, in all respects the same with the deed before the court (which indeed seems to have been drawn from it), except that, in the granting part, the words "give" and "enfeoff" were added, the clause being, "do give, grant, bargain, sell, enfeoff, and convey." The demandants claimed as heirs at law of Mrs. Gill; the tenants claimed under Moses Gill, who, by the death of his wife, was the asserted owner in fee under the deed. The cause came on, upon a special verdict, and was argued by the late Governor Sullivan and Lieutenant Governor Levi Lincoln for the tenants, and by the late Chief Justice Parsons for the demandant. The court unanimously gave judgment for

the tenants, affirming thereby, in the most solemn manner, the validity and sufficiency of the deed to pass the wife's estate to the uses expressed in the deed. The grounds of this decision have been somewhat differently represented in different books. In Sullivan's Land Titles (pages 209, 210), a report, in some respects incorrect, is given of the case, and it is said, that the court were unanimously of opinion, "that the conveyance to Scott was a covenant in Gill and his wife to stand seised to their own use, as joint tenants for the life of both, and in fee for the survivor, and the heirs of the survivor without limitation; by which the estate was vested in him as survivor in fee simple." In Marshall v. Fisk, 6 Mass. 24, 32, Chief Justice Parsons said, "In this state, a deed, purporting to be a bargain and sale to A. and his heirs, to the use of B. and his heirs, has been holden, in the case of Thacher v. Omans, to be a feoffment, and not by way of use, and that the estate passed to B., by way of use, by virtue of the statute of uses." The learned judge is not quite accurate in stating, that the deed purported to be a bargain and sale; it purported just as much to be a feoffment. Mr. Dane, in his Abridgement of the Law (4 Dane, Abr. 157), states the judgment to have been, that "this conveyance to Scott, to the use of Gill and wife, was good and valid; at any rate, the court held, that she parted with her estate by her deed to Scott." Having been furnished with a copy of the record in the case, I am enabled to say, that Mr. Dane has truly stated the judgment, which was for the tenants, and the question, as put by the jury to the court, turned altogether upon the validity of the deed to Scott. Fortunately, however, the case is not left to these general statements, though considering the very deep interest excited by the judgment, and the traditions respecting it within the memory of many counsellors yet alive, these might afford no insecure basis, on which to place our confidence. But the opinion, actually delivered by the late Chief Justice Dana in the case, has been produced at the bar, in his own hand-writing, which shows, very much at large, the grounds of his own judgment, and probably also that of the court itself. I have perused that opinion with great care and attention. It exhibits the talents, learning, and sagacity of that eminent judge in a very favorable light. All the leading arguments, on both sides, are stated, illustrated, and examined, in this opinion. The conclusion, to which his mind arrived, was, that the deed was to be considered as a feoffment, and not a mere bargain and sale; that it passed the estate of the wife, and that the uses declared thereon were good and valid to vest the estate in Gill and his wife, as joint-tenants in fee.[2] From a case so fully argued, and so well considered, which has ever since been deemed a land-mark in our law, and has guided the judgment of conveyancers, I should be extremely loth to depart, even if it seemed to me not originally quite founded in accurate law. In cases of this nature I feel myself bound to administer the local law, and when the rules, which regulate titles to real estate, are once ascertained in the state court, they are obligatory upon my judgment. In the present case I have only to say, that my judgment follows and approves the reasonings of Chief Justice Dana; and the decision in Thacher v. Omans, and others, cannot be departed from without uprooting some of the solid foundations of the law.

Upon the statement of facts judgment must be entered for the tenants.

DURANT (UNION PAC. R. CO. v.). See Case No. 14,377.

Case No. 4,191.

DURANT v. WASHINGTON COUNTY.

RIGGS v. JOHNSON COUNTY.

[1 Woolw. 377.][1]

Circuit Court, D. Iowa. May Term, 1869.

DISOBEDIENCE OF MANDAMUS — CONSOLIDATION — COSTS WHEN SEVERAL WRITS ARE ISSUED — OF MARSHAL AND CLERK — OF DISTRICT ATTORNEY — PROCEEDINGS FOR CONTEMPT OF COURT — CHARACTER—DISTRICT ATTORNEY TO APPEAR.

1. When a mandamus is awarded, directed to a board of officers composed of several members, commanding the performance of an official act by them as a board, and they do not obey it, but one writ of attachment should go against them for this contempt.

2. If more than one writ is issued, and each is entered as a separate case, they will be consolidated.

3. When a separate writ for attaching each member of the board has been issued, the marshal and clerk will be allowed their costs in each case.

4. The district attorney is entitled to but one fee for all the cases arising out of one writ of mandamus.

5. The statute provides that he shall have but one bill of costs in several proceedings which should be joined.

6. He should know when they should be joined, and if not joined at the outset, he should move for their consolidation; if he fail to do so, he can have nothing by reason of his neglect of duty.

7. Prosecutions for contempt of court are criminal in their character, the United States being plaintiff.

[Cited in Re Ellerbe, 13 Fed. 532; U. S. v. Atcheson, T. & S. F. Ry. Co., 16 Fed. 853; Hendryx v. Fitzpatrick, 19 Fed. 812.]

8. Whenever the vindication of the authority of the government requires it, the district attorney should appear in such proceedings.

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[2] This opinion has been since printed in 3 Pick. 521, 522.

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

Judgments having been rendered against certain counties by this court, mandamus was awarded to each creditor, addressed to the supervisors of each county by name, commanding them to levy and collect a tax sufficient to raise the money to pay the judgment. They declined to do so. At the last term, attachments were ordered by the court to go against them, to be returnable to the present term. Writs of attachments were framed and issued against each supervisor by name, so that, for the contempt of the board in disobeying one writ of mandamus, several processes of arrest went; and they were served accordingly. This action against each individual thus proceeded against was docketed as one case.

The district attorney appeared in each to prosecute it. The costs were taxed by the clerk in each case, without regard to the other cases.

Motion was now made to consolidate all the contempt proceedings, based on one mandamus, and to retax the costs.

MILLER, Circuit Justice. Several questions are presented in this case, which we will dispose of in their order.

The first arises on the motion to consolidate the cases.

The proceeding in which this motion is made is an attachment for contempt, against the supervisors, for failing to obey a writ of mandamus issued by this court. In fact, there were two writs issued at the instance of different relators, directed to the same board of supervisors. No special order was made by the court as to the manner of issuing the attachment for contempt; and the clerk, under instructions from the relators, or in accordance with what he believed to be his duty, issued a separate writ in each mandamus, for each individual supervisor, making two writs of attachment against each of the defendants, and as many sets of attachment as there are supervisors. The cases are docketed as cases of the United States against each individual.

We are of opinion that the cases of all the supervisors charged with contempt of one writ of mandamus, are proper subjects for consolidation into one. The order which the supervisors were required to execute was one order; the action required of them was joint action; and it related to but one subject matter. Their guilt or innocence of the charge of contempt has its foundation in the same duty and the same disobedience; and though there may be varying defences or excuses, and a difference in the degree of guilt, the hearing together of these matters is quite as consistent and appropriate as the trial of the guilty and the innocent, charged in the same indictment, with the vilest crime; or as the trial in one civil action of many persons charged as joint trespassers. The truth is, that, as a principle, they are jointly and severally guilty, and may be jointly or severally tried, as convenience and the discretion of the court may determine. In the cases before us, we are of opinion that justice and convenience will be subserved by a consolidation of all which relate to the disobedience of the same writ of mandamus, and we shall order that they be thus consolidated.

If it shall become necessary in future to issue attachment for contempt in this class of cases, but one writ should issue for the contempt incurred under each mandamus; all who are attached for disobedience to that mandate being included in the one writ.

We see no reason, however, for retaxing the costs of the marshal and clerk. The cases are of that character which allows of presentment jointly or severally. There is no reason to believe that the clerk acted otherwise than as he believed to be right. He should not be deprived of the fees, already earned, as allowed by law.

The case of the marshal is still stronger. There was placed in his hands a separate writ of attachment against each man, issued under the seal of the court. He had no part in framing the process, nor could he refuse to serve it. The only question is, what does the law allow him for such service? It is not claimed that too much is taxed for any of the services rendered, if the cases are to be treated as individual. That such is the case until they are consolidated, we have already shown.

The only limitation to the marshal's right to recover full fees for each writ which he serves, is to be found in the proviso to the 1st section of the act of 1853 (10 Stat. 144). It is there provided, that where, at the instance of the same parties, more than two writs are to be served on the same person, the marshal shall be entitled to mileage for two writs only. As there are here no more than two writs served upon any one person, this provision is obviously inapplicable.

A more difficult question is, whether a fee of $10 is taxable in each of these cases, in favor of the United States attorney for this district. Our first impressions were strongly adverse to this claim. The members of this court do not know of an instance in which such claim has ever been asserted, either in the state or federal courts. Nor are we aware of any instance in which the attorney for the government has appeared to present a case for contempt, originating in the refusal of a witness or other person to yield obedience to a writ issued in a suit between private parties.

We are satisfied, however, upon consideration, that a prosecution for contempt of court is a criminal proceeding, in which the government is interested as plaintiff; and that, whenever it becomes necessary for the government's attorney to appear to vindicate its authority as represented in the courts, it is his duty to do so.

It only remains to ascertain what provision the statute has made for his fees, in a case in which he properly appears. One of the provisions of the statute is, that whenever two or more indictments, suits, or proceedings, which should be joined, are or shall be prosecuted, the district attorney shall be paid but one bill of costs for all of them.

Now we have just held that all of these cases, which relate to the same writ of mandamus, should be joined; and have given effect to that view by ordering a consolidation. We have also given directions concerning the manner of issuing such writs in future. So far as the clerk and marshal are concerned, this can affect their fees for future services only. But it is obvious that the statute intended that the district attorney should have but one bill of costs in all cases which should have been joined, without reference to whether they are consolidated or not. It establishes a rule in reference to his fees, but does not do so in regard to those of the clerk and marshal. The obvious reason is, that he is supposed to know when cases should be joined, and, if such cases are not originally united, that he should move for their consolidation. If he fails to do this, and the matter is brought to the attention of the court, he can have only such fees as he would have been entitled to if they had been so brought or consolidated.

The result of these views is, that for the attachments growing out of each mandamus, the district attorney is entitled to one fee of $10, and no more. Most of the parties attached, and some under each mandamus, are still before the court for future action.

No fee will be taxed for the attorney in the cases of those parties who have been discharged with a nominal fine at this term. When the cases yet before us are finally disposed of, one fee of $10 will be taxed for him in the cases as consolidated under each mandamus.

DURFEE v. The FLORA. See Case No. 4,878.

DURFEE (PUGH v.). See Case No. 11,460.

Case No. 4,192.

DURHAM et al. v. ASHTON.

[Cited in Hamilton v. Franklin, Case No. 5,981. Nowhere reported; opinion not now accessible.]

DURHAM v. The ECLIPSE. See Case No. 4,268.

Case No. 4,193.

DURHAM v. RANGELY.

[See Case No. 2,177.]

DURHAM SMOKING TOBACCO CASE. See Cases Nos. 1,474 and 1,475.

DURKEE (UNITED STATES v.). See Cases Nos. 15,008 and 15,009.

Case No. 4,194.

DURKEE v. WORKMAN et al.[1]

[1 Law & Eq. Rep. 473; 2 Wkly. Notes Cas. 431; 21 Int. Rev. Rec. 349; 32 Leg. Int. 362.]

Circuit Court, E. D. Pennsylvania. Oct. 4, 1875.[2]

CONTRACT—CONSTRUCTION OF CONDITION IN CHARTER-PARTY.

1. A charter-party stipulated for "only half freight to be paid for all barrels delivered in a broken state." Some of the barrels were broken at the time of shipment. *Held*, that the meaning of the stipulation was that half freight was to be paid upon all barrels broken at the time of delivery to the consignee, and not only upon those broken at the time of shipment.

Appeal from the decree of the district court of the United States for the eastern district of Pennsylvania.

[This was a libel by A. R. Durkee, master of the ship Tancook, to recover freight due under a charter-party. The district court dismissed the libel (Case No. 4,195), and libellant appealed.]

McKENNAN, Circuit Judge. The appellant's right to recover in this case, depends upon the construction of the charter-party and bill of lading, by which, "on right and true delivery of the cargo, according to the bills of lading signed by the captain, he was to be paid freight, one shilling, three pence, British sterling, in full, for every barrel delivered, payable in cash, at the current rate of exchange, for sixty days, sight bills in London, noted on the day the vessel is entered at the custom-house at port of discharge, and only half freight to be paid for all barrels delivered in a broken state." The cargo consisted of empty oil barrels, some of which were sound and others "broken" at the time of shipment, and it is contended by the appellant that the reduced freight is applicable to those barrels only which were in a broken condition at that time. I do not think this is the import of the contract. The bill of lading acknowledges the shipment of the cargo "in good order and well conditioned," "being marked and numbered in the margin," of course having reference to the proportion of sound and broken barrels at that time, and stipulates that they shall "be delivered in like good order and well conditioned," at the port of Philadelphia, to the consignee, "he paying freight for said goods, at the rate of one shilling, three pence, British sterling, in full, for every barrel delivered in good condition. half freight for broken barrels." Independent of any liability of the vessel for injury

[1] [Syllabus reprinted from 1 Law & Eq. Rep. 473, by permission. The opinion is from 21 Int. Rev. Rec. 349.]

[2] [Affirming Case No. 4,195.]

to the cargo, resulting from negligence only, I think the contract provides for an adjustment of the freight upon the basis of the condition of the cargo at the time of its delivery to the consignee, and that the barrels which were then "broken," were chargeable with only half freight. This was the view taken by the court below, and its decree was, therefore, right.

A decree will not be entered that the libel be dismissed with half costs to the libellant in the district court [Case No. 4,195], but with costs to the appellee in this court.

Case No. 4,195.

DURKEE v. WORKMAN et al.

[1 Wkly. Notes Cas. 204.]

District Court, E. D. Pennsylvania. Dec. 24, 1874.[1]

CHARTER PARTY—CONSTRUCTION OF CLAUSE IN.

[A vessel was chartered for a cargo of empty oil barrels, with the stipulation, "Only half freight to be paid for all barrels delivered in a broken state." *Held*, that the half rate applied to barrels received by the ship in a broken condition as well as barrels broken during the voyage.]

[This was a libel by A. R. Durkee, master of the ship Tancook, against Workman & Co., to recover freight under a charter party.]

R. S. Carr, of Hamburg, Germany, chartered of libellant the ship Tancook, for a voyage thence to Philadelphia, with a cargo of empty refined petroleum barrels. The charter party stipulated that on delivery of the cargo, according to bills of lading signed by him, libellant was "to be paid freight one shilling three pence British sterling in full for every barrel delivered, * * * and only half freight to be paid for all barrels delivered in a broken state." Libellant received on board said vessel, at Hamburg, five thousand and seventy-one empty refined petroleum barrels, and gave bills of lading therefor, setting forth that the said barrels were "shipped in good order and well conditioned by the said R. S. Corr, and were to be delivered in the like good order and well conditioned at Philadelphia unto order, he or they paying freight" at the rate aforesaid "for every barrel delivered in good condition, half freight for broken barrels." The vessel, having performed the voyage, was discharged at Philadelphia, and her cargo delivered to respondents as consignees. The vessel delivered all the barrels, one thousand seven hundred and ninety-five being broken when landed. No evidence was given to show what part were broken on shipboard, and what part were broken when shipped. Libellant claimed to receive his full freight, averring that "broken barrels" in the charter party meant "barrels which might become broken in course of transshipment;" and that these barrels were not so broken, but were shipped in a broken condition at Hamburg. Respondents paid full freight on the barrels which were unbroken, and half freight on the barrels delivered in a broken condition, claiming that the stipulation of "half freight for broken barrels" applied to all broken barrels received by the consignees, whether shipped in that condition or broken on the voyage.

Mr. Gormley, for libellant.

Morton P. Henry, for respondents.

CADWALADER, District Judge. "It appearing that all except the disputed part of the libellant's demand has been paid since the libel was filed, it is dismissed as to the residue thereof. Half costs are allowed to the libellant."

[NOTE. The libelant took an appeal to the circuit court, where the decree was affirmed (McKennan, Circuit Judge). See Case No. 4,194.]

DURLING (U. S. v.). See Case No. 15,010.

DURNELL (HURST v.). See Cases Nos. 6,927 and 6,928.

Case No. 4,196.

In re DURYEA.

[17 N. B. R. 495;[1] 2 Nat. Bank Cas. (Browne) 170.]

District Court, S. D. New York. April 26, 1878.

BANKRUPTCY — FORECLOSURE OF MORTGAGE IN STATE COURT—INJUNCTION—SALE OF REAL ESTATE AT AUCTION.

1. Where a question arises involving the right of national banks to make loans of a particular character upon mortgage, the assignee should be permitted to litigate such question in the federal courts, and should not be sent into the state courts to try it on the distribution of surplus moneys in a foreclosure suit, or in a suit brought by the party holding the alleged invalid mortgage.

[Cited in Hudson v. Schwab, Case No. 6,835.]

2. The Bowery Savings Bank held a first mortgage on property of the bankrupt which was not contested by the assignee. It commenced foreclosure proceedings which were restrained by injunction of the bankrupt court. On motion to be allowed to proceed with the foreclosure to the entry of judgment, *held*, that there was no reason for allowing it to do so as its rights would be fully secured on the distribution of the proceeds of sale whenever the property should be sold under the direction of the court.

3. The fact that a recovery of the amount of a mortgage in the bankrupt court would be burdened with greater expenses than if the mortgagee were allowed to go on and foreclose will not control the action of the court, where it is obviously for the interest of the creditors that the estate should be administered in the bankrupt court.

4. The assignee must, in the present state of the real estate market, show a good reason for

[1] [Affirmed in Case No. 4,194.]

[1] [Reprinted from 17 N. B. R. 495, by permission.]

an immediate sale before he will be allowed to sell the property at public auction.

[In bankruptcy. In the matter of Abram Duryea.]

Fellows & Irvine, for assignee.
S. Dominick, for J. S. Young.
H. F. Anderson, for Chatham Nat. Bk.
Norwood & Coggeshall, for Bowery Savings Bk.

CHOATE, District Judge. In this case several motions have been submitted together. The bankrupt owned two pieces of real estate in the city of New York, one on Cherry street, the other on East Thirty-Ninth street, near Fifth avenue. The Cherry street property is subject to a first mortgage held by the Bowery Savings Bank, on which there is due about nine thousand dollars, and to a second mortgage for eight thousand eight hundred dollars, held by the Chatham National Bank. The first mortgage is not contested by the assignee. Foreclosure proceedings have been commenced by the Bowery Savings Bank and have been restrained by the injunction of this court. The second mortgage is contested by the assignee as invalid, as made in violation of the provisions of the national banking laws. There are also liens for judgments against the bankrupt for about four hundred dollars. The value of the property is estimated at about sixteen thousand dollars. The Thirty-Ninth street property is subject to: taxes, one thousand one hundred and fifty five dollars; judgments, four hundred dollars; a first mortgage to the Seaman's Savings Bank for eight thousand five hundred and sixty dollars; a second mortgage to J. G. Young for five thousand three hundred and eighty dollars, neither of which is contested, and a third mortgage to the Chatham Nat. Bank for seven thousand dollars and interest, which is contested by the assignee on the grounds stated above. Young and the Chatham Nat. Bank have commenced actions of foreclosure in the state courts. The assignee now moves for leave to sell at public auction the Cherry street property. This motion is opposed by the Bowery Savings Bank, and the Chatham Nat. Bank. The Bowery Savings Bank and the Chatham Nat. Bank and Young move to dissolve the injunctions restraining them from prosecuting their foreclosures. The Bowery Savings Bank moves to modify the injunction, so as to allow it to proceed at least to the entry of judgment. Upon the facts shown I am satisfied that the injunctions against the mortgagees, restraining their suits in foreclosure, should not be dissolved. If the mortgages of the Chatham Nat. Bank are held invalid, there is a considerable interest in the Cherry street property in the bankrupt's estate, and in the Thirty-Ninth street property there may be such an interest after the admitted mortgages and other liens on those properties are satisfied. What the amount of that interest is in both cases depends upon the determination of the question of the validity of the mortgage held by the Chatham National Bank, a question involving the powers of national banks to make loans of a particular character upon mortgage. The question is one which the assignee should be permitted to litigate in the federal court, and he should not be sent into the state courts to try this question on the distribution of surplus moneys in a foreclosure suit, or in a suit brought by the party holding the alleged invalid mortgage in the state court. I see no reason for allowing the Bowery Savings Bank to proceed with its foreclosure to the entry of judgment. Its mortgage is not contested, and its rights will be fully secured on the distribution of the proceeds of the property whenever it shall be sold under the direction of this court. It is suggested as a hardship that its recovery of the amount of its mortgage in this court will be burdened with expenses, assignee's commissions, etc., to which it would not be subject if allowed to go on and foreclose. But these are incidental disadvantages, if they are such, attending all persons who may hold claims on the estates of bankrupts. They may work some hardship in this case, not apparently very substantial, but such considerations cannot control the action of the court where it is obviously for the interest of the creditors, as in this case, that the estate should be administered here, and not in the state courts.

The assignee does not show any good reason for the immediate sale at auction of the Cherry street property. In the present state of the real estate market, a good reason should be shown for an immediate sale, as both the Chatham Nat. Bank and the creditors have, as claimants for the surplus proceeds over the admitted liens, a direct interest in having it sold to the best advantage. For aught that appears it may be advantageously rented or disposed of at private sale without the risk of loss attending an auction sale at the present time. The assignee must proceed with all the diligence that the rules and practice of the circuit court admit of to have the validity of the contested mortgages determined.

DURYEE (BURR v.). See Case No. 2,190.

Case No. 4,197.

DURYEE v. ELKINS.

[Abb. Adm. 529.] [1]

District Court, S. D. New York. April, 1849.

ADMIRALTY JURISDICTION — LIBEL IN PERSONAM FOR SHARE OF PROFITS IN VOYAGE — ACCOUNTING.

1. A court of admiralty in this country may entertain a suit in personam for a balance

[1] [Reported by Abbott Brothers.]

claimed by a seaman to be due to him on an account of the profits of a voyage, as his share thereof, where the libel avers that a specific sum came to the hands of respondent as the proceeds of the voyage, and that libellant is entitled to a specific share of such sum.

2. On such a libel the court may inquire into the validity of any charges in account made by the respondent against the libellant, and relied upon as reducing or satisfying his share.

[Cited in The John E. Mulford, 18 Fed. 457.]

3. A court of admiralty cannot entertain a libel in personam which seeks to bring respondent to a general accounting for the proceeds of the voyage, and to compel an adjustment of the proportion in which libellant is entitled to share in them.

[Cited in The C. C. Trowbridge, 14 Fed. 876.]

This was a libel in personam by William Duryee against George B. Elkins, to recover libellant's share of the takings of a whaling voyage.

The libellant was one of the crew of the whaling ship Sarah. He filed his libel August 10, 1848, against the defendant, sued as owner or part-owner of the ship, and assignee of the proceeds of the whaling voyage in which libellant served, and garnishee of the master's interest therein, seeking to recover libellant's share, alleged to be the one hundred and ninetieth part of the takings of the ship.

The libel charged that the libellant shipped at New York in December, 1843, and made the voyage with the ship, in various parts of the Pacific ocean, until July 1, 1846, when she put into Tahiti, was there condemned as unseaworthy by the United States consul, and the crew discharged; that the oil and bone taken by the ship were sent home and sold for the use of the owners; that no account had ever been rendered to the libellant of the proceeds of the voyage and of his share thereof, though he had demanded an account and payment of the share due him.

The libel prayed process of arrest against the defendant, (with a clause of foreign attachment,) to compel him to appear and answer the libel and such interrogatories as might be propounded to him, and that he might come to a just, reasonable, and equitable accounting with the libellant of and concerning the libellant's lay or share of said voyage, and be decreed to pay to the libellant whatever balance might be found due to the libellant upon such accounting.

The answer of respondent, filed September 5, 1848, admitted the main facts averred in the libel respecting the respondent's ownership in the vessel, and the voyage made by her; but averred that the libellant's lay was a two hundredth part instead of a one hundred and ninetieth, as alleged by him, and also that respondent had made up and delivered to libellant an account of the expenses and proceeds of the voyage, and of the advances and payments made to libellant, upon which account the libellant stood indebted to the ship in a large sum. The respondent therefore prayed a decree, with costs in his favor.

On the hearing, proofs were put in to substantiate the matters set up in the answer; but the cause was finally disposed of on the question of jurisdiction.

Alanson Nash, for libellant.

I. The court of admiralty in England, prior to the restraining act of Richard II., possessed jurisdiction over all cases of jettison, ransom, average, consortship, insurance, mandates, procurations, payments, acceptilations, discharges, loans, hypothecations, forms, emptions, venditions, conventions, taking or letting to freight, exchanges, partnership, factorage, passage-money, and whatever is of a maritime nature, either by way of navigation upon the sea or of negotiation at or beyond the sea in the way of marine trade and commerce. See the old Sea Laws, p. 209, being an extract from Godolphin's Sea Laws, &c., in his view of the admiralty jurisdiction. So, also, the court had jurisdiction over all matters immediately relating to the vessels of trade and the owners thereof; all affairs relating to mariners, whether ship officers or common seamen; all matters relating to masters, pilots, steersmen, boatswains, and other ship officers. Also all shipwrights, fishermen, and ferrymen. Also of all causes of maritime contracts, or, as it were, contracts whether upon or beyond the seas.

II. The statute of 13 Rich. II. declares, that the admirals and their deputies shall not meddle henceforth with any thing done within the realm, but only with things done on the sea. This statute was passed in 1389. The next statute, which was passed in the 15th Rich. II., or in 1391, prohibited the admirals to hold pleas of matters arising in the body of the county; in other words, these two statutes put together prohibited the admirals to hold pleas of things done on land, and also of things done or arising in the body of the county, though done upon the sea. In all other respects they left the admiralty jurisdiction precisely where they found it.

The statutes are both local, and do not extend to any case not arising on land, or within the body of the county in England. Hussey v. Christie, 13 Ves. 594; Rolle, 250.

A statute of 1391 declared, that the admirals should not hold plea of matters arising in the body of the county, or of wreck. Our courts have disregarded this statute by express decision; they do take cognizance of wreck. Hobart v. Drogansi, 10 Pet. [35 U. S.] 108; U. S. v. Comb, 12 Pet. [37 U. S.] 72.

III. The lord high admiral of England, and also of Scotland, the judges of the admiralty courts in North America, including New Hampshire, Massachusetts, and Virginia, formerly received commissions from the crown to hold "jurisdiction of pleas, bills of exchange, policies of assurance, accounts, charter-parties, agreements, and other things had

or done in or upon or through the seas or public rivers of fresh waters, streams, havens, and places subject to overflowing whatsoever within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them." Dunl. Adm. Pr. 34.

IV. Our courts have held the doctrine that they would take jurisdiction over cases of consortship. Wall v. Andrews, 2 N. Y. Leg. Obs. 157. Here is a case of accounting between parties.

V. The court may take this account by means of a reference to the register or to an auditor or assessor appointed for this purpose. Indeed, there is the same right in the court of admiralty to refer a cause to an officer created for this purpose, that there is for a court of equity to refer any matter to a master. Every court has an inherent power to refer cases for their information to officers created for this purpose. Lee, Dict. tit. "Master's Report;" 1 Tidd, Pr. 518; King v. Wheeler, 1 W. Bl. 311; Hoff. Ch. Pr. Introd. 16, note 13; 7 Bac. Abr. tit. "Officers," C; [Fullerton v. Bank of U. S.] 1 Pet. [26 U. S.] 604; [Hunter v. The U. S.] 5 Pet. [30 U. S.] 187; The Betsey, 3 Dall. [3 U. S.] 6; 3 Bulst. 205; 13 Coke, 52; Lindo v. Rodney, 2 Doug. 613 [note]; U. S. v. Goodwin, 7 Cranch [11 U. S.] 32; 1 Bac. Abr. (Phila. Ed.) tit. "Admiralty Courts."

E. C. Benedict, for respondent.

BETTS, District Judge. A question of practical importance arises upon the face of these pleadings; that is, whether an admiralty court can take jurisdiction of a claim of a seaman for a share of the proceeds of a fishing or whaling voyage, before the accounts of such voyage are made up; in other words, whether the court can bring the parties to an accounting, and, by its decree, adjust their respective rights in the adventure.

When the voyage is made up, admiralty courts will take cognizance of suits by seamen for their respective shares of the aggregate. The Sidney Cove, 2 Dod. 11. In a whaling voyage the account may be referred to a commissioner, to see that the computation is correct, or that no improper items are inserted against the crew. Reed v. Hussey [Case No. 11,646].[2] That is done, however, not on the ground of an original authority to compel the account, but regarding the voyage made up as an admission of the sum to be distributed to the ship's company; each seaman can have his remedy in this court for his aliquot part thereof, and may claim the aid of the court to protect him against overcharges. The same principle would extend to the case where the proceeds of the voyage are realized by the owner, and he refuses or neglects to make up the voyage, or holds the takings of the adventure in his possession at the home port an unreasonable length of time without sale. In such case the court may equitably regard him as appropriating the cargo to himself; and adopting the price received as the market value, may award to the seamen their compensation on that footing. The seamen may thus be permitted to claim their proportionate part of the entire value in the hands of the owner, throwing on him the burden of proving the charges and deductions to which it is subject under the shipping articles.

The case of Reed v. Hussey was one of wreck, where portions of the oil were saved and transmitted to this port and sold, a small parcel having been previously remitted home and sold during the continuance of the whaling voyage, and the voyage was made up by the owner on the footing of such net receipts. To that extent, the remedy of the sailor was allowed in this court.

The libellant does not proceed for an acknowledged or proved account of takings come to the defendant's possession, but demands an original and full accounting for the whole voyage. In this respect the case differs from that above referred to, which occurred in this court. If the libel had set up a specific amount realized by the defendant as the earnings of the voyage, and the libellant had then claimed an entire one hundred and ninetieth or two hundredth part of the gross sum, I cannot perceive any objection to the jurisdiction of the court over the case as thus shaped, or to its competency to try and decide the case, so as to preserve all legal rights to all parties. The defendant might be required then to justify the charges claimed by him as a satisfaction of the libellant's share, and the office of the court would be no more than to examine and adjudicate upon the credit so claimed.[3]

The case made by the libellant, however, rests upon the assumption that he is entitled to have the accounts at large stated in this court, and to be secured the value of the takings irrespective of the method of disposition adopted by the master or owners, or the actual amount realized. It would be his right undoubtedly, in equity, to overhaul all the proceedings of the master and owner, and to compel them to secure him the entire value of his earnings according to the terms of his shipping agreement, and that without regard to the method of adjustment stipulated by the articles, if he could establish any unjust or inequitable conduct on the part of the owner or his agents, in disposing of the takings of the voyage or in making up the accounts.

But can this be done by a court of admiralty? As a general principle that court does

[2] This case was affirmed on appeal to the circuit court, December, 1837 [not reported].

[3] Compare The Atlantic, Case No. 620.

not take cognizance of partnership transactions, nor of any method of securing to a seaman compensation for his services, excepting on an agreement express or implied for the payment of wages. And thus all extraordinary arrangements, such as those secured by deed (Howe v. Nappier, 4 Burrows, 1944; Campion v. Nicholas, 1 Strange, 405; Opy v. Child, 1 Salk. 31; Day v. Seirl, 2 Barnard, 419, 2 Strange, 969), or those contemplating a participation of profits (The Sydney Cove, 2 Dod. 11; The Mona, 1 W. Rob. Adm. 137; The Riby Grove, 2 W. Rob. Adm. 52), are by the English law excluded from that class of contracts on which seamen are privileged to sue in admiralty (Abb. Shipp. 659).

The rule in the courts of this country has not been so restrictive upon the remedies of seamen (Macomber v. Thompson [Case No. 8,919]; The Crusader [Case No. 3,456]), the courts being inclined to regard only the fact that the agreement was or was not intended to secure to the seaman wages for his services. If that is the purpose, it may be enforced in admiralty, although the wages were to arise out of a participation in the earnings of a freighting or fishing voyage, or although they were secured by a bond or other specialty. It is accordingly the common usage of the courts of the United States to entertain libels for shares or proportions of earnings in fishing voyages, such shares being the measure of the amount of wages. A suit in admiralty or at law may be maintained for such shares when ascertained by a final settlement of the voyage. 3 Pick. 435.

In principle, there is no distinction between a suit in personam in admiralty and a common-law action for the recovery of wages. The same ingredients enter into the rights of both parties in each tribunal. The demand rests upon an agreement express or implied, and is enforced according to the methods of procedure of the respective courts.

Thus an action lies at law by a seaman to recover his proportionate share of a whaling adventure, after the oil has been sold, and the amount liquidated out of which the share is to be completed. Wilkinson v. Frasier, 4 Esp. 182. That doctrine has always been adopted in this court, and numerous suits and recoveries have been had on libels so filed after the whaling voyage was made up.

There is no difficulty in furnishing the remedy when the materials are supplied from which the right is shown or may be deduced. The relief by suit in admiralty proceeds upon the same doctrine and like proofs as in the common-law action of assumpsit.

Do the functions of the court admit of its managing an action of account either according to the common-law practice, or under that of a court of equity?

The ancient common-law action of account is rarely used at this day. It was applicable to transactions between a lord and his bailiff, a man and his receiver, between partners and against administrators, &c. Finch, N. B. 116; Co. Litt. 172; 1 Bac. Abr. tit. "Account;" 2 Rev. St. 50, 306; Duncan v. Lyon, 3 Johns. Ch. 360. The action may be barred by plea that defendant has accounted. Baker v. Biddle [Case No. 764]. The action was founded on contract, and it was necessary that all parties should be joined in it, and that the defendants should have no claim in the thing to be accounted for. 1 Dane, Abr. 164.

The auditors or referees can examine all parties on oath, and accordingly the proceedings in the action at law are of the same character and of similar efficacy with those in equity. Duncan v. Lyon, 3 Johns. Ch. 360; Mitchell v. Great Works Milling & Manuf'g Co. [Case No. 9,662].

In this court, no other examination of parties can be had than by propounding interrogatories to be answered by them in connection with the pleadings. There is no usage or practice authorizing a referee or commissioner to call a party before him for an oral examination; and accordingly, if an admiralty suit embraced all the parties necessary to a full and proper accounting, there would be wanting, in order to carry it fully into effect, that essential attribute of the proceedings at law and in equity.

For that reason, it has been explicitly decided in this court, that a suit in rem will not lie in a case where an accounting is required and must be decreed. The Fairplay [Case No. 4,615][4]

The jurisdiction was interdicted in England "in accounts betwixt merchant and merchant or their factors" (Dunl. Adm. Pr. 16); and although in The Fairplay, the court withheld the expression of any opinion as to the right to sue in personam to compel an accounting, yet the reason of the decision applies with equal force to either form of action. The difference between the two, relates mainly to the greater inconvenience of keeping property on attachment pending an accounting, than that of subjecting a party to give bail.

In the case of The Fairplay, the master had chartered the vessel, and the libellant engaged to run her with him a period of five months, upon an agreement to share with the master one half of her earnings and profits. The other half was to be paid to the owner. No account had been stated between the parties. The libellant alleged there was due him the sum of $305.81 as his share of the earnings and profits. The answer denied the debt, and averred that the libellant stood indebted upon the adventure in the sum of $139.60. The decision went upon the general doctrine that this court would not entertain an action for an account, laying stress upon the fact as a corroborative reason, that the vessel

[4] This case was affirmed on appeal to the circuit court, in July, 1830 [not reported].

must be held in custody pending such accounting.

A whaling adventure is not regarded in our law as a partnership connection, but, as between the owner and crew, a trust is created and the right of the crew to compensation is, by the shipping agreement, usually made consequent to the acts of the trustee. A court of equity can no doubt secure the rights of a whaling crew independent of the method arranged and agreed between the parties, when the neglect or misconduct of the crew interposes any impediment to legal relief.

But is this within the powers of courts of admiralty proceeding in personam? They are clearly controlled by the shipping agreement in the remedy they administer, provided that agreement is valid. In the present case, the engagement in the articles is by the owner (on the fulfilment of the conditions stipulated by the crew) "to pay the shares of the net proceeds of all that shall be obtained by the crew during said voyage, as soon after the return of the voyage as the oil, or whatever else may be obtained, can be sold, and the voyage made up by the owner or agent of said ship, first deducting all such sums as may be due from them to the owner or officers thereof, for advances, supplies, or debts arising from other considerations." The libel charges that the defendant refuses to give the libellant an account of the voyage or pay him his dues, and prays the court to decree that the defendant come to a just, reasonable, and equitable accounting with him, of and concerning his share or lay of said voyage, and pay him whatever balance may be found on such accounting. It is true he claims general damages to $300, but he does not aver that such amount is due him on the account, nor that any specific sum whatever has come to the respondent from the takings of the voyage.

The difficulty thus presented is not obviated by the answer, and it is manifest that the relief the pleading seeks, and the only one to which it is adapted, is that of an original accounting upon all the particulars of the voyage. The counsel for the libellant maintained this view of the case in his argument, and strenuously presses the right of his client to such account, and the necessity of its being decreed him.

In my judgment, the case as brought before the court is not one of which it can take cognizance. The appropriate relief would be a bill in equity, setting forth the amount of takings, and requiring the respondent to account for their disposition.

If, however, the libellant elects to go upon the account set forth by the answer, a reference may be taken to a commissioner to ascertain and adjust the amount of payments properly chargeable to the libellant, and report whether any balance is due him out of the lay of $117.75, credited him on the account made up by the defendant.

Decree accordingly.

Case No. 4,198.

DURYEE v. WEBB.

[16 Conn. 558, note.]

Circuit Court, D. Connecticut. 1810.

SHERIFF — ACTION FOR ESCAPE UNDER MESNE PROCESS—COMPETENCY OF WITNESS — RESCUE—PLEADING CITIZENSHIP.

[1. In an action against a sheriff for an escape upon mesne process, the escaped prisoner is not a competent witness to prove his bankruptcy at the time of his escape.]

[2. The interest of the witness is not balanced so as to make him competent because, while liable for the debt to both parties, he is further liable to the sheriff for the cost and expense consequent upon the escape and defense of the action.]

[3. The sheriff cannot prove a rescue, as his return that the prisoner escaped is conclusive.]

[4. A person escaping from an arrest on mesne process is liable to the sheriff for all damage sustained by the latter by reason of the escape.]

[5. The sheriff is liable for the escape to the extent of the damage sustained by the party issuing the process.]

[6. A description of a defendant as "of the town and county of W., in the Connecticut district, * * * a citizen of the United States, and sheriff of said W. county," is equivalent to describing him as a citizen of Connecticut.]

This was an action on the case, brought by John T. Duryee, described as "a citizen of the city, county and district of New York, merchant," against Henry Webb, described as "of the town and county of Windham, in the Connecticut district, esquire, a citizen of the United States, and sheriff of said Windham county," to recover damages for the default of Hubbard Dutton, a deputy of the defendant, in permitting the escape of Roswell Bailey, after he had been arrested on mesne process in favour of the plaintiff. The return of the deputy-sheriff on such process, was as follows: "I then, by virtue of this writ, attached the body of the within-named Roswell Bailey, read the same in his hearing, and immediately thereafter, by reason of the darkness of the night and the connivance of sundry persons, there being many then present, and by their aid and secret assistance, the said Bailey escaped, so that I was unable to procure bail, or have the said Bailey in court." The defendant pleaded the general issue; on which the parties went to trial.

The plaintiff having made out his case prima facie, and rested, T. S. Williams, (with whom was J. Trumbull,) for the defendant, offered Roswell Bailey, as a witness, to prove, that at the time of the alleged escape, he was a bankrupt.

Daggett, for the plaintiff, objected to his competency; because if the plaintiff should recover, the defendant would have remedy against Bailey. He was, therefore, interested to defeat a recovery.

LIVINGSTON, Circuit Justice. Is not Bailey's interest balanced? He is now liable to Duryee; if the plaintiff recovers, he will then

be responsible to the sheriff. He cannot avoid responsibility one way or the other.

Daggett. The rule of damages in the two cases, will be different. Duryee can claim of Bailey no more than the debt; whereas the sheriff, if he is subjected in this suit, can come upon Bailey for all that he has had to pay on his account—debt, costs and expenses.

LIVINGSTON, Circuit Justice. Is that clear? Would the sheriff, in that case, recover accumulated damages?

Daggett referred to Sheriffs of Norwich v. Bradshaw, Cro. Eliz. 53, which was an action against the party arrested, for an escape. The debt for which defendant was arrested, was £9 10s.; and the plaintiff alleged, that they were bound, by reason of escape, to answer the debt, "necnon to expend money for the search of him, to their damage £20." After a verdict for the plaintiffs, the court held, that the action was sustainable, though they had not paid the money. This establishes the principle, that the party escaping must indemnify the sheriff. A judgment in favour of the sheriff against Bailey, would, of course, be greater than the amount of Duryee's present judgment against him.

Williams remarked, that it had been decided, that a person rescued may be a witness.

LIVINGSTON, Circuit Justice. In that case, the person rescued is supposed to be innocent. He would not be liable for accumulated damages. If Bailey was rescued, he might be a witness. But if he has run away himself, he must indemnify the sheriff, and is interested to diminish the damages against him. Here it appears from the return of the officer who made the arrest, that Bailey "escaped;" and this return is conclusive against the sheriff. I think Bailey ought to be excluded, though it struck me differently at first.

The counsel for the defendant then proposed to call other witnesses to prove that Bailey was a bankrupt.

Daggett said he would not object to the admission of this evidence, though he should contend, that if admitted and the fact proved, it would make no difference in the damages to be recovered.

After the evidence in the cause was before the jury, Daggett contended, that the rule of damages must be the amount of the judgment against Bailey and interest. It is a prominent feature of our law, that it takes the most effective means to secure the payment of honest debts. It first protects the debtor, by furnishing him security against an unfounded claim. It then gives the creditor power to proceed, first against the debtor's property, and then, for want thereof, to take his body. In the latter alternative, the officer must commit the prisoner, if he does not procure bail. If he does, he must still find special bail, before he can plead. If judgment goes against him, and he avoids, so that the execution is returned non est, the whole debt is recoverable of the bail. If he is committed, and escapes through the insufficiency of the gaol, the county is liable for the whole debt. If he escapes through the negligence of the sheriff, he is liable for the whole debt. And there is practically no difference, (if any in theory,) between an escape on mesne and one on final process. In every case that has occurred, the rule of damages has in fact been the whole debt. Hubbard v. Shaler, 2 Day, 195. In Gleason v. Chester, 1 Day, 152, the verdict was for the whole debt. No other rule can be adopted consistently with the principle which pervades our laws on this subject. The creditor has an absolute right to have the body. The sheriff has no discretion in the matter. He is not authorized to inquire whether his prisoner is rich or poor, young or old, strong or weak. The law prescribes to him a certain line of duty, and requires strict performance. Nor is the law unreasonable in this. The debtor may have no visible property; but he may have secret resources, which imprisonment will call forth. A young and active man, like the debtor in this case, may have friends who will pay the debt, and trust to his future efforts for reimbursement. If the debtor is destitute of resources and friends, and is committed on the execution, he may obtain relief by the poor debtor's oath, or the insolvent law.[1] In England, if the debtor, through the negligence of the attorney, is not charged in the execution, such attorney is liable for the whole debt. Russel v. Palmer, 2 Wils. 325.

LIVINGSTON, Circuit Justice. That case has always been relied on, to show, that the attorney was not of course liable for the whole debt; for although a verdict was, in the first instance, given for the plaintiff for the whole debt, yet a new trial was afterwards granted, the court, including Lord Camden, before whom the cause had been tried, being of opinion, that he had misdirected the jury in telling them they ought to find a verdict for the whole debt; and upon the second trial, the jury were told they might find what damages they thought fit, and they accordingly found only one-sixth part of the debt. 2 Wils. 328.

Trumbull, contra, insisted, that if the plaintiff was entitled to recover at all, in this case, the rule of damages was the injury actually sustained, by the negligence of the officer; and on the amount of that, they (the counsel for the defendant,) were at liberty to go to the jury. In the first place, here was a rescous. To constitute a rescous, it is not necessary that the prisoner should be taken out of the hands of the officer,

[1] The act of May, 1809 [Rev. St. 1821], authorizing the superior court to grant relief in certain cases of insolvency was then in force.

wholly by extraneous force. It may be done by aid of others. Nay, the prisoner may rescue himself.

LIVINGSTON, Circuit Justice. Rescous is a technical term, and must be shown distinctly. The return does not state in terms a rescous. Its construction must be made most strongly against the officer. Do the circumstances detailed in it amount to a rescous? Must not a rescous be effected by force?

Trumbull. It is not necessary that there should be physical force. He referred to Waldo v. Lambert, Cro. Eliz. 868, and Mounson v. Cleyton, Cro. Car. 255.

LIVINGSTON, Circuit Justice. Have you any authority to show, that the sheriff, in a case like this, is liable only for the injury actually sustained?

Trumbull. I was coming to that point. The opinion of Grose, J., in Bonafous v. Walker, 2 Term R. 132, establishes the proposition, that in an action on the case for an escape, the jury are at liberty to give such damages as they shall think right, under all the circumstances of the case; and he adds, that a shilling is frequently sufficient.

LIVINGSTON, Circuit Justice. Read the facts in that case. What a judge says, is to go for nothing, except as it applies to the facts. If the point is settled, as you claim it, by decisions, the court will be governed by them; but in the absence of such decisions, the court is inclined the other way. The evils would be great, if it were understood, that an officer may let a prisoner go, whenever he thinks that nothing can be got from him. It would open a wide door to collusion.[2]

Trumbull then cited Planck v. Anderson, 5 Term R. 37, 40, as a decision in point. Buller, J., says, where the prisoner escapes out of custody on mesne process, the creditor cannot bring an action of debt, but is driven to his action on the case, which is founded on the damage sustained; and if no damage be sustained, the creditor has no cause of action.

LIVINGSTON, Circuit Justice. There is a great difference between the liability of a private agent or attorney, and that of a public officer, to whom the party must of necessity resort. The sheriff ought not to be allowed to say, that this action is vindictive. If he is not liable, it is in his power not to execute mesne process at all; and we should be placed in an ocean of uncertainty.

Trumbull. Peake, in treating of the evidence in actions against sheriffs, says, that in an action for false return of mesne process, the plaintiff, in order to show the amount of damages he has sustained, should prove the circumstances of the party arrested, at the time of the arrest, and that he has since absconded or become insolvent; for if he were originally in bad circumstances, or he may be met with every day, and the plaintiff has not in fact been injured, by the negligence of the defendant, the damages will be nominal. In an action for an escape on mesne process, the plaintiff, he says, must prove, that the party was at large, or in improper custody, after the return of the writ; that no bail above was put in; and that, by these circumstances, he has been injured; for where a sheriff's officer kept a party in his custody some time after the return of the writ, and then took him to prison, yet as the plaintiff was not in fact delayed or injured, the action was holden not to be maintainable. Peake, Ev. [390] 420.

LIVINGSTON, Circuit Justice. Since I have been sitting here, my mind has undergone a great change. I doubt now, whether it has ever been decided in England, that the sheriff is liable for the whole debt, in an action for an escape on mesne process. The cases which have been read, seem to go on the ground, that where no damage has been sustained, no liability at all has been incurred. It appears, however, to have been understood, in the case read from 2 Day, that for an escape for the insufficiency of the gaol, the county is liable for the whole debt; though perhaps a distinction may be taken between that case and this.

Williams. The cases in which the county has been subjected for the whole debt, are where the escape was on execution, and turned on the construction of our statute. In Massachusetts, where the statute on this subject is different, the supreme court has decided differently. Burrell v. Lithgow, 2 Mass. 526. In the same case, the court say, that if a debtor in prison on mesne process escapes, the sheriff is answerable to the creditor, in an action on the case, who shall recover according to the damages he has sustained. This is the common law remedy.

LIVINGSTON, Circuit Justice. This is in point, and as respectable as any English decision. It is so respectable that I feel unwilling to depart from it; though it appears to me that the policy is the other way. The "common law" is spoken of in the case referred to. If this is the doctrine of the common law, I have no doubt it has grown up from consideration of hardship in particular cases, which do infinite mischief to public justice—the worst consideration in the world to influence a court of law.

Daggett commented upon the case of Burrell v. Lithgow, remarking, that the court cite no authority for their dictum about the common law. The case of Brown v. Lord, Kirby, 209, in this state, was an action against the sheriff, for the default of his deputy, in suffering a person arrested on mesne process to escape; and the defendant was subjected to

[2] It was in this connexion, I believe that the remark quoted in the text was made. I do not insert it in this report, simply because I do not find it in any minutes; and at this distant period, I may be mistaken as to its true locality.

the whole debt. In Gleason v. Chester [supra], in this county, the record shows, that the verdict was for the whole debt. In Crompton v. Ward, 1 Strange, 429, 436, which was an action for an escape from custody on a writ of habeas corpus, the plaintiff had judgment; and as there is nothing said about the damages, it must be understod to be for the whole debt. Powell v. Hord, 1 Strange, 650, before Raymond, Ch. J., was an action for a false return on mesne process; the jury found the whole debt in damages, with the approbation of the chief justice; and afterwards, on a motion for a new trial, the whole court were of opinion that the verdict was right.

Williams. It is clear beyond a doubt, that in an action for an escape on mesne process, the damages recoverable, are, by the common law, uncertain. All the cases, even those in which the whole debt was recovered, show this. In the case of Powell v. Hord, just cited, Lord Raymond said, the damages would depend on circumstances. If the defendant in the original action had been a man of estate, and in no danger, he would think the debt would be too much to give. In Crompton v. Ward, the court say, that the sheriff had not taken proper caution, whereby the plaintiff, who had an interest—a sort of property—in the body of the prisoner, had sustained a damage. This damage happened by the neglect of the sheriff, and therefore, he must answer it to the plaintiff in this action. 1 Strange, 436. No other rule of damages is here given, than the damage sustained. From a note of the case of Lenthal v. Gardiner, Bull. N. P. 69, it appears, that the sum recovered against the sheriff was less than the debt; the judgment being for £2000, and the damages recovered, only £1000. The giving of a less sum than the whole debt, is here spoken of as a thing that happens in the course of practice. Peake fully confirms the position, that in an action against the sheriff, either for a false return or an escape, on mesne process, the measure of damages is the injury, which the plaintiff has in fact sustained, by the negligence of the defendant. Peake, Ev. (3d Lond. Ed.) 390. The case of Burrell v. Lithgow, 2 Mass. 526, already cited, establishes the same position. To the same effect is Potter v. Lansing, 1 Johns. 215, in the state of New York. And in Rawson v. Dole, 2 Johns. 454, which was an action of debt for an escape, the court say, that if an action on the case had been brought, it might have been inquired what was lost by the escape, and the jury might have given such damages as they supposed the party had sustained. If the party bring case, even when he might have had debt, he thereby leaves the question of damages open. There is a plain distinction not only between escapes on mesne and final process, but also between escapes on mesne process before and after commitment. For an escape from a mere arrest, before commitment, the officer has never been held liable beyond the damage actually sustained. (The counsel then addressed the jury on the circumstances attending the escape in question, claiming, that the damages, if any, should be merely nominal.)

Daggett, in reply, commented on the cases cited by the counsel for the defendant. In Rawson v. Dole, the sole question was, whether interest on the original debt, could be recovered. In Potter v. Lansing, no point was decided, by a majority of the court, but that the damages recoverable for the escape, might be enhanced, by the false return. There is no distinction between an escape on mesne process before and after commitment, as to the liability of the sheriff, though there may be, as to his returning rescous, or as to the effect of it. See 1 Strange, 435, 436.

LIVINGSTON, Circuit Justice (charging jury). The first question is, whether there was a rescous, such as would justify the sheriff. This depends upon the construction to be given to the return, and is a mere question of law. I have no difficulty in saying, that the return shews no rescous. It only confesses that the officer was guilty of a negligent escape. I am therefore of opinion, that the plaintiff is entitled to recover.

The next question relates to the amount of damages to be recovered. Great inconvenience would result to the public from holding that a sheriff, in a case like this, is not liable for the whole debt: its tendency would be to make officers lax in the performance of their duty. Still I am fully satisfied, that in point of law, the jury are not bound to give the whole debt. You may give the whole debt; or you may give less; it is a matter wholly within your province; the court will not interfere.

His honor remarked, that the case from Massachusetts was entitled to great consideration. He was fully satisfied, that the practice in England and in this country, had been according to this direction.

The jury returned a verdict for the plaintiff to recover damages equal to the whole debt.

Williams moved to erase the cause from the docket, on the ground that the court had not jurisdiction of it. He read the description of the parties in the writ, and cited Bingham v. Cabot, 3 Dall. [3 U. S.] 382; Abercombie v. Dupuis, 1 Cranch [5 U. S.] 343; Wood v. Wagnon, 2 Cranch [6 U. S.] 1.

Daggett, contra. It may well be presumed, that there is no disposition in this country to apply the doctrine of these cases to others not strictly analogous. The plaintiff is described as a citizen of the district of New York. He is, of course, a citizen of the state of New York. The court will judicially take notice of the act of congress making the district and state co-extensive. Then as to the defendant; he is described as an inhabitant of Windham in Windham county, sheriff of said county, and a citizen of the United

States. Every person who is an inhabitant of any state, and a citizen of the United States, is a citizen of that state. The description of the defendant is tantamount to saying, that he is a citizen of the state of Connecticut. Thus it appears, that the parties are citizens of different states.

Williams, in reply. The court will not hold jurisdiction by intendment. It must be expressly averred, that one party is a citizen of one state, and that the other party is a citizen of a different state. Now, to say nothing of the plaintiff, is it here averred that defendant is a citizen of Connecticut? It certainly is not, in terms. Nor does this fact appear by necessary inference. A man may be "of Windham"—i. e. a resident or inhabitant of that town—and sheriff of the county of Windham, without being a citizen of this state. Citizenship is not co-extensive with inhabitancy. But if otherwise, we claim the intendment is not sufficient.

LIVINGSTON, Circuit Justice. I do not question the correctness of the decisions referred to. If I understand them they amount to this, that if the court cannot see from the record, that the parties are citizens of different states, it will dismiss the cause. After a cause has proceeded as far as this has, it is the duty of the court to make every reasonable intendment in favour of the jurisdiction. Can such intendment be made here? There is a decision which removes all objections to the plaintiff. Then is the defendant so described, that the court can see, that he is a citizen of Connecticut? The description of him as a citizen of the United States and an inhabitant of Connecticut, is equivalent to describing him as a citizen of Connecticut. He is, moreover, described as exercising an office, which none but a citizen of the state can be presumed to be capable of exercising. The motion must be denied.

[In the original report in 16 Conn. 558, this case is published as a note to Palmer v. Gallup.]

Case No. 4,199.

DUSAR v. MURGATROYD.

[1 Wash. C. C. 13.][1]

Circuit Court, D. Pennsylvania. April Term, 1803.

BANKRUPTCY — EFFECT OF DISCHARGE — UNLIQUIDATED DAMAGES — SHIPPING — NEGLIGENCE OF MASTER—GOODS INJURED IN PORT OF SHIPMENT —DAMAGES.

1. The true rule, in cases of bankruptcy, is, that if the original ground of action is founded in contract, but the immediate cause arises ex delicto, and the claim is for damages unliquidated by express agreement, or such as will not be implied; the certificate is not a bar; as such a claim could not have been set up under the commission.

[Cited in Doggett v. Emerson, Case No. 3,962.]

2. If the defendant had agreed to pay a certain sum on failure to perform his agreement; or if the plaintiff could bring either trespass, or money had and received, and waives the former by bringing the latter; the damages are due, which the law implied a promise to pay, and may be proved under the commission.

3. The owner of a vessel is answerable for the carelessness or unskilfulness of his master, and by the common law nothing can excuse him, but the act of God, or of the enemy, or of the party complaining.

4. When goods are destroyed, or materially injured, on board a vessel in the port where they are shipped, the damages must be ascertained by the difference between the prime cost and charges, and the sales at the port of shipment; and not by the probable profits if the goods had gone safe to the port of destination.

[See Gilpins v. Consequa, Case No. 5,452; Willings v. Consequa, Id. 17,766; Youqua v. Nixon, Id. 18,189.]

The plaintiff put on board a vessel belonging to the defendants, a quantity of sugars, to be carried to Hamburg. The day, or day after she had received her load, she nearly filled with water, in consequence of which the sugars received an injury of about fifty per cent., for which this action was brought; stating, as is usual, the agreement to carry the goods safely, (the dangers of the sea excepted,) and that they had been greatly injured by the neglect and unskilfulness of the defendant. Pleas, 1. Non assumpsit (but to be considered as non cul if the latter be the general issue in the case.) 2. That the defendants became bankrupts after the loss, as stated in the declaration, and had obtained their certificate. The plaintiff introduced a number of witnesses to prove that the accident happened in consequence of the lumber port having been opened, and not sufficiently secured before the cargo was taken in. But the defence principally relied on was, that the cause of action, if founded now, existed and was complete long before the bankruptcy of the defendants, and therefore the certificate is a bar of the action. The certificate was signed 15th July 1802, and approved 16th August 1802. The loss took place 27th October 1800.

WASHINGTON, Circuit Justice (charging jury). It is greatly to be wondered at, that so little satisfactory information is to be derived on this subject, from the decisions of the courts in England, where bankrupt laws have so long existed. The cases which have been cited, are not only of modern date in general, but are inapplicable to the present case. They have generally arisen on contingent debts, debts not due at the time of the bankruptcy, or cases where the creditor had an election to sue, as for a tort, or for money had and received. There is no contingency in the present demand, no action but the present could have been brought, and the cause of it was complete before the bankruptcy. It is not easy to extract from the cases cited any principles laid down, and so uniformly adhered to by the judges, as to entitle them to that respectful consideration which I always pay them, even where they do not

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

bind as authority. But I think enough may be gathered from those cases, and from the general principles of law, to enable us to lay down a rule which will decide this and other cases of the kind. The question is not whether the demand is connected with contract or tort, but is the plaintiff a creditor, and does he claim a debt? These are the operative words of the statute, and their legal import must be attended to.

It is not the breach of every contract which creates a debt. If a carpenter covenant to build a house, and then refuses to do it, or does it unskilfully, though there is a contract, yet the immediate ground of the action is an injury, for which the plaintiff may be requited in damages. These damages, before they are assessed by a jury, cannot be said to constitute a debt. So in the present case, there was a contract to carry the goods of the plaintiff, safely. But the ground of the action, is for an injury sustained by the neglect of the defendant's servant. The plaintiff is seeking a reparation in damages for this injury—it is no debt, and consequently could not have enabled the plaintiff to lay such a claim before the commissioners, as to entitle him to a dividend. If so, the consequence is inevitable, that he is not barred by the certificate. The true rule seems to be "that if the original ground of action is founded in contract, but the immediate cause of action arises ex delicto, and is a claim for damages unliquidated by an express agreement; or that, as the law will not imply an agreement to pay, it is not such a claim as would be brought before the commissioners." To explain the rule: The immediate cause of action in this case arises ex delicto, from the fault of the defendant; and the damages being unliquidated by the parties, and the law creating no implied contract on the part of the defendant to pay money in consequence of it, there is no debt. But if the defendant had engaged to carry the goods safely, and on failure to pay 1000 dollars; he would on the failure have become a debtor for 1000 dollars, the liquidated damages; and it would not have been in the power of the plaintiff to receive more, though he could prove the damage to have exceeded that sum. So if plaintiff had his election to bring trespass or action for money had and received, and he waives the tort, by bringing the latter action; here the damages, though unsettled, become a debt, which the law implies a contract in the defendant ex aequo et bono to pay. So in running accounts, though the balance is unliquidated, yet the law creates a contract to pay the balance.

I was struck, upon the argument, with the summary mode of ascertaining and settling claims by jury, and at first supposed that this variance from the bankrupt laws of England, was intended to let in all kinds of claims, and to facilitate the adjustment and liquidation of them. But I am now satisfied, that this provision was only intended to give to the commissioners or the creditor, an election as to the mode of adjusting such claims for debt, as are meant by the 34th section of the law, and not to let in any claims not of this description, if due and owing at the time of the bankruptcy. Upon this point therefore, I am of opinion the defendants cannot protect themselves against the present demand by their certificate.[2]

The next point is, are the defendants liable for damages, and what should be the measure of them? The owner of the vessel is liable for all injuries, which those who employ him sustain by the misconduct, negligence, or unskilfulness of the captain. Nothing can excuse him by the common law as understood in England, but the acts of God, the public enemies, or the fault of the party complaining. The present case however does not require us to proceed upon the most rigid extent of that rule. The defendant does not show himself to be within any of the exceptions which can excuse him, and the evidence of both parties has been confined to the condition of the lumber port at the

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[2] See the case of Utterson v. Vernon, 3 Durn. & E. [3 Term R.] 539, 4 Durn. & E. [4 Term R.] 570.

In Hammond's edition of Sir John Comyn's Digest, tit. "Bankrupt" (volume 2, p. 103), all the decisions upon the competency of a creditor claiming damages of the bankrupt to prove under the commission, are collected. Their insertion here may be useful: "1. Where the demand rests in damages, and cannot be ascertained but through the intervention of a jury, it cannot be proved; thus, for mesne profits, or a breach of covenant to do any other act, except to pay money. Doug. 584; 6 Term R. 489; 7 Term. R. 612. 2. If a demand is partly liquidated, partly not, as the difference of price upon a re-sale, creditors having a security may apply it first to the former, then to the latter, and may prove for the residue. 6 Ves. 94. 3. If a demand, in the nature of damages, be capable of being liquidated, and ascertained at the time of the bankruptcy taking place, so that a creditor can swear to the amount, he may prove it as a debt under the commission. 4. As in an action of assumpsit on a quantum meruit. Doug. 167. 5. Or if a bond be given to replace stock on a given day, and the bond is forfeited before the bankruptcy of the obligor, it may be proved; and the amount to be proved is the dividends due before the bankruptcy, and the value of the stock at the day the commission issues. Co. Bankr. Law, 149; 7 Ves. 302. 6. Or if money be paid by one partner to another (who afterwards becomes bankrupt) for the purpose of being paid over as his liquidated share of a debt to their joint creditors, and it is not so applied, it may be proved by the solvent partner as a debt under the commission. 1 East, 20. 7. So a demand in trover, if for a liquidated amount, may be proved under a commission. Doug. 168. 8. Damages liquidated by a security; thus, notes given upon compromising an action for seduction, are proveable. 15 Ves. 289. 9. Where a bankrupt, at the time of his bankruptcy, is indebted in an ascertained or ascertainable sum, it may be proved under the commission, and is discharged by the certificate. 3 Term R. 539; 4 Term R. 570. 10. Equitable demands are proveable. 1 Sch. & L. 48; 3 Ves. & B. 40. 11. Though the debt be contracted after the bankrupt quitted trade, it may be proved. 1 Ld. Raym. 287."

time the lading was taken in. Witnesses were examined to prove that it was usual and necessary to confine this port within by wedges, and secure it without, by caulking and paying over. One witness was of opinion that the inside lashing had sufficiently secured it. Upon the whole, if you are of opinion that the lumber port was not secured as is usual, and sufficiently for the safety of the cargo; or that the injury arose from the carelessness, neglect, or unskilfulness of the captain in any other respect; you will find for the plaintiff such damages as you may think right. The profit which might have been obtained, if the sugars had gone safely to Hamburg, was claimed at the opening, but was properly abandoned by the concluding counsel. The difference between the prime cost and charges, and the sales here, forms a fair measure of the damages sustained.

The jury found a verdict for 4825 dollars, or thereabouts, being the difference between the prime cost and charges, and the sales at auction.

Case No. 4,200.

DUSSERT v. ROE.

[1 Wall. Jr. 39.][1]

Circuit Court, Third Circuit. April Term, 1843.

EVIDENCE—PEDIGREE.

Where several persons, all of whom testify to considerable acquaintance with a family, swear that a particular person's pedigree was matter of common reputation, (notoriete publique,) it will be inferred, that reputation in the family is meant to be included; although not so in any way said: This, at least, in favour of depositions taken abroad; when the opposite party has not chosen to cross-examine, nor offered counter evidence; and when the depositions present general evidence of candour. The circumstances last mentioned are considerations which may properly weigh with the court, and induce the admission of testimony which, in opposite circumstances, might give pause.

[Cited in Hall's Deposition, Case No. 5,924.]

A question as to the plaintiff's pedigree, arising in this case, Mallery, for the defendant, objected to certain depositions taken at L'Orient in France, in 1840, to shew descent. The plaintiff's family had resided for many years at L'Orient, where all the witnesses, of whom there were four, likewise lived. But her father, a merchant, had died at Le Puy, in 1786, and a brother, in this country.

One of the witnesses, a merchant, sixty years old, had personally known Madame Dussert for more than thirty years. He had also known her relatives and family, by various connexions (differents rapports) which he had had with her or her sister in commercial dealings (a raison d'affaires commerciales) for about twenty or thirty years. But in answer to a question as to the means of his knowledge of this pedigree, the witness answered, that it was derived from Madame Dussert deceased (the present plaintiff) and par la notoriete publique.[2] The testimony of two other witnesses, (one aged 39, and the other 45,) whose acquaintance with the family arose likewise through business relations, (in both cases, however, of much less standing than that of the first witness,) gave the same answers as to their source of knowledge. But a fourth witness, a retired officer of the navy, (in which Madame Dussert had had a brother,) had known her and her family for twenty-four years, by social and friendly intercourse (rapports de societe et d'amitie) with her and her sister; and he had derived his knowledge of her pedigree, from what he had learned from her mother, her brother, (the navy-officer,) and by this same "notoriete publique."

Except as inference from these dates, it did not appear when the knowledge derived from these last named persons as to Madame Dussert's pedigree had been communicated.

The sister, mentioned in the depositions of the first and the last witness, was the survivor of Madame Dussert's family, and at the time the depositions were taken, had become the sole beneficiary of the suit.

The present action, which was ejectment, and the defence to which was twenty-one years adverse possession,[3] was brought in the year 1832. And the evidence left it in doubt whether or not the statements of the mother and sister to the ex-officer had or had not been after a lis mota, and the descent had become a question. No one of the witnesses was related nor affined to the family of Madame Dussert; but each of them stated, in reply to the plaintiff's interrogatories, the dates and places of the several members' deaths, in a way to indicate entire acquaintance, through some means, with the family history in these particulars. What these means were did not appear; but as to some of the dates specified, it was impossible that the younger witnesses should have known them otherwise than by information from others.

The general complexion of the testimony, as respects the intelligence and education of the witnesses, was good.

The defendant had not joined in naming commissioners; and had not cross-examined.

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

[2] The plaintiff's interrogatory as filed in English, asked: "Are you conversant with her pedigree, by direct knowledge; by declarations of deceased members of her family, or from general reputation?" This last expression the commissioners translated "Notoriete publique," and the witness, responding affirmatively, used the same words.

[3] The verdict having been for the plaintiff, this defence, it must be taken, was not made out; but the defendant showed a possession of several years.

Mr. Mallery, in support of his objection:

Evidence of common reputation may be received in matters of publick and general interest, a claim of highway, for example; because, all persons being interested in such matters, every one is presumed to have knowledge concerning them. But even in regard to such matters, proper means of information must be first shown; such as, in the case of a highway, being acquainted with the neighborhood, or frequently using the road. Otherwise, the evidence is not only worthless, but inadmissible. The principle on which such evidence is received, is the one already stated; viz. that the facts are publick facts, concerning the truth of which every person has an interest to inform himself. See the case of Crease v. Barrett, 1 Cromp. M. & R. 919, 929. But what interest can the publick have in the birth of a common child? or of what value is common rumour in regard to such a fact? a fact which as in this case, must have occurred more than half a century before the testimony was given.

Hence it is well settled, that common reputation is not evidence in regard to pedigree. Dr. Greenleaf, in his recent authoritative treatise on Evidence, after a careful collection of the cases, thus presents their result: "There are reported cases, in which the declarations of servants, and even of neighbours and friends, have been admitted. But it is now settled, that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connexions of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons, who were related by blood or marriage, to the person, and, therefore, interested in the succession in question." Greenl. Ev. pt. 2, c. 5, § 103.

It is to be observed that not one of these four witnesses swears to general repute in the family: it is to a "notoriete publique," alone; that is common rumour; no base whereon to rest judicial decree.

Is the case altered by what is said to have been derived from the family? As to what came from Madame Dussert the plaintiff, or from her sister, (for many years before these depositions were taken, the beneficiary of the suit,) it is clearly inadmissible. Then as for what was said by the mother. It is doubtful whether this was not said post litem motam. Now, first of all we must remember that the admission of hearsay testimony, at all, is in opposition to a maxim of the law, of more pervading influence than perhaps any other. The statements offered in evidence must appear to be the "natural effusions" of the mind of the party making them; and being, at best, received with jealousy, it is incumbent on whomsoever offers them, to clear away every suspicion that may rest upon them. It is not enough that the evidence may be true. It must present every credential of truth upon its face. This was the doctrine held by a great majority of the judges in the Berkeley Peerage Case [8 H. L. Cas. 21], a case to which the attention of the court is particularly directed, and which, being in the house of lords, is of the highest authority. Then the defence in this case is, the statute of limitations, or an adverse possession for twenty-one years before suit brought: and strong evidence has been given to support this defence. Now, admit that what was said by Madame Dussert was before suit brought, yet is it certainly clear that it was ante litem motam? The line of distinction is, not the commencement of the suit, but the origin of the controversy. Being an ejectment, the case is not one for favourable presumptions. "The plaintiff" says one case "must remove every possibility of title in another person, before he can recover; no presumption being to be admitted against the person in possession." Richards v. Richards, 15 East, 293, note. The plaintiff was a foreigner, a female, a widow, in a distant country; and there was no pressing necessity to bring a suit until the twenty-one years were about to expire.

But, finally, this hearsay is admitted under the condition that it is the best evidence which the case allows. And with us, where, except the family Bible, a registry is scarcely known; where there is but little motive of any sort, to perpetuate a knowledge of genealogies or pedigree, such evidence is well received; for in the nature of the case there can rarely be better. And this remark, though in a less extent, applies in England likewise. But in France, where marriage is a sacrament of the church, and baptism is scarcely ever omitted; where wills, and births and deaths are al enregistres devant notaire, and every man has his acte de naissance surely if the descent be as is alleged, some better evidence of it than such as is produced here, must exist; better than that of persons who appear to have been nowise connected with the family but in the course of commercial dealings; or than that of a person who, by force of his vocation, must have passed the greater part of his life at sea. Are there no family letters? nor deeds? nor recitals? Where is the father's will? or where any evidence of a devolution of property? The evidence, then, it is clear, is not the best of which the case admits; and though it may be hard on this plaintiff to reject evidence which may cause a loss of the suit, yet the court will act upon the wise sentiment of Lord Eldon, in a kindred case: "Your lordships will look hardships in the face rather than break down the rules of law."

Mr. C. Ingersoll, in support of the evidence: The father of Madame Dussert died in

1786; more than half a century before the depositions were taken. Direct evidence of marriage and birth cannot be required after such a term of years; for it would be impossible to obtain it. We have enough; we have persons of various ages and professions, all acquainted with the family through a series of years, and all testifying that the pedigree of Madame Dussert was matter of publick notoriety. The court will infer from the acquaintance proved with the family, that this notoriety means to include notoriety or common reputation in the family; and that is enough. Doe v. Griffin, 15 East, 293.

The depositions are in a foreign tongue, and the precise requirements of our law were probably understood by neither commissioners nor witnesses. The defendant did not name commissioners: he did not cross-examine; and the testimony is unimpeached; for he has offered none in rebuttal. In such a case no court will scan with eagle eyes.

As respects the lis mota, the question, by concession, is but doubtful; and this should not be enough to exclude the evidence. The Berkeley Peerage Case settled no such principle of exclusion. The testimony there offered has been made, not only post litem motam, but propter litem motam. To be sure, the court will not make difficult presumptions to support any testimony; neither will it make impossible ones for an opposite purpose.

BALDWIN, Circuit Justice. The rules of evidence are not absolutely inflexible; and where testimony bears strong general marks of candour, and an opposing party has neither cross-examined the witness, nor attempted to impeach the testimony by adducing counter evidence, a court, generally speaking, is not extreme in its requirements; especially where, as in this case, the evidence comes through the channels of a foreign language and a foreign commission. In such cases, testimony will sometimes be received, in regard to which, in other circumstances, the court would be more strict. We think, that under the circumstances of this case, it may be intended that the witnesses, two of whom appear to have been considerably acquainted with the family of Madame Dussert, designed by the expression notoriete publique, to include general reputation in the family.

The point being thus rested, it is not so important that we express an opinion as to the statements of the mother and brother; which it is a matter of doubt whether they were made ante or post litem motam. The defendant's counsel has argued very well against the reception of such testimony; but we rather incline, on first impression, to think that it is admissible. You may read the testimony, but we will reserve the point of law for future consideration, should it be rendered necessary.

Case No. 4,201.

DUSTIN et al. v. MURRAY.

[5 Ben. 10.][1]

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

SEAMEN'S WAGES—THREE MONTHS' EXTRA PAY—ENTERING FOREIGN NAVAL SERVICE.

1. Seamen, discharged from an American vessel, in a foreign port, by her master, may bring an action in admiralty against her owner, to recover their portion of the three months' wages, required by the act of February 28, 1803 (2 Stat. 203), to be paid.

[Cited in Gove v. Judson, 19 Fed. 524.]

2. Seamen shipped in New York, on board the steamer Algonquin, which her owner had contracted to sell to the Haytian government, and to deliver at Port au Prince. They sailed in her to Port au Prince, where she was delivered to the Haytian government, and went into the naval service of that government, and they remained on board her, till they were discharged at various times thereafter. They returned to New York, and filed this libel against the owner of the steamer, to recover the three months' wages required to be paid by the act above mentioned. The owner claimed that the men signed articles for a voyage to Port au Prince, to be there discharged, while the seamen claimed that their agreement was for a six months' voyage, at the end of which they were to be brought back to New York. *Held*, that it was not material what were the terms of the articles signed by the men, because the act of 1803 was equally applicable to the discharge of the men, when such discharge took place in a foreign port, whether it was at the termination of their agreement, or before such termination.

3. If, at the time of the delivery of the ship to the Haytian government, the men were discharged, their right to recover, under the act, was complete.

4. If, at that time, the men had been coerced into remaining on board, and thus entering into the Haytian service, such circumstance would be equivalent to a discharge.

5. On the facts, the men at that time voluntarily entered the Haytian service, and were not, therefore, discharged, and that their subsequent discharge would not bring them within the provisions of the act of 1803.

6. An agreement, made by the men in New York, to enter the Haytian naval service, would be illegal, and would not have prevented the men from claiming their discharge, upon the change of flag.

R. D. Benedict and Henry Morris, for libellants.

W. W. Goodrich and Warren G. Brown, for respondent.

BENEDICT, District Judge. This action is brought by a large number of persons, mostly colored seamen, who formed part of the ship's company of the steamer Algonquin, to recover of the defendant, as the owner of that vessel, three months' extra wages, under the provisions of the act of congress, passed February 28, 1803. The Algonquin was a vessel of war, fitted out in this port by the defendant, who had an agreement with the Haytian government for her purchase of him, and her delivery by

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

him in Port au Prince. On the 13th day of October, 1870, a large crew was shipped for her, in New York, by the defendant; and, having been cleared from New York as a merchant vessel, the steamer proceeded to Port au Prince. Upon her arrival there, eight days afterwards, she was transferred to the Haytian government, and entered the naval service of that government as a vessel of war. The libellants continued on board of her as mariners, firemen, cooks, &c., and served in the Haytian navy for different periods of from two to three months, and were finally dismissed from that service in Port au Prince. They now bring this action to recover the three months' extra wages, which they insist the act of 1803 entitles them to recover of the defendant.

That seamen have the right to maintain an action against the shipowner, to recover as wages their portion of the three months' wages, required, by the act of 1803 to be paid by the master on a discharge in a foreign port, is not, and cannot now be questioned in this court. Wells v. Meldrun [Case No. 17,402]; Emerson v. Howland [Id. 4,441]; Orne v. Townsend [Id. 10,583]. "Everything due from a ship to a sailor, as incident to his services, may be recovered in a court of admiralty, under the name of wages." Woodworth v. Fennel [Id. 18,015]. The question here is, whether the case is brought by the proofs within the scope of the statute relied on.

At the outset, a controversy has arisen as to what was the voyage for which the seamen were shipped. The libel avers that the voyage was from New York to Port au Prince, thence to such ports or places in the island of San Domingo as the master might direct, and back to a port of discharge in New York. The answer denies that such was the voyage, but avers that the seamen were hired by the respondent to serve on board said vessel from the port of New York to the port of Port au Prince, and to no other port or place.

In support of the answer, the ship's articles, deposited with the collector of the port of New York, at the time of the departure of the steamer, as required by law, are produced, and the voyage therein contained corresponds with the voyage set forth in the answer. But the evidence makes it entirely clear, that no such ship's articles were ever signed by the crew, and that the articles deposited with the collector were simply fabricated, for the purpose of a formal compliance with the statute.

The crew signed some document, but it is not produced. It is hardly possible that the agreement with the men could have been for a definite voyage from New York to Port au Prince, there to end, in all contingencies, as claimed in the answer. The expectation was, that the vessel would, upon her arrival, be transferred to the Haytian government, but it was not certainly known that she would be accepted, and if not accepted, the service of the crew would be of absolute necessity to the defendant to bring her home, or navigate her to some other market. For that reason, an agreement with the crew, which would deprive him of the right to their further service, in case the vessel was not sold, would not have been safe, and it would require strong proof to convince me that it was made.

Neither am I satisfied, that the agreement set forth in the libel is correct. But I take no time to determine what was the actual contract made with the men, not deeming that material to the disposition of this case; for I am of the opinion that the act of 1803, is applicable in a proper case, whatever may have been the agreement with the men at the time of their shipment. I am not aware of any express decision, that the act of 1803, is applicable to a case where the discharge of the seamen takes place at the termination of the voyage agreed on. See, however, Wells v. Meldrun [supra]; The Dawn [Case No. 3,665]. But I do not doubt that the act may properly be held applicable in such a case. No reason suggests itself for exempting such a case from the effects of the statute. The terms of the act are general and applicable to all discharges of American seamen in a foreign port. It is expressly applicable to a discharge by consent, and nowhere requires that such consent should be first given at the foreign port. A discharge according to the agreement in the articles is as much a discharge by consent as any discharge can be. The object of the act is to compel provision for the return to their homes of American seamen left in foreign ports. The same necessity exists for its application, when the voyage agreed on ends, by its terms, in the foreign port, as when the voyage is there ended by consent, there given.

The subsequent modification of some features of the act also indicates an intention, that the statute should be applicable in such a case. Thus, the 9th section of the act of July 20, 1840 [5 Stat. 395], expressly provides for exacting the three months' pay, where the contract is fulfilled; while the 15th section of the act of March 1, 1855 [10 Stat. 624], when creating exceptions, omits to except the case of a voyage, terminated by the terms of the articles; and, although it permits the consul to forbear to require payment of the three months' extra wages, when the master and seamen jointly apply for a discharge without such payment, still it forbids such action, unless under circumstances which will secure the United States from all liability to expense on account of the mariner. If it should be said, that this construction of the act would make it exceedingly onerous in all cases of short voyages, terminating in foreign ports, the answer appears to be that the act is intended to be onerous, and to exclude

the possibility of an American seaman being left without money in a foreign port, liable to be a charge upon the United States, except in cases where the consul shall be satisfied that no injustice will be done, and no expense entailed upon the United States. Furthermore, the 1st section of the act of 1803, requires of the master of any vessel, bound on a foreign voyage, before he can obtain a clearance, a bond, conditioned that he shall return to the United States all the seamen upon his articles, except such as shall have died, or absconded, or been discharged in a foreign port with the consent of the consul signified in writing—and such a bond given for the return of these libellants is in evidence here. For these reasons my opinion is, that neither the agreement set up in the libel, nor that in the answer contain any features which prevent the libellants from recovering the extra wages, if the other facts of the case are sufficient to bring it within the purview of the act.

The statute compels the payment of three months' wages, in two contingencies—when the ship shall be sold in a foreign country, and her company discharged; or, when a seaman shall, with his own consent, be discharged in a foreign country. Subsequent statutes modify these contingencies in the event of certain action by the consul, but such modifications do not affect the present case, inasmuch as it is conceded, that the consul took no action in regard to the these men.

Was this vessel sold in Port au Prince, and her company discharged, within the meaning of the act? The sale of the ship in Port au Prince is proven. The contract between the Haytian government and the respondent is in evidence, and its legal effect was to vest the title to the vessel in the Haytian government upon her arrival and acceptance by that government, in Port au Prince, and not before. In accordance with that contract, she was sent to Port au Prince by the respondent, and there by him delivered to her new owners. If the ship's company was then discharged within the meaning of the act, the case of the libellants is complete.

Now, it is certain, that at the time the vessel was sold, and the flag changed, the company did not, any of them, leave the ship; on the contrary, they remained on board, under the Haytian flag for some months. This circumstance, which ordinarily would be so controlling, demands especial attention here, owing to the fact that the officers of the steamer were not changed at the time of the sale, but the vessel was at once put in service as a vessel of war, under their command; and doubtless, it would have been impossible to procure for her, at that time and place, any proper crew, if the crew, shipped in New York, had left her on the change of flag. Accordingly, as is apparent from the testimony, the men were considered and treated by the master as enlisted seamen of the Haytian navy, and if they had then desired to leave the ship, would not have been permitted to do so.

A continuance on board the vessel and in the service of a foreign power, under such circumstances, if unwilling and enforced, I should not consider sufficient to prevent the operation of the statute.

To compel the men to remain on board and in the service of a foreign state, would be equivalent to a discharge, and, coupled with the fact that the men finally did leave the vessel in the foreign port, would be sufficient to entitle the seamen to the extra wages under the statute. Nor could the defendant, the ship-owner, be permitted to say that he is not responsible for the action of a foreign power, in compelling the men into their naval service; because, under such circumstances, it would be the duty of the ship-owner to make provision to secure to the seamen an opportunity to leave the ship, if they desired to, before they passed into the power of the foreign government; and not having done so, he would be responsible, as having connived at their detention on board. It becomes important, then, to determine whether the libellants desired to leave the vessel on the change of flag, or voluntarily entered the service of the Haytian government. This aspect of the case has been anticipated, and much testimony has been taken to show, on the one side, that at the time of the change of flag, the seamen protested against being compelled to enter the Haytian service, and demanded to be discharged; and, on the other side, to show, not only that the men willingly entered the service at the time of the change of the flag, and voluntarily took upon themselves the character of seamen of the Haytian navy, but also to show that, at the time of their shipment in New York, they expressly agreed to enter that service. I attach no importance to the evidence offered by the respondent, as proving an agreement at the original shipment to serve in the Haytian navy, inasmuch as such an agreement made would be illegal and void,—see Act April 20, 1818, § 1 [3 Stat. 447],—and the men in nowise prevented from claiming their discharge upon the change of flag. This evidence is only important, as tending to throw light upon the action of the crew at the time of the change of flag. It will not be desirable to extend this opinion, by referring at length to all the portions of the testimony which have led me to the conclusion which I have reached upon this, as I view it, the decisive point of the case. It is sufficient to say, that I have duly weighed all the testimony, and, notwithstanding the very positive statements of many, indeed, of most of the libellants, I consider that the weight of the evidence sustains the position taken by the defendant, that the libellants voluntarily joined the Haytian naval service, at the time of the transfer of the vessel to that government. I do

not say that the continuance of all the men in that service, for the time they served, was voluntary, but that their entering the service was voluntary. The vessel was known in New York to be a vessel of war. That she was such, was apparent to the crew when they went on board. The expected sale to the Haytian government was notorious, and common talk on board; the probability that they would be expected to enter the service of that government, in the event of her sale, was known to all; and upon the evidence, it appears reasonably certain that, when the men shipped, it was with the intention of going with the ship into the Haytian service, in case she was sold to that government. Nothing is shown to have transpired during the voyage out, calculated to cause a change of intention, and I conclude that that intention was not changed, but that the libellants willingly and intelligently entered the service of the foreign government to which the ship was sold. It is doubtless true, that very shortly thereafter there was dissatisfaction, and that then many of the men claimed their discharge, upon the ground that they had shipped under the American flag, and were not bound to serve under a foreign flag; but the question is, whether, at the time of changing the flag, the crew willingly took service under the new flag, or whether they were coerced into so doing by the officers of the ship. This question being determined adversely to the libellants, it is impossible for them to recover the extra wages, payable according to the act of 1803, in the case of the sale of a ship and the discharge of her company in a foreign port.

A word only is necessary in reference to the position—that the extra wages are due by reason of the subsequent discharge of the men, by consent, in the foreign port. No such position can be maintained, for the reason that when the men were finally discharged from the ship, no relation then existed between them and the defendant. He ceased to be owner at the time of the change of flag. Besides, the men were not then American seamen. The act of 1803 was intended only to provide for American seamen. Engaging in a foreign service by a seaman would preclude the possibility of a payment to the American consul at a subsequent discharge from such foreign service, as provided by the act, and such engagement would be a waiver of all right to claim the benefit of the statute. Matthews v. Offly [Case No. 9,290].

The views already expressed also dispose of the claim to a balance of the wages earned by the libellants while in the service of the Haytian government. Supposing it to be true, that the agreement was that, in case of sale, the passage of the men home should be paid, or that they should serve the defendant for a period of six months, and then be returned to the United States, nevertheless, if, as I have found, the libellants voluntarily entered the service of the Haytian government, that terminated the liability of the respondent for future wages. As to the wages up to that time, it is conceded that they have been paid.

The result, therefore, is, that the libel must be dismissed, with costs.

DUSTIN (UNITED STATES v.). See Cases Nos. 15,011 and 15,012.

Case No. 4,202.

DUTCHER et ux. v. BROOKLYN LIFE INS. CO.

[3 Dill. 87; 4 Ins. Law J. 812; 2 Cent. Law J. 153; 4 Bigelow, Ins. Cas. 665.] [1]

Circuit Court, E. D. Missouri. Sept., 1874.[2]

LIFE POLICY — FORFEITURE — PAYMENT OF PREMIUMS — ELECTION TO TAKE PAID-UP POLICY — AMBIGUITY—USAGE.

Construing the provision of the policy in suit, in the light of the practical construction [previously] put upon similar policies by the company: *Held*, that the plaintiff was entitled, on electing to discontinue the payment of premiums, to a paid-up policy, without first paying a note held by the company for part premiums, but that said note with interest, less the dividends, was to be deducted from the amount insured when the policy became payable.

[See note at end of case.]

This is a bill in equity [by Clinton O. Dutcher and his wife] against the company to enforce the issue and delivery to the plaintiff of a paid-up policy for $4,000. On February 29, 1868, the defendant issued its policy to Mrs. Dutcher, in which, for the annual premium of $615.40, for ten years, the company insured the life of the husband for $10,000, "with participation in profits." This amount was payable "within sixty days after due notice and proof of death." After the payment of four annual premiums, the plaintiffs (Mr. and Mrs. Dutcher) file the present bill, claiming that they are entitled to a paid-up policy for $4,000. This is resisted by the company.

The following is a copy of the material portions of the policy: "Non-forfeiture policy. The Brooklyn Life Insurance Company. No. 3718. Amount, $10,000. Premium, $615.40. Age, 40. By this policy of assurance, in consideration of the representations and agreements contained in the application therefor, and the sum of six hundred and fifteen dollars and forty cents, to them in hand paid, by Annie C. Dutcher, wife of Clinton O. Dutcher, and of the annual premium of six hundred and fifteen dollars and forty cents, to be paid on or before the twenty-ninth day of February, in each and every year until ten full years premiums shall have been paid, do assure the life of Clinton O.

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[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Bigelow, Ins. Cas. 665, contains only a partial report.]

[2] [Affirmed in 95 U. S. 269.]

Dutcher in the amount of ten thousand dollars, for the term of his natural life, with participation in profits. And the said Brooklyn Life Insurance Company do hereby promise and agree, to and with the said Annie C. Dutcher, well and truly to pay or cause to be paid the said sum assured, to her; or, in case she shall die before the said Clinton O. Dutcher, to pay the said sum assured to her heirs, etc., or assigns, within sixty days after due notice and proof of the death of said person whose life is hereby insured, the balance of the year's premium, if any, and all indebtedness due or to become due to the company, to be first deducted therefrom. Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by this company, and accepted by the said Annie C. Dutcher, upon these express conditions, that in case the said Annie C. Dutcher shall not pay or cause to be paid the premium as aforesaid, on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due, the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease, and be null, void and of no effect. And it is further understood and agreed by and between the parties hereto, that the dividend of profits which may become payable by virtue of this policy to the holder thereof, shall be applied toward the payment of the note taken for part premiums aforesaid, and that if this policy shall cease or become null or void, the said Annie C. Dutcher, her heirs, executors, administrators or assigns, shall be liable to pay to said company the amount of all notes taken for premium which shall remain unpaid on the note taken for part premium and made payable at twelve months from date, and that the said last mentioned note is to be cancelled by the company on the surrender and cancellation of the said policy, and also that this policy shall not be assigned without the consent of the said company in writing, previously obtained. And it is also further understood and mutually agreed, that in case the said person whose life is hereby insured, shall be or become in any sense an inebriate, the company shall have the right to declare this policy cancelled, and shall be absolved from all liability under it on paying to the holder thereof, or tendering in payment the amount of all unearned premiums, actually received thereon up to the time of such payment or tender of payment. After two annual payments, should the party wish to discontinue (notice to the company being given before the next premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash. In witness whereof, &c., this twenty-ninth day of February, one thousand eight hundred and sixty-eight."

The parties agreed upon the following facts: "That the plaintiff, Annie C. Dutcher, and the defendant contracted and agreed together that the annual premium, $615.40, due upon said policy, should be payable each year as follows: $369.24 in money, and $246.16 in her promissory note, payable twelve months after date, with interest thereon at the rate of seven per centum; that upon the payment of said sum of money and the delivery of said note, the defendant would execute and deliver to said plaintiff, Annie C. Dutcher, a receipt for $615.40, the premium upon said policy for twelve months, the amount of said note to be a permanent loan from the defendant to Annie C. Dutcher, plaintiff, bearing interest at the rate of seven per centum until paid by dividends, and that at maturity of said note a new note bearing the same interest and covering the amount of said first mentioned note, except as reduced by dividends, and the amount of $246.40 of premiums for the current year should be given, and so on from year to year. That said Annie C. Dutcher, plaintiff, did on the 29th of February, 1868, pay to defendant $369.24, in money, and $246.16, in her promissory note, payable twelve months after date and bearing interest at the rate of seven per centum, and in return therefor defendant did deliver to said plaintiff a receipt for $615.40, the premium due February 28th, 1868, on policy 3718, insuring 10,000 dollars for twelve months ending February 28th, 1869; that said Annie C. Dutcher did, on the 28th day of February, 1869, pay to defendant the like sum of money and the like note increased to the extent of the amount of the preceding note unpaid by dividends, and in return therefor defendant did deliver to said plaintiff a receipt for $615.40, the premium due February 28th, 1869, on policy 3718, insuring 10,000 dollars for twelve months, ending February 28th, 1870; that the said Annie C. Dutcher plaintiff, did pay to the defendant the like sum of money and the like note to that last above mentioned, on the 29th day of February, 1870, and also on the 29th day of February, 1871, for the years then next ensuing and defendant in return therefor did deliver at each of said dates to said plaintiff a like receipt to the above; that the delivery of said like sum of money and said like note upon the 28th day of February, 1871, continued said policy 3718 in force until the 29th day of February, 1872. Said receipts were in the form and to the same tenor and effect as the receipt hereto annexed and marked 'A,' and hereby made a part of these agreed facts. That, on the 1st day of February, 1872, there was due and owing to defendant by said Annie C. Dutcher, on account of the notes hereinbefore mentioned to have been given by the said Annie C

Dutcher to defendant, the sum of $793.64. That on the 1st day of February, 1872, the said Annie C. Dutcher notified defendant that she wished to discontinue policy 3718 and desired a paid-up policy therefor, and offered to deliver up to defendant said policy 3718; that defendant refused to accept said policy and deliver to Annie C. Dutcher, plaintiff, a paid-up policy as requested, because the said Annie C. Dutcher refused first to pay defendant said amount of $793.64 which was then and there a lien against policy 3718. That from the time defendant began business to the 20th day of January, 1871, it was the course of business of defendant to issue paid-up policies to policy holders on demand without deducting the loans of the defendant to the policy holder and to hold the same as a lien against the paid-up policy, but that on and after said date defendant refused to give a paid-up policy to any policy-holder without the payment first of any loans due defendant by such policy holder."

Krum & Patrick, for plaintiffs.
Sharp & Broadhead, for the company.

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

TREAT, District Judge. This is a bill for specific performance. On the 29th of February, 1868, the defendant issued a non-forfeitable policy. The sum insured was $10,000; annual premium $615.40; number of premiums to be paid, ten; term, natural life of the insured, "with participation in the profits." Payment of the $10,000 was to be made within sixty days after death and proof thereof—"the balance of the year's premium, if any, and all indebtedness due, or to become due to the company, to be first deducted therefrom." This seems to contemplate that there would be, or might be, a part of a year's premium and other indebtedness due at the death of the insured.

The policy further provides that "in case" "the premium, as aforesaid," shall not be paid "on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due," the policy shall become void. It further provides that "the dividend of profits which may become payable by virtue of this policy to the holder thereof, shall be applied towards the payment of the note taken for part premiums aforesaid, and that if this policy" shall become void, said holder of the policy "shall be liable to pay to said company the amount of all notes taken for premiums, which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and payable at twelve months from date, and that the said last mentioned note is to be cancelled by said company on the surrender and cancellation of said policy." There is also a clause absolving the company from liability if the insured becomes an inebriate, "on paying to the holder thereof * * * the amount of all unearned premiums actually received thereon up to the time of such payment."

The next and last provision is as follows: "After two annual payments, should the party wish to discontinue (notice to the company being given before the next premium becomes due), the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid, in cash." In this case the required notice was given after four payments had been made, and a paid-up policy was demanded for the prescribed four-tenths of the amount insured. The defendant refused the request, unless the plaintiffs would first pay their notes for premiums held by the company; contending that the last clause, cited above, contemplated a previous payment of the annual premiums, in cash. The plaintiffs, on the other hand, insist that those notes are mere loans to them, to be paid out of their share of the dividends, should their share equal the amount of said notes, at the death of the assured—said notes being a lien on the policy for the sum finally due thereon—or, if that be not the true construction of the policy, then the defendant should issue a paid-up policy for $4,000, less the amount of said notes.

The terms of the policy as to notes, quoted above, are not very clear; for they seem to imply in one phrase that many notes for premiums may be outstanding, and in another phrase, that there can be only one outstanding note of the kind, and that for a part of the last premium due. The course of dealing between the parties, however, has put a practical construction on the contract. The receipt for each annual premium paid (as for the last in this case) is as follows:

"Received from Clinton O. Dutcher, $615.40, which continues in force policy 3718, issued by this company, until the 29th day of February, 1872, in accordance with the terms and conditions of said policy.

"Old note returned herewith, the indebtedness being debited against the policy, $547.48; amt. of premium loaned this year, $246.16,—$793.64."

The original agreement, it is admitted, was that of the $615.40 for the annual premium, $369.24 should be paid in cash, and $246.16 in a note at twelve months at seven per cent interest, whereupon a receipt for the payment of the whole premium should be given, the amount of said note to be a permanent loan by the company, until paid by dividends, and that at maturity of said note, a new note, at the same rate of interest, should be given, including the $246.16, and the amount of the former note, less the dividend applicable to its payment. This was the mode pursued each year.

It is further admitted in this case that de-

fendant had always, prior to January 20th, 1871, issued paid-up policies on demand without deducting the loans on outstanding notes, holding such notes as a lien against the paid-up policy; and that since that date the defendant has uniformly refused to issue a paid-up policy unless the holder first paid the outstanding loans or notes.

As there are many like suits pending against this defendant on somewhat similar policies, issued at different times, it may be well to examine them with reference to any changes made by the company in the terms of its subsequent contracts. Thus policy No. 6060, issued March, 1869, is the same as that with reference to which this suit is instituted, except that on the back thereof, in print and writing, the cash-surrender value of the policy is stated for successive years—that value being "exclusive of the value of any dividend, deposits or reversions, which the company will pay in addition;" also that "the above amounts, less any outstanding loans or notes, will be paid on the surrender of this policy, duly receipted, within two months after being forfeited by non-payment of premiums."

The policies of the defendant were stated from the first to be non-forfeitable; yet they contained clauses of forfeiture. Subsequently, as above, the non-forfeitable provisions were attempted to be defined—that is, a surrender-cash value was stated, if the policy was surrendered within two months after forfeiture. Still, in the body of the policy the forfeiture clause for non-payment of premium and notes when due was retained.

Policy 5633, issued in January, 1869, omits the words "non-forfeiture policy," and substitutes for the provision above quoted as the last in the policy, No. 3718 (that in question), these words:

"On surrender of this policy, while in force, after the full amount of two or more annual premiums have been paid in cash, including the payment of any note or notes given on account of premiums, the company will issue a paid-up policy for the amount of premium paid, less any and all dividends paid on said policy."

On the back of policy No. 5633 was the same agreement as to cash-surrender value as that endorsed on policy No. 6060. The company had thus added to the new policies, subsequent to plaintiffs', the requirement of previous payment of notes given on account of premiums; indicating, on its part, that there was previous uncertainty on that point.

It thus appears that the policies issued by this company at the commencement were designed to induce the holders to understand that they included several distinct provisions favorable to the insured, viz.:

1st. They were non-forfeitable. Afterwards they defined, under the head of cash-surrender value, the precise meaning of their non-forfeitable qualities, and limited to two months the condition of non-forfeiture; still retaining on the face of the policy their non-forfeiture designation, and among the conditions, a forfeiture clause. Such seemingly inconsistent and conflicting provisions exact a construction against the company most favorable to the insured.

2d. They gave to the insured a participation in the profits. For what period of time? When he was insured for his natural life, would not his participation in the profits continue until his death? It matters not that the annual premiums were to cease at the expiration of ten years, if the insurance was for life. The participation in profits may be in various ways—either by corresponding reduction of premiums, in annual cash dividends, or in additions, with or without accumulations of interest, to the principal sum assured.

3d. The defendant's policies determined the mode of the participation in profits when part payment of annual premium was by note. At the time of the next annual premium, which would be the same time the previous note fell due, there would be credited on the note the dividend of profits to which it was entitled. Then the balance, together with the amount payable by note for the next premium, would be included in the new note, and the former note would be cancelled. In that way there would be only one note outstanding. Such was the practical construction given and assented to; yet serious difficulties might have arisen if a forfeiture had been claimed; for it is provided that the holder, when forfeiture occurs, shall be liable to pay all unpaid notes taken for premiums, "except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date," and said last note is to be surrendered and cancelled on surrender and cancellation of the policy. If that was the only note which could, in the routine of business be outstanding, and that was to be surrendered and cancelled, for what would the holder be liable? It would seem he would lose only the cash paid on the premiums, and that his notes would be surrendered. But under the clause concerning inebriates, when the company cancels a policy, it must pay back the amount of all unearned premiums actually received. What is meant thereby? Actually received only in cash, or both in cash and notes? The main question in dispute here, is, whether the defendant is bound to issue a paid-up policy except when the annual payments are actually paid in cash or the notes given are also first paid in cash. Under the clause concerning inebriates, the company must pay back the amount of unearned premiums actually received. How received? In cash merely? Certainly, it cannot be fairly contended that the company would absolve itself under that clause by returning the cash payments and holding the assured liable on his notes for premiums. The payment of premiums includes both cash and notes given. Why

then, should not the phrase in the last clause as to annual premiums, paid in cash, receive equally as broad and favorable a construction?

4th. The policies contemplated part payment by note, and indicated how the notes should be treated in connection with the profits, and also how the sum due on said notes should be met when the policy became payable, viz.: that the sum insured should be paid, less the amount due on the notes.

5th. If the ten annual payments had been made, the original policy would have stood as a paid-up policy, and the last note would have been outstanding, payable in twelve months, by its terms, less dividend accrued. Was it contemplated that it should be paid at the end of said twelve months, when it is admitted that the sum named therein was to be a permanent loan at seven per cent, debited against the policy? If so, what was the inducement as to part payment by note, and as to participation in profits to be applied to the payment of the note? How was the participation of profits to be thereafter enjoyed? The theory of the plan proposed and acted on was a receipt for the annual premiums as for cash, while actually cash was to be paid for part, and a note was to be received as cash payment for the balance. Throughout the ten years no actual payment, even of interest on the notes, was expected, but the balance due thereon was carried into a new note. Practically, it seems, the plan offered to the insured was found not to work satisfactorily to the company, and hence it changed not only the phraseology of its later policies but its own interpretation of the earlier policies. It changed the last clause concerning paid-up policies for tenths, as to "annual premiums paid in cash," so that it should read, "including the payment of any note or notes given," etc.

Through all the various provisions concerning the non-forfeiture, cash-surrenders, issuing of paid-up policies for tenths, and giving of notes, the way those notes should be treated on cash-surrender, or cancellation in case of inebriates—in short, throughout the various contingencies attempted to be provided for, the notes are treated as sums to be accounted for on the final payment of the policies, and not before. It is impossible to reconcile the various provisions with each other, or with the manifest theory on which the earlier policies were based, or with the practical construction given, unless it is held that paid-up policies were to be issued for the tenths named, without the previous payment of the notes, or the deduction of them from the amount of said tenths. If deducted, what was to become of the participation of profits, and what of the interest they bore? The conclusion is, that the plaintiffs are entitled on the facts agreed, to the paid-up policy. The company will hold the notes bearing seven per cent interest, and whatever balance due, less dividends, there may be at the time of the death of the assured, will be deducted from the tenths assured.

The defendant agreed that plaintiffs should participate in the profits during the natural life of the assured; that they should give notes for part of annual premiums; that at the expiration of ten annual premiums the policy should be considered paid up; that the dividends should be applied towards payments of the notes; that the amount payable at the death of the assured should be $10,000, less the balance due on the final note given as above stated. It could not be determined until the death what would be due on that note; for while it bore seven per cent interest annually, it was subject to reduction for dividends. It was uncertain whether the dividends would exceed the interest, or amount to the whole note, principal and interest. Hence, when the paid-up policy for tenths was demanded, the plaintiffs were entitled thereto, without previous payment of the notes.

DILLON, Circuit Judge. The policy here in question is dated February 29th, 1868. The payment of the premiums was to be made each year, part in cash and part in a note for the amount of the premium "loaned by the company to the assured," upon interest. After making four annual payments, the plaintiff elected to avail herself of the last provision of the policy, which is in these words: "After two annual payments, should the party wish to discontinue, the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash." The company holds the note of the assured, given for previous premiums, less dividends, for $793.64, drawing seven per cent interest.

The assured now demands a paid-up policy for $4,000, which the company refuses to issue, unless she will first pay in cash her note for $793.64, held by the company. The assured concedes, if the company issues the policy for $4,000, that her outstanding note for $793.64, with interest to the death of the person whose life is assured, less dividends, is, by the terms of the policy, then to be deducted from the $4,000.

As shown by my Brother TREAT, the provisions of the policy bearing upon the question now to be decided are far from being harmonious or clear. Under the circumstances, it seems to me that we cannot go far wrong if we hold the company in this case to the same measure of liability that down to January 20, 1871, it voluntarily admitted. It is peculiarly a case, as it seems to me, in which the practical construction put upon the same kind of contract by the company for years should be adopted by the court.

In the agreed statement of facts is the following: "That from the time the defendant began business to the 20th day of January, 1871, it was the course of business of the defendant to issue paid-up policies to policy-holders on demand, without deducting the

loans of the defendant to the policy-holder, and to hold the same as a lien against the paid-up policy, but on and after said date the defendant refused to give a paid-up policy to any policy-holder without the payment first of any loans due defendant by such policy-holder." I give to this course of dealing a controlling influence in my judgment, and, accordingly, am of opinion that the plaintiffs are entitled, on the agreed facts, to a paid-up policy for $4,000, payable at the time and on the terms specified in the present policy as here expounded.

Decree accordingly.

NOTE [from original report]. The following note was prepared by Hon. J. O. Pierce, of Tennessee:

"1. The policy in this case was described as 'non-forfeitable,' and provided that, on discontinuing the payment of annual premiums, the assured might have in lieu a paid-up policy 'for as many tenths of the amount originally insured as there have been annual premiums paid in cash.' But it was not contracted in the first instance that the premiums should be paid wholly in cash. A note was received for a portion of the annual premium, and the remainder was paid in cash. For these was exchanged a receipt for the annual premium 'as for cash.' Upon this 'theory of the plan,' it is held that the premium was actually paid by the delivery of the note and the cash. This conclusion accords with the following cases: Hodsdon v. Guardian Ins. Co., 97 Mass. 144; McAllister v. New England Ins. Co., 101 Mass. 558; New England Mut. Life Ins. Co. v. Hasbrook, 32 Ind. 447; Mowry v. Home Life Ins. Co., 9 R. I. 346; Baker v. Union Life Ins. Co., 6 Abb. Pr. (N. S.) 144.

"The court is aided in its conclusions by the practice of the insurer in expounding its own policies of like character for several years. This was clearly proper in view of the vague and inconsistent provisions which the policy bore upon its face. Custom and usage will be resorted to, to explain or construe insurance contracts whose provisions are ambiguous. May, Ins. § 173; Bliss, Ins. p. 604; Coit v. Commercial Ins. Co., 7 Johns. 385; Robertson v. French, 4 East, 135; Fowler v. Aetna Fire Ins. Co., 7 Wend. 270; Astor v. Union Ins. Co., 7 Cow. 202; Reynolds v. Commerce F. Ins. Co., 47 N. Y. 597; Strohn v. Hartford Ins. Co. (Wis.; 1874) 7 West. Ins. Rev. 452. But not to defeat the essential provisions of the contract, where there is no ambiguity. Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235; Stebbins v. Globe Ins Co., 2 Hall, 632; Mutual Ben. Life Ins. Co. v. Ruse, 8 Ga. 534; Ruse v. Mutual Ben. Life Ins. Co., 23 N. Y. 516; Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 282; Hearne v. New England Mut. Ins. Co. [20 Wall. (87 U. S.) 488]; Busby v. North American Life Ins. Co. [40 Md. 572]; King v. Enterprise Ins. Co. [45 Ind. 43].

"3. The court construes the language of the policy strongly against the insurer, because it is his language, and is intended for his benefit. In this it is in accord with a great weight of authority. Pelly v. Governor, etc., of Royal Exch. Assur., 1 Burrows, 349; Catlin v. Springfield Ins. Co. [Case No. 2,522]; Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 305; Westfall v. Hudson River Fire Ins. Co., 2 Duer, 490; Fowkes v. Manchester & L. Life Assur. & L. Ass'n, 3 Best & S. 917; Hoffman v. Aetna F. Ins. Co., 32 N. Y. 414; Western Ins. Co. v. Cropper, 32 Pa. St. 351; Reynolds v. Commerce F. Ins. Co., 47 N. Y. 597; McMaster v. President, etc., of Ins. Co. [55 N. Y. 222]; Boon v. Aetna Ins. Co. [Case No. 1,639]; James v. Lycoming Ins. Co. [Id. 7,182].

"4. It is worthy of remark that while this policy was ostensibly non-forfeitable, its sole provision for avoiding a forfeiture was that referred to in note 1, supra. But this, according to the construction contended for by the insurer, required the performance, by the assured, of a condition not a part of the original contract, namely, the payment of all premiums to date wholly in cash. Grammatically, this construction involved a solecism; in morals, it 'kept the word of promise to the ear' merely. Viewed from a legal stand-point, it is well illustrated by the deductions of the court, in Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 103. 'It is not good policy in the courts to favor such cunningly devised insurance policies, as that, whatever event happens, the underwriters may reap the premium and escape the risk. On the contrary, some degree of acuteness should be called in to uphold and enforce such agreements, whenever there has been a fair contract and a substantial compliance.'

"Chief Justice Marshall said, in 1809, 'policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed in order to effect the real intention of the parties, if that intention can be clearly ascertained.' Yeaton v. Fry, 5 Cranch [9 U. S.] 342. 'Cessante ratione legis, cessat ipsa lex.' But whenever their policies assume a form as incongruous as that exhibited in the principal case, insurers may expect the courts to renew their application of Judge Marshall's rule."

[NOTE. On appeal by the defendant the decree was affirmed by the supreme court. Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269. The decision there was rested both upon the interpretation of the policy taken by itself, and upon the practical construction theretofore put upon it by the company. Upon this latter topic Mr. Justice Swayne, delivering the opinion of the court, said: "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are large in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice, during the period mentioned, as a factor in the case. It was competent for the company, under proper circumstances, at any time to change its rule with respect to the future; but it could not affect vested rights acquired in the past, while a different rule prevailed."]

Case No. 4,203.

DUTCHER v. MARINE NAT. BANK.

[12 Blatchf. 435;[1] 11 N. B. R. 457.]

Circuit Court, E. D. New York. Feb. 9, 1875.

BANKRUPTCY OF STATE BANK — RIGHTS OF ASSIGNEE—ENFORCEMENT OF STOCKHOLDER'S INDIVIDUAL LIABILITY.

1. The assignee in bankruptcy of a banking corporation created by the laws of the state of New York, filed a bill in equity, to enforce, against the defendants, as stockholders in such corporation, a provision of the constitution of that state, which declares that such stockholders shall be individually liable for the debts of the corporation, to the amount of the stock

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

held by them respectively. On demurrer: *Held*, that the bill could not be sustained.

[Cited in Trustees Mut. Bldg. Fund v. Bosseiux, 3 Fed. 826.]

2. Such liability is not a part of the assets of the bankrupt corporation, and no legal or equitable title, right, or interest, in such liability passed to the assignee in bankruptcy of the corporation.

[Cited in Platt v. Stewart, Case No. 11,220.]

Tracy, Catlin & Brodhead, for plaintiff.

Waldo Hutchins, for defendant.

WOODRUFF, Circuit Judge. The bill herein is filed by the complainant, as assignee in bankruptcy of the Central Bank of Brooklyn, a corporation created by or under the laws of the state of New York. The defendants are alleged to be stockholders in that corporation. The object of the bill is to enforce that provision of the constitution of the state of New York which declares that the stockholders of such a corporation shall be individually liable for the debts of the corporation, to the amount of the stock held by them respectively. The defendants demur to the bill.

I am of opinion that the demurrer is well taken. The liability thus provided for is purely collateral to the liability of the bankrupt debtor. It is a liability to, and created a right in favor of, the creditors of the corporation, and is not a liability to the corporation itself, nor, in any legal sense, for the benefit of the corporation. It is neither property, nor a right of property, nor a credit of the bankrupt. In some broad sense, having respect to the rights of the creditors, it may be called a provision for the payment of debts, and, in that sense, as insisted by the counsel for the complainants, "assets," but not assets of the bankrupt. The assignee in bankruptcy has no legal or equitable title, right, or interest therein.

It is not like a charge upon land devised for the payment of debts, which can be enforced by the executor, for, there, he has, in virtue of his title to the personal estate, a direct interest in enforcing the charge, for the exoneration of such personal estate and himself from liability for such debt.

It is not like unpaid subscriptions to the capital stock, as in Sawyer v. Hoag, 17 Wall. [84 U. S.] 610, for, the liability of the stockholder there was a liability to the corporation, and passed, as such, to the assignee in bankruptcy. It was a fund belonging to the corporation, for all purposes; and any act of the corporation itself, which fraudulently or inequitably operated to deprive the creditors thereof, was properly held void. In that respect, acts of the corporation defeating the just rights of creditors to have that liability enforced for their benefit, were of the same nature as fraudulent conveyances of any other property of the bankrupt.

Nor will the case of Story v. Furman, 25 N. Y. 214, 231, furnish any support to this bill. The question there was, whether, in regard to certain corporations, an act of the legislature of the state of New York, authorizing the trustees, in case of a dissolution of the corporation, to enforce this liability of the stockholders, was constitutional. The court deemed it competent for the legislature to provide a mode of enforcing such liability; and that the question was one of remedy merely. So far as the case depended upon that specific statute, it implies that, but for that statute, extending the power of trustees over their specific subject, no such power existed, and the creditors would be compelled to file a bill, or institute actions in their own behalf. No such express authority is conferred by the bankrupt law on the assignee, or upon this court, upon his application by bill or otherwise. It is unnecessary to deny the correctness of the observations of the court, in the case last named, to the effect that this liability constitutes a fund in equity for the payment of debts, or that a court of equity, on bill filed by a creditor or creditors, would, in virtue of its general power and jurisdiction, be competent to appoint a receiver, and clothe him with authority to enforce this liability of stockholders. That is not the question here. If the assignee in bankruptcy has any power over the subject, it must be found in the bankrupt law itself, and that must be consulted to determine whether, at his instance, as complainant, this court can exercise any jurisdiction in the matter.

In a suit brought in the district of Connecticut, in Bristol v. Sanford [Case No. 1,893], a similar question was considered and decided by the circuit court. The circuit court held, upon views not unlike those above stated, that the assignee could not maintain his suit.

The demurrer must be sustained, and the bill be dismissed.

DUTCHER v. THE ROCKET. See Case No. 11,975.

DUTCHER (UNITED STATES v.). See Cases Nos. 15,013 and 15,014.

Case No. 4,204.

DUTCHER v. WOODHULL et al.

[7 Ben. 313.][1]

District Court, E. D. New York. April, 1874.

EFFECT OF APPEAL ON JUDGMENT — SUPERSEDEAS —POWER OF THE COURT.

1. The effect of an appeal to the circuit court, from a decree of the district court in admiralty, when security for damages is given on the appeal, is, to make the decree of the district court of none effect.

2. Where such an appeal is taken, but security for damages is not given, the decree of the district court may remain of effect.

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

3. The district court, sitting in equity, has power to restrain the enforcement of a decree made by the same court sitting in admiralty.

4. A decree was rendered in an admiralty cause. Notice of appeal was served, but no security for damages was given, and judgment was entered against the stipulators, and execution issued, and a levy made. Thereafter, security for damages was given, and the return duly made to the circuit court, and proceedings stayed, the execution and levy being ordered to stand. The appeal was heard in the circuit court, and the decree of the district court was affirmed. An appeal with due security was taken to the supreme court, which affirmed the decree of the circuit court. Thereafter, the libellants sought to enforce the execution and levy: *Held*, that the judgment was destroyed by the subsequent proceedings, and that a perpetual injunction must issue, preventing such enforcement.

This was a bill in equity by [Silas B. Dutcher] an assignee in bankruptcy, for a perpetual injunction to prevent the sale by the marshal of certain land in the bill described, by virtue of an execution issued out of the district court for this district, sitting in admiralty, in a certain cause wherein Joshua Atkins and others were libellants against the ship Helen R. Cooper and the steamtug R. L. Mabey, and to prevent the enforcement of a certain decree in admiralty made by such district court in that cause. The facts were as follows: On the 19th day of September, 1866, a libel was filed in the district court for this district, sitting in admiralty, by Joshua Atkins and Edwin Atkins against the ship Helen R. Cooper and the steamtug R. L. Mabey, in a cause of collision. In that cause John K. Pruyn became the stipulator for value for the Helen R. Cooper. The cause was tried in the district court, and such proceedings therein had, that, on the 17th day of April, 1868, a decree was made in favor of the libellants, for the sum of $15,563.78 with the usual provision, that, unless an appeal was taken within the time limited by law, the stipulators should cause their stipulation to be fulfilled, and, in default thereof, the libellants should have execution against them, to enforce satisfaction of the decree. Notice of appeal from this decree was given, and a bond for costs filed, on April 21st, within the time fixed by the rules of court, and, by order of the court, the time for giving a bond for damages on appeal, to act as a supersedeas, was extended to the 22d day of May. On the 22d day of July, no other bond than the bond for costs having been given, a judgment, was entered up against the stipulators, and, on the 4th of August, an execution on that judgment was issued, for the amount of the decree, and a levy made by the marshal upon the lands described in the bill.

On the 7th day of September, 1868, after the entry of the judgment, and the making of the levy in question, a bond for damages on the appeal, in the proper form to give the appeal effect as a supersedeas, was presented for approval to Judge Blatchford, then holding the district court, and the same was approved by him and filed in the cause, after which, on the 10th day of October, on the application of the appellants, a stay of proceedings on the judgment till December 9th, 1868, was directed by the district court, the execution and levy to stand meanwhile. The case being in this position, on the 6th day of November, 1868, the clerk of the district court made his return on appeal to the circuit court, where it was duly received and filed on the same day. The return contained all the matters and things required by law to be transmitted on appeal, including the bond for damages on appeal. Upon such return, the cause was thereafter heard in the circuit court on the appeal, and the decree of the district court affirmed, whereupon, and on motion of the libellants, a decree was entered in the circuit court affirming the decree of the district court, and directing, that, unless an appeal from the decree of the circuit court be taken within the time limited by the rules and practice of the court, the stipulators on appeal cause their stipulations to be performed.

From this decree an appeal was taken to the supreme court, and the bond required by law, to obtain the effect of a supersedeas, duly given, which appeal was thereafter heard by the supreme court, and that court, in due time, issued its mandate to the judges of the circuit court, directing that the decree of the circuit court be affirmed, and that a decree be entered in favor of the libellants, whereupon, in pursuance of such mandate, and on motion of the libellants, a final decree was entered in the circuit court in accordance with the mandate.

In the meantime Pruyn, the original stipulator against whom the judgment of July 22d, 1868, had been entered, being indebted to the Central Bank of Brooklyn, mortgaged the lands in question to that bank. The bank was thereafter declared an involuntary bankrupt, on a petition filed October 1st, 1870, and the plaintiff in this action was appointed assignee. He took proceedings to foreclose the mortgage in question, and obtained a decree of foreclosure, under which the property in question was advertised for sale. The defendants in this action, who had become possessed of the judgments and decrees in the case of Atkins v. The Helen R. Cooper, sought to collect the amount, by directing the marshal to sell the lands in question, under the levy made by him in July, 1868. Thereupon, by agreement between them and the assignee, $25,000 of the purchase money of the lands was deposited subject to the lien of the judgment, and this action was commenced by the assignee.

Charles Jones, counsel for complainant, argued as follows:

First Point. The appeal taken from the decree in the district court to the circuit court superseded and suspended that decree altogether. The cause thereby was removed to

the circuit court to be heard there de novo, as if no decree had been made in the district court. Yeaton v. U. S., 5 Cranch [9 U. S.] 281; The Collector, 6 Wheat. [19 U. S.] 194; U. S. v. Preston, 3 Pet. [28 U. S.] 57; Montgomery v. Anderson, 21 How. [62 U. S.] 386; The Alicia, 7 Wall. [74 U. S.] 571; The Roarer [Case No. 11,876]; Harris v. Wheeler [Id. 6,130]; The James A. Wright [Id. 7,191]. The same rule is laid down in the text books, and results from the course of procedure and practice in maritime and admiralty cases, when the proceeding is in rem. "After the circuit court is possessed of the cause, by the receipt of the return from the district court, the cause is no longer in the district court. That court cannot make any order whatever in relation to it." Ben. Adm. Pr. § 588. By an appeal from the district court to the circuit court, the circuit court becomes possessed of the cause, which is no longer in the district court. The circuit court alone can make orders in it, and executes its own judgment, without any intervention of the district court; and, if there be a further appeal to the supreme court, that court does not execute its own judgment, but sends a special mandate to the circuit court, to award execution thereon. The regular order of proceedings there requires, that the property should follow the cause into the circuit court, not only with a view to its own action, but also that of the supreme court. The vessel or other property, the funds and original stipulations follow the cause and are sent up to the circuit. Ben. Adm. § 589; Cir. Ct. Rules, 121–123. The circuit court is possessed of the cause from the time of filing the appeal with the documents required to be returned therewith (rule 125), and, if the appellee does not enter his appearance within the first two days in term succeeding the filing of the appeal, &c., the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand (rule 126). New allegations may be made in the circuit court, new rulings sought, and new evidence taken. Either party may bring on the cause for hearing, and the cause is thus heard in the appellate court de novo, as if no decree or sentence had been passed. Rule 131, &c. There being no cause in the district court, there can be no decree in that court to be executed, and, if there were, it could only be executed by the circuit court, where the cause was. If the Helen R. Cooper had been in the custody of the marshal at the time the appeal was perfected in the circuit court, or if she had been sold, and the proceeds were in the registry of the district court, it cannot be doubted that both would have been sent and transferred to the circuit, there to abide the order and decree of the circuit court. The bail or stipulation, which is a substitute and stands for the property, will necessarily follow the cause into the circuit court, and all remedies therein will be enforced in that court.

Second Point. The right of appeal to the circuit court from final decrees in a district court, in causes of admiralty and maritime jurisdiction, when the matter in dispute exceeds the sum of fifty dollars, is absolute, and the claimants of the Helen R. Cooper complied with all the provisions of the statute regulating appeals in such cases. Under the provisions of the 21st, 22d, and 23d sections of the judiciary act of 1789 [1 Stat. 83], and the act of 1803 [2 Stat. 244], it will be seen, that, while security and a supersedeas were specially provided for by the statute in the case of a writ of error, and an appeal from the circuit to the supreme court, no security, for costs or otherwise, is required by the statute in terms, in the case of an appeal from a decree in admiralty from the district to the circuit court. In the case in question, there was an appeal—it was taken from the decree of the district court to the next circuit court, and the appeal was received, heard and determined by the circuit court. Thus, all the statutory requirements were complied with.

Third Point. The point is made, that the claimant of the Helen R. Cooper, having failed to give security within ten days, as prescribed by rule 73, and a summary decree having been entered against the stipulators under rule 66, this decree was unaffected by the appeal afterwards perfected, and can be enforced by the execution issued out of the district court.

1. This point is not tenable, and is sufficiently answered by the decisions above cited as to the effect of an appeal. The cause, when the appeal was taken, or, at any rate, when it was perfected, no longer remained in the district court, but it and all its incidents were removed to the circuit. The district court could make no order in it. The liability of the parties could be determined and enforced only in the circuit, and the decree against the stipulators was as much superseded as any other order or decree in the cause.

2. Security was given and the bond was approved. All the proceedings required by the rules and practice of the court, in order to perfect the appeal and stay execution, were taken. It is too late now to object that the security was not given within the time required by the rules of the court. That was a mere matter of practice, and was waived by the libellants' not objecting and making no motion to dismiss the appeal. It is a familiar principle, that all irregularities are waived by acquiescence, and when no objection is made. Pearson v. Lovejoy, 53 Barb. 407. And a party will be deemed to waive the objection that an appeal was not taken within the time allowed by law, when he is guilty of laches in not moving to dismiss. Stevenson v. McNitt, 27 How. Pr. 335. And in the case of The Dos Hermanos, 10 Wheat.

[23 U. S.] 306, the point was made that the appeal was not in time. The appeal was prayed for within five years, and allowed by the court within that period. The security allowed by law was not given until after the lapse of five years. Marshall, C. J., says: "Under such circumstances, the court might have disallowed the appeal and refused the security; but, as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal. The mode of taking the security and the time for perfecting it are matter of discretion, to be regulated by the court granting the appeal, and, when its order is complied with, the whole has relation back to the time when the appeal was prayed. We must presume the security was given in this case according to the rule prescribed by the district court, and the appeal was, therefore, in time.

3. In the present case, the bond for security was approved by the district judge, and, if it had no relation back to the time when appeal was entered, it yet operated as a stay from the time it was approved. The district court could not, and, indeed, did not, attempt thereafter to execute the decree against the stipulators. This being followed by the appeal being perfected, and heard and determined in the circuit, estopped the district court from thereafter proceeding in the cause.

4. The libellants in the admiralty court are clearly estopped. They appeared and argued the appeal in the circuit, and entered a decree in the cause. They appeared and argued the appeal in the supreme court, and have entered a decree in the circuit in pursuance of the mandate of the supreme court. This is the final decree in the cause, and superseded all other decrees made. If not, there are three decrees in the same cause, all enforceable.

5. But the right of appeal is a statutory right. It cannot be taken away by any order or rule of the court. The most that the court can do is to prescribe the manner in which the appeal may be taken, and, if this is not strictly followed, all defects are cured by the court's receiving, hearing and determining the appeal.

Benedict, Taft & Benedict, for defendants, argued as follows:

First Point. There are cases in which, although an appeal has been taken from an admiralty decree of this court to the circuit court, the decree remains in this court, and may, nevertheless, be enforced in this court. The 73d and 75th rules of this court expressly provide for such cases. And the 66th rule expressly provides for the mode of procedure in such enforcement. It is not pretended but that this case is exactly the case in the 73d rule, nor but that the proceedings to enforce this decree followed rule 66. That rule provides how the judgment and execution against the stipulators may be discharged. No other mode is provided either by statute or rule. Unless those rules are set aside, this bill must be dismissed.

Second Point. It is claimed that an appeal in admiralty destroys the decree below. But the 133d rule of the circuit court provides for the "carrying into effect" of the decree of the district court. The appeal, therefore, cannot destroy that decree and make it no decree. An "order" of the circuit court might direct the enforcement of an existing decree, but it could not make that a decree which had been by the appeal made no decree, as the complainant insists. That rule of the circuit court, therefore, recognizes the existence and validity of the decree made in the district court, notwithstanding an appeal from it has been taken. That rule provides for the enforcement of the decree appealed from, by permission of the circuit court. An affirmance of the decree may well be held as giving that permission.

Third Point. It is, doubtless, to be understood, that there is no limitation of ten days within which the security on an appeal in admiralty must be given, to stay execution. That time may be extended. But, the effect of the failure to give such security within the extended time should be the same as where the time is statutory. The rules of the courts which we have cited are made to meet such cases, and to give the same relief which the statute gave the party, in cases where the time was fixed by statute.

Fourth Point. No matter, therefore, whether the effect of an appeal which is duly perfected by the giving, within the ten days or the further time granted by the court, of the security which shall operate as a supersedeas, is to remove the cause to the circuit court, with the decree and its lien, in such wise as to destroy the decree, or not. No such power can be claimed for an appeal which is not thus duly perfected. On such an appeal, the proceedings under the 66th rule of this court may clearly be taken. Otherwise, an appeal without security has the same effect as an appeal with security.

Fifth Point. The counsel for complainant has not ventured to urge that the mere entry of an appeal, without any security whatever, has the effect of setting aside the decree in the district court. He must, then, admit, that such a result can only follow an appeal perfected by the giving of security in time. But here is no such appeal. The time to perfect it expired on May 22, by the order of May 19. The subsequent filing of a bond in the case could not perfect it, so as to give it the effect of a duly perfected appeal. An appeal thus imperfect could not destroy the judgment against stipulators, entered after the time to perfect the appeal had expired. It was not treated by the judgment debtors themselves as having any such effect. No application was made to the cir-

cuit court to prevent this court from proceeding to enforce the judgment, as being a judgment which had been transferred to that court. But an application was made to this court to stay execution, and this court made a temporary stay, ordering the execution and the levy under it to stand. No order has been made by this court, since then, which sets aside the execution and levy which it thus ordered to stand. An assignee of a creditor of the party against whom the judgment was entered, cannot now, in this collateral proceeding, attack that execution and levy thus ordered to stand. He must procure the order directing them to stand to be set aside in the cause in which they were entered.

Sixth Point. The circuit court was not possessed of the cause when the judgment of July 22d was entered. It became possessed of it only on the filing of the return on November 6th, 1868. Rule 125, Cir. Ct. This court, then, had power to enter the judgment of July 22d. No appeal has ever been taken from that judgment. How could an appeal previously taken have any effect whatever upon that judgment?

Seventh Point. But again, if we were to concede that the effect of the appeal and the giving of the security in the case of the Cooper was to transfer the cause to the circuit court, still the result cannot follow which the complainant claims. If it transferred the cause, it must have transferred it as it was when the transfer was effected. It transferred it, therefore, with this judgment against stipulators and this execution and levy still standing. How does it appear that such transfer destroyed all these? Suppose a sale under a decree of the district court. A subsequent appeal would not destroy the sale. How, then, could it destroy the levy under which the sale was made? and, if that levy stands, why should this court interfere with it?

Eighth Point. And yet again, if this judgment, execution and levy were, by the appeal, transferred to the circuit court, what power has this court over them? Has this court, as a court of equity, more power than as a court of admiralty? If it has no power to make any decree or order in the cause, because the cause is not in this court, what power has it to restrain proceedings in a cause which is not in this court, on a judgment and execution which are not in this court?

Ninth Point. The intention of congress, as shown by the acts, and of the courts, as shown by the rules, is, that the decree is enforceable against the party himself, and, also, that the decree shall be entered against the stipulators and enforced against them, unless the party appeals and gives the security within the ten days given by the rule, or such further time as the court shall grant. If he does not do that, he has no remedy against such enforcement. This court, on cause shown, might stay proceedings on the execution, by order. But, the very supposition that this court could do so, includes the idea that the judgment is in this court and enforceable. This court does not stay proceedings in causes in the circuit court.

Tenth Point. The rules are a part of the stipulation (The Belle [Case No. 1,270]), it being "entered into" pursuant to them. It is clear, upon the rules, that it was the intention, that, if a defendant allowed the proceedings in the district court to get so far that judgment was entered against the stipulators, that judgment was enforceable, and the respondent was left to his right to obtain restitution in case the decree was finally reversed. It cannot be claimed, that the effect of an appeal is to destroy the security taken in the court below. The complainant's counsel has not maintained that it has that effect. He claimed that an appeal transferred the security, whether bond or stipulation, into the circuit court, and that, after an appeal, the security is enforceable only in the circuit court. But, when a judgment has been entered on such a stipulation, the stipulation is merged in the judgment and is functus officio. Another judgment could not be entered upon it. And, since the effect of an appeal cannot be to destroy the security, it cannot destroy the judgment. It matters not, then, whether the effect of an appeal in such case is to carry to the circuit court all the incidents of the cause, or not. The security is not destroyed, whether it be bond, stipulation or judgment.

BENEDICT, District Judge. The question here presented is, whether the decree and levy made in the district court were, in law, vacated and rendered of no effect by the subsequent proceedings in the cause.

In determining this case, it is not necessary to say whether, under some circumstances, a decree in admiralty, made by the district court, cannot remain of effect after an appeal is taken to the circuit court. It would seem that such may be the case where an appeal is taken, but no bond for damages on appeal is given. Under such circumstances, the failure of the appellant to give a bond for damages would seem to change the aspect of the case, and render it thereafter a proceeding to obtain a decree of restitution, and the numerous cases heretofore determined both in the circuit court and the supreme court of the United States do not appear to me to furnish authority for determining that, after an appeal without security for damages on the appeal, no effect whatever can be given to the decision of the district court. The general language of these decisions can only be understood by referring to the position of the cases then under consideration, which were not cases of appeal without security.

The adjudged cases do however decide, that, where, in an admiralty cause, an ap-

peal is taken from the decree of the district court, and security on appeal is given, then the decree of the district court is, by such appeal, rendered of no effect, and they furnish authority for determining this case in favor of the plaintiff, because the appeal under consideration was an appeal with security. Here, a bond for damages on appeal was offered and approved by the district court, and the same was transmitted to the circuit court, where, on the motion of the libellants, a decree was thereafter entered, directing that the stipulators upon it perform their stipulation. All the proceedings required by the rules and practice of the court, in order to cause the appeal to act as a supersedeas, were done, and the appeal was thus brought within the rule declared by the supreme court in the decisions referred to.

It is no answer to this to say, that the bond for damages on appeal, which alone would give to the appeal the effect of a supersedeas was not given within the time required by the rules of the district court. The district court had power to extend the time for giving the bond, and when, in this case, the bond for damages was taken and approved by the court, its effect related back to the time of taking the appeal, and it rendered the appeal effective to supersede the execution issued in the district court, and in legal effect to vacate the decree. Moreover, no objection was made to the filing of the bond for damages, nor to its transmission to the circuit court, and, after omitting thus to object in the district court, and after availing themselves of the benefit of the bond by entering judgment upon it in the circuit court, it is not open to the libellants to say that the bond was not duly and in time given in the district court, to give to the appeal the effect of a supersedeas.

Nor is the case of the libellants changed by the fact that the appellants, prior to the transmission of the return to the circuit court, applied for an order directing a stay of execution, on the granting of which order the district court then directed that the judgment, execution and levy stand. Such a provision in the order of the district court would be powerless to take from the appeal its legal effect, and I may be permitted to say, that the object of the provision was to avoid prejudging, upon a motion, the very question to determine which this action is brought.

But, it is objected, that the district court, sitting in equity, in the exercise of the jurisdiction conferred by the bankrupt act [of 1867 (14 Stat. 517)], has no jurisdiction to stay the hand of the admiralty court, in the execution of its own decrees. As to this I concede that much may be said, but, inasmuch as, entertaining the views above expressed in respect to the effect of the appeal in question, I should be obliged, on application to me, sitting in admiralty in the district court, to direct a perpetual stay of the execution in question, from which action relief might be difficult, whereas, by granting the relief in this case, any error I may commit can be corrected by an appeal, I have little hesitation in maintaining, for this purpose, the jurisdiction of the district court, sitting in equity, to grant the relief prayed for by this bill.

The plaintiff must, therefore, have a decree in accordance with the prayer of the bill,

Case No. 4,205.

The DUTCHESS.

[6 Ben. 48.] [1]

District Court, S. D. New York. April, 1872.

COLLISION—VESSEL AT ANCHOR—PLEADING—INEVITABLE ACCIDENT.

1. A sloop at anchor was sunk in the night, and a libel was filed against a schooner to recover the damages, alleging that the schooner negligently ran into her and sank her, in consequence of the schooner's being insecurely anchored. The answer of the schooner denied any collision, and alleged that the schooner was properly anchored, and dragged her anchors through the resistless force of the elements alone, and alleged that, if any injury was done to the sloop by the schooner, it was the result of inevitable accident: *Held*, that, on the evidence, it was proved that there was a collision between the two vessels sufficient to account for the sinking of the sloop.

2. On the pleadings, the burden of proof was on the schooner to show that that collision was caused by inevitable accident, and that she had failed to establish it.

Beebe, Donohue & Cooke, for libellant.

C. P. Hoffman, for claimant.

BLATCHFORD, District Judge. The sloop Exertion, owned by the libellant, while at anchor on the night of November 22d, 1870, off the foot of Hammond street, New York, laden with a cargo of brick, was sunk. The libel alleges that the sloop, while so lying at anchor, was run into and against by the schooner Dutchess, in consequence of the Dutchess' being insecurely and improperly anchored, and no proper attention being paid to her, and seeks to recover the damages resulting from such collision, on the ground that it caused injuries to the sloop, by reason of which she sank.

The answer denies that the Dutchess was improperly or insecurely anchored and that no proper attention was paid to her. It alleges, that the sloop sank through injuries occasioned by the negligence of her own crew, and not from any collision between her and the schooner; that the schooner was properly and securely anchored and manned, and managed with due care and proper skill; that she dragged her anchors through the resistless force of the elements, without any fault on the part of those on board of her; that human skill and precaution could not

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

have prevented her drifting; and that any injury that was done to the sloop by the schooner, if any was done, which is denied, was the result of inevitable accident only.

I deem it satisfactorily established by the proofs, that the schooner, while she was dragging her anchors, came into collision with the sloop, and inflicted the injury in consequence of which the sloop sank. The answer does not set up that the sloop was anchored in an improper place, or in proximity to the Dutchess too close for safety, nor is either of such facts established by the evidence. Nor does the answer set up that any negligence on the part of the sloop caused the collision, if there was one. It merely sets up that there was no collision, but that the sloop sank from some injuries attributable to the negligence of her crew, and caused otherwise than by a collision between her and the schooner, and that, if there was a collision, it was the result of inevitable accident. The manner of the collision, and the character of the wound, as described by the witnesses from the sloop, and as established by the evidence, were such as to furnish adequate cause for the sinking of the sloop; and the evidence for the defence gives no reasonable explanation of how the sloop could have sunk or did sink from any other cause than a collision between her and the schooner. There having been, then, a collision sufficient to cause the damage done, the only defence set up is inevitable accident. The sloop being at anchor, and being run into by the moving schooner, the burden of proof is on the schooner to establish this defence of inevitable accident. The sloop anchored in the day time, her position was visible and known to those on the schooner, and they gave her no warning, that they deemed her to be anchored too near to them. The collision was caused by the dragging of the anchors of the schooner, and it is for her to make it clear that such dragging could not have been prevented by proper care and vigilance. She has failed to show that she maintained a proper watch on deck, that she discovered her dragging as soon as it commenced, and applied proper remedies as soon as possible, and that her dragging was not the fault either of the condition of her jib, or of the arrangement of her anchors and chains, or of the management of the vessel after the dragging was discovered. The allegation in the answer, that the sloop sank through injuries occasioned by the negligence of her own crew, even if it could be considered as an allegation of negligence contributing to a collision, is too vague and general to be a triable allegation. But the proof shows no negligence on the part of the sloop.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages.

DUTCHESS OF ULSTER, The (TOMPKINS v.). See Case No. 14,087a.

Case No. 4,206.

DUTILH v. COURSAULT.

[5 Cranch, C. C. 349.][1]

Circuit Court, District of Columbia. Nov. Term, 1837.

EQUITY PLEADING — ANSWER AS EVIDENCE — FRENCH SPOLIATION—CLAIMS—AWARD OF COMMISSIONERS— CONFLICTING CLAIMANTS — RIGHTS NOT BARRED—EFFECT OF FALSE OATH—PARTIES.

1. The answer of a defendant in chancery, who has no personal knowledge of the facts he states, and whose conscience cannot be affected thereby, is not evidence in the cause, although responsive to the allegations in the bill. The only effect of such an answer is to present an issue, and put the plaintiff to the proof of his allegations.

[Cited in The Holladay, Case 27 Fed. 841.]

2. The commissioners under the French convention of July 4th, 1831, were authorized to make their award in favor of the person who was the legal and ostensible owner of the property seized, at the time of the seizure, and were not bound to ascertain the rights, and decide the litigations between conflicting claimants, citizens of the United States.

3. They might select that one whom they deemed best entitled, and award to him the portion of the indemnity applicable to the claim, and leave the others to settle their disputes before the ordinary tribunals of the country, adjudicating according to the municipal laws of the land; it is, therefore, unimportant whether any other citizen of the United States could or could not support an original claim to a part of the indemnity allowed; and no citizen of the United States could, by any judgment of the commissioners, be deprived of his right to resort to the ordinary tribunals of the country to establish his claim to participate in the sum awarded for the whole loss.

4. It is no objection to the intervening claim of a third person to a part of the fund awarded, that the original claimant, in making the oath required by the commissioners as a condition of receiving the claim, swore falsely, but not fraudulently; the third person not participating in the oath, nor in the motive of the person who made it.

5. Quaere, whether the commissioners had authority to require such a preliminary oath?

6. In a contest between two litigants respecting a sum awarded by the commissioners, it is not necessary to make all the other claimants, under the convention, parties to the suit.

7. The party who receives the sum awarded for the whole claim is a trustee for such as may be entitled to participate therein.

[This was a suit by Stephen Dutilh's administrator with the will annexed against Gregoire Coursault, administrator of Amable Coursault, Thomas Carmichael, Levi Woodbury, secretary of the treasury of the United States, and John Campbell, treasurer of the United States.]

Bill in equity to recover from the administrator of Amable Coursault, one half of the amount awarded to him, under the French treaty or convention of July 4th, 1831, as indemnification for the seizure and confiscation of the brig Triphena and cargo. The bill states that on the 5th of October, 1809, Amable Coursault, a naturalized American citizen, residing in Philadelphia, having laden his

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

brig Triphena, bound to Tonningen, sold and assigned to the plaintiff's testator, Stephen Dutilh, for a large and valuable consideration, a moiety of the said brig and cargo, before she sailed. That she sailed; put into Morlaix in France, and was there seized and sequestered by the French authorities. That Amable Coursault died, and the defendant Gregoire Coursault, his administrator, presented his claim for the whole loss, which was allowed by the commissioners, who awarded the sum of $16,727. That at or about the time of filing the claim by G. Coursault, it was arranged between him and the plaintiff that it should be prosecuted in the name of the said G. Coursault; thus avoiding the expense and trouble of two memorials, and of two sets of proof, and that the plaintiff's right to a moiety thereof should be admitted. That the defendant Gregoire Coursault resides at Truxillo in Guatemala in Central America, and has left no agent or attorney empowered to receive the money awarded, and to pay the plaintiff his moiety. It states a belief that Amable Coursault died insolvent, leaving many creditors, and that some of them are taking measures to obtain possession of the fund; and that a certain Thomas Carmichael, residing at Nantes in France, claiming to be a creditor of the said Amable Coursault, by his attorneys Key and Dunlop, applied to the secretary of the treasury to refrain from paying the money to the said Gregoire Coursault, and threatens to apply to this court for an injunction. But the plaintiff does not admit that the said Thomas Carmichael is a creditor, nor that if he were, he is entitled to the possession of any part of the estate of his deceased debtor. The plaintiff only asks for his moiety of the award; and that the defendant Gregoire Coursault should be decreed to give him authority to receive it; and that the said parties may be enjoined from receiving the part belonging to the plaintiff; and that the Hon. Levi Woodbury, secretary of the treasury, and John Campbell, treasurer of the United States, may be enjoined, &c. "The joint and several answers of Thomas Carmichael, of Nantes, in France, surviving partner," &c., of the late house of Jacques Carmichael & Sons, by his attorney in fact, Thomas Dunlop, of Francis Key and James Dunlop, counsellors at law, (Gregoire Coursault, the other defendant, having departed this life since the filing of the said bill,) to the bill of complaint of Edmund G. Dutilh, administrator," &c. These defendants, saving, &c., admit that Amable Coursault was owner of the brig and cargo, the sequestration by the French authorities, the claim by Gregoire Coursault, and the award No. 461. They deny, that before the sailing of the vessel Amable Coursault sold to Stephen Dutilh a moiety of the vessel and cargo. They deny, that when G. Coursault was about to present his claim to the commissioners he agreed with the plaintiff, in order to save the expense of two memorials, or for any other reason, that G. Coursault should present his claim exclusively in his own right, and subsequently share the amount awarded, with the plaintiff. They aver, that Thomas Carmichael is an honest and bonâ fide creditor of Amable Coursault to a greater amount than the whole sum awarded. They set forth the act of congress of the 13th of July, 1832 [4 Stat. 575], marked B, authorizing the commissioners to make rules, and refer to the rules marked A, and to the oath taken by G. Coursault to his memorial, No. 461. They aver, that the plaintiff's interest in the claim was never made known to the commissioners; and that the whole award belongs to the estate of Amable Coursault, to be distributed by his administrator according to law. The secretary of the treasury and the treasurer of the United States have answered, that they are officers of the government of the United States, and not amenable to the jurisdiction of this court as to the payment of moneys out of the treasury of the United States, or any other of their official acts. They, therefore, plead and except to the jurisdiction of this court in this case. "These defendants, under the plea aforesaid and under protest of being bound by any injunction or order of this court, do, however, answer and say, that awards have been made by the commissioners, as stated in the bill, &c.; and that the moneys to liquidate and pay the sums so awarded to the respective parties entitled to the same, are in the treasury of the United States, and will be duly paid to the parties to whom it shall appear that the said moneys so awarded, are legally and equitably due." The death of Gregoire Coursault on the 31st of January, 1837, having been averred in the answer of Mr. Dunlop, and stated in the deposition of James Matlack, and Mr. Elias Kane having taken out letters of administration de bonis non of the estate of Amable Coursault, the bill has been amended by making him a defendant in the place of Gregoire Coursault; and it is agreed by the counsel of the parties, that the answer of Mr. Dunlop shall be received and taken as the answer of Messrs. Key and Dunlop, and of Elias Kane, except that Mr. Kane does not admit, but denies, that Gabriel Paul ever qualified as executor or administrator of Edward Coursault; that a general replication be filed to all the answers, and that the cause be set for final hearing on the bill, answers, general replications, exhibits, and evidence.

The cause accordingly came on so to be heard, and was argued by R. S. Coxe, for plaintiff, and by Mr. Key and Mr. Dunlop, for defendants, on the 14th, 16th, 18th, and 19th December, 1837.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent), after stating the substance of the bill, answers, and evidence, delivered the opinion of the court:

It is remarkable that not one of the defendants pretends to have personal knowledge of any of the material facts charged in the bill; and that the conscience of none of them can be affected, unless it be Mr. Kane, in denying the interest of the plaintiff in the brig Triphena and cargo; consequently, neither the averments nor the denials of facts, contained in those answers, are evidence in the cause, (although responsive to the allegations of the bill,) except as to the fact that Mr. Carmichael is a creditor of the estate of Amable Coursault. The only effect of such answers is, to present an issue and put the plaintiff to the proof of his allegations. The most material fact denied by those answers, is the interest of the administrator of Stephen Dutilh in the brig and cargo, or in the sum awarded to Amable Coursault as indemnification for their loss. They deny also the agreement between the plaintiff and Gregoire Coursault, that the claim should be presented in the name of the said Gregoire. If these two facts are established, the plaintiff's right to the relief for which he asks will follow of course, unless he should be barred from that relief by his acquiescence in the oath taken by Gregoire Coursault, the administrator of Amable Coursault, on the 3d of January, 1833, in the affidavit annexed to the memorial received by the commissioners on the 30th of January in the same year. Or by reason of his having had a right to present his original claim to the commissioners, under the convention, and having failed so to present it. The evidence of Mr. Dutilh's interest in the net proceeds of the adventure to Tonningen, is very satisfactory; and the certificate of Mr. Gregoire Coursault, as administrator of the estate of Amable Coursault, on the 10th of January, 1833, at the foot of the account current of the latter with Mr. Stephen Dutilh, marked B,) made after the claim was filed, is evidence that Mr. Dutilh, as against Gregoire Coursault, would be entitled to one half of the sum which should be awarded, and that Gregoire Coursault, as administrator of Amable Coursault, would become the trustee of the plaintiff for one half of the amount of the award, as soon as it should be received. Mr. Kane now stands in the place of Gregoire Coursault, and if he receives the amount of the award, he, also, will become trustee for the plaintiff in like manner; and, if he refuses to pay over one half of it to the plaintiff, the latter may have relief in equity, unless barred by some principle of law, or some rule in equity.

1. The first objection taken by the defendant's counsel to the plaintiff's right to relief in equity, is, that he had a clear legal remedy, which he was bound to pursue elsewhere; that is, he was entitled to be an original claimant under the convention, whether his title was legal or equitable; and, that this is admitted by his bill where he says, that at or about the time the said Gregoire as administrator filed and exhibited his said memorial and claim for said compensation as aforesaid, it was agreed between him and the plaintiff, that the claim should be prosecuted in the name of the said Gregoire, thus avoiding the expense and trouble of two memorials and sets of proof; and that the right of the plaintiff's testator should be admitted and recognized to the extent of the moiety of the same; and the plaintiff refers to the written acknowledgment of Gregoire Coursault at the foot of the account current marked B, and dated January 10, 1833, which speaks of the claim as already entered by him before the board of commissioners at Washington. The affidavit to the memorial is dated the 3d of January, 1833; and the commissioners on the 30th of January, 1833, so far acted upon the memorial, as to order it to be received; for, according to the rules of the board, no memorial could be received, unless it contained certain averments verified by affidavit. The argument is, that having had a right to be an original claimant before the commissioners, and not having exercised that right, he can have no remedy in equity. In considering the validity of this objection, it may be well to inquire, what was the nature of the plaintiff's interest at the time of the filing of the claim by Gregoire Coursault as administrator of Amable Coursault? It appears by the agreement of the 5th of October, 1809, between Amable Coursault and Stephen Dutilh, that Amable Coursault was the owner of the brig and cargo then bound to Tonningen, consigned by Amable Coursault, to his brother Gregoire Coursault, who went out as supercargo. Of course the register of the brig must have been in the name of Amable Coursault, as well as all the invoices and ship's papers, all showing the proprietary interest to be in him alone. It is also to be inferred from the same agreement of the 5th of October, 1809, that the whole adventure was to be directed and managed by Mr. Coursault. That he and his supercargo were to transact the whole business, and that Mr. Dutilh was to take one half of the risk, and to receive from Mr. Coursault, to whom the returns were to be made, one half of the net proceeds of the voyage out and home; the legal title and proprietary interest in the brig and cargo still remaining in Mr. Coursault. There is no evidence of any delivery of possession of the property to Mr. Dutilh, nor of any act of ownership by him. For the chance of receiving one half of the net proceeds of the expedition, he was willing to pay the cost of one half of the outfit. Mr. Coursault's title to the vessel and cargo was good against all the world. Even Mr. Dutilh himself could not touch it. His right was only a future and contingent right to one half of the net proceeds of the voyage. He could claim nothing until the voyage should be ended, and the proceeds received by Mr. Coursault. He had no legal

property in the brig and cargo. He could not, either alone or jointly with Mr. Coursault, maintain trespass, or trover, or detinue for the vessel and cargo, or any part of them. If he should bring either of those actions alone, the defendant would defeat him by showing the legal title in Mr. Coursault. If he should join with Mr. Coursault in bringing the suit, the defendant would also defeat them by denying the title of Mr. Dutilh. If Mr. Coursault had insured the vessel and cargo, and they had been lost by the perils of the sea, Mr. Dutilh could not have had direct recourse to the underwriters; he could only claim through Mr. Coursault, who upon receiving the money from them would be a trustee for Mr. Dutilh's moiety. Mr. Coursault alone had the right to represent the property in a foreign tribunal; and to him alone would the property have been restored, if restored at all; and if the vessel and cargo had been captured as prize of war, and he had been an enemy, and Mr. Dutilh a friend, Mr. Dutilh's contingent right to a moiety of the proceeds of the voyage would not, as we apprehend, have saved any portion of the property from condemnation. So when retribution is made for the property sequestered, it is to be made to the party who had the legal title, and who could give a legal and valid discharge. Mr. Coursault, being the only person who could represent the property in the French tribunals, was the only proper person who could represent it before the commissioners. The indemnification awarded, stands in the place of the net proceeds of the voyage; and Mr. Dutilh's right to the moiety does not accrue until the indemnity comes into the hands, or is ready to be paid into the hands of the administrator of Amable Coursault, who, if he receives it, becomes a trustee for Mr. Dutilh as to his moiety. In this view of the subject, I am by no means satisfied that Mr. Dutilh could have supported a claim for indemnity before the board of commissioners; nor that his competency to do so is so clear as to deprive him of his right to proceed in equity against his trustee. If he had filed a claim before the commissioners, it must have been either in the name of the administrator of Amable Coursault, or jointly with him, or in his own name, stating his future interest in the sum to be awarded; in either of which cases, the proofs must have been the same, except so far as related to his interest in the net proceeds of the voyage, or in the amount which should be awarded. In either case, the disclosure of his interest could not in any manner alter the nature of the claim, as between the United States and France, or in any manner affect its validity. All that the commissioners were to ascertain, was, whether it was such a claim as was provided for by the convention, namely, whether it was a bonâ fide claim by citizens of the United States upon the French government, for such spoliations as were provided for by the convention of July 4, 1831. This being ascertained, the commissioners were not bound to ascertain the rights of, and decide the litigations between conflicting claimants, citizens of the United States. They might select that one whom they deemed best entitled, and award to him the portion of the indemnity applicable to the claim, and leave the others to settle their disputes before the ordinary tribunals of the country, adjudicating according to the municipal laws of the land. If Mr. Dutilh had filed an original claim, the commissioners might have said to him, "Mr. Coursault has exhibited to us a clear legal title to the whole of the property; all the documentary evidence is in his name. You have suffered the voyage to be prosecuted entirely in his name; you admit his legal title; you are both citizens of the United States. It is a clear and valid claim under the convention, whether it belongs to one or the other, or to both jointly. We have no jurisdiction to decide between you. We shall be safe in awarding the indemnity to him who has the legal title, and we leave you to settle your conflicting claims in the ordinary courts of the country." This might have been the result if Mr. Dutilh had filed an original claim before the commissioners, and after he had been at the trouble and expense of filing a memorial and prosecuting the claim; whereas his object would be just as well accomplished by obtaining Mr. Gregoire Coursault's admission of his right to a moiety of whatever sum the commissioners might award. But whether Mr. Dutilh could or could not have supported an original claim before the board of commissioners, we deem a question of little importance, because the right of the commissioners to award the whole to Mr. Coursault is unquestionable, leaving all other citizens of the United States, having a right to participate in the amount thus awarded, to their remedy against Mr. Coursault, in the ordinary courts of justice. And the commissioners had no power to deprive them of that remedy. Admitting that Mr. Dutilh might have made and supported a separate and original claim before the commissioners, he was not bound to do so. His omission has no effect whatever upon the other claimants; nor upon the interests of the United States, or of France. His claim would not have been a claim at law, nor would his remedy have been a remedy at law as contradistinguished from equity, so as to be a bar to equitable relief.

The principle, that no decision of the board of commissioners under the French convention is conclusive between conflicting claimants, citizens of the United States, was decided by this court in the case of Ridgway v. Hays [Case No. 11,817], at November term, 1836. In the opinion of the court in that case, it is said: "It has been contended that the decision of the board of commissioners, rejecting the claim of Mr. Ridgway, is conclusive against him. To this there are two

objections. First, that the commissioners had no jurisdiction to decide ultimately between two or more conflicting American claimants." The act of congress of July 13, 1832 (4 Stat. 574), authorizing the appointment of the commissioners, declares their duties to be "to receive and examine all claims which may be presented to them under the convention," "and which are provided for by the said convention, according to the provisions of the same, and the principles of justice and equity and the law of nations;" "and to report to the secretary of state a list of the several awards made by them." It appears, by the first article of the convention, that the claims which the commissioners were to examine and report upon, were, "the reclamations preferred against it," (the French government,) "by citizens of the United States, for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property." "The claims, of which the board had cognizance, were claims against the French government; not against the owners of the property claimed, nor against the property itself. In each case, the great question for them to decide was, whether the property of American citizens had been unlawfully seized, &c., by the French government. So far as it was necessary to decide the national character of the property seized, they had authority to ascertain the legal owner; but if all the conflicting claimants were citizens of the United States, there was no necessity of their deciding the question of ownership between them. They might select the name of the person who seemed to them to be the legal owner; or they might name all the conflicting claimants, and leave them to litigate their rights in the municipal courts of the country; or they might award in favor of 'the legal owners,' without naming them; as they did in several cases, as will appear by reference to the list of awards returned by them to the secretary of state. See the printed documents of the house of representatives, No. 117, of the first session of the 24th congress." This opinion is in accordance with that of the commissioners under the treaty with Spain, (commonly called the Florida Treaty,) as stated in the case of Sheppard v. Taylor, 5 Pet. [30 U. S.] 685, from their final report to the department of state on the 8th of June, 1824, where they say: "But in these and many other cases which occurred, the board, having ascertained the full amount of the loss, distributed this amount, so ascertained, amongst the different parties claiming it before them, and seeming to have a right to receive it, no matter in what character, without deciding, or believing itself possessed of the authority to decide, upon the merits of conflicting claims to the same subject. To whom, of right, the sum thus awarded, when paid, may belong, or for whom, how, or in what degree, the receiver ought to be regarded as a trustee of the sum received, were questions depending upon the municipal laws of the different states of the Union, the application of which to the facts existing in any case, the board did not feel itself authorized to make; and, therefore, abstained from instituting any inquiry as to the facts necessary to such a decision." It may be remarked, here, that the powers given to the commissioners under the Florida treaty, are broader than those given to the commissioners under the French convention. The words of the Florida treaty are: "To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, citizens of the United States, shall be appointed by the president, by and with the consent of the senate; which commission shall meet at the city of Washington, and within the space of three years from the time of their first meeting, shall receive, examine, and decide upon, the amount and validity of all the claims included within the description above-mentioned." "The said commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish government shall furnish all such documents and elucidations as may be in their possession for the adjustment of the said claims, according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties, of the 27th of October, 1795; the said documents to be specified, when demanded, at the instance of the said commissioners." The act of congress, authorizing the appointment of these commissioners, neither adds to, nor diminishes their powers.

The French convention does not, like the Florida treaty, provide expressly for a board of commissioners, but only provides that the indemnity to be paid by the French government to the government of the United States, shall be distributed, by the latter, among those entitled, in the manner and according to the rules which it shall determine. By the sixth article, the two governments reciprocally engage to communicate to each other the documents, titles, and other information proper to facilitate the examination and liquidation of the reclamations comprised in the stipulations of that convention. The act of congress of the 13th of July, 1832, "to carry into effect the convention," authorizes the president, with the advice and consent of the senate, to appoint "three commissioners, who shall form a board, whose duty it shall be to receive and examine all claims which may be presented to them under the convention," "which are provided for under the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations." And by the second section of the act they are authorized to make "all needful rules and regulations," "for carrying their said commis-

sion into full and complete effect." And by the sixth section they are required to "report to the secretary of state a list of the several awards made by them." By a comparison of the powers of the respective boards it appears, that the commissioners under the Spanish treaty are authorized, not simply, as the other commissioners are, "to receive and examine" the claims, "according to the principles of justice, equity, and the law of nations," and send a list of their awards to the secretary of state; but "to receive, examine, and decide upon, not merely the claims, but the amount and validity of the claims; and further, "to hear and examine on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same," and "for the adjustment of the said claims according to the principles of justice, the law of nations, and the stipulations of the treaty" of 1795. Yet with all these powers, so far transcending those given to the commissioners under the French convention, the commissioners under the Florida treaty did not believe themselves "possessed of the authority to decide upon the merits of conflicting claims to the same subject." If their construction of their own authority was correct, a fortiori are we correct in denying the supposed power to the commissioners under the French convention?

But we are further fortified in our opinion respecting the powers of the commissioners under that convention by the opinion of the circuit court of the United States for the district of Pennsylvania, as delivered by the late Mr. Justice Washington in the case of Vasse v. Comegys [Case No. 16,893], and by the opinion of the supreme court of the United States, as delivered by Mr. Justice Story in the same cause. [Comegys v. Vasse] 1 Pet. [26 U. S.] 211, 212. In the circuit court, Mr. Justice Washington said: "It is to be preliminarily observed, that the case does not state in whose favor the award of the commissioners was made, or who were the parties that presented themselves before the commissioners as the claimants of this money. All the court can know is that the money was paid to the defendants by the treasury of the United States; but in the view which I shall take of this case, I deem it immaterial who were the claimants, or in whose favor the award, or sentence, was given, if given in favor of any particular person or persons. The treaty described the duties and the jurisdiction of the board of commissioners, and, of course, it was essentially the guide of that tribunal, as it must be of this. I admit, at once, that the decisions of that board, upon every subject within the scope of its authority, and to the utmost extent of its jurisdiction, are binding and conclusive upon this, and upon every other judicial body. It was constituted by a treaty, and its decisions are entitled to the same sanctity as those of tribunals constituted by the constitution or by the ordinary acts of legislation; beyond this they have no binding force. What, then, were the duties of those commissioners, and what the extent of their jurisdiction? By the eleventh section of the treaty they are to receive, examine, and decide upon the amount and the validity of all the claims which the United States had consented, by the ninth article, to renounce, as well on the part of the government as of citizens of the United States. The extent, then, of the jurisdiction of this board was to decide upon the amount and validity of the claims which might be presented to it on account of the enumerated losses and injuries. It had no cognizance of any other claims; and their inquiries and decisions were strictly confined to the validity and amount of such as they had cognizance of. They had no authority to decide, and we presume that in no instance did they decide, upon the rights of conflicting claims, or of hostile claimants. They did not possess the ordinary means for engaging in investigations of that nature; nor was it consistent with the objects of the treaty, or the interest of the claimants that such questions should be litigated before a tribunal so constituted It necessarily belongs to the ordinary tribunals of the country to decide who is entitled to the money thus awarded by the commissioners to be paid to the United States because they alone possess the means of examining and settling the innumerable questions to which such controversies may give rise." "But even, if the jurisdiction of the board of commissioners, in the present case, had extended to the decision of conflicting claims, it is by no means admitted that their award would be conclusive in this suit; unless it appeared that the plaintiff was before the commissioners to submit his claim to their examination and decision. For, although the decision of the board in favor of the assignees, the defendants, would be so far conclusive as to protect the treasury of the United States against a double payment; yet if, in point of law, the money ought to have been paid, not to the assignees, but to the plaintiff, it was so much money received by the former to the use of the latter, and would be recoverable in this form of action." And in delivering the opinion of the supreme court of the United States in the same cause (1 Pet. [26 U. S.] 212), Mr. Justice Story says: "It has been justly remarked, in the opinion of the learned judge who decided this cause in the circuit court, that it does not appear, from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority

to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal. An amount once fixed is the final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to this fund so awarded. The commissioners are to look to the original claim for damages or injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may in the intermediate time have devolved; or who was the original legal, as contradistinguished from the equitable owner; provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees, or personal representatives, or bona fide purchasers, was not necessary to be ascertained in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broad jurisdiction with due justice and effect. They had no authority to compel parties asserting conflicting interests, to appear and litigate before them; nor to summon witnesses to establish or repel such interests; and under such circumstances it cannot be presumed that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by the award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of the parties. We are, therefore, of opinion that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners."

The principle upon which these opinions rest, was settled in England by Lord Chancellor Hardwicke, in the year 1748, in the case of Randal v. Cockran, 1 Ves. Sr. 98. "The king having granted letters of reprisal on the Spaniards, for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the commissioners would not suffer the insurers to make claim for part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers, who thereupon brought the present bill." "Lord chancellor was of opinion that the plaintiff had the plainest equity that could be. The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid. Although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them, their commission was limited in time. They see who was owner; nor was it material to them, to whom he assigned his interest, as it was, in effect, after satisfaction made." Here, although the commissioners had rejected the claim of the underwriters, the lord chancellor decided that their claim was good in equity; that the commissioners did right not to entangle themselves in the disputes between the owners and the underwriters, and in awarding in favor of the owner, whose original right to indemnity was unquestionable.

This court is further sustained in its opinion by that of Lord Chancellor Eldon in the case of Hill v. Reardon, 2 Russ. 608, which was a case under the treaty of —— between England and France, in which the commissioners had awarded the whole indemnity to one Devereux, under whom the defendant Reardon claimed. Hill and others brought their bill in equity against Reardon, who had received the amount awarded. The plaintiffs in equity had never presented their claim to the commissioners, although the facts upon which their claim rested were brought to the knowledge of the commissioners. Upon the hearing before the vice chancellor, in the year 1825, he decided that the award of the commissioners was final and conclusive against the plaintiffs, and dismissed their bill. Upon appeal to the lord chancellor, in 1827, he reversed the decision of the vice-chancellor upon that point, and said: "The first question is, whether an award made in favor of A. B. by the commissioners acting under the conventions between France and this country, is not only to be conclusive as between the subjects of this country and the French government, but is also to destroy all demands in equity which third persons might have against A. B. if he had received the money otherwise than through the channel of such award. My opinion is, that the conventions and act of parliament have no such effect." "The conventions and act of parliament, meant no more than this, that the decision of the commissioners should be conclusive between the two countries; and that the demand of an English subject, and a judgment in his favor, and a compliance with the judgment, would be a discharge of the government of France;

but the equities with which any persons receiving money under the adjudication of the commissioners might be affected, were not at all touched by the conventions and the act." The lord chancellor, however, being of opinion that the plaintiffs had not made out their equity, dismissed the bill; but without costs.

Thus supported, we still adhere to the opinion expressed by this court, in the case of Ridgway v. Hays [supra], and must say that the award of the whole indemnity to Mr. Coursault is no bar to Mr. Dutilh's remedy in equity against Mr. Coursault's administrator, if he has received the fund, or against any other person in whose hands it may be. This we think a sufficient answer to the defendant's first objection, that the plaintiff had a legal remedy by claim before the commissioners, which he ought to have pursued.

2. The second objection to the plaintiff's relief in equity is, that Mr. Coursault, in order to comply with a rule made by the board as a condition of their receiving his claim, on the 3d of January, 1833, in an affidavit annexed to his memorial, made oath that the facts, circumstances, and allegations stated in the said memorial, so far as they had come within his own knowledge, were true as stated, and that those stated as derived from the knowledge of others, he believed to be true. That the said memorial contains the following declaration, viz., "That no other person was at the time of the origin of this claim, nor has at any time since been, nor now is, interested in said claim, or any part thereof, except the said Amable Coursault, and your memorialist, his administrator, as hereinbefore stated; and that, whatever amount of said claim may be awarded under said convention, will belong solely and exclusively to your memorialist, as administrator of the said Amable Coursault, deceased." That the above declaration was false, as appears by the plaintiff's own statement in his bill, and that Gregoire Coursault, when he made the said affidavit, knew it to be false, as appears by his certificate, dated the 10th of January, 1833, written at the foot of the account current of Amable Coursault against Stephen Dutilh, in which he charges Mr. Dutilh with one half of the estimated value of the brig and outfit, and with one half of the cargo, and gives him credit for $1,099.80 for logwood, and for his three notes, amounting to $3,854.54 for the balance. In that certificate of the 10th of January, 1833, Mr. Gregoire Coursault says, "I do certify and declare, that to my knowledge the above is true, and that the estate of Mr. Stephen Dutilh, deceased, is interested of one half in the claim of the French, entered by me before the board of commissioners at Washington, for the whole amount of the brig Triphena and cargo." It seems, therefore, that the oath taken by Mr. Gregoire Coursault, on the 3d of January, 1833, must have been false. It is also contended, that Mr. Dutilh, the present plaintiff, must have been conusant of that oath and assented to it, and must, therefore, be considered as a participator in his guilt, and must abide its consequences. That he is to be considered as particeps criminis. That no person can have a standing in a court of equity, whose claim rests upon an avowed violation of the law. And, to support this doctrine, the case of Cambioso v. Maffitt [Case No. 2,330] is cited. It was an issue sent by the commissioners of bankrupts to try the right of the executors of Cambioso to recover from the bankrupt a share of the net proceeds of sundry adventures carried on as joint owners, by Cambioso, an alien, and Maffitt, a citizen of the United States, in fraud of the revenue laws of the United States, Maffitt having obtained, in his own name, American registers for vessels owned jointly by him and Cambioso, thereby evading the payment of foreign duties; to obtain which registers, Maffitt must have taken a false oath. Mr. Justice Washington, in his charge to the jury in that case, said: "The defendants insist that this claim cannot be enforced in the courts of the United States, because those courts cannot lend their aid to establish a demand founded on a violation of the laws of the United States. This principle of law may not, in a moral point of view, destroy the right of the plaintiff; but it goes to defeat his remedy in the tribunals of this country. The soundness of the principle, as a general one, is acknowledged by the plaintiff's counsel; but it is contended to be inapplicable to foreigners, who are not bound to take notice of the revenue laws of a foreign country, unless proof is brought home to them of a knowledge of those laws, or of every fact necessary to apprise them of the breach of them." The judge, after giving his reasons at large for denying the supposed exception to the generality of the principle, said: "Upon the whole, then, it is clear, that if proof were necessary to be brought home to Cambioso, of his knowledge that these vessels had obtained the character of American vessels by a fraud upon the laws of the United States, such proof is furnished by the nature of the transactions themselves. But whether he had such knowledge in fact or not, the frauds were committed by his partner, or agent, by which he must be affected; and as to the revenue laws themselves, he was bound to take notice of them. As to any goods which may have been imported in those vessels into this country, which were free of duties, they are subject to a different consideration. Such importation was not a violation of the revenue laws. As Cambioso gained nothing, and the United States lost nothing, by a concealment of his interest in those goods, or in the vessels, there was no such fraud as would vitiate his demand for any balance due on their account. It was contended that Cambioso, by sending to Maffitt documents representing the cargoes as

belonging to Maffitt, enabled him to commit perjury in the oath which he took at entering them; and that thus participating in this immorality, he ought not to recover. But it by no means appears that the oath taken by Maffitt, on entering such goods as his sole property, was even false, much less, that it was perjury. We do not observe that the oath, or any part of the law, requires that all the partners should be named. The object of the law is to insure the payment of duties; and not to disclose the names of the owners of the property." "But even admit that a false oath was taken by Maffitt, by means of the papers sent to him; we do not see how this can affect the right of Cambioso to recover the value of these goods sold by Maffitt, for which he was justly indebted to Cambioso. Cambioso violated no law of the United States in concealing his name as part-owner of these goods."

Upon considering this Case of Cambioso, it is evident that the foundation of the principle upon which it was decided, is fraud. The plaintiff was not permitted to recover, because his claim was founded in fraud; not mere false swearing, from which no injury resulted or was intended. There was an actual fraud practised upon the United States by means of the false oath. An injury to the United States was intended and actually perpetrated. The United States, by that oath, had been cheated out of a large amount of revenue; and Cambioso was completely particeps criminis, to the extent of the fraud intended, as well as of that actually perpetrated. It is evident, also, that the principle applies only to cases of fraud. For if the false swearing alone was sufficient to prevent the plaintiff from recovering, the judge could not have said, in relation to the goods free of duties, imported in the same vessel respecting which the false and fraudulent oath was taken, that "there was no such fraud as would vitiate his demand for any balance due on their account." Nor could he have said, as he did, "But even admit that a false oath was taken by Maffitt, by means of the papers sent to him, we do not perceive how this can affect the right of Cambioso to recover the value of these goods sold by Maffitt, for which he was justly indebted to Cambioso. Cambioso violated no law of the United States in concealing his name as part-owner of these goods." And why did he not violate a law of the United States in concealing his name as part-owner of those goods? Because it was immaterial to the United States whether the goods belonged to an alien, or to a citizen of the United States; for in either case they paid the same rate of duties as if imported in a vessel of the United States. The rate depended upon the character of the vessel, not that of the owner of the goods. In order, therefore, to make this case like that of Cambioso and Maffitt, it must be shown that the claim of the plaintiff is founded in fraud. It must not only be shown that a false oath was taken by Coursault, but that it was taken with intent to defraud the United States, or some person, and that the plaintiff was a participator in that fraud. So far, however, from there being any evidence of a fraudulent intent on the part of Mr. Coursault or of Mr. Dutilh, in filing the claim in the name of Mr. Coursault alone, without disclosing the interest of Mr. Dutilh, and in the oath taken by Mr. Coursault, it is clear that the rights of no person, nor of the United States, would in any manner have been varied, if Mr. Coursault, in filing the claim, had disclosed the interest of Mr. Dutilh; or if Mr. Dutilh had filed a separate claim for his half of the indemnity. As both were citizens of the United States, and as Mr. Dutilh was not indebted to the United States, no possible motive, affecting the United States, or the other claimants, can be imagined for concealing the interest of Mr. Dutilh. Whatever might have been the motive of Mr. Coursault in filing the claim in his own name and making the affidavit, there is no evidence that Mr. Dutilh participated in that motive; on the contrary, the presumption is that Mr. Coursault filed the claim in his own name alone without consulting Mr. Dutilh, and that Mr. Dutilh, hearing of the claim being thus filed on the 3d of July, applied to Mr. Coursault on the 10th to give him an acknowledgment of the interest of his testator's estate in the sum which should be awarded, which acknowledgment appears to have been readily given. There is no evidence upon which to charge Mr. Dutilh with bad faith towards the United States or the claimants under the convention, or with any evil intent or sinister design. The intention to save expense is not averred in the bill as the motive for suffering the claim to be filed by Mr. Coursault alone, but as a consequence of his thus filing it, and of Mr. Dutilh's subsequent assent upon receiving Mr. Coursault's acknowledgment that the estate of Mr. Stephen Dutilh was interested therein. The averment in the bill is not that they agreed that the claim should be filed in the name of Mr. Coursault alone, to save expense; but that it should be "prosecuted" in his name, "thereby avoiding the expense and trouble of two memorials and sets of proof." The oath was not required by the law which designates the duties and the authority of the commissioners, nor by the convention. It was required only by a rule of the commissioners, as a condition, without which they would not receive and act on any memorial. It is by no means clear of doubt, whether the commissioners had authority to make such a rule; for the second section of the act, which authorizes them to make rules, only authorizes them to make rules "not contravening the laws of the land, the provisions of this act, or the provisions of the said convention;" and in the first section of the act, it is expressly declared to be the duty of the board, "to receive and examine all claims which

may be presented to them under the convention, which are provided for by the convention, according to the provisions of the same." But, admitting that they had a right to require such an oath, and that the oath taken was false, there is no evidence that it was taken with such a fraudulent intent as brings the claim, even of Mr. Coursault, within the principle which denies relief in the courts of the United States either at law or in equity. Much less is there any evidence which will justify an imputation to Mr. Dutilh of whatever of obloquy may be supposed to attach to Mr. Coursault, or of any portion of it. He comes into this court with clean hands, and we think, has a right to relief in equity.

It was contended at the hearing, that as each claimant is interested in opposing all the others, so as to increase the fund, which is insufficient to pay all in full, all the other claimants should have been made parties in this cause. But it is clear, that as the award of the commissioners in favor of Gregoire Coursault is conclusive as to the amount and validity of the claim, this litigation between him or the creditors or his intestate, Amable Coursault, and Mr. Dutilh, can have no effect whatever upon the general fund to be divided among the claimants, and that a decree in this cause can have no effect whatever upon the interests of the other claimants.

We have not noticed the objection to Mr. Carmichael's right to interfere in the litigation between Mr. Dutilh and the administrator of Amable Coursault. He was not a necessary party in this controversy. He can claim no greater rights than those which Mr. Amable Coursault could have claimed, if he had been a party; nor than those which his administrator can now claim. Mr. Dutilh's right to one moiety of the indemnity is clearly proved; and if Amable Coursault himself were now before the Court and had received the money, he would be a trustee to Mr. Dutilh for that moiety; and his administrator, who is now a party, if he receives the money, will be equally a trustee of that moiety for Mr. Dutilh.

This being the opinion of the court upon the principal question in the cause, the counsel for the plaintiff will prepare the form of a decree for the consideration of the court.

Case No. 4,207.

DUTILH et al. v. MAXWELL.

[2 Blatchf. 541.][1]

Circuit Court, S. D. New York. Feb., 1853.

CUSTOMS DUTIES — INVOICE IN DEPRECIATED CURRENCY — CONSULAR CERTIFICATE — PAROL EVIDENCE.

1. Under the proviso to the 61st section of the act of March 2d, 1799 (1 Stat. 673), an importer of goods from Austria is entitled to enter them on the payment of duties on their specie value, although the invoice is made out in a depreciated paper currency, legitimated by the Austrian government; but, in order to avail himself of the benefit of the proviso, the deterioration of the invoice currency must be proved in the manner required by the proviso.

2. Accordingly, as the proviso authorizes the president to make regulations for estimating the duties on goods invoiced in a depreciated currency issued under the authority of a foreign government: *Held* that, under a treasury circular requiring invoices of goods, when made out in such depreciated currency, to be accompanied by a consular certificate showing the specie value of such currency, the presentation of such certificate is a prerequisite to any correction of the invoice, or to any relief founded on such depreciation in currency.

[Applied in Dutilh v. Maxwell, Case No. 4,208.]

3. Where no such certificate accompanies the invoice, and no bond for its production is given, its place cannot be supplied by parol evidence of the depreciation in the currency.

This was an action [at law by Dutilh & Cousinery] against [Hugh Maxwell] the collector of the port of New York, to recover back an alleged excess of duties paid him. A verdict was taken for the plaintiffs, subject to the opinion of the court. The facts are stated in the opinion of the court.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The importations in question in this case were of merchandise purchased in Austria and invoiced and shipped at Trieste in June and September, 1849, and entered at the custom-house in New-York in August, September and October, 1849. The purchase-prices of the goods were stated, in the invoices and entries, in the paper currency of Austria, from which a deduction on some of 28½ per cent., and on some of 27½ per cent., was claimed by the plaintiffs at the custom-house, to bring the invoice prices in florins to the specie standard. The values of the goods were, however, rated by the collector according to the nominal paper prices, and duties were exacted on those values. A protest in writing was made at the time by the plaintiffs, to the sufficiency of which in law no objection is taken on the part of the defendant. No consular certificate of the United States consul at Trieste, showing the depreciation of the invoice currency below the specie standard, was offered by the plaintiffs or demanded at the custom-house by the collector or any of his officers, nor is there evidence that the collector exacted a bond for its after production. The plaintiffs brought their action to recover back the duties paid on the differences between the specie value of the importations and that expressed in the invoices in the depreciated currency.

This court has decided, in two cases heretofore before it, that the government was entitled, by the revenue laws, to exact duties only on the specie value of goods in the

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country of production or exportation, and that, when the purchase-price was exhibited in a depreciated currency, the importer might prove, as a fact in pais, what was the actual value of the nominal currency in the foreign market. Grant v. Maxwell [Case No. 5,699]; Loewenstein v. Maxwell [Id. 8,462]. In the last case, oral evidence of the fact of depreciation was given and received without question by the government as to its admissibility or sufficiency, and the jury found the value of the currency upon that testimony. In the first case, the depreciation was proved both by the production of a consular certificate and by evidence in pais. No evidence other than oral was given in the present case, and it was taken subject to the objection of the defendant as to its competency and effect.

The principle adjudged in the two cases above referred to is, that the act of May 22, 1846 (9 Stat. 14), does not rescind the proviso to the 61st section of the act of March 2, 1799 (1 Stat. 673), so as to permanently fix the value of the Austrian florin in respect to purchases and invoices made in that money on importations from Austria to the United States, but that subsequent adulterations or depreciations of the currency may be proved according to the provisions of the act of 1799. In case the government of that empire legitimates a base currency in florins at a value equal to that of specie florins, the importer will be protected, by force of the act of 1799, from losses so arising, and will be entitled to enter his goods on payment of duties upon the specie value of the importation. That construction of the law is in effect adopted at the treasury, and, by a circular issued September 19th, 1851, will govern future importations.

That doctrine is not called in question in this case, but the point is now raised for the first time, that the merchant cannot have the advantage of the principle without proving the deterioration of the invoice currency in the manner required by the treasury instructions founded upon the authority conferred by the proviso to the 61st section of the act of 1799. There can be no doubt of the legal principle that, if a mode of proof is prescribed by the terms of the law, or by its fair interpretation, no other than the statutory evidence can be admitted.

It appears to me, that the cases adverted to, and this suit itself, rest upon a principle which, in effect, disposes of the question now presented. The right to maintain this action springs out of the provisions of the proviso referred to, as interpreted by this court, in connection with the act of 1846. If the latter act works a repeal of the proviso, in respect to the currency of Austria, the plaintiffs have no footing upon which to base their action. In bringing forward that proviso as the authority for their demand, they must necessarily take it subject to all its legal qualifications and conditions. A cardinal one is a power in the president to establish regulations to meet the case of invoices exhibited in a depreciated currency, for the purpose of equalizing ad valorem duties. Its terms are, "that it shall be lawful for the president of the United States to cause to be established fit and proper regulations for estimating the duties on goods, wares and merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency issued and circulated under the authority of any foreign government." The acts of the treasury department, to which matters affecting the revenue appropriately belong, are, in law, the acts of the president (Wilcox v. Jackson, 13 Pet. [38 U. S.] 498), and, accordingly, the instructions given by the secretary of the treasury, either by general circulars to collectors, or by specific directions in a particular case, are to be regarded by the court as regulations in that behalf established by the president. A part of the circular of August 20th, 1845, is directly applicable to this subject, and is as follows: "Invoices of ad valorem, specific or free goods, when made out in a foreign depreciated currency, or a currency the value of which is not fixed by the laws of the United States, must, in each case, be accompanied by a consular certificate, showing the value of such currency in Spanish or United States silver dollars."

The decisions before cited regard a foreign currency debased by legislative authority since the act of 1846, as being "a currency the value of which is not fixed by the laws of the United States," and hold that, accordingly, the importer can have relief against its effect upon his invoices, under the treasury instructions founded upon the 61st section of the act of 1799. It follows, as a necessary consequence of that doctrine, that, in order to obtain the relief, he must present his claim under the sanction prescribed by the instructions, and must accompany each case by a consular certificate. A collector has no power to dispense with this requirement, or, by a course of practice or construction, to enable importers to draw from the treasury, upon other and inferior evidence, duties paid in upon a wrong valuation of importations, the same as if a consular certificate had accompanied the invoice and been presented to prove the debasement of the invoice currency: That document is the statutory evidence and authority upon which the invoice may be rectified; and it cannot legally be corrected without either exacting the presentation of the certificate with the invoice, or taking a bond to produce it. This bond, of necessity, becomes estreated to the government if the certificate is not forthcoming according to its condition; and the direction of the president that a bond must be given to produce the certificate, is full notice that the certificate is a prerequisite to any relief in this respect.

The entry, in this case, was made without the offer of a consular certificate, or any demand of one by the collector, or of a bond for its production, and the protest against the exaction of duties on the invoice value makes no mention of the existence of such a certificate.

Upon these facts, I am of opinion that the plaintiffs have not, by legal and sufficient evidence, substantiated a right of action against the defendant, and that judgment must be entered for him.

Case No. 4,208.

DUTILH et al. v. MAXWELL.

[2 Blatchf. 548.] [1]

Circuit Court, S. D. New York. Feb., 1853.

CUSTOMS DUTIES—ACTION TO RECOVER BACK—INVOICE IN DEPRECIATED CURRENCY.

1. The doctrine of the case of Dutilh v. Maxwell [Case No. 4,207] applied.

2. Where duties on an importation are fully paid, a consular certificate of depreciation in the foreign paper currency in which the invoice was made up, cannot be afterwards presented to the collector, so as to entitle the importer to recover back the duties paid on the difference between the specie value of the goods and their invoice value.

This was an action [at law by Dutilh & Co.] against [Hugh Maxwell] the collector of the port of New York, to recover back an alleged excess of duties paid him. A verdict was taken for the plaintiffs, subject to the opinion of the court.

John S. McCulloh, for plaintiffs.
J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. The plaintiffs, on the 15th of February, 1851, made entry of an importation of merchandise from Trieste, and, at the same time, produced at the custom-house two invoices thereof, dated at Trieste, August 27th and 28th, 1850, in which the value of the goods was stated in the currency of Austria, and claimed the right to enter the goods at their specie value and pay duties on that only. The discount claimed for the difference was sixteen per cent. The collector exacted duties on the nominal or paper value stated on the invoices. This was paid under protest, on the 21st of February, 1851, and, to recover that amount, with interest from that date, the plaintiffs have brought their action against the defendant. In these respects, the case presents the same features as that of Dutilh v. Maxwell [Case No. 4,207], decided in favor of the defendant.

There is a difference in the particularity of the protest made in this case at the time of payment, which merits notice. It is in writing, upon the entry, addressed to the defendant, and is in these terms: "The exaction of excessive duties on the depreciated currency in which our annexed invoice is made out, as the law requires, and the rate of which depreciation is stated by our invoice and entry, is hereby protested against, and the object, to recover back this and all future similar exactions from yourself and the United States, by suit or otherwise, is, at the time thereof, hereby expressly reserved, the said payments being made only to obtain possession of our goods; and we maintain that the fair wholesale cash value or prices of our merchandize, in the principal markets of the country of production, at the times specified by section 16, Tariff 1842 [5 Stat. 563], must be ascertained, and the allowance for the depreciation of currency, as set out by our invoices and entries, be made in estimating the dutiable value of the merchandize, and in exacting the duties thereon." This is a very full and perspicuous statement of the grounds of objection to the duties demanded, but it was not supported by the production of a consular certificate at the time, nor is there any evidence that one had been presented at the custom-house, accompanying any previous importation of the plaintiffs, or that, on the occasion of this protest, one was offered or referred to by the plaintiffs. The oral testimony on the trial satisfactorily proves a large depreciation of the Austrian paper currency from the year 1848 to the time of these importations. Had such certificate been previously offered to the collector with a like protest, I think that, within the spirit of the case of Marriott v. Brune, 9 How. [50 U. S.] 619, and within the reason of the act of March 2, 1799 [1 Stat. 673], the plaintiffs would have been entitled to the benefit of that evidence upon the protest in the case, more especially if, on making this entry, they had offered to furnish the certificate thereafter.

The duties were paid under this protest on the 21st of February. On the 28th of February, seven days afterwards, another importation from the same place was entered by the plaintiffs, of similar merchandize, the invoices being dated at Trieste, November 6th and 7th, 1850, accompanied by a consular certificate showing the depreciation of the Austrian paper florin at Trieste, on the 6th of November, 1850, to have been 20¼ per cent. The equity of the plaintiffs to the restoration of the excess of duties paid on the importation in question, was thus, by evidence supplied immediately afterwards, made most manifest, and would seem to claim consideration from the fact that the importations and entries were so nearly simultaneous, while it is to be fairly inferred that the time of exportation was also the

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same. The point for consideration on this state of facts is, whether the plaintiffs can, by means of that after evidence, now have a remedy at law for such payment, as one illegally exacted by the defendant.

It is well settled, that a payment exacted and made without a written protest is not illegal, and affords no foundation for an action by the importer against the collector to recover it back. Lawrence v. Caswell, 13 How. [54 U. S.] 488. The supreme court, however, in Marriott v. Brune, 9 How. [50 U. S.] 619 allowed an after protest, put in whilst the moneys remained in the hands of the collector, and before the duties were closed up, to retroact and avail the importer, the same as if it had been presented at the time the duties were paid. This was for the reason that, "till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." That is, the advance of money by the importer, to obtain his permit or make his entry, is not regarded as a final payment, as it does not at the time go into the public treasury. But, after the duties are fully ascertained at the custom-house, and the adjusted amount is demanded by the collector and paid by the importer, the payment is regarded as "closed up," and the court does not feel justified in embracing the case "under any existing equities." Id. 636. That is the predicament in which the present case stands. The duties were fully made up and paid on the 21st of February, and the money, on its payment to the collector, passed into the treasury of the United States, and became public funds. Act March 3, 1839 (5 Stat. 348, § 2); Cary v. Curtis, 3 How. [44 U. S.] 236. And the protest cannot be made to invoke an after consular certificate to prove the payment illegal. Such certificate must have been presented at the time, or a bond have been tendered to produce it. The importer, to support an action afterwards for the recovery of the money so circumstanced, must bring himself within the requirements of the act of February 26, 1845 (5 Stat. 727); and the instructions of the president, under the proviso to the 61st section of the act of March 2, 1799 (1 Stat. 673), being also a statutory appointment, prerequisite to a right of recovery, must have been equally observed and fulfilled. The plaintiffs in the present case, not having accompanied their invoice with a consular certificate, nor presented one to the collector until after the duties were closed and paid, failed to make the proofs exacted by the statute, and cannot recover back the duties paid on that entry.

Judgment for the defendant.

DUTTON (COMMERCIAL STEAMBOAT CO. v.). See Case No. 3,064.

Case No. 4,209.

DUTTON v. The EXPRESS.

[3 Cliff. 462.][1]

Circuit Court, D. Maine. Sept. Term, 1871.

SHIPPING—MASTER'S QUALIFICATIONS — OWNER'S RESPONSIBILITY—TOWAGE—DUTIES OF MASTERS OF TUG AND TOW.

1. Masters of vessels being selected by the owners, the latter are responsible for the qualifications of the former. Masters are required to possess and exercise reasonable skill and judgment in the discharge of duty.

2. Where a tow is lashed to the side of a steam-tug, and depends wholly upon it for motive power and steerage, the responsibility for the navigation of both is wholly on the tug.

3. Where a vessel is drawn by a hawser extending from her forward part to the stern of the tug, both vessels have duties to perform, and it may then happen that either or both of the vessels may be in fault in case of accident.

[Explained in The Annie Williams, 20 Fed. 868. Cited in The W. J. Keyser, 6 C. C. A. 101, 56 Fed. 734.]

4. Where tow-lines are used the master of the tow is bound to obey all proper orders of the master of the steamer.

[Cited in The Allie & Evie, 24 Fed. 747.]

5. If the master of the tow refuses or neglects such reasonable obedience, or fails in reasonable skill, or attention to his duty, the owners of the tug are not to be held responsible for the consequences.

[Cited in The Pres. Briarly, 24 Fed. 480.]

6. In this case the owners of the tug were held responsible for an accident to the tow, because the master did not pursue the channel in a river which he was requested and had tacitly consented to take, and because he had given, on entering the channel, confused and contradictory orders, which, it was *held*, led to the accident.

Admiralty appeal in a cause of damage caused by the fault of the Express, by which the schooner of the libellant was run aground and injured. The place of the injury was Union river, near Ellsworth, Maine. Damages were claimed by the libellant, as the owner of the schooner A. Hooper, against the steam-tug Express, for the breach of an alleged contract, made by the master of the steam-tug, to tow the schooner from the wharf where the schooner was lying, at Ellsworth in this district, down the Union river on her voyage to Boston, to the usual place of casting off vessels in tow, at the mouth of the river. Pursuant to that contract, as the libellant alleged, the steam-tug, on the 19th of July, 1869, made fast to, and took control of, the schooner; and the charge in the libel was that the master and crew of the steam-tug, in towing the schooner down the river on her voyage, were guilty of negligence and carelessness, and such want of skill and judgment that the steam-tug ran the schooner aground and injured her to the amount of $600. Four defences were set up in the answer, which in substance and effect were as follows:

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

1. That the master of the steam-tug did not make any such contract as that set forth in the libel; that he did not make any contract upon the subject, except what was implied from the fact that he made fast to the schooner, for the purpose of towing her down the river, in pursuance of his ordinary business of towing vessels; that he did not contract to tow the schooner by the eastern channel, as alleged in the libel, but that he was at liberty to tow her down the river by any channel which he as master of the steam-tug judged safe and convenient.

2. That the schooner grounded at the entrance to the western channel, and that she received the injuries described in the libel through the carelessness and negligence of her master and crew, and by the failure on their parts to comply promptly with the orders and directions of the master of the steam-tug.

3. That the injury to the schooner was not occasioned by her grounding, but by the vessel keeling over toward the channel, as the tide receded, on a rock; that the injury might have been prevented if the master had removed, or even shifted, his deck load, or if he had taken any proper precaution in the emergency.

4. That the master of the schooner at the time the master of the steam-tug undertook to tow the schooner down the river misled the master of the steam-tug as to the draught of the schooner when loaded; that she drew more water than he represented at that time; and that she would not have grounded if his representations had been true.

Testimony was taken on both sides, and the district court overruled the several defences set up in the answer, and entered a decree for the libellant in the sum of $350 damages and costs of suit, whereupon the claimants of the steam-tug appealed to this court. All of the evidence in the district court was sent up in the transcript of the record, and the parties have entered into written stipulation that it is correctly reported. Since the appeal additional testimony was taken, and the parties were fully heard upon all the questions involved in the pleadings. The questions were almost entirely of fact.

A. A. Strout and G. P. Dutton, for libellant.

Geo. F. Talbot and Hale & Emery, for claimants.

CLIFFORD, Circuit Justice. Masters of vessels are selected and appointed by the owners, and the owners are responsible that the master is qualified for the situation. Vested as the owners are with the power of appointment, they are under obligations to employ persons possessing reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor are they insurers that the masters, in any given emergency, shall do what after the event others may think would have been best, if it appear that they exercised reasonable skill and judgment in view of the impending peril. The Niagara, 21 How. [62 U. S.] 22; The Star of Hope, 9 Wall. [76 U. S.] 230.

Compensation for the damage occasioned to the schooner by her grounding at the entrance of the western channel of the river is claimed by the libellant upon the ground that the master of the steam-tug contracted to tow the schooner down the river by the eastern channel, and that he committed a breach of the contract in attempting to enter the western channel, and that he was guilty of negligence and carelessness in the performance of his duties as master of the steam-tug. Suppose the disaster was occasioned by the negligence or carelessness of the master of the steam-tug, or by his want of due skill and judgment in the performance of his duties, it is quite clear that the owners of the steam-tug would be responsible to the libellant for the injuries received by the schooner, even if no such contract was made as that alleged in the libel, but the inquiry whether or not such a contract was made becomes a matter of much importance in determining the question whether there was any such negligence and carelessness or want of due skill and judgment as is supposed in the charge made by the libellant. He alleges in the libel that the master of the schooner directed the master of the steam-tug to take the eastern channel of the river, and not the western, in towing the schooner down the river, and that the master of the steam-tug signified his assent to that direction. Direct testimony to that effect is given by the master of the schooner, and the record shows that he is confirmed by other witnesses.

On the day alleged in the libel, the schooner, before she was taken in tow by the steam-tug, was lying at Hall's lower wharf, loaded with two thousand two hundred cedar sleepers for railroads, and with eight thousand feet of spruce planks,—eight or nine hundred of the sleepers being stowed on the deck of the vessel. Her deck load was seven and a half feet high, or five feet above the rail. Inquiry was made of the master of the schooner, by the master of the steam-tug, early in the morning, before high tide, whether the schooner would be ready to go down the river during that tide, and the testimony shows that the master of the schooner answered the inquiry in the affirmative, and that the master of the steam-tug stated in reply, that he had an engagement to tow two vessels down the river to Tinker's wharf, and that he would return when that service was performed, and take the schooner in charge. About eight o'clock, just before high tide, the steam-tug returned from the performance of that service, and it ap-

peared that she came up the eastern channel, passed the steamboat wharf, and came alongside the schooner, where she was lying heading down the river. Some conversation took place between the master of the steam-tug and the master of the schooner, at that time each standing on the forward part of his vessel, as they were lying starboard and starboard, their bows only lapping. Undoubtedly the master of the steam-tug came alongside to take the schooner in tow, in pursuance of the previous conversation, and the testimony of the master of the schooner is, that he asked him if the schooner was ready to start, and that he told him that she was, excepting that his cook was ashore, and that he would come on board immediately. Responsive to that, the master of the steam-tug said it was getting near high water, and that it was about time to go; to which the master of the schooner replied, that he need not wait for the cook; that he might at once make fast to the schooner; and he also testified that he told the master of the steam-tug that he wanted him to tow the schooner by the eastern channel; that the master of the steam-tug asked him how much water the schooner drew; that he told him that she drew eight and a half feet strong; and that the master of the steam-tug stated that he could take the schooner out by the western channel if she did not draw more water than her master represented. Then follows the important conversation which, if true, proves the contract substantially as alleged in the libel. Evidently the sentence last reported was intended as a proposition to tow the schooner through the western channel; but the master of the schooner testifies that he immediately replied that he dared not attempt the western channel, as that channel was obstructed, and his deck load was so high he was afraid of getting upset; that if he would take the schooner down the eastern channel, he, the master of the schooner, was ready to proceed; but if not, to let the schooner remain where she was. as he would not attempt to go by the western channel, and he also testifies that the master of the steam-tug said, "Pass your lines then," "Give us your lines," and that he gave them the lines, supposing they were to go by the eastern channel. Express confirmation of the statements of the master of the schooner in respect to the alleged contract is found in the testimony of several witnesses, examined by the libellant, especially in that of the pilot of the steam-tug, and that of two seamen stationed on the forward part of the schooner at the time the arrangement was made between the masters of the respective vessels. Attempt is made to impeach the credit of the pilot as a witness, by showing that his general reputation for truth and veracity is bad, and several witnesses were examined by the respondents, who have testified to that effect.

Witnesses were also examined upon that subject by the libellant, who testify that they have never heard his reputation in that behalf questioned; but it is not necessary for the court to enter much into that inquiry, as the statements of the master of the schooner in respect to the alleged contract are satisfactorily confirmed, even if that of the pilot is not entitled to belief. Support to the substance of his testimony is also derived from the testimony of the master of the steam-tug, who was examined by the respondents. His attention was directly called to the subject of the alleged contract, and he fails to contradict the most important portion of the testimony of the master of the schooner. He denies explicitly that there was anything said on his part about the eastern channel, but he does not deny that the master of the schooner told him that the western channel was obstructed, that he did not dare attempt to go out by that channel, that his deck load was so high that he was afraid of getting upset, nor does he deny that the master of the schooner told him to let his schooner remain where she was lying unless he would take her down the eastern channel. Silent acquiescence on the part of the master of the steam-tug in the final terms proposed by the master of the schooner was as effectual to close the contract as an express assent would have been, as he must have known that the lines of the schooner were passed to him with the distinct understanding on the part of her master that he was to take the eastern channel of the river in performing the towage service. Confirmation of the theory of the libellant, that the masters of both vessels understood, when the trip was commenced, that the schooner was to be towed down the river through the eastern channel, is also derived from the course pursued in leaving the wharf where the schooner lay, and from that moment until the master of the steam-tug gave the order to the schooner to port her helm, just before the disaster occurred. Considerable conflict exists in the testimony, but when considered as a whole it is persuasive and convincing that the distinct understanding between the masters of the schooner and steam-tug was that the schooner was to be towed down the eastern channel. Different modes of towing are adopted by different tow-boats, or even by the same tow-boat on different occasions. Where the tow is lashed to the side of the steam-tug and depends entirely upon the latter as well for steerage as for motive power, the responsibility for the navigation of both is wholly on the steam-tug, as the tow is as completely under the control of the steam-tug as if she was a part of that vessel. The Johnson, 9 Wall. [76 U. S.] 151. Cases arise, however, where the tow is propelled by a hawser extending from the forward part of the tow to the stern of the steam-tug, and in such cases both vessels have duties to

perform, and it may happen that the steam-tug or tow, or both, may be in fault, according to the circumstances. Sturgis v. Boyer, 24 How. [65 U. S.] 121; The James Gray, 21 How. [62 U. S.] 192.

Tow-lines were used in the case before the court, and it appears that they were fastened to the windlass bitts of the schooner, and to the tow-post constructed for the purpose near the stern of the steam-tug, and that the two vessels were fifty feet apart, as they proceeded down the river. Masters of vessels in tow in such cases are bound to obey all the proper orders of the master of the steam-tug, as the chief responsibility for the navigation of both vessels rests upon that officer, and if the master of the tow refuses such obedience, or is guilty of negligence and carelessness, or want of due skill and judgment in the performance of his duties, the owners of the steam-tug are not liable for the consequences to the owners of the tow. Somewhat different rules apply in cases where the rights of third persons are involved, but where the controversy is between the owners of the steam-tug and the owners of the tow, it is clear that the owners of the former are not liable if the disaster was occasioned by the fault or misconduct of those in charge of the other vessel.

Suppose such a contract was made as that alleged in the libel, still the respondents contend that they are not responsible to the owner of the schooner in the case before the court, because they insist that the disaster was occasioned by the carelessness and negligence of the master of the schooner, and by his refual or neglect to obey promptly the order of the master of the steam-tug. Prior to the circumstance in question, the testimony clearly shows that the course pursued was the proper one for the vessels of the kind intending to take the eastern channel, but the weight of the evidence shows that a change became necessary in order to enter the western channel. and the theory of the respondents is, that the master of the steam-tug, in order to effect that change, gave the order to port the helm, and that the master of the schooner, instead of obeying that order first, hove the wheel to starboard, turning the schooner a point or so in the wrong direction, before he attempted to execute the proper order, and they insist that it was that mistake, in connection with the delay which ensued in putting the helm to port, which caused the disaster in attempting to enter the western channel. Instead of that, the theory of the libellant is, that the mistake which caused the disaster was made by the master of the steam-tug; that he first gave the order to starboard before he gave the order to port, and that the master of the schooner immediately obeyed that order, and that he also attempted to obey the other as soon as it was given, but that it was impossible. as the helm dragged in the obstructions which had accumulated in that part of the channel.

Mills of various kinds, for the manufacture of lumber, are situated above on the river, and the navigation at several points, as more fully explained in the testimony, is much obstructed by slabs, sawdust, and edgings, which have floated down the river and rest in large masses upon the bottom. Numerous witnesses were examined on the one side and on the other in support of these conflicting theories, in whose testimony was given every circumstance which either party could invoke in support of his particular theory, including the description of the condition of the channel, the course of the two vessels, and everything which was said or done on board either vessel before the disaster. Beyond all question the master of the schooner did have his helm to starboard before he put the helm to port, and it is equally clear that the proper order to be given on the occasion, if the intention was to enter the western channel, was to port the helm, as it was necessary that the schooner should turn to the right for that purpose. Throughout the trip her course had been the proper one, to pass down the eastern channel to the place of destination, as arranged between the masters of the respective vessels, and the circumstances considered together leave no doubt in the mind of the court that the master of the schooner, and every one on board that vessel, understood that in continuing the trip they were to pass through that channel to the place of destination, as arranged between the masters of the respective vessels before they started.

Whether the master of the steam-tug actually gave the order to starboard before he gave the order to port is left in doubt by the evidence. Perhaps the better opinion is that he did not, but whether he did or not, it is proved to the entire satisfaction of the court that the responsibility of the mistake, whether it was made by the master of the steam-tug, as is supposed by the libellant, or by the master of the schooner, as is supposed by the respondents, properly belongs to the master of the steam-tug, as he caused it to be made by the other vessel or by her master. Viewed in any light consistent with the evidence, he was responsible for the consequences, as it is shown to the entire satisfaction of the court that he either caused the disaster by giving a wrong order, or, what is more probable, he was the procuring cause of the same, by misleading the master of the schooner and suffering him to continue to suppose that they were going by the eastern channel, when in point of fact he, as master for the time being of both vessels, had determined to go by the other. Concede, for the sake of the argument, that the power to direct the course of the trip was vested in the master of the steam-tug, still the conclusion can-

not benefit the appellants, as it is clear that, having agreed to go by the eastern channel, he could not properly attempt to go by the other without giving reasonable notice to the master of the other vessel of such intention, as he must have known that the agreement would necessarily tend to mislead the other party in the performance of his duty as master of the schooner which he had in tow. Intentional disobedience of orders is not imputed to the master of the schooner, and, if it were, the imputation could not be sustained for a moment, as there is not a fact or circumstance in the case to support such a theory. Evidence, as before remarked, is not wanting to show that the master of the schooner was directed to starboard before he was directed to port, but the better opinion is that he did not correctly understand the order, and, knowing what the contract was, assumed that it was an order to starboard, which would have been the proper order if the intention had been to go by the eastern channel. Caused as the mistake was, either by the omission of the master of the steam-tug to give reasonable notice to the master of the schooner that he had determined not to fulfil his contract and go by the eastern channel, or by his own improper order to starboard, the court is of the opinion that the defence that the disaster was occasioned by the negligence, carelessness, or want of skill and knowledge of the master of the schooner is not sustained.

Argument to show that some portion of the injuries received by the schooner were occasioned by the grounding of the vessel is unnecessary, as the evidence to support the proposition is too full to require any comments to enforce it; but the respondents insist that certain other portions of the injuries might have been prevented if the master had removed his deck load, or even shifted it from one side of the vessel to the other, or if he had taken any proper precaution in the emergency. Injuries occasioned by the grounding of the vessel, it is conceded, constitute a proper charge to the claimants if the disaster was in fact occasioned by the fault of the master of the steam-tug, but it is insisted that the additional injuries occasioned by the heeling over of the schooner do not fall within the same category. Defences of the kind just mentioned are more particularly for the consideration of the master, as they do not constitute an answer to the entire cause of action set up in the libel; but the court has looked into the record, and is of the opinion that the charge of negligence made against the master of the schooner is not sustained by the proofs. Much greater reason exists to conclude that the master of the steam-tug was guilty of fault, in prematurely abandoning the schooner which he had in tow, than to suppose that the master of the schooner was guilty of any culpable omission to save the vessel from further injury.

Complaint is also made that the master of the schooner at the time the contract was made was guilty of misrepresentation as to the draught of the schooner when loaded; but the charge is wholly unsupported by proof, and is therefore dismissed without further remarks. Error in the amount awarded is not alleged in argument, nor is it necessary to re-examine that question, as the parties waived the usual reference to a master, and the clear inference from the record is, that both parties acquiesced in the finding of the court as to amount.

Decree affirmed with costs.

Case No. 4,210.

DUTTON et al. v. FREEMAN.

[5 Law Rep. 447.]

Circuit Court, D. New Hampshire. Dec., 1842.

INVOLUNTARY BANKRUPTCY—WHO MAY CONTEST—PARTIES "INTERESTED"—ATTACHING CREDITOR—INJUNCTION—PROOF OF CLAIMS—AMENDMENT.

1. A person may be "interested" in a bankruptcy, and have a right to establish his debt, but it does not follow that he has a right to appear and contest every question which may arise in the progress of the proceedings under the bankruptcy.

2. The language of the bankrupt act in reference to "persons interested" applies to those who have a direct, immediate interest in the matter put in controversy, and not merely a remote, consequential, or contingent interest.

3. Upon a petition by creditors, in invitum, against their debtor, to have him declared a bankrupt, the debtor alone is properly the "person interested" to appear and contest the facts stated as the grounds for the petition.

4. Where A. attached the property of B. on mesne process, and C., another creditor of B., filed a petition in invitum to have B. declared a bankrupt, and also obtained an injunction against A. from proceeding in his said suit until the hearing on the petition in bankruptcy; it was *held*, that A. had no right to appear and contest the facts asserted in the original petition of C. to maintain a decree of bankruptcy against B.

5. A party will not be permitted to exercise the rights of a creditor in the proceedings in bankruptcy, until he has proved his debt; but where the proof it not regularly or technically made, it is amendable under the authority of the court.

[Distinguished in Re Thomas, Case No. 13,891.]

6. Creditors, who prove their debts in bankruptcy, must do so absolutely, without any protest, or qualification, or reservation.

7. As to the effect of a proof of his debt by the creditor under the circumstances of the present case;—quaere.

This was the case of a petition in bankruptcy, by Dutton and Richardson, in the district court of the district of New Hampshire, praying that Otis R. Freeman might be declared a bankrupt, under the bankrupt act of 1841 [5 Stat. 440], and alleging certain specified acts of bankruptcy to have been committed by Freeman. Freeman appeared and made answer, denying all the supposed

acts of bankruptcy, and contested the right of the petitioners to a decree. At this stage of the proceedings, and before any hearing or decree upon the petition and answer, or any proofs taken upon the points in issue, Edward Brinley, a creditor of Freeman, appeared before the district court and filed the following petition: "Respectfully represents, Edward Brinley, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, merchant, that the said Otis R. Freeman is justly and truly indebted to your petitioner in the sum of two thousand dollars and upwards, upon three several promissory notes, and upon an account; that your said petitioner caused a writ of attachment to be issued in his favor against said Freeman, founded upon said notes and account, upon which writ property of said Freeman was attached, sufficient to satisfy your petitioner's claim, which said writ was returnable to the court of common pleas for Grafton county, in the state of New Hampshire, at the February term of said court, A. D. 1842, when and where said writ was returned, and duly entered, at said term of said court, when and where the action brought against said Freeman was continued to the next September term of said court, during which said term, to wit, September term, 1842, an injunction, issued by the district court of the United States for the district of New Hampshire, upon the petition of said Dutton and Richardson, was served upon the agent of your petitioner, W. C. Horton, his attorney in said suit, Wm. H. Duncan, and the sheriff of the county of Grafton, enjoining your petitioner, his agents and attorneys, and the sheriff of said Grafton county from further proceedings in said suit, till further proceedings were had upon the petition of said Dutton and Richardson in this court. Whereupon said action was continued to the next February term of said court of common pleas, in which court the said action is now pending. Said action was commenced on or about the 28th of August, A. D. 1841. And now your petitioner further prays that he may be admitted to oppose the prayer of the petition of said Dutton and Richardson, without furnishing any further proof of the indebtedness of said Freeman to your petitioner, or of the interest that your petitioner has to oppose the petition of Dutton and Richardson aforesaid, than what arises from the foregoing statement of facts." And he also filed the following proof of his debt, with the annexed protest: "Respectfully represents, Edward Brinley, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, merchant, that on the 19th of October, A. D. 1842, he proved a debt of two thousand dollars and upwards against said Freeman, upon the several promissory notes and an account, in short, setting forth particularly the said notes and account, and in his said proof stated that he had not received any security for said debt, except what he may have obtained by an attachment made of the property of said Freeman, on or about the 28th of September, A. D. 1841. The proof of said debt was made before a commissioner of this court, and was in the usual form, with the above exceptions. Said proof was accompanied by a protest, as follows: 'I make proof of my debt against said Freeman, under the following circumstances, to wit: Sometime in the month of August or September, A. D. 1841, I brought an action against said Freeman, upon said notes and account, and upon the writ which issued in said action, sufficient property of the defendant was attached to satisfy my claim, as I have been informed. Said writ was returnable to the court of common pleas for Grafton county, in said state of New Hampshire, February term, A. D. 1842, when and where said action was entered, and continued to the next September term of said court, when and where, to wit, at said September, 1842, an injunction was issued and served, enjoining my agents and attorneys, and the sheriff of said county of Grafton from further proceeding in my said suit, till further proceedings were had in this court, —whereupon said action was continued to the next February term of the court of common pleas, for the said county of Grafton, and is now pending in said court. I make proof of my debt solely for the purpose of defending against the said petition of said Dutton and Richardson, and for no other purpose—protesting, that by so doing, I do not waive my right of action or suit against said Freeman, nor surrender any proceedings already commenced, or which may be commenced by me in the state courts against said Freeman.' And now your petitioner prays to be admitted to oppose the prayer of said Dutton and Richardson's petition upon the proof, made as aforesaid, accompanied by said protest. William H. Duncan, Solicitor for Edward Brinley."

To this petition Dutton and Richardson filed the following exceptive allegation: "Respectfully represent, said Dutton and Richardson, that Edward Brinley, of Boston, in the district of Massachusetts, has filed in said court proof of his debts as creditor, against the said Otis R. Freeman, and claims to appear and object to the said Freeman being declared a bankrupt. And now the said Dutton and Richardson file their objections following to the said Brinley's proof of his pretended debts against said Freeman, and to his being permitted to appear and object to the said Freeman being declared a bankrupt: 1. Because the said Brinley, in his proof of his debts, does not describe the date or amount of his several promissory notes against said Freeman, or otherwise describe them with the particularity required by the law. 2. Because said Brinley offers said proof of his debts, accompanied with a protest, refusing to waive his right to proceed in the court of common

pleas for the county of Grafton, in said district, in the prosecution of a suit now pending in said court of common pleas, in his favor, against said Freeman on his said debts. And on said objections the said Dutton and Richardson ask the opinion of the court."

Upon these proceedings the district court ordered the following questions to be adjourned into the circuit court for a final decision: First. Whether the petitioner, Edward Brinley, shall be admitted to defend against the petition of Dutton and Richardson upon the statement of facts contained in the petition hereunto annexed, marked "B," the said facts having been agreed upon by said parties, without waiving his right to proceed in the state courts. Second. Whether the description of said Brinley's debt, as set forth in the proof of debt as described in paper hereunto annexed, marked "C," is sufficient. Third. Whether said Brinley's proof of his debt, being accompanied with a protest refusing to waive his right to proceed with his action now pending in the state courts against said Freeman, is sufficient to authorize the said Brinley to appear and oppose the petition of Dutton and Richardson.

Mr. Duncan and P. W. Chandler, of Boston, for petitioner, Brinley.

Mr. Blaisdell, of Hanover, N. H., and Mr. Brigham, of Boston, for Dutton and Richardson.

Freeman did not appear at the hearing.

STORY, Circuit Justice. The first question is that, which embraces the merits of the controversy, so far as it respects the rights of the parties now before the court. Brinley, the attaching creditor, insists upon the right to appear in the present stage of the proceedings, and to contest the whole facts asserted in the original petition of Dutton and Richardson to maintain a decree of bankruptcy against Freeman, in invitum. And the petitioning creditors insist that he has no such right. My opinion is, that Brinley, the attaching creditor, has no such right under the provisions of the bankrupt act. It may be admitted that he is, in the sense of the act, a "person interested" in the bankruptcy; but that is not the sole point for the consideration of the court. A person may be interested in a bankruptcy, and have a right, as a creditor, to establish his debt; but it will by no means follow, that he has a right to appear and contest every question, which may arise in the progress of the proceedings under the bankruptcy. The act of congress could by no means have intended any such a general and sweeping right. Its language must, in its reasonable interpretation, be limited to cases where the "person interested" has a direct immediate interest in the matter put in controversy, such as a creditor has when his own debt or dividend is controverted by the bankrupt or the assignee, and not merely a remote, consequential, or contingent interest in the question to be decided. In this latter sense every creditor might be said to be interested in every question and decision made in bankruptcy, and clothed with full rights accordingly, which I am persuaded could never have been the intention of the act. The distinction between an interest in the question and an interest in the suit is familiar to every lawyer; and we must put a reasonable and analogous interpretation upon the language of the bankrupt act in order to prevent the most inconvenient and even contradictory results, which might otherwise arise from it.

The seventh section of the bankrupt act contemplates proceedings by petition, both by a voluntary bankrupt, and by creditors against an involuntary bankrupt; and, after requiring that notice of the hearing of every such petition for the benefit of the act shall be published, it provides that "all persons interested may appear at the time and place, where the hearing is to be had, and show cause, why the prayer of the said petitioner should not be granted." Now, upon a petition by creditors, in invitum, against their debtor to have him declared a bankrupt, (which is the present case,) the debtor alone is properly the "person interested" to appear and contest the facts stated as the grounds for the petition—namely, the petitioning creditor's debt—the debtor's being a trader, and his having committed one or more acts of bankruptcy, within the scope of the statute. All these touch the rights and property of the debtor himself, directly and immediately, and he is the very party in interest to admit or contest them. His creditors have no direct or immediate or absolute interest in the proceedings. If declared a bankrupt, he may never obtain a discharge; and, therefore, they have no necessary or positive interest in the proceedings at this stage, or at most only a possibility of interest, dependent altogether upon future events. But I do not rest my judgment upon these considerations, although there appears to me to be great weight in them, as a reasonable construction of the provisions of the act, as to "persons interested." What I rely on is the positive provision of the first section of the act, as a demonstration, that such is the proper, nay, the necessary construction of the act in all cases of petitions by creditors, in invitum, against their debtor, to have him declared a bankrupt. That section provides, "That any person so declared a bankrupt at the instance of a creditor, may, at his election, by petition to such court, within ten days after its decree, (declaring him a bankrupt) be entitled to a trial by jury, before such court, to ascertain the fact of such bankruptcy."

Now, it is plain from the very terms of this enactment, that this is a privilege exclusively given to the debtor himself. He, and he

alone, can demand a trial by jury; he and he alone can contest the "fact of bankruptcy." No other creditors can appear as adverse parties, and contest the "fact of such bankruptcy;" for here the maxim firmly applies, "Expressio unius personae est exclusio alterius." Yet the "fact of such bankruptcy" is the very question which Brinley by his petition seeks now to controvert before the court, and to put in issue. He seeks to supersede the debtor in his proceedings, or to act independently of him. Suppose the debtor should not choose to contest "the fact of such bankruptcy," or suppose, after contesting it, he is satisfied with the decision of the court, declaring him a bankrupt, or suppose the jury upon a trial should find "the fact of such bankruptcy," could other creditors be permitted to appear and contest the conclusion? It appears to me, upon the obvious purport of this provision of the statute, they could not. In short, the view which I take of this whole matter is that, in this stage of the proceedings against a debtor, in invitum, the only persons in interest, who are competent to appear and enter into contestation as to the "fact of such bankruptcy," are the petitioning creditors, on one side, and the debtor, on the other side, as the parties in adverse interest. All other creditors are but collaterally connected with these preliminary proceedings, and may contingently be affected thereby; but they are not persons having a right to present themselves in judgment before the court, or, as the phrase is, they have no "persona standi in judico."

The third and second questions may be disposed of in a few words. If Brinley had a right to appear and contest the proceedings, it could be only in the character of a creditor of Freeman; and before he could be admitted to examine the rights of another creditor, he must prove his debt in the manner pointed out by the statute, and the rules of the court. The proof in this case is not regularly or technically made; but it is clear, that if sufficient in its form, it is properly amendable under the authority of the court.

The third question may be answered by the single suggestion that upon the proof of any debt by a creditor he must make it simpliciter, according to the rules of the court, and he is not at liberty to interpose any protest or qualifications, or reservations. Indeed, I go further, and say, that the court would have no authority to allow or sanction them. What would be the effect of an absolute proof of his debt by Brinley upon his attachment, it is unnecessary for this court now to consider. That is a point which cannot be entertained now; and belongs, if at all, to a future state of these proceedings.

Upon the whole, my answer to the several questions adjourned into this court are these: To the first, that Brinley ought not in this stage of the proceedings, upon the statement of facts in his petition, to be admitted to appear and contest the facts stated in the petition of Dutton and Richardson. To the second, that the description of Brinley's debt, as set forth in his proof of debt in the case, is not sufficient; but the proof is amendable under the order of the court. To the third, that Brinley's proof of his debt being accompanied with a protest, as stated in the question, is improper, no such protest being allowable, and is not sufficient to authorize him to appear and oppose the petition of Dutton and Richardson.

Case No. 4,211.

DUTTON v. NEW YORK LIFE INS. CO.

[7 Ins. Law J. 129, 675; 6 Reporter, 423.][1]

Circuit Court, D. Indiana. Nov. Term, 1877.

LIFE INSURANCE—POWERS OF AGENT—WAIVER OF FORFEITURE AND PROOFS OF LOSS.

[1. Where for many years a person represents an insurance company, doing what a local agent usually does,—soliciting insurance, collecting premiums, adjusting and paying losses, corresponding with the home office, and remitting money,—all with the knowledge of the company, or of those in charge of its general office, this makes the company responsible for his act in receiving premiums paid to him by a policy holder in good faith, after a forfeiture, and estops it from denying his power to so waive the forfeiture.]

[2. Payment of the last premium, which fell due before the loss, at or before maturity, authorizes the inference that all prior premiums had been paid in time, or afterwards on waiver of the forfeiture.]

[3. Actual receipt by the company or its authorized agent of premiums paid after forfeiture, and receipted for by the agent in his own name, is a waiver of the forfeiture, notwithstanding that the policy provides that the only evidence of such payment shall be receipts signed by the president or actuary.]

[4. Proofs of loss are waived by a refusal to pay the loss on the ground that payments of premiums were made, after forfeiture, to a person not authorized to receive them or to waive the forfeiture.]

[This was an action by Ellen Dutton against the New York Life Insurance Company on a policy on the life of George Dutton for $5,000. The policy was issued at Indianapolis through one R. C. Joseph, who represented the company in some capacity, but the extent of whose powers was a matter of dispute. He collected the first two premiums, and issued receipts therefor, signed by the president or actuary of the company. He also collected the subsequent premiums, but for these he issued receipts signed in his own name as agent.]

Finch & Finch, for plaintiff.

McDonald & Butler, for defendant.

GRESHAM, District Judge (charging jury). It is not disputed that some of the premiums were not paid on or before the day when by the terms of the policy they were due. This forfeited the policy, and unless the company

[1] [6 Reporter, 423, contains only a partial report.]

or its authorized agent or agents waived this forfeiture the plaintiff cannot recover. Mr. Joseph collected all the premiums that were paid, and it is not disputed that the company received the two first premiums. If Joseph collected the premiums, and paid them over to the company, it is quite immaterial what authority he had to represent the company. If the company got the premiums either at or before their maturity, it is of no consequence who collected the money from the assured.

Curran McDonald testified that he knew Joseph sent money or drafts to New York in connection with his agency here. That at times Joseph gave him money to go to the bank and buy drafts to send to New York. That these drafts were sent to an insurance company whose name had "New York" in it; and that, so far as he knew, Joseph represented but one company. On the other hand the treasurer of the company swears in his deposition that, after the second semi-annual premium, Joseph sent no money to the home office; so it is a question of fact whether the premiums were paid. If Joseph was authorized by the company to go and demand premiums from George Dutton, either before or after forfeiture, his failure to account to the company for the premiums collected is no defense to this action. If the company had a dishonest agent, it is its misfortune and not the misfortune of the assured. And if Joseph delivered this policy to the assured and collected the first and second premiums —and that is not denied;—if he subsequently called both before and after forfeiture and demanded and received premiums; if he was engaged here from 1861 or 1862 to 1872 or 1873, representing the defendant, doing what a local agent usually does, soliciting insurance, collecting premiums, adjusting and paying losses, corresponding with the home office, and remitting money, if he was known to be thus acting in the community where the assured lived, I leave it to you to say whether or not the company in New York, or those in charge of the general office here, did not know the extent to which Joseph was claiming to represent the defendant; and if the defendant did know that Joseph was thus claiming to act for it during all this time, it must be held by his acts. And if you find that for this length of time, and in this manner, Joseph did hold himself out as the agent of the company, and that with the knowledge of the company, or its agent in charge of its office at this place, and that the assured in good faith paid the premiums to Joseph, believing him to have authority to demand and receive the same, then the defendant cannot be heard to say that Joseph had no authority to collect the money and waive forfeiture, and, if the last premium was paid at or before maturity, you are authorized to infer that all former premiums have been paid in time, or after maturity on waiver of forfeiture. Insurance companies are not in the habit of collecting premiums on forfeited or dead policies.

It is insisted by the defendant that by the terms of the policy the only evidence of payment of premiums is receipts signed by the president or actuary. There is a provision of that kind in the policy; but notwithstanding that provision, if the company got the premiums the policy was kept alive. Receipts are not the only evidence of payment. The material question is, were the premiums paid? If they were, it is immaterial whether receipts were given or not.

Mrs. Dutton said that some time after the death of her husband she went to the company's office here in Indianapolis, informed them of her husband's death, and demanded payment of the policy. This was in the forenoon. She was requested to return at 2 o'clock in the afternoon; she did so, when she was informed that Joseph had been at the office and left. She was then requested to return at 9 o'clock the next morning. She did so at that time, and was informed that Joseph had left the city, and that the company would not pay the policy, because the assured had no right to pay the premiums to Joseph. It was not claimed that Joseph had not collected the premiums. The refusal to pay was put upon other grounds, and this was a waiver of the formal proofs of death of the assured. And if you find for the plaintiff you are at liberty to allow her interest at the rate of six per cent., say from sixty days after the time she went to the office and demanded payment of the policy.

There is one thing further that I might have said as to the authority of this agent. I understand that it is admitted that Joseph had some authority to appear for this company. The only serious controversy is as to the authority of Joseph to waive forfeitures. The company say that by the terms of this contract the assured was informed that the agent could not do anything of that kind. Now any term of the contract inserted for the benefit of the company may be waived, and it is a question of fact for you to determine whether they were waived. The extent of an agent's authority is to be determined by all the facts before the jury. You have heard all the witnesses, and if Joseph for some eight or ten years discharged the general duties of a local agent, soliciting business, collecting premiums, adjusting and paying losses, and remitting money to the home office, it is for you to say whether in thus acting he exceeded his authority, whether the company did not know the extent to which Joseph was claiming authority to represent it.

(The jury having asked particularly as to one point, the court further instructed:)

This is what I endeavored to say on that point, and think I did say it: If you believe from the evidence the last premium was paid at or before maturity to the company, or to some one authorized to represent the com-

pany, as already explained to you, then you are authorized to infer that all prior premiums were paid, either in time or by waiver after forfeiture. The agent would hardly have called on the assured for this premium if the policy had already lapsed. It will not do to allow an insurance company to say, after its agent has demanded and received a premium, that the policy was dead, and therefore the payment amounted to nothing. Notwithstanding what was said in that receipt, viz., that a receipt to bind the company should be signed by the president or actuary, if in fact the company itself or those in charge of the company's office here sent Joseph out to transact business with this man in this way, and he paid money to Joseph while Joseph was acting in this general way, as the local agent of this company—I say if he thus received the money the company is bound by it. In other words, the form of the receipt is not material. The question is whether the company or its authorized agent got the money. If this man paid the money either to the company or its authorized agent, it is the duty of the company to pay the loss, and you should not hesitate about the particular form of the receipt. As I undertook to say to the jury before, the question here is: First, was Joseph authorized to go there and do business in this way? If he was, notwithstanding the form of these receipts, the company is bound by his receipt of the premiums. Again, suppose the company had limited Joseph's authority in this way, yet if for this period of eight or ten years Joseph continued to sustain apparently the relation of a general or local agent of the company here, transacting the duties of an insurance agent, soliciting risks, making contracts of insurance, delivering policies, collecting premiums, forwarding them to the company, and adjusting and paying losses, if he was doing that and was recognized by the company's general office here, they knowing what he was doing all the time, and Dutton paid his premiums in good faith, believing Joseph was sent by the company to collect them, then the company is liable, whether it authorized Joseph to demand payment or not. If the company knew what Joseph was doing, and took no steps to stop him, you have a right to infer that he had the company's authority for what he did.

The jury returned a verdict for the plaintiff in the sum of $64.88.

DUVAL (TRASK v.). See Cases Nos. 14,143 and 14,144.

DUVAL (UNITED STATES v.). See Case No. 15,015.

DUVALL (BAYLEY v.). See Case No. 1,139.

DUVALL (BUTLER v.). See Cases Nos. 2,238 and 2,239.

DUVALL (UNITED STATES v.). See Case No. 15,016.

Case No. 4,212.

DUVALL v. WRIGHT.

[4 Cranch, C. C. 169.][1]

Circuit Court, District of Columbia. May Term, 1831.

COSTS—DEATH OF SURETY FOR—PRACTICE—PLEADING.

1. If the plaintiff's surety for costs in scire facias, die, pending the suit, the court, on motion, will require new security, although the administrator of the former surety may have assets.

2. After the issue joined upon nul tiel record, and the cause is called for trial on that issue, the court will not permit the defendant to plead that the plaintiff was never administrator.

Scire facias [by Benjamin Duvall, administrator of Ann Jackson, against Thomas C. Wright], nul tiel record, and issue made up under the general authority given to the clerk by the attorneys of this court, to make up their issues. W. Emack was surety for costs.

Mr. Redin, for defendant, suggested the death of Mr. Emack, and demanded new security for costs.

THE COURT suggested, that perhaps Mr. Emack's administrator had assets.

Mr. Redin said that the defendant was entitled to security not dependent upon assets.

THE COURT yielded to that suggestion, and Mr. R. P. D. became surety.

Mr. Redin then asked leave to plead that the plaintiff is not administrator; and cited North v. Clark, in this court, at May term, 1827 [Case No. 10,308], in which this court decided that the defendant had a right to demand oyer and plead that the plaintiff is not administrator, at any time before the expiration of the rule to plead.

But THE COURT (THRUSTON, Circuit Judge, doubting) refused now, at the trial court, when the cause is called for trial on the issue of nul tiel record, to permit the plea to be filed, unless the defendant will make oath of the fact that the plaintiff is not administrator, considering it only a temporary bar; and CRANCH, Chief Judge, doubting whether the plaintiff is bound to have his letters of administration in court at this term to give oyer so long after profert, and when the only issue he came prepared to try, was nul tiel record.

DUVIVIER (UNITED STATES v.). See Case No. 15,017.

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

Case No. 4,213.

DUWELL v. BOHMER.

[2 Flip. 168;[1] 14 O. G. 270; 10 Chi. Leg. News. 356; 3 Cin. Law Bul. 533; Cox, Manual Trade-Mark Cas. 351; 6 Reporter, 262; 24 Int. Rev. Rec. 254.]

Circuit Court, S. D. Ohio. April Term, 1878.

JURISDICTION IN TRADE MARK CASES.

1. The circuit court of the United States has jurisdiction of a suit in equity, to restrain the infringement of a trade mark registered under the act of congress, of July 8, 1870 (16 Stat. c. 230), irrespective of the residence of the parties to the suit.

[Cited in Leidersdorf v. Flint, Case No. 8,219.]

2. The fact that both complainant and respondent are citizens of the same state, does not deprive this court of jurisdiction.

3. The act of July 8, 1870 (16 Stat. c. 230), and of March 3, 1875 (18 Stat. pt. 3, c. 137, § 1), construed with reference to said jurisdiction.

This was a bill in equity filed [by Charles Duwell] to restrain the defendant [H. Bohmer] from the alleged infringement of a trade mark, which the complainant claimed to have registered in accordance with the provisions of the act of congress of July 8, 1870.

W. S. Bates, for respondent, who demurred to the bill of complaint for the reason that the court had no jurisdiction of the case.

The grounds taken by respondent in support of the demurrer, were as follows:

The bill shows that both parties are citizens of the city of Cincinnati, state of Ohio. The question is whether the trade mark statute (title 60, Rev. St. c. 2, p. 963) gives jurisdiction? The only clause in the statute which it is claimed gives jurisdiction, is section 4942, Rev. St., which provides that the party aggrieved shall have his remedy in "any court having jurisdiction over the person" guilty of the wrongful use. It is submitted that the words "jurisdiction over the person," do not confer jurisdiction on the circuit court. The circuit courts have jurisdiction only where it is expressly given by act of congress. In cases of doubt the presumption is against their jurisdiction. See Turner v. Bank of North America, 4 Dall. [4 U. S.] 8; 1 Pet. Cond. R. 206, 207; also, U. S. v. Hudson, 7 Cranch [11 U. S.] 32, 2 Pet. Cond. R. 405; also Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445–451, 1 Pet. Cond. R. 441; New Orleans v. Winter, 1 Wheat. [14 U. S.] 91, 3 Pet. Cond. R. 499; Ex parte Smith, 94 U. S. 455; Hubbard v. Railroad Co. (Vt. 1853) [Case No. 6,816]; Lockhart v. Horn (Ala. 1871) [Id. 8,445]; Karrahoo v. Adams [Id. 7,614]; Harrison v. Hadley (E. D. Ark. 1873) [Id. 6,137]; U. S. v. Joe (Wash. T.) [Id. 15,478]. From this it appears that the federal courts have jurisdiction of the person of a defendant, only in certain cases specifically set forth in the statute. The case at bar is not one of these. Nor is there an act giving the federal courts jurisdiction over the subject matter of trade marks. What then is the object of the section in question (section 4942, Rev. St.)? By the common law the right of property in the use of a trade mark accrued only after long use. McAndrew v. Bassett, 10 Jur. (N. S.) 550. "By the common law the owner of a trade mark had his remedy, etc., in any court having jurisdiction over the person guilty of the wrongful use" —Derringer v. Plate (1865) 29 Cal. 292,—i. e., he might sue an infringer in the courts of the state of which the infringer was a citizen. He might sue in the United States circuit court, if he were a citizen of one state and the infringer of another, because in that case the circuit court would have jurisdiction over the person. By section 4942, Rev. St., the owner of any recorded trade mark has his remedy, etc., in any court having jurisdiction over the person, etc. The common law gives a remedy for a mark established by use. The statute provides the same remedy for a mark established by registration. The statute is designed to encourage trade and commerce by facilitating the adoption of trade marks. This is the view adopted by the commissioner of patents. See Case of Dutcher Temple Co., Com'r Dec. 1871, pp. 248, 249. The case should therefore be dismissed for want of jurisdiction.

W. H. Fisher, for complainant, in support of the motion to overrule the demurrer.

Under the organic act of September 24, 1789, § 11 [1 Stat. 78], patentees and authors had the same footing in the circuit courts as other suitors. The limitation as to amount and citizenship was removed from them by the act of February 15, 1819 [3 Stat. 481]. The patent act of July 4, 1836, c. 357 (5 Stat. 117), and the copyright act of February 3, 1831, c. 16 (4 Stat. 436), each respectively repeal all of said act of 1819 that relates to their respective subjects, and both re-enact the aforesaid provisions of the act of 1819. The act of July 8, 1870, c. 230, §§ 55, 106 (Rev. St. p. 111, § 629), provides that the circuit courts shall have jurisdiction as follows: "Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States." In the act of July 8, 1870 (16 Stat. c. 230, § 21 et seq.), to revise, consolidate and amend the statutes relating to patents and copyrights, we find the first mention of trade marks, the place and the mode of registry, the nature of the protection granted them when registered, and the remedies for securing such protection. The section relating to trade marks lies between those pertaining to patents and those relating to copyrights, and the sections of the act are numbered consecutively. The heading and interior construction of this act indicate it to be one act. This act interpreted in connec-

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

tion with the said ninth section of the act (Rev. St. p. 111, § 629), same year, gives the United States circuit court jurisdiction of the present case. The right of congress to legislate concerning trade marks is based upon section 8 of article 1 of the constitution of the United States. The law of trade marks being a part of the copyright laws, the circuit court has jurisdiction. The first section of the act of March 3, 1875, does not repeal the act of 1870 (Rev. St. p. 111, § 629), pertaining to the circuit courts, as no reference is made in the act of 1875 to that of 1870; and only such acts or parts of acts are repealed, as are in conflict with that of 1875. The jurisdiction given the circuit courts by the act of 1870, as to cases arising under the patent and copyright laws, is not in conflict with the act of 1875. In the act of 1870 there are several sections that relate to cases arising under the laws of the United States, and it may be urged that the words "arising under the laws of the United States" in the act of 1875, are intended to take the place of such several sections of the act of 1870; the clause referred to not appearing in the earlier judiciary act. If this fact be admitted it is evident that the act of 1875 gives jurisdiction in patent and copyright cases (which is one class of cases arising under United States laws) only where the amount exceeds, exclusive of costs, $500. Such could not be the intent of this act, as the intendment of legislation has always been to give the circuit courts jurisdiction in patent and copyright cases without regard to the amount in controversy. If this act of 1875 is construed in connection with section 4942 of the patent and copyright law of 1870 (16 Stat. p. 200, § 21, c. 230), it will be apparent that said section 4942 does not take away the jurisdiction of the circuit courts in patent, trade mark and copyright cases conferred by the act of 1875, but does allow the circuit court jurisdiction in an equity suit for injunction, etc., to prevent an infringement of a registered trade mark, without regard to citizenship of the parties or the amount in controversy; the only limitation being that the infringer shall be sued where he can be legally served. The United States circuit and supreme courts have assumed jurisdiction and rendered decisions in a number of suits brought for infringement for trade marks registered under the said act of July 8, 1870. The case of Smith v. Reynolds [Case No. 13,097] is exactly in point, in the present motion, as both complainants and respondents thereof were citizens of the same state. Judge Blatchford assumed jurisdiction and delivered an opinion on the question of infringement. Smith v. Reynolds [supra]. The question of jurisdiction was not raised by counsel. If the United States courts have no jurisdiction, cases brought for infringement of trade marks, registered under the act of 1870, parties being residents of same state, and amount in controversy not being over $500, a class of cases exists where no remedy has been provided, because it is not clear that the said act confers upon the state courts jurisdiction of such suits. Hence the registry of his trade mark as provided by said act would afford the complainant no protection. If the complainant discard the fact of registry, bring his suit in the state courts, (unless he had acquired a property in the mark by use,) he could obtain no footing there. By the act of 1870 one who invents or appropriates a new trade mark and registers the same is promised protection, irrespective of the question of use of the mark. If he cannot have protection in the United States courts, he cannot have it anywhere, and the act of 1870 becomes a dead letter. He has paid the government a fee of $25, for registry of his trade mark in consideration of protection. The government has received his money and withholds the consideration. It is respectfully submitted that the demurrer should be overruled.

SWING, District Judge. The demurrer is that this court has no jurisdiction of the case. The ground of the demurrer is that the parties are both residents of the state of Ohio, and that there is no act which confers upon the United States courts jurisdiction of the subject matter in such a case. The act of 1870 (Rev. St. p. 111, § 629) gives the circuit court jurisdiction of all suits under the copyright and patent laws. If the trade mark law is in any fair sense a copyright law, the act gives jurisdiction.

The only provision of the constitution which in any wise bears on the power of congress to pass laws respecting trade marks, or to protect them, is the following, viz. (section 8 of article 1 of the constitution of the United States): "The congress shall have power: to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." "Also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." There is no other clause of the constitution which vests in congress the power to grant to authors an exclusive right to their writings, and congress in legislating on this question undoubtedly drew their power from this section.

The copyright and trade mark laws all come from the same source. So if the trade mark act of 1870 be a copyright law, then the court has jurisdiction without reference to residence or the amount in controversy. The clause or words in section 4942, of the copyright and trade mark law, viz.: "shall be liable to an action on the case for damages for such wrongful use of such trade mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade mark and to recover compensation

therefor in any court having jurisdiction over the person guilty of such wrongful use," does not limit this jurisdiction. But there may be a general extending of the right to sue; that is, where there is a general jurisdiction in the courts of the United States you may go into any state court. This section 4942 may be an enlargement, but is not a limitation of the jurisdiction.

But aside from this act, section 1, c. 137, of the act of March 3, 1875, provides: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States," etc. The clause granting jurisdiction is without limitation as to residence. It only limits the amount in controversy. The remaining clauses are wholly disjunctive.

The first three clauses are without qualification as to citizenship. Then follows the clause when there shall be controversies of citizens of different states. In the present case the right is derived exclusively from a law of the United States. In this statute no citizenship is requisite, and if, in this case, it is a suit of a civil nature at common law or in equity, the jurisdiction vests in the circuit court, whenever the amount in controversy is over $500. If the suit arises under the constitution or a law of the United States, the jurisdiction is then vested without respect to the amount.

The authorities upon the question at issue are very limited, and not a single case, in which the question has been raised, has been cited by counsel. The point at issue is argued for the first time de novo. It has been ably argued. I have looked into every book and in all reported decisions, and have been unable to find anything in which the question has been determined.

In Bump's Treatise, Law of Patents, Trade Marks, and Copyrights, it seems to be taken for granted that the circuit court has jurisdiction. I find that in the index, under the head of "Circuit Courts," is "Original jurisdiction in patent cases, page 13," "in copyright cases 13," "in trade mark cases 13," "without regard to citizenship, page 13." And he has classed it there without regard to citizenship. Turn to the pages referred to in the index, and we find a copy of the trade mark act. Turn to page 349—where he speaks of the jurisdiction—he simply copies section 4942 of the act.

When we go back to his index and look under the head of "Trade Marks," we find "Remedy in State Courts preserved." See page 250, on which page he quotes section 4945 of the statute of 1870, Rev. St. c. 2. Now, if we examine that section, we find that it provides again: "Nothing in this chapter shall prevent, lessen, impeach, or avoid any remedy at law or in equity, which any party aggrieved by any wrongful use of any trade mark might have had if the provisions of this chapter had not been enacted." So it is clear that he regards the jurisdiction which the circuit court has additional to that possessed by the state courts, and that the circuit court has jurisdiction without reference to the residence of the parties or the amount in controversy. When we come to look at the trade mark law (Rev. St. tit. 60, p. 953), we find that the title thereof is "Patents, Trade Marks and Copyrights." And then follows, "Chapter One, Patents;" "Chapter Two, Trade Marks;" "Chapter Three, Copyrights;" and the sections are numbered continuously from the beginning of chapter 1, through chapters 2 and 3.

The demurrer is overruled.

See case of Leidersdorf v. Flint [Case No. 8,219], Dyer, J. (E. D. Wis. Nov., 1878), deciding to the contrary, where Harlan, J., concurred, on the hearing, with the district judge. [Hartell v. Tilghman] 99 U. S. 547, where the court, two judges dissenting, hold to the contrary of the text.

Case No. 4,214.

DWIGHT v. AMES.

[The case reported under above title in 2 N. B. R. 455 (Quarto, 147), and 2 Am. Law T. Rep. Bankr. 65, is the same as Case No. 4,965.]

Case No. 4,215.

DWIGHT et al. v. APPLETON et al.

[1 N. Y. Leg. Obs. 195.]

Circuit Court, S. D. New York. Jan. 7, 1843.

COPY-RIGHT—DAMAGES FOR INFRINGEMENT—COPY-RIGHT NOTICE—DELIVERY OF VOLUME TO SECRETARY OF STATE.

1. The plaintiff was proprietor of a theological work, the copy-right of which was secured according to the provisions of the act of congress, and the defendants, who were booksellers, imported a number of copies thereof from England, purchased there from a London bookseller, some of which he sold in New York, and the other copies of which were in his possession. *Held*, that the jury were authorized in finding a verdict of fifty cents for every sheet contained in the whole number of volumes found to have been in the defendants' possession at any time, or which they had imported for sale, or sold without leave of the plaintiff.

2. Where a work is published in several volumes at different times, the insertion of the record in the page next following the title-page of the first volume of the work, is a sufficient compliance with the provisions of the statute to secure the whole work. The same record may be inserted in another edition of the same work published in a different number of volumes without impairing the copy-right.

[Cited in Lawrence v. Dana, Case No. 8,136.]

3. The delivery to the secretary of state of the first volume of a work within six months after its publication, and the rest of the volumes before the offence is committed, or the ac-

tion is brought, is a sufficient compliance with the law to enable the plaintiff to recover.

This was an action of debt qui tam in favor of the plaintiffs, [Timothy Dwight and others], who sued as well for the United States as for themselves, against the defendants, D. and Wm. H. Appleton, demanding the sum of three thousand six hundred dollars debt, due by reason of a violation of the plaintiffs' copy-right for Dwight's Theology, published by the plaintiffs in five volumes. The declaration stated that the plaintiffs were the proprietors of a book called "Theology Explained and Defended, in a Series of Sermons, by Timothy Dwight, S. T. D., LL.D., late president of Yale College, with a Memoir of the Life of the Author, in five volumes," entered and secured according to the act of congress in the year 1818, and that they had complied with the provisions of the acts of congress in such case made and provided, whereby the plaintiffs had become the legal proprietors of said work. That the defendants, well knowing the premises, and in fraud of the rights of the plaintiffs, and without their consent, and in violation of the acts of congress in such case provided, on the 15th day of October, 1837, and on divers days between said date and the date of the writ issued in this case, did import, or cause to be imported, forty copies of said book, each containing sixty sheets, contrary to the acts aforesaid, &c. By reason whereof, &c. The declaration contained a second count for having in their possession, exposed to sale, and offering for sale, and selling forty other copies, &c., containing sheets, &c. By reason whereof, &c. Plea, Nil debet.

This cause came on for trial December 2, 1840. In support of the action, the plaintiffs introduced a record from the clerk of the district court of the United States for the district of Connecticut, in the following words; namely:

"(L. S.) District of Connecticut, ss. Be it remembered, that on the fifth day of January, in the forty-second year of the Independence of the United States of America, Timothy Dwight, and William T. Dwight, both of said district, administrators of the Rev. Timothy Dwight, now deceased, and late of the said district, have deposited in this office the title of a book the right whereof they claim as administrators aforesaid, and proprietors in the words following, to wit: 'Theology Explained and Defended, in a Series of Sermons, by Timothy Dwight, S. T. D., LL. D., late President of Yale College, with a Memoir of the Life of the Author in five, vol. 1,'—in conformity with the act of the congress of the United States, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the term therein mentioned.' R. J. Ingersol, Clerk of the District of Connecticut.

"A true copy of record examined and sealed by me. R. J. Ingersol, Clerk of the District."

A copy of this record was printed on the back of the title-page of the first volume, a copy of which record was duly published within two months, according to the law as it then was. And it was proved that Dr. Dwight, the author, resided at the time of his death, which was in February, 1817, in New Haven, in the district of Connecticut; and that the volumes of said work issued from the press and were published, the first volume on the 7th of February, 1818; the second volume on the 6th of June, 1818; the third volume on the 3d of August, 1818; the fourth volume on the 29th of October, 1818, and the last or fifth volume on the 10th of March, 1819. As to the delivery of the work to the secretary of state of the United States, as the law requires, the plaintiff proved that the first and third volumes were both delivered to the secretary of state within six months from the publication thereof as the law requires. As respects the second volume, it appeared that it was not deposited with the secretary of state until about seven months after its publication; or rather, there was no evidence that it was in the office at an earlier period. As respects the fourth and fifth volumes, there was proof that the whole five volumes were in the office of the secretary of state on the 20th of January, 1820, but at what precise times the volumes, except the first and third, were deposited in the office, was matter of inference from the depositions and receipts read in evidence.

To show that the defendants had violated the plaintiffs' copy-right, they introduced an invoice from the custom-house of twenty-five copies of Dwight's Theology, published by the defendants and purchased of a London bookseller by the defendants. This invoice was signed by the defendants, and was the one upon which said books were entered and duties paid, and the plaintiffs insisted, was evidence that the defendants had imported so many copies of the work, which in this London edition was in one volume. The plaintiffs also introduced several witnesses who testified that they had purchased sundry copies of Dwight's Theology at the defendants' bookstore in Broadway, in the city of New York, at different times before the commencement of this suit, which copies appeared to have been published in Glasgow, and with Dr. Dewar's Essay on the Inspiration of the Scriptures prefixed, some of which copies were produced in court, in which the whole work was contained in one volume, and compared with the work described in the invoice, which had been given in evidence. The witness also testified that they had, during the same period of time, seen a number of copies of the same work in the defendants' bookstore for sale, similar in all respects to the copies produced in court. The plaintiffs then introduced as evidence the original work as first published

in five volumes in the year 1818, and soon after the death of its author. The defendants introduced a witness to prove that any other sermon, delivered by any other minister, independently of this work, would not be an improper addition to it, and that if any sermon was taken from the work, it would still be left a system of theology, complete for what he knew; that he had seen the work as published in five volumes, and also in four volumes. That he understood each sermon was complete in itself,—that he was aware that two volumes of sermons, by the same author, had been published, distinct from the system of theology. Here the evidence closed.

While the counsel were summing up to the jury, THE COURT suggested that it would be better to reserve the points of law, and let the jury find a verdict, if for the plaintiffs, for an amount sufficient to cover the sum which the plaintiffs had shown they were entitled to, according to this view of the evidence, subject to the opinion of the court on the questions of law, the amount to be reduced, if required, to conform to the opinion of the court. This was agreed to by the counsel on both sides.

THE COURT, after summing up the evidence to the jury, instructed them, if they found for the plaintiffs, to find specially how many volumes were deposited in the office of the secretary of state, and when, and how many volumes were imported, sold or exposed for sale by the defendants, or found in their possession, within the meaning of the law as explained by the court; which was, that the defendants were liable for all the sheets which had at any time been in their possession as importers or as venders of the same, or as having the same at any time for sale. The jury found for the plaintiffs two thousand dollars; and that the first and third volumes were deposited in the office of the secretary of state within six months from the time of their publication; and that the second, fourth and fifth volumes were not deposited in said office within six months after the time of their publication; and that the defendants had had in their possession thirty-eight copies of the English work complained of.

Upon this verdict the plaintiffs moved for judgment on the following grounds:

First. That Dr. Dwight's Theology was one entire complete work, constituting a system of theology in which every sermon and every part stood connected with some other part and with the whole. That this was apparent, from the analysis at the commencement of the work, and the summary at the end. That no one sermon, nor any other part of the work, could be withdrawn without impairing the system and rendering it imperfect. That it was immaterial whether this work was published in five or four volumes, like the American copies, or in one volume like the English copy. That whether the work was published in one volume, or five or four, was a mere matter of convenience to the publisher and binder, and regulated by the taste of the reader and the expected profit of the publisher. It is not like an author's writings upon separate, independent subjects, published at different periods, in separate volumes. If the above position is sound, then it follows: (1) That the deposit of the title-page of the work, as found in the first volume, in the office of the clerk of the district court, and the record thereof, was sufficient for the work, although got out in more volumes than one; and that the number of volumes was immaterial. (2) That the publication of the record from the district court, on the title-page, or page next to the title-page of the first volume of the work, effectually secured the copy-right to the whole work, although published in more volumes than one. If the title became thereby vested at all, it was vested in the work, not in the first volume only of the work. (3) The publication in the newspaper of the record of the title of the work as inserted in the first volume, protected the work, not merely that volume of the work. The object of such a publication was to let the world know that the author had taken out a copy-right of his work, not of the first volume of his work merely. (4) And hence it follows, fourthly, that the deposit of the first volume of the work, within six months after the publication thereof in the office of the secretary of state, is sufficient to secure the right and protect the work, provided the whole work is deposited there in a reasonable time, and before the reprint or attempt to reprint the work by any one else. The provision of the act on this subject is directory, and the object twofold. One object is to have a place, established by law, in which a copy of the work may be found, that the public may at all times know what works are private and what public property; and this notice is effectually given by deposit of the first volume in this case. The other object is to compel the author to furnish, for the use of the public library of congress, a copy of his work when complete. Both these objects have been answered in the present case. The whole work was furnished and delivered to the secretary of state within a very short time after its publication, and two of the volumes, the first and third, within six months. (5) And hence it follows, in the fifth place, that the insertion of the record on the page next following the title-page of the first volume of the work was a sufficient compliance with the statute. It was complying with the reason and spirit of the act; for it was giving sufficient notice that the work was secured by copy-right, and was private property. No one looking at the work with a view to a publication would omit to examine the first volume. Besides, it is submitted to the consideration of the court that the terms "book" or "books," as used in this section of the act, mean work

or works, not volume or volumes of a work.

Secondly. It is urged by the defendants, in the next place, that the record of the title of the work inserted on the page next following the title-page of the first volume of the first edition of the work, in five volumes, protects only that and such other editions of the work as might be published in five volumes; that the words "five volumes" make a part of the title of the work. In answer to this objection, it is insisted: (1) The number of volumes in which the author declares he means to put his work into, makes no part of the title of the work. That the subsequent alteration of the number of volumes in which the work may be published, is no change of the title of the work or book. (2) If this objection is valid, an author could not, after taking out a copy-right, in which he had specified the number of volumes, ever change the number of volumes in which he might wish to publish his work without losing his copy-right. (3) As this would be most unreasonable, it may be said that the author may record his title anew, specifying the number of volumes in which he might wish to publish. But, if this would be of any effect, it would be taking out a new copy-right for precisely the same work, only in a different number of volumes; and from this date his second copy-right would again commence, and if this would be legal, a man might perpetuate his copy-right as long as he pleased.

Thirdly. The counsel for the plaintiffs insisted that the plaintiffs had a right to recover fifty cents for every sheet contained in the whole number of volumes found to have been in the defendants' possession at any time, or which they had imported for sale, or sold without leave from the plaintiffs.

The defendants made the following points:

1. If the work in question was, by the deposit of its title-page, copy-righted, as an entire work, including the five volumes, the plaintiffs cannot recover, because they have not complied with the acts of congress in depositing in the department of state a copy thereof within six months after its publication.

2. The copy-right, secured by the deposit of the title-page, was a copy-right in the first volume only. (1) The language of the entry and title-page deposited, expresses this idea in express terms. (2) A series of publication issued from the press, at distant intervals, cannot be brought within the protection of the copy-right acts, by observing in respect to the first in number in the series, the forms prescribed by those acts.

3. Whether the copy-right extended to the whole work, or only to the first volume, the plaintiffs relinquished the benefit and protection thereof. (1) By publishing and selling for profit an unprotected edition in England. (2) By printing and publishing here ten editions of the entire work, in four volumes each, with different title-page. (a) The identity of the work, published with that copy-righted, is advertised to the public by the title-page alone. (b) If a man issue his own copy-righted work, with a title-page other than that mentioned in the copy-right, he thereby relinquishes the protection of the copy-right acts. (c) A citizen is not bound at his peril to buy a copy of both works and compare the text, in order to ascertain whether the work with a new name is identical with the copy-righted work. (d) This objection applies with peculiar force, if the copy-right extends only to the first volume of first edition, for then the copyright extends to perhaps the middle of a page in first volume of second edition, and there stops.

Staples, S. P., and Ketchum, E., for plaintiffs.

O'Connor, McElrath, and Bloomfield, for defendants.

Cur. ad. vult.

THOMPSON, Circuit Justice. The statutes made to secure the copyright to authors in their works are somewhat obscurely expressed; and the English decisions shed very little light on the subject; though these acts are penal, yet they are remedial also, and made in favor of the aggrieved party, and to secure his rights, and the forfeiture goes in part to him. The jury were authorized to give fifty cents for every sheet contained in the volumes found at any time, within the period stated in the declaration, to have been in the possession of the defendants. The law applies to all the copies which the defendants had imported, or sold, or held for sale, contrary to the rights of the plaintiffs; and the insertion of the record on the page next following the title-page of the first volume of the work was a sufficient compliance with that provision of the statute. This was not like a periodical work, but was an entire work embracing a system of theology, which system appeared from the author's analysis, as well as his summary found in the work. That the number of volumes, in which it was stated the work would be published, made no part of its title, and might be rejected as surplusage; and that the plaintiffs might insert the same record in another edition published in a different number of volumes, without impairing their copy-right.

That the delivery to the secretary of state of the first volume of the work within six months after its publication, and the rest of the volumes, before the offence complained of, was committed, or the action brought, was a sufficient compliance with the law to enable the plaintiffs to recover. That this case was distinguishable from the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 591. In that case, it did not appear that the volumes had been delivered to the secretary of state at any time, and to ascertain this with other facts, a trial at law was ordered; that, in this case, full notice had been given to the

public of the plaintiffs' claim of a copy-right in this work, and, in the opinion of the court, the law had been substantially complied with, and that the title to the copy-right in the work had become well vested in the plaintiffs.

Case No. 4,216.

DWIGHT v. HUMPHREYS et al.

[3 McLean, 104.] [1]

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

EQUITY PLEADING — SIGNATURE OF COUNSEL TO BILL—DEMURRER—AMENDMENT.

1. A bill must be signed by counsel, or it is demurrable.

2. But a signing on the back of the bill is sufficient. The court, as a matter of course will give leave to amend the bill so as to obviate the objection made by the demurrer.

Mr. Romeyn, for complainant.
Mr. Bates, for defendants.

OPINION OF THE COURT. This is a bill to foreclose a mortgage. The defendants demur on two grounds. 1. That the bill is not signed by counsel. 2. That Bacon having no interest in the foreclosure, should not have been made defendant. In regard to the first ground, it is not denied, that the English practice requires a bill to be signed. This practice seems to have been introduced by Sir Thomas More, who made an order to that effect. And if a bill be not so signed, it is demurrable. 2 Coop. Eq. Pl. 18; Story, Eq. Pl. § 47. But in this case the bill is indorsed by counsel, and that is a sufficient signing within the rule. It seems that Bacon is not a party to the mortgage, nor does it appear how he is interested in the decree. No decree is prayed against him. The objection to the bill on this ground may be obviated by an amendment, and leave is given to amend the bill.

Case No. 4,217.

DWIGHT v. PEASE et al.

[3 McLean, 94.] [1]

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

PROMISSORY NOTE—SEVERAL PAYEES—ASSIGNMENT.

1. A promissory note given to two or more payees, who are not in partnership, must be assigned by all of them.

2. An assignment of one of two payees, at most, can convey but one-half of the interest in the note.

3. This does not enable the assignee to sue the drawer. A note cannot thus be cut up and suits against the drawer multiplied.

Mr. Talbott, for defendants.

OPINION OF THE COURT. This action was brought upon the following promissory note: "Detroit, January 1st, 1837. Two years after date, I promise to pay to the order of Walter Chester, and Pease, Chester & Co. one thousand and five hundred dollars, for value received, at the Farmers' and Mechanics' Bank of Michigan, with interest. [Signed] John Chester." Indorsed: "Pease, Chester & Co., and also D. E. Jones in blank." The declaration contained three counts, to the first of which there was a demurrer. This count states that one John Chester, on the 1st of January, 1837, made his note payable to order of Walter Chester, and Pease, Chester & Co., and that Pease, Chester & Co., under their partnership name, indorsed and delivered the said note to the plaintiff. John Chester, the maker, was a member of the firm of Pease, Chester & Co. Demand of the note when due, and notice to the defendants, was proved. Walter Chester, one of the promisees in the note, seems not to have indorsed it, and this is fatal to the right of the plaintiff. The interest of the promisees is joint in the note, and not being in partnership, they must each transfer the note. Chit. Bills, 123; Tayl. 55; Carvick v. Vickery, 2 Doug. 653; Jones v. Radford, 1 Camp. 83, note, 21 E. C. L. 41. Only one-half of the note was transferred by the indorsement of Pease, Chester & Co., and this does not give a right to their or any subsequent assignee to sue on the note. Recourse against the maker cannot thus be divided and suits multiplied. The plaintiff seeks by this action to recover the full amount of the note against the defendants, as indorsers. But as he holds but one-half of the note under the assignment, the indorsement, at most, can only be evidence of that amount. The declaration is defective in not averring that Walter Chester, one of the payees, did indorse the note. Demurrer sustained. The plaintiff dismissed his action.

Case No. 4,218.

DWIGHT v. WILLIAMS.

[4 McLean, 581.] [1]

Circuit Court, D. Michigan. June Term, 1849.

CONTRACT OF GUARANTY — INTERPRETATION—DISCHARGE OF GUARANTOR BY DELAY.

1. A guaranty to pay any balance that could not be collected on a certain bond and mortgage, after due course of law; *held* that any and every course of law, necessary to reach the property of the obligor was a condition precedent, to the liability of the grantor.

2. The contract created the law between the parties; and where one party contracts with another to do a certain thing, no excuse can be heard for the non performance, except the act of the obligee hindering the performance or dispensing with it. In such a case insolvency is no excuse.

3. This under the rule of law, may excuse suit where the debtor is insolvent; but there

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

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

is no such condition expressed or implied in the contract.

4. To charge the guarantor, suit in a reasonable time was essential, and the prosecution of it with ordinary diligence. A failure to use this diligence releases the guarantor.

Joy & Porter, for plaintiff.

Mr. Frazer, for defendant.

OPINION OF THE COURT. This suit is brought on a bond in the nature of a guaranty, in which the defendant covenanted to pay whatever should remain uncollected of a debt due by Lawrence to the Bank of the River Raisen, of $1190, and interest thereon, from the 1st May, 1840; for the payment of which a bond and mortgage had been executed to the bank—which debt was assigned to the defendant, and by him to the plaintiff, "when he, the plaintiff, should by a due course of law have been unable to collect the said amount and interest." The defendant by this agreed to pay only the part of said indebtment, which could not be collected by a due course of law. The due course of law was therefore to be used before the defendant became liable, under this covenant to pay any balance of the debt which remained.

In the declaration it is averred that there was a prosecution on the mortgage, and the mortgage property sold, and that there still remained a debt due on the bond and mortgage of the sum of fourteen hundred and ninety-nine dollars and sixty-nine cents, above demanded, and the plaintiff avers that the same sum remains due, and that by due course of law he has been unable to collect the sum or any part thereof, and that due course of law has been had for that purpose. And the plaintiff further avers, "that the said Wolcott Lawrence departed this life on or about the 29th of April, 1843, and that at his decease, and for a long time before that time, was and had been utterly insolvent; and that his estate was worthless to the creditors having claims against the same and utterly and wholly insolvent, and though long since closed up, paid no dividend to said creditors, and that claims against and debts were and have ever been worthless and good for nothing." The defendant demurred to the declaration.

The mortgage bond was due the 3d of August, 1840. A bond was executed by Lawrence on 3d August, 1839, the date of the mortgage, to the Bank of the River Raisen, as collateral. On the 7th August, 1840, the bank sold and transferred these securities to the defendant, who, on the 28th March, 1842, by a deed under his hand and seal, assigned and transferred them to the plaintiff. On the 20th of December, 1842, the plaintiff assigned these securities, and all the rights he derived under the assignment, to Sauverhill. Lawrence died the 29th of April, 1843, insolvent, and was so long before his decease. On the 18th November, 1843, Sauverhill filed the bill to foreclose the mortgage, on which he obtained a decree of sale the 17th March, 1846, and the property was sold on the 18th of June of that year. On the 28th of March, the time of the assignment of the mortgage to the plaintiff, the defendant, in the deed of assignment, covenanted, "that when he, the plaintiff, should by a due course of law have been unable to collect the said amount and interest, he the said defendant would pay to the said plaintiff, such an amount as might be necessary to make good any deficiency of principal and interest, remaining unpaid."

It is contended, 1. That no action can be maintained against the present defendant, admitting the facts set forth in the declaration to be true. The covenant is so clearly expressed that no one can mistake it. It is not an undertaking to pay absolutely, but conditionally. The defendant bound himself to pay whatever balance could not be collected of the debt of $1190, from Lawrence, the debtor, "after a due course of law" had been taken. The balance could not be ascertained until the due course of law had been taken, consequently, the due course of law was a condition precedent to the suit now brought. In Moakley v. Riggs, 19 Johns. 69, the defendant undertook that the note was good and collectible after due course of law; held, that the holder was bound to prosecute the indorser and maker, with due diligence, before he could resort to the defendant on his guaranty. A delay of seventeen months discharged the defendant. Betts v. Turner, 2 Caines' Cas. 306; Ten Eyck v. Tibbits, 1 Caines, 440. In Taylor v. Bullen, 6 Cow. 624, the defendant assigned a note to plaintiff, and promised him to warrant the collection of it, and to pay him all costs in all suits legally commenced for its recovery; held, that the commencement of a suit is a condition precedent to the enforcement of the promise. And that it is no excuse for not making the attempt that the maker died intestate, and no administration taken out on his estate. In Cumpston v. M'Nair, 1 Wend. 459, was a guaranty thus, "I guarantee the collection of the note." Held, that the guarantor was not liable until after the holder had endeavored to collect the money from the maker; and that it was equivalent to a guaranty, "that the note is collectible by due course of law." In White v. Case, 13 Wend. 543, in a similar case, the court held legal proceedings to be a condition precedent, "and that the parties must use all the remedies presented by law," "even an attachment if the parties remove." And in Eddy v. Stantons, 21 Wend. 255, the defendant assigned a third party note, and "agreed, in case the plaintiff could not set off the note in payment of any balance that might be due from them to the debtors, or collect the same in some other way, or due course of law, to pay the same and all costs." Held, that there were conditions precedent, and that in-

solvency of debtor was no excuse. In 12 Vt. 68, where a party warranted "note due and collectible," held, the holder was bound to sue, and use due diligence, and if the first failed, through defective service, that guarantor was discharged.

It is an acknowledged principle, that the terms of a guaranty must be strictly pursued to make the guarantor liable. Lord Ellenborough said, "the claim as against a surety is strectissimi juris, and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with." 3 E. C. L. 404; 29 E. C. L. 210; 15 E. C. L. 514; 25 E. C. L. 413.

There is no averment in the declaration of a performance of the condition precedent, but an excuse, and we are now to inquire as to the sufficiency of the excuse. In a great number of authorities the law is thus declared: "The act of God or of the law can not vary the terms upon which the guarantor agreed to become liable. It is a part of the consideration which can not and should not be dispensed with." 13 Wend. 544; 3 Com. Dig. 96, 121; 2 Bac. Abr. 335; Chit. Cont. 334; 19 Ward, 500. "Where a right of action depends upon the performance of a condition precedent, performance can not be excused, unless it is dispensed with, or prevented by the opposite party, although it has become impossible." 12 Wend. 452; 6 Cow. 625; 19 Johns. 71; 6 Term R. 760. There is a distinction between the cases where the law creates a duty or charge, and the party is disabled to perform, without any default in him, and hath no remedy over —there the law will excuse him; but where the party by his own contract creates a duty or a charge, he is bound to make it good, notwithstanding any accident or inevitable casualty. Under this view, therefore, the alleged insolvency of Lawrence is insufficient. 19 E. C. L. 393 and note. Was it essential that the plaintiff should allege in his declaration the performance of the condition precedent? It was so, if the performance of the condition was necessary to establish his right to sue on the guaranty. It lays at the foundation of the action. 2 Bl. Comm. 157; Lewis v. Brewster [Case No. 8,318]. In his declaration, has the plaintiff shown due diligence? He received the transfer of the bond and mortgage, on the 28th of March, 1842. The mortgage money had then been due more than eighteen months. Suit was not brought on the mortgage until the 18th of Nov., 1843. One year and eight months elapsed from the time the plaintiff received the mortgage, before a step was taken to enforce it. Lawrence the mortgagor, died on the 29th of April, 1843, but suit was not brought in his life time, although he lived more than eleven months after the mortgage was in the hands of the plaintiff. And a decree for the sale of the mortgaged premises was not obtained until the 17th of March, 1846.

"A due course of law when applied to the prosecution of a demand in a court of record, confessedly means no more than a timely and regular proceeding to judgment and execution." 10 Wend. 635; 17 Bac. Abr. 111; Philips v. Astling, 2 Taunt. 206; 3 Pen. & W. 18; 16 Serg. & R. 79. Suppose the statute of the state had provided in all cases of guaranty the guarantor should be held liable, if by a due course of law against the debtor, nothing could be collected. Would any court say that a suit duly prosecuted could be dispensed with? Suppose the debtor was insolvent, could that dispense with a suit? The due course of law was a condition precedent, and to give the remedy against the guarantor, a suit was as essential where the debtor was insolvent as where he was not so. That condition of the debtor was not made an excuse in the law for not complying with the condition, and the courts could not by construction hold it as an excuse, as that would be to dispense with a positive law. The contract of the parties is not less binding than a legislative enactment, the contract makes the law between the parties, no excuse being provided for, none can be implied, unless that which arises from the act of the other party. He may dispense with the condition, or if he prevent the other party from performing, the law will excuse the performance. Nothing else can constitute an excuse. If, within a reasonable time, the plaintiff had brought suit against Lawrence, in his life time, no one can say what fruits might have been received by it. He may have been in possession of no property which he called his own, yet he may have had friends, or property covered which the law could reach. But it is enough to know, that suit was required by the contract, as a condition precedent, and that within a reasonable time after the contract. Suit on the mortgage was delayed eighteen months, and after suit brought three years transpired before a decree was obtained. This, it would seem, could not be the ordinary course of the law. And if there was any neglect, in this respect, the defendant would be absolved from liability under his contract. In 4 Cow. 103, it was held, that the plaintiff must not only issue a fi. fa., but also a ca. sa., and that it was no answer to say the original debtor was insolvent. A delay of two and a half months has been held fatal. In 1 Cow. 98, 5 Wend. 433, it was held that a term should not be suffered to pass without suing the original debtor, otherwise it would amount to laches.

On the part of the plaintiff it is contended that the instrument was not intended as a guaranty. In effect it certainly is a guaranty on conditions, and it is to be governed by principles of law applicable to such a case. But he insists if it be a guaranty, the inquiry is, what loss has the defendant sustained by the negligence charged? This is not the rule; as it is not within the con-

tract. On the contrary, it is opposed to it, as by the contract suit was to be brought. And it is argued that the plaintiff was not bound to adopt all the courses of the law. That a due course means a proper and just course to realize the debt. We suppose that the contract required the plaintiff to adopt any, and every, legal course of law, which was necessary to reach the property of Lawrence; and that nothing short of this can be considered a due course of law.

It is admitted that by Revised Statutes of Michigan, 376, 377, a suit at law upon the bond and mortgage can not be prosecuted while a bill of foreclosure is pending on the same mortgage. The declaration, in its averments, does not show any excuse for not proceeding against Lawrence in his life time, nor does it appear that he was insolvent from the time that the plaintiff received the mortgage until his death. The declaration alleges that "Lawrence, at the time of his decease, and for a long time before that time," was and had been insolvent. Now this averment is indefinite—"a long time before his decease." How is that to be measured, by days or months? The averment does not cover this period of time with the requisite certainty; and on this ground, independently of every other, the demurrer must be sustained.

Leave was given to amend the declaration.

Case No. 4,219.

DWIGHT v. WING et al.

[2 McLean, 580.] [1]

Circuit Court, D. Michigan. Oct. Term, 1841.

VENUE IN CIVIL CASES—HOW LAID—NEGOTIABLE INSTRUMENTS—NOTICE TO INDORSER—PLEADING.

1. A venue in the body of the declaration is sufficient, without being stated in the margin.

2. By the present rules of pleading in England, a venue is laid only in the margin.

3. An averment of due notice, is sufficient to charge the indorser of a note or bill. Under such an allegation, proof of the facts may be made.

Mr. Bates, for plaintiff.

Mr. Joy, for defendants.

OPINION OF THE COURT. This action is brought against the defendants, as indorsers of a promissory note, payable at the Bank of Michigan. To the declaration there is a demurrer, for the following reasons: First: There is no venue set forth in the margin of the declaration; Second: The averment of notice, of nonpayment, is not laid with certainty, as to time or place. There is no formal venue laid in the margin of the declaration; but there is a venue in the body of it, and that is sufficient. By the rule adopted in England, Hilary Term, 4 Wm. IV., the venue, in the body of the declaration, is to be omitted, and it is laid in the margin only. Under this rule, the venue, not being laid in the margin, is ground of demurrer. There is an averment of demand, of the drawer of the note, when it became due, and that due notice of nonpayment was given to the defendants. This is all the law requires. Under the averment of due notice, all the facts, in proof of that allegation, may be given in evidence. Firth v. Thrush, 8 Barn. & C. 387; 2 Man. & R. 359. Demurrer overruled, and judgment.

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

D. W. LENNOX, The (BROOKS v.). See Case No. 1,952.

Case No. 4,220.

D'WOLF v. BABBETT et al.

[4 Mason, 289.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

SALE—DELIVERY—INSOLVENCY OF PURCHASER—FRAUDULENT SUPPRESSION.

1. A purchase was made of 198 boxes of sugar, for which certain acceptances, drawn by the purchaser and indorsed and accepted for his accommodation, were to be given to secure payment. The sugars were to be shipped on board of a ship belonging to the purchaser, then lying in the same port, and bound on a foreign voyage. The acceptances were to be delivered upon the return of the purchaser from Boston, to which place he was then going. While at Boston he failed, and assigned his property. During his absence, a part of the sugars were put on board of the ship. After his return, he kept his own failure a secret, and also the failure of his indorsers and acceptor, and procured a delivery of the residue of the sugars, on the faith, that the acceptances were to be duly given. *Held*, that if the delivery of the sugars, under these circumstances, was not intended by the parties to be an absolute delivery, but a delivery on condition only, that the terms of the contract were complied with, then the vendor might reclaim the sugars, and his property in them was not gone.

2. If the delivery of the sugars, after the failure, was procured by a fraudulent suppression of that fact, the delivery, as to that portion, was altogether without any legal validity, whatever might be the case as to the other parcels.

Trover for 198 boxes of sugar. Plea, the general issue.

At the trial it appeared, that the sugars originally belonged to the defendant, Jacob Babbett, and were sold to one George D'Wolf, in the manner hereafter stated. As soon as the purchase was made, George D'Wolf ordered an invoice and bill of lading to be made out, by his clerk, of the goods, as if already on board of the ship Magnet, Capt. Usher, master, in which they were to be sent to Marseilles. The ship was owned by George Coggeshall, and was not expected to sail for a number of days, not then being equipped for sea. The master signed the bill of lading of the goods, as on board, though in point of fact

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

they were, at the time, in the store of the defendant, Babbett. This bill of lading was indorsed by George D'Wolf, and immediately sent to the plaintiff at New York, who, upon the faith of it, accepted a draft drawn on him by George D'Wolf, to a large amount. The defendant, Babbett, was wholly ignorant of these transactions.

The testimony of George D'Wolf, introduced by the plaintiff in the cause, was as follows:

"That on the seventh day of December, 1825, he, D'Wolf, agreed to purchase of Messrs. Babbett & Browning one hundred and ninety-eight boxes of brown sugar, at eleven cents per pound. In payment he was to allow them the debenture certificates, and give them Isaac Clapp's acceptance, endorsed by John Smith and George Coggeshall, for $4983.88, at sixty days, and for the remainder his own note at ninety days. On the date of the agreement, the sugars were cleared for debenture, by him, and were to be shipped in the Magnet, Usher, master, for Marseilles. On the same day he went to Boston, and was to deliver Clapp's acceptance on his return. He returned from Boston, on Friday evening the 9th, on which day he made an assignment to John Richards, Isaac Clapp, and Charles D'Wolf, to secure them for their advances, acceptances, and endorsements; on the same day Mr. Clapp and John Smith stopped payment, and on the 10th George Coggeshall stopped payment. These facts were not known in Bristol until the evening of the 10th. In consequence of his stopping, and Clapp, Smith, and Coggeshall's stopping, he did not offer Mr. Babbett the paper. In the course of Saturday evening the 10th, Mr. Babbett called at R. Rogers, Jr.'s house, to see him, D'Wolf, and said he should keep the sugars; to which he, D'Wolf, made no reply. On Sunday morning the 11th, Capt. Usher and Mr. Babbett met him in the street, and Babbett demanded of Capt. Usher the sugars, which Usher refused to give up, because he had signed a bill of lading for them. Mr. Babbett inquired of D'Wolf where the bill of lading was. He replied to Babbett, that he had sent it to New York, previous to his going to Boston. At the time said bill of lading was signed, the whole of the sugars were in Mr. Babbett's store, and he did not know of the bill of lading being signed until Sunday morning. Babbett asked D'Wolf, in presence of Capt. Usher, whether the sugars had been settled for by him; D'Wolf replied, they had not. On the day D'Wolf purchased the sugars, he drew on Mr. James D'Wolf, Jr. for $6000, at sixty days, as an advance upon them, and forwarded to him the invoice and bill of lading, consigned to his order at Marseilles, which draft was negotiated and accepted.

"In answer to certain questions put by the plaintiff's counsel, D'Wolf farther stated, that he did not take possession of the sugars by employing the coopers to work upon them: That he went immediately to Boston after the agreement. The sugars were to be delivered when called for, and to be paid for when he returned from Boston. When he returned from Boston on Saturday following, he saw the sugars going on board the ship: That he had not any idea of stopping payment when he left Bristol for Boston on the 7th: That he did ask Mr. Babbett, whether he would receive the paper after his return from Boston, at Mr. Robert Rogers's house, in the evening, at the time he read to him the assignment, which he declined: That on Saturday forenoon Mr. Babbett did call on him, D'Wolf, for the paper. He informed Babbett that he had not seen Mr. Coggeshall, and the paper was not ready. He never did obtain Coggeshall's endorsement, or Clapp's acceptance."

The clerks of D'Wolf stated, that the invoice and bill of lading of the sugars were made out, pursuant to G. D'Wolf's order, and sent to New York: That no debenture of the goods was ever obtained, or given by G. D'Wolf to Babbett; and no note was ever given for the amount of the sugars, all the parties having failed: That G. D'Wolf went to Boston on Wednesday (the 7th of December), and returned from Boston on Friday night (the 9th of December); but his failure was not known, but kept a secret until Saturday night. One of his clerks, by his order, applied on Thursday to Babbett for the delivery of the sugars. They were stored in an upper loft of the store of Babbett, and he objected to lowering them down at his own expense; but made no objection to the delivery. The sugars were lowered down at D'Wolf's expense, and coopered, and 12 boxes were put on board of the Magnet (which lay at a wharf opposite the store), on Thursday; 26 boxes were put on board on Friday; and 102 boxes on Saturday. The clerk of D'Wolf, who attended to this delivery, stated, he did not know of D'Wolf's failure until Sunday the 11th.

On the part of the defendants, a witness swore, that he was present during the conversation and bargain for the sale, between the defendant, Babbett, and George D'Wolf. The defendant, Babbett, agreed to sell upon credit upon the terms stated; but said to G. D'Wolf, that the delivery would not be made, until the drafts were given, according to the terms of sale. D'Wolf then asked, if Babbett had any objection to his coopering the boxes of sugar in the mean time; to which Babbett replied he had not. He further testified, that on Sunday (the 11th of December), in the morning, the ship Magnet was in the stream, but not in a condition to go to sea for several days. Babbett came on the wharf with the witness. George D'Wolf was there. Babbett said, he was going to take the sugars out of the ship. D'Wolf said he had no objection. D'Wolf then told Capt. Usher, that he might deliver the sugars to Babbett, adding, "It is Babbett's; I have not com-

plied with the terms of sale." Usher said he would deliver the sugars, if D'Wolf would give up the bill of lading. D'Wolf said it was out of his power; the bill of lading was at New York. Usher then asked the witness's advice, who advised him to protest against Babbett's taking the sugars. Babbett, however, did take them out of the ship.

It further appeared, by other testimony, that the clerks of G. D'Wolf were very busy on Saturday (the 10th) in hurrying the sugars on board the ship, from the store of Babbett. But Babbett had no notice of G. D'Wolf's failure until late on Saturday night or Sunday morning.

Upon this evidence, Whipple, for the plaintiff, contended, that the sale was complete on Wednesday; that the bargain was, that George D'Wolf should have a credit for the amount, until his return from Boston on Friday; that he was then to give the notes and drafts conformably to the agreement. The goods were to be delivered, as D'Wolf wished, in the intermediate period; and they were actually and absolutely delivered to D'Wolf, so that the defendant, Babbett, had no right to retake them, but the property passed to the plaintiff. He cited 13 Johns. 434; 6 East, 618; 2 H. Bl. 504; 4 Bos. & P.; 1 Taunt. 458; 5 East, 175; 1 Camp. 452.

Searle, for defendants, contended, that the delivery was merely conditional, and the defendant, Babbett, had a right to retake his own goods under the circumstances.

STORY, Circuit Justice, in summing up to the jury, said: If in this case there has been an absolute and unconditional delivery of the sugars to George D'Wolf, unaffected by fraud, the plaintiff is entitled to recover. So far as regards the 102 boxes of sugar delivered on Saturday, as that was after the terms of the personal credit had expired, which the counsel for the plaintiff supposes to exist, the delivery can be maintained as valid, only upon the supposition, that the whole transaction was bona fide, and the defendant, Babbett, waived a compliance with the terms. At that time D'Wolf had failed and assigned his property, and Clapp and Smith had also failed, and Coggeshall failed on Saturday morning. Thus, all the parties to the intended drafts in payment had failed, at the time of the delivery of the 102 boxes on Saturday. The facts were well known to George D'Wolf, and they were utterly unknown to the defendant, Babbett. What then was the conduct of G. D'Wolf to Babbett on Saturday morning? It was an evasive reply to an inquiry respecting the paper to be given for the sugars. Was it not evasive for the purpose of misleading Babbett? My opinion is, that under the circumstances of this case a delivery, procured by a fraud in misleading the vendor by a suppression of facts, and by an effective affirmation of an intention to comply with the terms of sale, which the party at the time knew was impracticable, was such a fraud, that it at all events avoids the delivery, so far as respects the 102 boxes; and the jury, if they believe the facts, ought to find a verdict for the defendants to this extent.

But the other part of the case turns upon a ground equally applicable to the whole of the sugars. The question is, whether this was a contract for an absolute delivery of the sugars upon a personal credit to G. D'Wolf, until his return from Boston, or whether, in the understanding of all parties, a bona fide compliance with the terms of sale, by giving the note, acceptances, &c. was a condition precedent to the absolute delivery of the sugars. The vendor is not divested of his right to retake the goods, if for the convenience of the vendee he has assented to a qualified delivery of the goods, with the understanding, that the property is not absolutely to pass, unless all the terms of sale are complied with. If indeed a personal credit is given to the vendee, and the delivery is absolute and complete under the sale, the vendor has no right to reclaim the property. If, on the other hand, the delivery is conditional, and so understood by the parties, then the vendor does not part with his property until the terms of the sale are complied with. In short, the sale then is merely a conditional sale. Here there is no pretence, that all the terms of the sale have been complied with. They were notoriously broken by the insolvency of the parties, when there had been a part delivery only. No debenture has been given, no note, no acceptance. The question is a question as to the real intentions and bargain between the parties. Did the vendor intend to part with the property absolutely, by giving a personal credit to G. D'Wolf, whether he complied with the terms of sale or not? Or did not both parties understand, that the title by sale was only to be complete by a strict compliance with all its terms, and that any delivery of the goods, in the mean time, was to be deemed conditional, and merely for the convenience of the vendee? As the jury find the fact, their verdict ought to be for the plaintiff or defendant, as to all the sugars, not affected by the fraud. If the delivery was conditional, then the verdict is to be for the defendants; if absolute, then for the plaintiff.

Verdict for defendants.

See Bloxam v. Sanders, 4 Barn. & C. 941; Harris v. Smith, 3 Serg. & R. 20; Hussey v. Thornton, 4 Mass. 405; Haggerty v. Palmer, 6 Johns. Ch. 437; Copland v. Bosquet [Case No. 3,212].

Case No. 4,221.

D'WOLF v. HARRIS.

[4 Mason, 515.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1827.[2]

REPLEVIN—TAKING BY MARSHAL—ASSIGNMENT OF GOODS AT SEA—VALIDITY—POWER OF CONSIGNEE—BILL OF SALE OF SHIP—MORTGAGE—RIGHTS OF CREDITORS—REPLEVIN BY PART OWNER.

1. In replevin, upon the issue of non cepit, proof that the defendant took the goods as marshal, is sufficient proof of the caption.

2. An assignment of goods at sea, and their proceeds, if bona fide, is sufficient to pass the legal title to the goods, and also to the proceeds, so that replevin will lie for the latter.

3. An assignment may, in point of law, be good, of goods and their proceeds, though given by way of mortgage, or as security for future advances.

4. An indorsement of the bill of lading is not indispensable to perfect an assignment of goods at sea. It is sufficient, if there be a good assignment of the property by a conveyance, with apt words.

5. Where a bill of lading consigns the property to a consignee for sales and returns, he alone can indorse them, so as to convey the title. But subject to such an indorsement to a purchaser, the consignor may, by a legal conveyance, assign a legal title to them, so as to be good against his own creditors.

6. A bill of sale of a ship is good, though it do not recite the certificate prescribed by the registry act. A bill of sale of a ship and cargo, lying in port, is, as against creditors, good and valid, if bona fide made, although possession is not taken of the same by the purchaser, if such bill of sale be merely by way of mortgage or security, and not absolute, and it is pursuant to the agreement of the parties, that the mortgagor shall have the conduct and management of the voyage on which the ship is then destined.

[Cited in The Romp, Case No. 12,030; Almy v. Wilbur, Id. 256; The J. B. Lunt, Id. 7,246; Re Dalby, Id. 3,540.]

7. Where property abroad is transferred, either as security, or absolutely, it is sufficient to convey a good title to the purchaser against creditors, if the purchaser uses due diligence upon the return voyage to take possession of the proceeds, although they may be consigned to the vendor.

[Explained in The Romp, Case No. 12,030. Cited in Leland v. The Medora, Id. 8,237.]

8. What circumstances are, or are not, badges of fraud, so as to make an assignment void as to creditors.

9. Replevin will not lie by one joint owner. But the objection can only be taken by a plea in abatement, where he sues for the whole. If he sues for a moiety, the court will abate the writ ex officio. That there is another part owner is not good evidence, under the plea of property in a third person.

[Cited in Williamson v. Ringgold, Case No. 17,755.]

10. The proviso in the revenue collection act of 1799, c. 22, § 62 [1 Stat. 673], as to transfer before entry of goods, does not interfere with the general validity of such transfers. Its object is only the security of the duties due to the government, and the duties on the goods being paid, the transfer, if bona fide, is complete for all legal purposes.

[Cited in Merrill v. Dawson, Case No. 9,469; The Celestine, Id. 2,541; Ex parte Dalby, Id. 3,540.]

Replevin for twenty-three cases of silks. The defendant pleaded, 1st. Non cepit: 2d. That the said silks were the property of one George D'Wolf, and not of the plaintiff, and made an avowry for a return, stating that he attached the goods in his capacity of marshal of the district, as the property of George D'Wolf, in a suit brought by the United States against said George D'Wolf. Upon both of which pleas issue was joined.

The plaintiff gave in evidence a deed poll to him from George D'Wolf and John Smith, dated the 19th November, 1822, which was in the following words:

"To all to whom these presents shall come, George D'Wolf, of Bristol, in the state of Rhode Island, merchant, and John Smith, of the same place, merchant, severally send greeting.

"Whereas the said George D'Wolf is the owner and proprietor of five eighth parts of the ship Octavia, Andrew Blanchard, master, and of her tackle, apparel, and furniture, and of her cargo, now lying in the port of New York, and bound on a voyage from thence to the Sandwich Islands, thence to Canton, and thence to a port of discharge in the United States; also of nine sixteen equal parts of the brig Quill, Lewis, master, and of her tackle, apparel, and furniture, and of her cargo, now absent on a voyage from Bristol aforesaid, to the northwest coast of America, thence to Canton, and thence to Bristol aforesaid, on which voyage she sailed on or about the seventeenth day of August, in the year one thousand eight hundred and twenty-one; and also of nine sixteen equal parts of the brig Arab, Thomas Meek, master, and of her tackle, apparel, and furniture, and of her cargo, now absent on a voyage from Boston to the northwest coast of America, thence to Canton, and thence to Bristol aforesaid, on which voyage she sailed on or about the third day of December, in the year one thousand eight hundred and twenty. And whereas the said John Smith is the owner and proprietor of the remaining parts of the aforesaid ship and two brigs, and of their respective tackle, apparel, and furniture, and of their said cargoes. And whereas the said George D'Wolf is the sole owner and proprietor of the brig Friendship, Hopkins, master, her tackle, apparel, and furniture, and of her cargo, now absent on a voyage from Bristol aforesaid, to the Havana, and back to the port of New York, on which voyage she sailed on or about the seventeenth day of November instant. And whereas James D'Wolf, jr. of the city of New York, merchant, hath made divers advances, and come under various responsibilities, for or on account of them, the said George D'Wolf and John Smith, individually or separately, but not jointly, in an open account between him and them separately, having an unsettled balance due from each of them to him; and whereas he the

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

[2] [Affirmed in 4 Pet. (29 U. S.) 147.]

said James D'Wolf, jr. hath consented and agreed to and with the said George D'Wolf and John Smith, individually, to make to each of them, and on their separate account, further advances, and come under further responsibilities, from time to time. as the nature and exigencies of their separate business may require, and as he the said James D'Wolf, jr. may, from time to time, arrange and agree with them individually, or either of them, so to do. For all which advances and responsibilities, of every nature and kind whatsoever, including, as well those already made or incurred, as those hereafter to be made or incurred, and also the commissions and all other expenses and charges of the said James D'Wolf, jr. in and about the same, they, the said George D'Wolf and John Smith. have severally, each one on his own account and for his separate debts or liabilities, incurred or to be incurred on his separate account, agreed to secure and indemnify the said James D'Wolf. jr. by an assignment, pledge, and hypothecation, of all and singular their separate shares and interests in the aforesaid ship and three brigs, their respective tackle, apparel, furniture, and cargoes, and the proceeds of such cargoes, in the manner herein stated and set forth.

"Now, therefore, know ye, that we, the said George D'Wolf and John Smith, in consideration of the premises, and of one dollar to us severally in hand paid by the said James D'Wolf, jr. at or before the ensealing and delivery of these presents. the receipt whereof is hereby acknowledged, have severally granted, bargained, and sold, assigned, transferred, and set over, and by these presents do severally grant, bargain, sell, assign, transfer, and set over, unto the said James D'Wolf, jr. his executors, administrators, and assigns. all and singular the aforesaid ship Octavia, and the said three brigs Quill, Arab, and Friendship, their respective bodies, tackle, apparel, furniture, boats, and cargoes aforesaid, and the proceeds and investments of such cargoes, and also all and singular our and each of our separate and individual parts, right, title, interest, claim. property, and demand whatsoever, of, in, and to the same, and each and every of them, and every part thereof, to have and to hold all and singular the above granted and bargained premises unto the said James D'Wolf, jr. his executors, administrators, and assigns, to his and their own proper use, benefit, and behoof forever.

"Provided always, and these presents and the assignment, pledge, and hypothecation hereby made, are upon the express condition, that if, at any time or times hereafter, we severally, or our respective executors, administrators, or assigns, shall and do, well and truly pay, or cause to be paid, unto the said James D'Wolf, jr. his executors, administrators, or assigns, all and singular such sum or sums of money, accounts, claims, and demands, as may then be due and owing to him from us respectively, and all responsibilities and undertakings, whereby he may therein any way be bound or holden for us severally, or our own separate accounts, including therein his commissions and all other lawful charges, expenses, and interest, and interest properly chargeable thereon, then these presents are to become null and void, but otherwise to be and remain in full force and virtue against both or either of us making default, as the case may happen to be, and in case of such default, as against both or either of us, the said James D'Wolf, jr. his executors, administrators, or assigns, shall and may, at any time or times hereafter, at his pleasure, enforce the hypothecation and pledge hereby made, by process and arrest of the said assigned premises, or any part thereof, in all courts or places whatsoever, and cause the same to be sold, and the proceeds thereof applied in satisfaction of the moneys which may then be due him from us respectively, or either of us, or for which he may then be holden or bound for us respectively, or either of us; and it is hereby expressly understood and agreed by and between us respectively, and the same James D'Wolf, jr. that all insurance, effected and to be effected upon the said vessels and cargoes, or either of them, for or on our respective accounts, shall be and enure to his benefit, and the policies thereof shall be in due form assigned to him, as an additional collateral security, and also, that he shall be at liberty, at any time or times hereafter, and he is hereby authorized by us respectively, to insure his interest in the said vessels and cargoes, any or either of them, under this assignment, and to debit us individually, in account with the premiums, which premiums are also to be protected and covered by these presents.

"But it is further also understood, that the separate interests of one of us, in the said ship, brigs, and cargoes, is not bound for the separate debts or liabilities incurred or to be incurred on account of the other, but the interest of each shall be held bound only on his own account."

The plaintiff also produced his books of account, together with his correspondence with the said George D'Wolf and John Smith, and with other persons, their agents, and proved by said accounts and correspondence, and by the testimony of his book-keeper, and by the book-keeper and agent of the said George D'Wolf, that, at the date of said deed of assignment, the said George D'Wolf was indebted to the plaintiff in the sum of $308,000, and that John Smith, at the same period, was also indebted to the plaintiff in the sum of $135,000, for advances made, and goods purchased, on their account and by their order. And the plaintiff also proved, that a large part of the outward bound cargoes of the brigs Arab and Quill, and a large part of the outward bound cargo

of the ship Octavia, were furnished by the plaintiff, and by funds advanced by him for this purchase. And the plaintiff further proved, that George D'Wolf and John Smith had constantly been indebted to him, on their individual accounts, in large sums of money, from the date of said assignment to the present time, and that the balance, at this time, due to the plaintiff from George D'Wolf, was $59,500 and upwards, and that the balance due to him from John Smith was $142,375 and upwards. He further proved, that the balances due to him from the said George and John, on said 19th day of November, 1822, had never been extinguished; and that immediately after the failure of George D'Wolf and John Smith, on the 9th day of December, 1825, he gave written notice of the aforesaid assignment, and of his claims upon the property resulting therefrom, to the agent and correspondent of the said George D'Wolf and John Smith at Canton, to Messrs. Bryant & Sturgis, the owners of the brig Rob Roy, and to various other merchants in Boston, engaged in the Canton trade, and directed his agent in Boston, John A. Bacon, to be on the watch for all goods coming from Canton to Boston, consigned to John Smith and George D'Wolf, and to take possession of the same, whenever they might arrive, on the plaintiff's behalf, by virtue of said deed of assignment. The plaintiff then introduced the said John A. Bacon, as a witness, who testified, that on the 21st of August, 1826, the day of the arrival of the brig Rob Roy at Boston, with the said twenty-three cases of silk goods on board, he gave notice to the said Bryant & Sturgis, that the same were the property of the plaintiff, and claimed possession of them in his behalf, but was informed by Bryant & Sturgis, that the silks had already been attached, while yet in the harbour of Boston, by the creditors of George D'Wolf: That he, immediately after the arrival of said silks, gave notice to the collector for the port of Boston and Charlestown, that they were the property of the plaintiff, and claimed the right to enter them, in his behalf, at the custom-house in Boston, and that the said collector expressed no objection to this course, but desired, before the entry was made, to see the bills of lading and invoices of said silks, that thereupon he wrote to the plaintiff at New York, for the said bills of lading, and invoices, which he shortly after received from the plaintiff, together with the certificate of entry of the same at the custom-house in New York, and three several bonds to secure the duties upon the same, with a certificate indorsed thereon by the collector of New York, that said bonds would be considered as sufficient in New York: That thereupon the witness presented the said bills of lading, invoices, certificate of entry and bonds, to the collector of the port of Boston, and demanded possession of the silks, and was then informed by the collector, that he should cause the same to be attached at the suit of the United States, he, the said collector, having no doubt, that the same were liable for the debts of the said George D'Wolf, for duties due to the United States. The plaintiff further proved, that immediately after the arrival of said silks at Boston, in the said brig Rob Roy, the bills of lading and invoice of the same were forwarded to Bristol, in Rhode Island, and came to the hands of the said James Bayley, who, by direction previously received from the said George D'Wolf, who was absent from the United States, forthwith transmitted them to the plaintiff at New York. The plaintiff further proved, that, immediately after receiving said bills of lading and invoice, he presented the same, together with said assignment, to the collector of the port of New York, who, without hesitation, allowed him to enter said silks as his own property, and that thereupon they were entered by the plaintiff, as his own property, at the custom-house of New York, on the 28th day of August, 1826, ten days before the same were attached by the marshal of the district of Massachusetts.

The plaintiff then proved, that said twenty-three cases of silks, replevied, were part and parcel of the proceeds of said brig Arab and said ship Octavia, and that the same were attached by the marshal of the district of Massachusetts, on the 7th day of September, 1826, by virtue of certain writs against George D'Wolf, at the suit of the United States, and that the same were detained by the said marshal until they were replevied. The said bills of lading were not endorsed by the said George D'Wolf, or in his name, to the plaintiff, but the order of said George D'Wolf to said Bayley, who was his general agent in his business during his absence, was, to deliver the same to the plaintiff upon their arrival, so that the plaintiff might receive the property on its arrival, pursuant to the said assignment.

The defendant proved, that the said silks were imported into the United States, consigned to the said George D'Wolf and John Smith, and that, at the time of the importation of said silks, said George D'Wolf and John Smith were indebted to the United States on bonds, given by them respectively, for duties, which were then due and unpaid, to an amount much exceeding the value of the silks replevied. The plaintiff offered no evidence to prove, that any bills of sale of either of said vessels, reciting the register, or other bills of sale, except said deed, were ever made by said George D'Wolf or John Smith, to the plaintiff. The defendant further proved, and it was admitted by the plaintiff, that, at the time of the execution and delivery of said deed, the ship Octavia, with her cargo on board, was lying in the port of New York, nearly ready for sea, and that the plaintiff was there and resident there, and that said

ship and cargo continued to lie at New York for the space of thirty days after the execution and delivery of the deed.

The defendant offered evidence to prove, that bills of lading of the cargo of said ship Octavia were signed by the master of the ship, and regular sets thereof were delivered by him to said George D'Wolf and John Smith, prior to her sailing from the United States, and prior to the execution and delivery of said deed, and that said sets of bills of lading were, at the time of the execution and delivery of said deed, in the hands and possession of George D'Wolf and John Smith, by which bills of lading the cargo was consigned, and was to be delivered to the master of the ship Octavia, at her port or ports of destination, for sale, exchange, and returns, and that neither of said bills of lading were ever indorsed, assigned, or delivered, by George D'Wolf and John Smith, or either of them, to the plaintiff. The defendant further proved, that no possession was taken by the plaintiff of the ship Octavia and cargo, while she lay at the port of New York, and that no notice of said deed, or of any transfer or lien on said vessel or cargo, was given by the plaintiff to the master of said vessel, or transmitted by said master, or in said vessel, to any agent or other person, at the ports or places of destination of said vessels. The defendant further proved, that the bills of lading of the silks, now in question, were never, at any time, indorsed or assigned by George D'Wolf and John Smith to the plaintiff, nor to any other person, and that, prior to the arrival of said silks, George D'Wolf had left the United States, and that said bills of lading were sent to the plaintiff by a clerk of George D'Wolf, in consequence of directions left by George D'Wolf with him, to send all papers connected with the said vessels, or their cargoes and proceeds, to the plaintiff, to be dealt with according to the assignment. And the defendant further gave in evidence, that the ship Octavia was registered at the office of the collector for the said port of Boston and Charlestown, on the 25th of June, in the year 1825, in the name of Daniel N. Maurice and said George D'Wolf, and on the 25th of August, then next following, was sold by public auction (having been previously advertised for sale in the public gazettes, as usual in such cases), to Lot Wheelwright and sons, and the bill of sale was executed to them by the said George D'Wolf: That after the said ship departed on her voyage, in 1822, from New York, she, for the first time, arrived with a cargo at said port of Boston, on the 3d of June, 1825, which cargo came consigned to George D'Wolf and John Smith, and was by them entered at the custom-house in Boston, and the duties thereupon bonded by them: That the brig Arab, mentioned in the said assignment, was registered at the custom-house in Boston on the 1st of October, 1820, in the names of George D'Wolf and John Smith and one Robert Davis; that she proceeded, in that year, on a voyage, with a cargo, to the northwest coast of America, which was there sold, together with the vessel, by the agent of George D'Wolf and John Smith, after the date of said assignment: That the brig Quill, mentioned in the said assignment, was sold, after the date of the assignment, by public auction, in the month of November, 1823, after the usual notice of such intended sale in the public gazettes, to William Dehon, in Boston, and the bill of sale thereof executed by George D'Wolf to the said Dehon: And that the said brig Friendship, mentioned in the said assignment, was, at the date of the assignment, registered in the name of George D'Wolf, and that, while she so continued to be registered, she arrived at Boston with a cargo of merchandise, from a foreign port, consigned to George D'Wolf and John Smith, on the 3d day of May, 1824, and afterwards, with another cargo of merchandise from a foreign port, on the 3d of August of the same year, and also with another cargo of merchandise from a foreign port, on the 25th of July, in the year 1825, all of which cargoes were imported in said vessel into the port of Boston and Charlestown, under consignments to the said George D'Wolf and John Smith, and were by them and in their names entered and bonded; and that, on the 9th of December, 1825, the said brig was sold at Boston, by George D'Wolf, to one John Richards, to whom the same was transferred by George D'Wolf's bill of sale, and the vessel thereupon registered in the name of said Richards.

The plaintiff then proved, that, after the date of the assignment, in the month of March, 1823, the brig Friendship arrived at New York from Cuba, with a cargo of coffee on board, consigned to the plaintiff; that the coffee was received by the plaintiff, and sold for the sum of $31,000 and upwards, and the proceeds passed to the credit of George D'Wolf on the books of the plaintiff: And that also, after the date of the assignment, in the month of June, 1823, the brig Quill arrived at Newport, in the state of Rhode Island, from Canton, having on board sixty-eight cases of silk goods, consigned to George D'Wolf and John Smith, who immediately gave notice thereof to the plaintiff, and forwarded the said silks to him at New York, where they were received and sold, and the proceeds passed to the credit of George D'Wolf and John Smith, on the books of the plaintiff.

And the plaintiff further proved, that, as the brig Quill had on board a certain quantity of freight for Boston, after landing said silks she proceeded to that place, with the consent and approbation of the plaintiff; that, upon her arrival in Boston, the plaintiff constantly asserted his right to her in his letters to George D'Wolf and his agents, who proposed to sell her and forward the

proceeds to the plaintiff: That, thereupon, the said brig was, with the knowledge and assent of the plaintiff, sold in Boston by George D'Wolf, and the entire net proceeds, amounting to $7,280, transmitted to the plaintiff at New York, by him received, and passed to the credit of George D'Wolf and John Smith. And the plaintiff further proved, that upon the arrival of the ship Octavia at Boston, in the month of June, 1825, he immediately repaired to Boston, in person, and there received all that part of her cargo which came consigned to George D'Wolf and John Smith, to wit, two hundred and twenty-six cases of silk goods, and forwarded the same to New York, where they were received and sold by the plaintiff, and the entire proceeds passed to the credit of George D'Wolf and John Smith: And that he, also, in said month of June at Boston, in his own person, sold the ship Octavia to one Daniel N. Maurice, for the sum of $16,000 in cash, which the plaintiff received, and passed to the credit of George D'Wolf and John Smith: That, subsequently, the said Maurice re-sold three fourths of said ship to George D'Wolf in exchange for one quarter part of a cargo of sugar put on board of her by George D'Wolf, and that, as her register was in the sole name of George D'Wolf, but one fourth part of said ship was transferred by her register to said Maurice; the other three fourths remaining in the name of George D'Wolf. And it was proved, that the plaintiff constantly exercised such diligence to secure said vessels and their cargoes, as an anxious and careful creditor would ordinarily use, and there was no proof, that, on any particular occasion, he had omitted reasonable diligence to secure the same, after the arrival of the vessels in the United States. And the plaintiff further proved, that the deed of assignment was well known by several individuals in New York, at the time of its execution, and had become a matter of notoriety, among the merchants of Bristol, and insurance companies at Boston, for a long time before the failure of George D'Wolf and John Smith; and that George D'Wolf and John Smith were in good credit both in Boston and Bristol, up to the time of their failure in the month of December, 1825, and that the various policies of insurance, effected upon said vessels and cargoes, were endorsed by said George and John to the plaintiff, with the written consent of the offices in Boston, from eight to twelve months before their failure. And the plaintiff further proved, that George D'Wolf and John Smith, although connected in many joint enterprises of business, were not, and never had been, co-partners in trade, and that their several accounts were, and always had been, separately kept on the books of the plaintiff.

Upon this evidence, J. T. Austin, for plaintiff, contended, that by the operation of the abovementioned deed of assignment, and the consequent acts of the parties, the silks in question were the property of the plaintiff, and could not be holden upon the attachment made by the marshal on behalf of the United States, as the property of George D'Wolf.

G. Blake, Dist. Atty., for defendant, contended that the deed of assignment, made by George D'Wolf and Smith to the plaintiff, was fraudulent and void in law, as against the creditors of said D'Wolf and Smith; that it could not be considered as a bottomry bond, or contract of marine hypothecation, and although it might have been sufficient to effect a transfer of the specific vessels mentioned therein, and their cargoes, yet as the silks in question did not constitute a part of those specific cargoes, but were only purchased with the proceeds of them, the plaintiff could not recover them in this action: That if the jury should be satisfied from the evidence, that, at the time the assignment was executed, the Octavia, with her outward cargo on board, was lying in the port of New York, and remained there thirty days after that time, and that the plaintiff was, at the same time, resident there, and that the master of the Octavia had executed and delivered to D'Wolf and Smith bills of lading of her outward cargo, by which the cargo was to be delivered and consigned to the master for sales, exchange, and returns, at the ports of destination of said ship; and that the masters of the Quill, Arab, and Friendship, had, prior to the sailing of said vessels from the United States, executed and delivered to said D'Wolf and Smith similar bills of lading of their respective cargoes, consigned, and to be delivered, to their respective masters for sales, exchange, and returns, and that the same were, at the time said deed of assignment was executed, in the possession of said D'Wolf and Smith, and that neither of said bills of lading were ever delivered or transferred to the plaintiff, then that said deed of assignment was not a valid transfer of said cargoes, so as to defeat a subsequent attaching creditor having no notice of such deed: That the title to said vessels, Arab, Octavia, Quill, and Friendship, could not be transferred to the plaintiff, as against a subsequent attaching creditor, without notice, except by bill of sale reciting the register of said vessels: That if the silks in question, at the time of their importation into the United States, came consigned to said D'Wolf and Smith; and that, at the time of said importation and prior to the entry of said silks, said D'Wolf and Smith were indebted to the United States for bonds given for duties, then due and unpaid, and that the defendant attached said silks in pursuance of instructions from the collector, and by virtue of writs in favour of the United States, against said George D'Wolf, founded on such bonds; then that by virtue of the 62d section of the collection

act of the United States, passed March 2, 1799, these silks were, as to the United States, the goods of said D'Wolf and Smith, notwithstanding said deed of assignment, and were in the legal custody of the collector, and that the attachment in favour of the United States was sufficient to bar the plaintiff from maintaining this suit.

STORY, Circuit Justice, in summing up the case, said: This is an action of replevin for twenty-three cases of silks, valued at $6000. The defendant, who is the marshal of this district, has pleaded, first, non cepit; and, secondly, that the goods in question are the property of one George D'Wolf, and not of the plaintiff, and he makes an avowry for a return, stating, that the goods were attached by him, as marshal of the district, as the property of George D'Wolf, in a suit brought against him in behalf of the United States. Issue is joined between the parties upon both pleas.

The nature of the writ of replevin is such in general, that it requires the party, to maintain it, to have property in the goods, and an actual or constructive possession of them. The pleadings, however, in the present case, narrow down the case to the question of the taking of the goods, and whose property they were at the time of the attachment. Now the return of the marshal, which has been read, upon the writ of attachment, is conclusive upon the first issue, as to the taking, and establishes it beyond any possible doubt; and therefore the real question is upon the second issue, whether the property belonged to the plaintiff, so as to entitle him to maintain this action. The plaintiff claims them as the proceeds of the cargo of the ship Octavia and brig Arab, which were assigned to him by a deed of assignment, executed between himself on the one part, and George D'Wolf and John Smith on the other part, on the 19th of November, 1822, whereby he assigned the ship Octavia and cargo, and the brig Arab and cargo, and certain other vessels and cargoes, to the plaintiff, as security for certain advances made, and thereafter to be made, to them respectively, and according to their respective interests in the same, &c. &c. The first question is, as to the identity of these goods. Are they the proceeds of the cargoes of the Octavia and Arab, or either of them? If so, then the next question is, whether the plaintiff did acquire any legal title to them, as such proceeds, by virtue of the assignment above mentioned?

The first question is not much contested, and indeed seems to be made out by evidence, which, if believed, ought to be entirely satisfactory.

The second question depends upon the validity of the assignment itself, which has been controverted upon several grounds. In the first place, it is said, that, assuming the assignment to be bona fide, still no legal title to these proceeds vested in the plaintiff, or could so vest. The terms of the assignment are indeed admitted to be sufficient to pass the legal title, if it could pass at all; for the words not only grant and convey the original cargoes themselves, but also the "proceeds" of them. It is unnecessary, therefore, to say, what would be the case, if the words of the assignment had been confined to a mere conveyance of the original cargoes, although I profess to feel no difficulty on this point, considering that a grant of personal property carries with it a right to all the proceeds into which it may be afterwards converted by barter or otherwise. See Taylor v. Plumer, 3 Maule & S. 562. My judgment is clear, that at law the assignment was sufficient to carry the legal title to the proceeds. The argument is, that at law the proceeds of a cargo are incapable of being transferred; and the title is recognized only in equity. I think otherwise. A grant of goods, or of the proceeds of goods, confers on the grantee a good title at law to such proceeds, and vests a present legal interest capable of being vindicated in an action of replevin; and if there were no other objection to the assignment, this would present no obstacle to the plaintiff's recovery.

But in the next place, it is objected, that the assignment is not bona fide, but fraudulent in point of law and fact, in respect to creditors. I admit, that it is not, upon its face, a bottomry instrument, or maritime hypothecation. It does not purport to contain any clause or clauses taking marine risks, or claiming marine interest. It purports to be, not an absolute and indefeasible conveyance of the vessels and the cargoes, but a conveyance of them as security for advances already made, and thereafter to be made, to the assignors respectively. It is therefore, in its nature and essence, a mortgage, or conditional grant. It is not, as has been supposed at the bar, a mere pledge or deposit, if those words are to be understood in their strict meaning, but a conveyance or assignment of the goods themselves and their proceeds, as security. It is not the case of a lien, or special interest, but of a general grant, as security. Such a conveyance may be valid in point of law, although given for future advances, if it be bona fide and for a valuable consideration. This will hardly be denied, and indeed has been most solemnly settled. What then are the objections to it? It has been said, that it was fraudulent in its original concoction and intention in fact. But that point is not now insisted on. But it is still insisted, that, however innocent it may have been in intention, it is fraudulent in point of law, as to creditors. It is a case of constructive fraud. The circumstances relied upon to establish this result, I shall now proceed to consider. It is true, that the ad-

vances made, and to be made, were very large, and indeed the whole credits exceed $300,000. But George D'Wolf and John Smith were merchants in large business at the time, in good credit, and the times of payment were necessarily indefinite, being dependent upon the success of their commercial enterprises. The assignment embraces four vessels and their cargoes, all of which, except the ship Octavia, were at the time of the assignment, on foreign voyages to the northwest coast and China. The Octavia was, at the time, in the port of New York, with a cargo on board, and then bound on a like voyage. The plaintiff was a merchant of New York, and George D'Wolf and Smith were merchants of Rhode Island. The assignment was prepared and executed by all the parties at New York.

The first objection is, that the original bills of lading of the several cargoes were not delivered over to the plaintiff at the time of the execution of the assignment, or indeed at any subsequent period, although they must be presumed to be in the possession and control of D'Wolf and Smith. The fact is so; but the argument, that the assignment was therefore void, is a non sequitur. I have already stated, that all these vessels, except the Octavia, with their cargoes, were at sea when the assignment was made. It is also material to state, that the bills of lading were upon shipments made by the owners, but consigned, not to them or their order, but to the masters of the respective vessels, or their order, for sales and returns. Without question one set of these bills remained, as is usual, in the hands of the owners, as vouchers of their interest in the shipments. And if the set so in their hands had been indorsed to a bona fide purchaser, for a valuable consideration, without notice, it might have given him a title, if it had words of sufficient legal efficacy for this purpose, which might overreach the title under this assignment. But then it must have been because the words of the endorsement were effectual as an assignment of the shipments, and the circumstances such as would justly give a legal priority. The argument at the bar, upon the nature and effect of the endorsement of a bill of lading to convey a legal title, proceeds upon a mistake. The endorsement of a bill of lading, to convey such a title, must be made by a party authorized to make it, that is, by the person, to whom, or whose order, the goods are consigned. The consignee alone, and not the owner of the goods, can convey the same by an endorsement; for the negotiability of the bill of lading is limited to the persons to whom, or whose order, it is made transferable. Now, in all these cases, the cargoes were consigned to the masters for sales and returns, and they alone were competent to convey a title by an endorsement of the bill of lading, and a purchaser, claiming a title bona fide from them, without notice, by an endorsement of the bills of lading by them, would be entitled to hold the same against every other person. The owner indeed, subject to this power of the master, in the intermediate time, to defeat the title by a bona fide endorsement, may, by an assignment on the back of the bills of lading retained by him, or by a separate instrument, convey a good title to any third person, against every person but a bona fide purchaser. But this results from his general right and interest, as owner, and not as holder of the bills of lading. In the present case, there is no claim made by any such purchaser. It is a struggle by creditors to overturn the assignment. My opinion is, that the delivery of the bills of lading in this case, being such as I have stated, containing a consignment, not to the owners but to the masters, were not necessary to be delivered or indorsed to the plaintiff, by the owners, to perfect the title of the plaintiff to the cargoes conveyed by the assignment, if in all other respects it is valid. The circumstance is open to observation upon the point of bona fides. It is not necessarily inconsistent with good faith. It is not indispensable to convey a legal title. The fact, such as it is, is for the consideration of the jury, as far as it touches the allegation of fraud, but not as a reason for impeaching the legal validity of the assignment, upon the ground relied on at the argument.

Another objection is, that no bills of sale of these vessels were executed, reciting the registers, or change of registers, which, it is contended, is fatal to the transfer. The law is clearly otherwise. Our ship registry acts do not, like the English act, render the transfer a nullity, unless the bill of sale contains such a recital, and in all other respects the transfer conforms to the registry acts. On the contrary, they leave the transfer to have its full effect, according to the principles of the common law. The only penalty of a non-recital of the register, and a correspondent change of papers, is, that the vessel ceases to enjoy the privileges of an American ship. This is applicable to the transfers of ships in port, and a fortiori the doctrine applies to ships at sea, where, pending the voyage, a change of papers is impracticable. U. S. v. Willings, 4 Cranch [8 U. S.] 48.

Another objection relates mere especially to the transfer of the ship Octavia and cargo. At the execution of the assignment she was lying with her cargo on board, bound on a voyage, and no actual delivery or possession of them took place by the plaintiff, which, it is contended, is indispensable to perfect the title. If this objection were well founded, it would not affect the conveyance of the other vessels and cargoes, which were at sea, if the assignment were bona fide; for it may be good as to part of the property conveyed, and fail as to the residue. But let the objection itself be considered, with reference to the circumstances of this case. Whatever may be its validity, in cases of an absolute

sale of a ship and cargo while in port, the same principle does not apply generally to cases of a defeasible conveyance. The general rule, upon transfers of personal property, is, that possession should accompany and follow the deed. But if, by the terms of the contract itself, or by necessary implication, the parties agree, that the possession shall remain in the vendor, such possession is consistent with the deed, and does not avoid its operation in point of law, unless it be in fact fraudulent. Now, in cases of mortgages, like the present, the possession of the mortgagor, at least until a breach of the condition, is perfectly consistent with the terms of the deed, and the intention of the parties. Indeed the present assignment demonstrates, that the parties could have no other intent. The object is avowed on the face of the instrument. The vessels and cargoes were to be under the direction of the mortgagors, for they had a substantial, resulting interest in the voyages. The only object of the parties was to give collateral security upon the vessels and cargoes for advances. Was this a lawful intent? Clearly it was. Was the agreement of the parties, that the possession and control of the vessels and cargoes, during their voyages, should be in the mortgagors, in point of law, and of itself, a constructive fraud, however innocent the intentions of the parties might be? I answer no. It was a circumstance open to explanation. If the assignment was, in all other respects, bona fide; if the want of possession was consistent with the terms of the deed, and indeed flowed from it; if the parties acted honestly and fairly, and held out no false colours to deceive creditors; then there is nothing in this circumstance which destroys the legal validity of the assignment.

Many authorities have been cited at the bar on this point; and some of them, from the Massachusetts Reports, have been pressed upon the court, as if they justified a different doctrine. See 2 Pick. 599; 17 Mass. 110; 2 Term R. 485; 9 Johns. 337. My opinion is that they are in perfect harmony with it. But if there be any difference between them and the decisions in New York, the latter must prevail in this cause; for this is a New York transaction, and is to be judged of by the test of New York law. Without going into the authorities at large, it is sufficient to say, that one of the most recent cases, Bissel v. Hopkins, 3 Cow. 166, is directly in point.[3]

Another objection is, that the plaintiff could acquire no title to the return cargoes, or proceeds of the property passing under the assignment, because all the bills of lading therefor were made out and consigned to George D'Wolf and Smith, as owners, and not to the plaintiff. It is said that this vested the property exclusively in them. The apparent ownership, upon the bills of lading, is conclusive upon no one, unless it be in favor of a bona fide purchaser, for a valuable consideration, under the consignee, which is not the present case. If a person has bona fide parted with his interest in a shipment, by a legal conveyance, the mere fact, that on the bills of lading he remains the ostensible owner, or consignee (as indeed he usually must, where the transfer is made while the ship is at sea), will not divest the title of the purchaser. It is sufficient if, as soon as he reasonably may after the return of the ship, he takes possession of the proceeds. In respect to the other return shipments in other vessels, if the evidence is believed, it establishes sincere and effectual diligence in obtaining the possession and sale of them. I will advert to the evidence in a summary manner. (Here the judge summed it up.) As to the twenty-three cases of silks, now in question, it is manifest, that every reasonable effort was made to take possession of them as soon as possible after their arrival in the Rob Roy at Boston. An agent was specially employed for the purpose. He gave immediate notice of the plaintiff's title at the custom-house. The bills of lading were transmitted to Bristol in Rhode Island to the agent of George D'Wolf there, who, in pursuance of an express authority for this purpose, immediately endorsed them, and sent them to the plaintiff at New York without delay. The Rob Roy arrived at Boston on the 25th of August, and on the 28th of the same month, the plaintiff applied at the custom-house at New York to have the goods entered there, having then possession of the bills of lading. So that, if the jury believe the evidence, it seems hardly possible to doubt, that there was extreme diligence in the pursuit of possession of the silks.

Another objection of a broader cast, and going to the original concoction of the assignment, is, that its object was to hold out the mortgagors as absolute owners of all the property covered by the assignment, and thereby to deceive the United States in particular, and the public at large, and that, in fact, they were so deceived, and gave credit to the mortgagors accordingly. Now, if such was the object of the parties, it was a fraudulent transaction, and as such it was void, as to all persons affected by the fraud, and especially as to creditors. On the other hand, if no false colours were held out; if the assignment was bona fide made for a valuable consideration, it would be valid, although it were given as security merely for future advances, and not as the present was, for past as well as future advances. The law does not prohibit such a transaction. How is the fact? It is said, that the assignment was concealed from the public, and that there has been gross negligence and fraud in the arrangements and management between the parties under it. That is for the consideration of the jury, under all the circumstances. As to the

[3] See, also, the learned note of the editor, in 3 Cow. 189, where nearly all the cases are collected. Bartlett v. Williams, 1 Pick. 288; Badlam v. Tucker, Id. 389; Dawes v. Cope, 4 Bin. 258

concealment, there is positive testimony, that the assignment was publicly known at Bristol, for at least two years before the failure of the mortgagors, and yet that their credit was not affected by it there, either in commerce generally, or in discounts at the banks. There is also evidence of its having been known for a long time before the failure at New York and at Boston. The indorsements on the policies at Boston demonstrate the existence of such knowledge, from the times they were respectively made, to the extent of the interest thereby assigned. Yet it is in proof, and not denied, that George D'Wolf continued to have large credits afterwards at the Boston banks.

I agree to the doctrine asserted at the bar, that if there has here been a fraudulent concealment of the assignment, or gross negligence, such as establishes an original fraudulent design, the assignment is void in toto. It is void ab initio, in respect to creditors injured by the fraud, as to all the property included in it, whether there has been any concealment of the title to the twenty-three cases of silks or not, and whether, as to them, there has been due diligence in taking possession or not. But if the assignment was bona fide, mere negligence as to one particular shipment in taking possession, would not take away the title to other shipments, as to which there was due diligence. The question reduces itself, then, to a question of good faith, valuable consideration, and reasonable diligence.

Then, again, it is said, that if D'Wolf and Smith failed to make the payments stipulated in the assignment, at the times therein stated, there was a breach of the condition, and the assignment became an absolute conveyance, exactly as if it had been originally without any such condition, so that possession must be taken subsequently in the same manner, as is by law required under absolute conveyances. What would be the effect of such a breach of the condition, whether it would wholly defeat any right or title of redemption of the assignors, or whether they would still be deemed, at least in a court of equity, to possess an interest in the proceeds beyond what would be necessary to pay the debts due for advances, need not be discussed in the present case. We may here confine ourselves to the objects and intentions of the parties, as disclosed in the assignment itself. If the possession has gone accordingly, and the shipments have been left under the control of the assignors no longer than those objects and intentions required, and the whole transactions have been bona fide, there is no principle of law, which precludes the plaintiff's right of recovery. Then, again, it is said, that the assignment of the policies was not made at the time provided for by the assignment. So far as this is true, it is for the consideration of the jury; they have heard the reasons for the delay, and will form their own conclusions as to the effect of this circumstance upon the point of fraud.

Another circumstance, relied on as presumptive of fraud, is, that no notice of the assignment was given to the masters of the ships. In respect to those on the northwest coast, or in the Pacific ocean, it is not shown, that it was either practicable or important. In respect to the ship Octavia, as she was then in the port of New York, it was certainly practicable. But if the whole management of the voyages was, by the express agreement of the parties, to remain under the control of the assignors, until the return of the ships, such notice could not have varied the case, unless so far as the want of such notice is presumptive of fraud. Other circumstances have been relied upon for the same purpose. Such as the control of George D'Wolf and Smith over all the vessels and cargoes during their voyages; the consignment of the return cargoes to them; their entry of them at the custom-houses; the circumstances connected with the sale of the ship Octavia after her return; the arbitration and award with the master of the Quill respecting his adventure. So far as these are presumptive of fraud, they are fairly before the jury, with all the explanations which belong to them. (The judge here recapitulated the evidence on these points, and left it to the jury.)

Another objection to the plaintiff's right of recovery, in this action, is, that Capt. Meek was a joint owner with the plaintiff in the twenty-three cases of silks; and in an action of replevin no recovery can be had by one part-owner, without joining all the other part-owners as plaintiffs in the suit. The doctrine is undoubtedly true, that where a personal chattel is owned by several persons, all ought to join in a writ of replevin for it; and one part-owner has no right to bring such suit severally for his own share. If he does, and the objection is taken by way of plea in abatement, the writ will abate. And if he sues for a moiety only in his writ, the court will ex officio abate it. But I am clearly of opinion, that where the action is brought for the whole chattel, the exception is pleadable in abatement only, and is not a plea to the merits; and that pleading over to the merits is a waiver of it. In this case, my judgment would be, that the exception, if it were well founded, comes too late; it is not proper evidence under either of the pleas filed by the defendant. The defendant has no right to retain the property, unless it belonged to George D'Wolf; and it is of consequence to him, if the plaintiff is part-owner only, for as against every one but the other part-owner, or some person claiming his title, he has a right to the possession of the whole. A fortiori he has against a wrong-doer. Nor do I think that the cases cited from the Massachusetts Reports contradict this doctrine.[4] And if there be any contradiction in them I should incline to follow the earlier author-

[4] See Hart v. Fitzgerald, 2 Mass. 509; Portland Bank v. Stubbs, 6 Mass. 422; Gardner v. Dutch, 9 Mass. 427; Page v. Weeks, 13 Mass. 199; Ladd v. Billings, 15 Mass. 15.

ities as standing on the better legal reasoning. Still, though this is my opinion, I shall desire the jury to find this fact specially, and a special verdict for the plaintiff upon it, if Capt. Meek is a part-owner, enabling the court, however, to enter a general verdict for the plaintiff, if it shall be of opinion, that this exception cannot now prevail, and if the jury are in all other respects satisfied, that the plaintiff is entitled to recover. (The judge then summed up the facts as to the supposed joint ownership.)

The last objection, which it is necessary to notice, is that founded on the proviso contained in the 62d section of the revenue collection of 1799, c. 128. That proviso declares, "And to prevent frauds arising from collusive transfers, it is hereby declared, that all goods, wares, and merchandise, imported into the United States, shall, for the purposes of this act, be deemed and held to be the property of the persons to whom the said goods, &c. may be consigned, any sale, transfer, or assignment, prior to the entry and payment, or securing payment, of the duties on the said goods, &c. and the payment of all bonds then due and unsatisfied, by the said consignee, to the contrary notwithstanding." Upon a careful consideration of the whole section, my opinion is, that this clause has no reference whatsoever to the general question of property between vendor and vendee, and meant not to meddle with it. The sole object was the security of the duties to the government. A credit is allowed upon such duties to all importers, who have not any duty bonds due and unpaid at the time of the mportation. Of persons in this predicament, payment of the duties is immediately demandable. The object of the proviso was, to prevent collusive transfers to obtain this credit, and evade this salutary restriction. The proviso was therefore intended to make the consignee, at all times, liable, as the importer and owner, so far as the duties were concerned, or, in the language of the proviso, "for the purposes of this act." Subject to this exception, the bona fide owner of the goods is entitled to vindicate his title to the same, as his lawful property, whoever the consignee may be. These are the most material considerations for the jury, upon the arguments made by the parties, and they will govern themselves accordingly.

General verdict for the plaintiff.

[NOTE. The defendant took the case on error to the supreme court, which affirmed the decision, mainly on the authority of its previous decisions in Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.) 386, and Harris v. Dennie, 3 Pet. (28 U. S.) 294. The opinion was delivered by Chief Justice Marshall. See Harris v. D'Wolf, 4 Pet. (29 U. S.) 147.]

D'WOLF (RABAUD v.). See Case No. 11,519.

D'WOLF (SAVAGE v.). See Case No. 12,383.

D'WOLF (VERNON v.). See Case No. 16,922.

Case No. 4,222.

The D. W. VAUGHAN.

[9 Ben. 26.] [1]

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

SALVAGE—MASTER'S CLAIM—PRIORITY—WAIVER—COSTS.

Where a schooner, encountered in distress at sea, was towed into the harbor of New York by a steamship, and was libelled by the steamship, claiming salvage, by the master and crew of the schooner herself claiming salvage, and by the master claiming also for supplies, advances and expenses for the schooner: *Held*, that the service rendered by the steamship was a salvage and not a towage service, but the services rendered by the master and crew of the schooner were not salvage services; that the master had no claim against the fund in court, except for the pumping necessary to save the vessel after arrival; and that no deduction would be made from the salvage awarded the steamship by reason of the payment upon consent of certain demands as liens upon the schooner, for which the owners were also personally liable, out of the fund. Such consent on the part of the owners must be deemed an admission that these demands were not to be chargeable with any portion of the salvage; and after paying the master and steam-pump owner for pumping and the fees of officers of court, the remainder of the fund must be paid to the libellant in the first action as salvage.

[Cited in The Marie Anne, 48 Fed. 748.]

The schooner D. W. Vaughan on a voyage from Cape Henry to New York with a cargo of pine wood, was disabled and was encountered in distress by the steamship Queen, of the National Line, bound to New York from Liverpool. The schooner had lost her steering-gear, her pumps were broken, and she was but a few miles from the Long Island shore. She was taken in tow, and brought into port; her master and crew were requested to come on board the steamship, but preferred to stay on board their vessel, though she was in some danger, the weather being still heavy. The master offered $1000 to be towed into New York, but no bargain was made at the time. On arriving in port, the master of the schooner got a steam-pump at work to keep his vessel afloat. The steamship company asked for their services $3000, and as the owners of the schooner thought it too much, they offered to leave the matter to arbitration, which was refused. Thereupon the schooner was libelled for salvage, and sold under order of court for $2818. The master and crew of the schooner also libelled, claiming $1500 salvage for their exertions in behalf of their vessel after she was taken in tow; and the master also filed a separate libel, claiming for advances to the crew and supplies to the schooner and for pumping her after arrival in port in charge of the salvors.

Pending the adjudication of these actions, by consent of all parties certain claims considered to be liens upon the vessel were

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

paid out of the proceeds of the sale of the schooner, leaving the sum of $1139.07 for distribution.

The three actions were tried together, and one decree made.

John Chetwood, for the Steamship Co.

D. & T. McMahon, for the schooner.

D. & T. McMahon, for the master and crew.

John J. Allen, for other libellants.

BENEDICT, District Judge. These three causes have been tried together. The first cause instituted was that of John T. Bragg, master of the steamship Queen, in behalf of himself and the owners of the Queen, to recover of the schooner D. W. Vaughan and her cargo a salvage compensation for services rendered in bringing that schooner into the port of New York in distress.

To this libel the owners of the schooner made answer, admitting that a service had been rendered by the Queen to the Vaughan, but averring that the service was simply towage service and that no salvage service was performed. They also aver an offer to pay a liberal price for the towage service, and a refusal to accept by the owners of the Queen.

The next libel is that of Alvarado Johnson, the master of the same schooner, who seeks to enforce against the vessel commanded by him a lien for moneys advanced by him for the use of the schooner upon the voyage broken up by the disaster. This demand consists of $80 paid for supplies bought for the vessel on commencing the voyage; of $106.40 paid to the seamen for wages earned on the voyage, and for $50 paid by him for pumping the vessel after her arrival at the dock in charge of the salvors.

The third libel is by the same Alvarado Johnson, in behalf of himself and the crew of the schooner, to recover of the schooner and her cargo for salvage services rendered by the master and the crew of the schooner, on the same occasion set forth in the libel of the steamer. The amount of this demand is $1,500.

The schooner and her cargo having been seized by the marshal, under process issued in the first action, was thereafter sold under the order of the court and the proceeds are now in the registry, less certain sums, that, with the assent of all parties, have been paid to the holders of certain demands against the schooner. The proceeds of the schooner and cargo amounted to $2,818.50, of which there remains undisposed of the sum of $1,139.07.

An extended examination of the facts proved by the evidence in support of the demand of the steamer for salvage is unnecessary, as plainly enough a salvage service of great importance was rendered by which the schooner and her cargo was saved from total loss, to compensate which the remnant in court, subject to distribution to the salvors, is no more than sufficient. An effort was made to show that a deduction should be made from what would otherwise be the proper reward to the salvors, because of a refusal on the part of the salvors to accept a fair offer or to make a proper adjustment of their demand without suit, and because of the loss occasioned to the owners of the salved property by reason of the proceedings taken to enforce the salvors' claim. But I am unable to see any cause for just complaint in this respect. The demand of the salvors was not exorbitant. They offered to leave it out to a third person, and they are not responsible for the incidental losses arising from the seizure and sale of the saved property.

In regard to the claim of the master and crew of the schooner to be paid some $1,500 by way of salvage, because of their refusal to leave their vessel and to go on board the steamship, as was desired, and in working on board the schooner while she was in tow of the steamer, it need only be said that the master and crew did no more than their duty and cannot claim salvage therefor.

The claim of the master of a lien upon his vessel for the amount of certain advances made by him at the outset of the voyage, assuming that such a lien exists, is not entitled to a priority in payment over the claims of the salvors. If by reason of a lien the master had an interest in this vessel, that interest was saved to him by the services of the salvors, and it became subject to a charge in their behalf. But it is contended that certain liens upon the vessel saved by the salvage service, which have been paid out of the proceeds of the saved property, should bear their proper proportion of the burden thereof, and that there must be an abatement from the sum to be paid the salvors out of the fund in court to the extent of the proportion of salvage chargeable upon these liens, because the salvors assented to the payment of these liens without deducting anything for salvage, and thereby to that extent waived their right to salvage, and can now obtain from the fund remaining only that portion of their reward chargeable against the interest of the owners of the vessel vessel after deducting the amount of the liens. But the assent of the salvors to the payment, out of the fund in court, of demands against the vessel and her owners, conceded by the owners to be due and which the owners of the schooner consented should be paid out of the fund in court, was no waiver of any part of the claim of the salvors. The demands so paid were due from the owners personally as well as from the schooner, and the payment thereof out of the proceeds of the vessel in court effected a discharge of the owners from a personal liability to that amount. It was therefore

solely in the interest of the owners of the vessel, that part of the proceeds of the vessel was applied to the payment of these debts, and it was for them, if they intended ever to contend that those debts should be charged with salvage, to see to it that such charge was made before payment. By consenting to the payment of these demands without deduction for salvage, the owners must be deemed to have admitted that such demands were not to be chargeable with any portion of the salvage, and having by the payment in full procured themselves to be relieved from personal liability to the holders of those demands, they cannot be permitted now to say as against the salvors that those demands were subject to a deduction for salvage which not having been made at the time must now be made from the salvors' reward.

As far as I can gather from the evidence, the master did actually pay $50 in money to persons engaged in pumping the vessel after her arrival in New York, partly at least before the marshal took charge. This $50 may be repaid him out of the fund as part of the expenses of preserving the property. He is not entitled to costs.

There seems also to be another bill of $70 due John C. Baxter & Co., which may be paid to them upon their making proof of the demand and that it is not paid. The remainder of the fund, less the fees of officers of court, must be distributed to the libellants in the first entitled action.

DYEING, BLEACHING & CALENDERING CO. (NESMITH v.). See Case No. 10,124.

DYER (BANK OF ALEXANDRIA v.). See Case No. 847.

DYER (BROWNELL v.). See Case No. 2,038.

DYER (CENTRAL PAC. R. CO. v.). See Case No. 2,552.

Case No. 4,223.

DYER v. COYLE.

[2 Cranch, C. C. 684.][1]

Circuit Court, District of Columbia. May Term, 1826.

REPLEVIN—GOODS DISTRAINED FOR TAXES.

Goods distrained by a collector of taxes in the city of Washington, cannot be replevied without a special order from a justice of the peace, as required by the Maryland act of 1790, c. 53.

Replevin for goods distrained by a city collector of taxes in Washington.

Mr. Wallach, for defendant, moved the court to quash the writ, or that the court would direct a non-pros to be entered; because the goods were distrained by the city collector for taxes due to the corporation of Washington.

By the twelfth section of the amended charter of Washington, of May 15, 1820, it is enacted that the provisions of the Acts of Assembly of Maryland (1785, c. 34, and 1790, c. 53), relating to the right of replevying property taken in execution for public taxes, shall apply to all cases of personal property taken by distress to satisfy taxes imposed by virtue of that act. The Maryland act of 1785, c. 34, prohibits replevin of goods taken in execution for taxes and public dues, but the act of 1790, c. 53, permits it upon application to a magistrate and his warrant therefor. No such warrant had been obtained.

Mr. Smith, for plaintiff, contra, relied upon the fact that the property, for which the tax was laid, was not liable to taxation.

THE COURT (nem. con.) directed the non-pros to be entered.

DYER (GAYLOR v.). See Case No. 5,283.

DYER (LANE v.). See Case No. 8,050.

Case No. 4,224.

DYER et al. v. NATIONAL STEAM NAV. CO.

[3 Ben. 173.][1]

District Court, E. D. New York. March, 1869.[2]

COLLISION OFF FIRE ISLAND—SHIP AND STEAMER—STOPPING—LOOKOUT.

1. Where a ship and a steamer were both sunk by coming in collision at sea, the night being dark but starlight, the wind being from the north northwest, the ship sailing to westward close hauled on her starboard tack, about seven and a half knots an hour, and the steamer sailing ten to eleven knots, on a course stated by the officer of her deck to be east and by her master to be southeast three fourths east: *Held*, That although evidence was given, on behalf of the steamer, estimating the distance of the ship, when she was first seen, at several miles, yet estimates of time and distance cannot be relied on, and are here overborne by the sequence of events, stated by the witnesses, which shows that when the steamer's helm was first changed, it was got hard-a-port as soon as possible and the engine at once stopped and reversed.

2. Therefore, it must be concluded that either the ship was not seen by the lookout as soon as she ought to have been, or if seen, failed to receive proper attention from the officer of the deck, of which last fact there was some other evidence in the case.

3. If the ship was seen three or four miles off, as claimed, the steamer was in fault for not sooner stopping and backing, for the helm was shown to have been ported as soon as she was seen, and yet the witnesses testified that porting made no change in the bearing of the ship. It was her duty, under such circumstances, as soon as she discovered she was not shaking off the ship's light by porting, to have checked her speed and ascertained which way the ship was sailing.

[Cited in The Manitoba, Case No. 9,029.]

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

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

[2] [Affirmed and modified in Case No. 4,225.]

4. On the evidence the fault charged against the ship of not holding her course was not made out.

5. The lookout on the ship having been killed by the collision and having been proved to have been on duty before the collision and to have reported the lights of the steamer, no fault could be charged upon the ship in this regard.

6. The owners of the steamer were liable for the damages occasioned by the loss of the ship in the collision.

[This was a suit in admiralty by Joseph W. Dyer and others against the National Steam Navigation Company.]

E. C. Benedict and Scudder & Carter, for libellants.

C. Donohue and John Chetwood, for respondents.

BENEDICT, District Judge. This is a cause of damage arising out of the following circumstances: The ship Kate Dyer owned by the libellants was, on the night of the eighth day of September, 1866, off Fire Island, bound from Callao to New York, fully laden. The night was dark, and bitter cold, but starlight, and a ship's lights could be seen for several miles. The wind was blowing fresh from the north north-west, and the ship was sailing to westward, close hauled upon the starboard tack at a speed of about seven and a half knots, with all the proper lights displayed and in charge of a pilot.

The steamer Scotland, owned by the defendants, and bound from New York to Liverpool, was proceeding at a speed of ten to eleven knots, upon a course declared by the officer of the deck to be due east, and by the master to be southeast three fourths east, displaying also the proper lights. The two vessels came in contact at about right angles, the steamer striking the starboard bow of the ship, and having at the time sufficient headway to carry her over the ship and for a considerable distance to leeward before she was stopped.

The effect of the collision was such as to cause the ship to go to the bottom so rapidly that twelve of the persons on board, including the mate, were drowned, while the steamer herself was so injured that although at once put about she could only reach the Outer Middle, when she sunk and became also a total loss. This action is brought to recover the damages caused by the loss of the Dyer, her cargo and freight, amounting in all to some $255,000.

The averments of the libel, bearing upon the points in controversy upon the evidence, are that the night was fine and clear and the ship close-hauled; that the masthead light of the steamer was seen about two points over the starboard bow of the ship and distant two and a-half to three miles; that the ship held steadily to her course, and, as the light approached, it grew broader and broader abeam, but closer and closer to the ship, and it was apparent that the steamer was attempting to cross the ship's bows, with her helm nearly or quite hard a-port; that danger seeming imminent, the ship's helm was put hard up and the spanker let go, but, before the orders could be obeyed, the steamer came into the ship at full speed striking her upon the starboard bow.

The answer admits that the night was clear, and avers that the steamer's lights could be seen at a much greater distance than three miles; that the Scotland was on a course about east, and, while so heading, discovered the lights of the ship about one and a-half points off the port bow; that in order to give the ship a wide berth, and when the ship was at least three to four miles off, the helm of the steamer was ported, altering her course to starboard, as she proceeded; that, thereafter, the persons in charge of the steamer discovered that the ship was falling off to the southward and down on the steamship, and that the only thing then left for the steamer was, to put her helm hard a-port and stop and back, which she did, and at the time of collision had changed about four points, being struck by the ship on her port bow.

The evidence produced in support of these respective averments is contradictory, and, in some particulars, unsatisfactory. I have given to the difficulties which it presents my best attention, and, after careful consideration, am of the opinion that little doubt can be entertained as to what should be the proper decree. It will be more convenient to examine first the evidence introduced by the steamer in regard to her own movements.

This evidence presents certain features, and discloses certain attendant circumstances, which at the outset challenge attention. For it appears that the starboard watch of the steamer was on duty, but, up to the time of the alarm, the master was below at supper—that the second officer was in charge of the deck, but was not at his proper station upon the upper bridge, until after the ship was reported—that two men are stated to have been stationed on the lookout forward, but neither of them is produced, and the omission is unexplained—that two men were at the wheel, but neither of them is produced by the claimant and they are called by the libellants—that no witness called from the steamer is able to say which of the side lights of the ship was presented to the steamer, although it is beyond question that these lights were plainly to be seen, and, according to the theory of the defence, the ship was seen at a distance of some miles and watched till she struck.

These circumstances become significant when the accounts of the collision given by these witnesses are examined.

Turning then to these accounts, a careful comparison of the various statements of fact renders it quite apparent that the attention of the officer in charge of the movements of the steamer was not fastened upon the

ship, until she was near enough to show her sails, and so close that, although the helm of the steamer was put hard-a-port, and the engine stopped and reversed at full speed, she struck the ship before her headway was seriously reduced.

If this be so, the steamer must be held in fault. She was sailing at a rapid rate, in a locality requiring the utmost watchfulness on account of the danger of meeting vessels. By the exercise of a proper care, the ship could have been seen. and her course determined, in abundant time to have enabled the steamer to take, with proper deliberation, steps to avoid her, and the failure to give proper attention to the approaching ship, in time to avoid her, was negligence.

In coming to the conclusion that the ship was not seen by the officer of the deck until she was close upon him, I have not overlooked those portions of the testimony which are relied on as supporting the averments of the answer, that the ship was seen at a distance, and the steamer's helm then ported. But estimates of time and of distance cannot be relied upon. and here they are overborne by the sequence of events stated by these witnesses, which shows that when the helm of the steamer was first changed, it was got hard down as soon as possible; and that this was simultaneous with the stoppage and reversal of the engines; and that all this was done as soon as the second officer ascended the bridge. The engine was reversed by Hunt, the third officer, who hastened from below on hearing the order to shift the wheel, and the ship was, as he says, then only 200 yards distant.

This failure sooner to notice the ship, and take steps to avoid her, may have arisen from the absence of an attentive lookout, or from a failure on the part of the officer of the deck to observe the reports of the lookout, if any such there were, and in this connection the omission to produce either of the men claimed to have been upon the lookout is very noticeable; while the statement of one of the crew of the steamer, who was upon the forecastle, and is called by the libellants, that the first report of the ship's light from the forecastle received no attention, tends to increase the significance of the omission. The statement of this witness is, moreover, strengthened by the circumstance that, although the deposition containing the statement was taken in December, 1866, and the witness then named several others of the crew who were on the forecastle with him, none of those witnesses are called to contradict him.

But, assuming it to be true, as claimed on the part of the steamer, that the ship was seen when three or four miles off, and that the steamer's helm was then ported, she would still be guilty of negligence, in not sooner stopping her engine.

The witnesses from the steamer declare that, from the time the ship's light was seen, up to the moment of the collision, the bearing of the ship, in reference to the steamer, did not change. According to this theory, then, the steamer, at a distance of three or four miles, began sheering to leeward, and actually made a leeway of a mile before coming in contact with the ship, during all which time it was apparent from the bearing of the ship's light, that the change of course in the steamer was not changing the relative bearings of the vessels. Under such circumstances, it was the duty of the steamer, as soon as it was noticed that she was not shaking off the light by porting her helm, to have slackened her speed, and ascertained the direction in which the ship was sailing, and acted accordingly; instead of which, she kept up her full speed till the collision was inevitable. It cannot be doubted that, if the steamer, at the distance of a mile, even. had stopped her engine, no collision would have occurred. Whether, then, it be considered that the Scotland failed to pay proper attention to the ship until close upon her, or that, having seen her at the distance of three or four miles, she continued at full speed until the collision was inevitable, running in the interval a mile to leeward of her course, with the ship's light all the time bearing within a point or two of her port bow, it must be held that the steamer was guilty of negligence.

There only remains, then, to consider whether any fault is shown on the part of the ship, which conduced to the collision. The principal fault charged upon her is, that she did not hold her course, but kept away, falling off to the southward, and down upon the steamship.

In considering the evidence bearing upon this point, it is to be noticed that no witness produced on behalf of the steamer testifies that he saw any change whatever in the ship's course; and, as before remarked, although the ship was displaying the proper colored lights, which, in the language of the sea, proclaimed her course to the steamer, if observed by her, no witness on the part of the steamer is able to say which side light the ship displayed to the steamer—a fact, by the way, entirely consistent with the conclusion that when the ship was first seen by the persons in charge of the steamer, she was too near, and the danger too imminent, to warrant any observation of her side lights, but difficult to reconcile with the statement that the ship was watched for the space of three or four miles.

The only evidence in the case, then, going to show a change of course on the part of the ship, is the statement of the claimants' witnesses, that when they saw the sails of the ship, it was evident that she was off the wind, and off from her proper course. But when the ship's sails were seen, she was close at hand, and this evidence is, therefore, entirely consistent with the statement of the

pilot, second officer and wheelsman of the ship, that no change in their course was made until the steamer was seen to be approaching them at full speed and close by, when the wheel was put hard up and the spanker sheet let run. As contradicting this evidence on the part of the libellants, and supporting the account that the ship kept away when at a distance from the steamer, the claimants have laid great stress upon the evidence that the ship's light was seen over the steamer's port bow and that the green light of the steamer was not seen on board the ship, which it is insisted shows that the ship was to northward of the steamer and, therefore, must have kept away to the southward and towards the steamer in order to be found in her track.—But if the ship were to northward of the steamer and if, as the claimants insist, the steamer was continually bearing to the south, inasmuch as the ship was running only seven and a half knots to the steamer's ten, it is not easy to see how it would be possible for the ship to get in advance of and to southward of the steamer so as to be found in her track—while on the other hand, if the ship was on a course west half south and the steamer on the course stated with great particularity by her master to be south of east, the ship might be to southward of the steamer and yet be seen over the steamer's port bow, while the steamer would be seen over the ship's starboard bow. The red light of the steamer would thus be displayed to the ship and the green light at no time visible, while the green light of the ship would be displayed to the steamer, giving her notice that she was crossing the course of the ship.

I am unable, therefore, to say that the evidence in regard to the light seen from the respective vessels—which is by no means free from contradictions—will justify the conclusion that the collision was caused by the ship's falling away to leeward and towards the steamer.

As bearing upon this point, stress has also been laid upon evidence in the cause showing that the persons in charge of the ship believed the steamer to be a tug, and it has been insisted that this circumstance renders it highly probable that the ship did keep away, in order to meet her—a course otherwise improbable as the ship was situated.

But the movements of the ship do not appear to me to indicate any intention on her part to speak to or be taken in tow by the supposed tug, and I am unable to discover from the evidence, that the supposition that the steamer was a tug, had any effect upon the course of the ship.

My conclusion, therefore, upon this branch of the case, is that the collision cannot be attributed to the fault of the ship, in not holding her course.

The only remaining question necessary to notice is that raised in regard to the lookout on the ship. But as to this no doubt can exist upon the evidence. The man alleged to have been on the lookout is proved to have been seen and spoken to just previous to the collision, upon his station; his reports of the approaching light are proved, and he was seen and spoken to just before the ship went down, lying forward in a dying condition, having been crushed, doubtless, by the spars which fell forward when the vessels struck. Upon this point, therefore, no fault can be found against the ship.

I have now noticed all the material questions of fact and of law which have been raised in this difficult case, and in announcing a conclusion in favor of the libellants, as I do, without hesitation, upon the whole case as it stands, I may add that it is a satisfaction to me to know that the cause, as well because of its importance, as of its difficulty, will without doubt be re-examined in the appellate court, and if I have fallen into error, my decision can there be corrected.

Let a decree be entered in favor of the libellants, with an order of reference to ascertain the amount of the damages.

[NOTE. The commissioner to whom the case was sent having died pending the reference, the hearing on the question of damages was continued before the court. See Case No. 4,226. A final decree having been entered, appeals were taken by various parties to the circuit court, which affirmed the decree, with some modification. See Case No. 4,225. Appeals were then taken to the supreme court, where the decree was affirmed in part and reversed in part. See Nat. Steam Nav. Co. v. Dyer, 105 U. S. 24. The circuit court having rendered a decree pursuant to the mandate, the case was again appealed, and the decree affirmed. See Dyer v. Nat. Steam Nav. Co., 118 U. S. 507, 6 Sup. Ct. 1174.]

Case No. 4,225.

DYER et al. v. NATIONAL STEAM NAV. CO.

[14 Blatchf. 483;[1] 24 Int. Rev. Rec. 198.]

Circuit Court, E. D. New York. June 12, 1878.[2]

COLLISION — LIMITATION OF LIABILITY — FOREIGN SHIPS — LIBEL IN PERSONAM — ATTACHMENT — DAMAGES—INTEREST.

1. The owners of a sailing ship and her cargo sued a British corporation, the owners of a British steamer, in admiralty, for the value of the ship and cargo, lost by a collision with the steamer. The steamer was damaged by the collision, and, in running for a harbor, grounded and then went to pieces. A quantity of anchors, chains, rigging and cabin furniture, of the value of several thousand dollars, was saved from her and received by the respondents. The answer of the respondents set up that the steamer was sunk and destroyed by the collision, and that there was no liability in personam against the respondents, for the loss of the ship: *Held*, that, under the act of March 3, 1851 (9 Stat. 635), as the respondents had not instituted any proceedings to have the limitation of

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

[2] [Affirming and modifying Cases Nos. 4,224 and 4,226.]

their liability adjudged, and had not surrendered or transferred what was saved from the vessel, they could not have the benefit of that act.

[Cited in Thommasen v. Whitwill, 12 Fed. 904.]

[See note at end of case.]

2. *Held*, also, that the respondents, by their delay, and by allowing a final decree to go against them in the district court, had waived their right to institute such proceedings.

[See note at end of case.]

3. *Held*, also, that no limitation of liability could be claimed by the respondents under the general maritime law, because they had not surrendered their interest in the steamer.

[See note at end of case.]

4. Whether the act of 1851 applies to the owners of a foreign vessel, quere.

[See note at end of case.]

5. The jurisdiction of the district court to enforce the personal liability of the respondents, as a foreign corporation, was properly exercised, by issuing an attachment against its property.

6. The proper rate of interest to be allowed on the value of the property lost by the collision was 6 per cent., and not 7 per cent.

7. The cargo lost was guano belonging to the republic of Peru. Under the facts in this case, the proper rule of damages for the loss of the cargo was *held* to be, neither the market price of the guano at its port of destination, less the costs and charges which would have been incurred from the time of the loss until it could have been placed in such port ready for sale, nor the cost of the cargo at the place of shipment, with the expenses and charges actually incurred, and interest thereon, but the value of the guano in Peru, as an article to be dealt with there by a merchant seeking to export it and realize only a fair mercantile profit on it, such value to be ascertained by deducting from its value at its port of destination, shipping expenses, freight, duties, marine insurance, port charges and commission for selling, and then deducting from the net proceeds 10 to 12 per cent., as a fair average mercantile profit.

[Cited in The George Bell, 3 Fed. 585.]

[See note at end of case.]

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

Scudder & Carter, for the ship.

Prichard & Smith, for the cargo.

Benedict, Taft & Benedict, for the passenger.

Butler, Stillman & Hubbard, for the steamer.

BLATCHFORD, Circuit Judge. The evidence is entirely satisfactory that the steamer was wholly in fault for this collision, and that the ship was free from fault. The wind was from northwest to north-northwest. The ship was closehauled on the wind, and heading a little south of west. The steamer was heading in such manner that her course crossed the course of the ship at an angle of about two points. The ship showed her green light to the steamer, and the steamer saw that light, and no other light, on the ship, and saw that light a little over the port bow of the steamer. The steamer showed her masthead light and her red light to the ship, and the ship saw those lights, and no other lights, on the steamer, and saw those lights a little over the starboard bow of the ship. The steamer saw the ship's light at a sufficient distance off to have avoided her, and yet the steamer ported and persistently ported, although the ship's light continued to draw towards the bow of the steamer and was not shaken off, as the result of the steamer's porting; and, in spite of the danger which this condition of things indicated, the steamer did not slow, or stop and reverse, until just before the collision. Her speed was so great, when she struck the ship, that she cut off entirely the forward part of the ship and passed some distance beyond her. The ship did not change her course before a collision was inevitable, and it is doubtful whether she changed it even then. She made no change which contributed to the collision or embarrassed the steamer's freedom of action. The answer charges, as faults on the part of the ship, that she had no lookout, and was not properly manned and navigated, and changed her course. No one of these points is established by the respondents.

The foregoing conclusions were those arrived at by the district court. Dyer v. National Steam Nav. Co. [Case No. 4,224]. But there is one question which has been presented to this court, that was not discussed or considered in the court below. The answer of the respondents alleges as follows: "Respondents, further answering, say, that said steamer Scotland was by said collision sunk and destroyed, and that there is no liability in personam against these respondents for said loss of the Kate Dyer." Under this allegation the respondents insist, that their liability, as owners of the steamer, did not extend beyond the value of their interest in the steamer and in her freight pending at the time of the collision: that, as the steamer was lost by the collision, and no freight money or passage money was earned by her, the respondents are thereby discharged from liability; and that the district court had no right to exercise jurisdiction by issuing a writ of foreign attachment against the respondents, and no right to seize any property belonging to the respondents, under such writ. The answer does not state whether the alleged non-existence of liability is claimed under the act of congress of March 3, 1851 (9 Stat. 635), or under the general maritime law.

The question may first be considered on the view that the act of 1851 applies to this case. Under the third section of that act, the liability of the respondents, as owners of the steamer, for the damages sustained by the libellants by this collision, cannot exceed the amount or value of the interest of the respondents in the steamer and her freight pending at the time of the collision. Section 4 of that act provided that the respondents might take the appropriate proceedings in any court for the purpose of apportion-

ing the sum for which, as owners of the steamer, they might be liable, amongst the parties entitled thereto. The claims sued for and represented by the libellants in this case are the claims for the loss of the ship and of her freight and cargo, and of the personal effects of her master and crew, and of property owned by a passenger on the ship. They comprise all the claims which could exist for any loss or damage growing out of such collision, so far as appears. This being so, and those claims being all before the district court in this suit, it was easy for the respondents to institute appropriate proceedings in that court to have the limitation of their liability adjudged, and to have the sum for which they were liable apportioned among the parties making such claims. No such proceedings were instituted, although the rules of proceeding were made by the supreme court in May, 1872, and some of the testimony as to damages was put in after that time, and the commissioner's report was made after that time, and the question of damages was heard by the district court after that time, and the final decree of that court was not made until July 17th, 1874. Moreover, the 4th section of the act provided, that it should be a sufficient compliance with its requirements, on the part of the respondents, if they should transfer their interest in the vessel and freight, for the benefit of the persons making claims, to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee, for the persons who might prove to be legally entitled thereto, and that, from and after such transfer, all claims and proceedings against the respondents should cease. The district court was a court of competent jurisdiction to appoint a trustee in this case, but no such proceeding was had.

But, it is insisted by the respondents, that there was nothing in the shape of vessel or freight, or interest therein, or value of interest therein, which existed after the libel herein was filed, on the 17th of December, 1866, to which the act of 1851 could apply. In Norwich Co. v. Wright, 13 Wall. [80 U. S.] 104, it was held by the supreme court, that, by the maritime law, the liability of the owner of the vessel doing damage by collision was limited to his interest in the vessel and freight, and he was discharged by giving up that interest or by the loss of the vessel on the voyage; that, by the English law, as constituted by statute, such liability was limited to the amount and value of the vessel and freight at the time of the injury; and that the act of 1851 intended, so far as collisions are concerned, to adopt the rule of the maritime law. Therefore, under the act of 1851, it is sufficient to surrender the vessel and any freight that may have accrued, without paying into court anything further, and it is not necessary to pay or give security for the value of the vessel at the time of the collision, and of the freight for the voyage. But, to enjoy the benefits of the act of 1851, so long as there is anything left of the vessel to be surrendered or transferred, or in or of which to have an interest capable of being surrendered or transferred, what is so left, or the interest in it, or the value of it or of such interest, must be surrendered or transferred. In the present case, it is shown that there was a large amount of anchors, chains, rigging and cabin furniture saved from the steamer and delivered to the agent of the respondents, and that what was so saved was of the value of several thousand dollars. That was a part of the vessel, and should have been surrendered or transferred, if the act of 1851 was to be availed of. Nor is there yet time for the respondents to institute proceedings under the act of 1851. No sufficient excuse is shown, as in Norwich Co. v. Wright [supra], for not having taken such proceedings. There was more than two years time after the rules of practice were prescribed in May, 1872, and before the final decree of the district court was made, during which the proceedings might have been taken in that court. The respondents, especially in view of the allegation in their answer as to their non-liability because of the alleged destruction of the steamer, must, after allowing a final decree to go against them in the district court, without instituting any proceedings under the act of 1851, be held to have waived all right to institute such proceedings now. I have not found it necessary to determine the question, whether the act of 1851 applies to the owners of a foreign vessel who seek the benefit of that act.

Undoubtedly, under the general maritime law, the liability of the owner of the vessel doing damage by collision, for the wrongful act or negligence of the master or crew of the vessel, if such owner was personally free from blame, was limited to his interest in the vessel and its freight, and ceased by his abandoning and surrendering those to the parties sustaining loss. But, he could not discharge himself without abandoning vessel and freight; nor, if vessel and freight were lost, could he discharge himself without surrendering all claims in respect of vessel and freight, such as insurance, &c. If, in consequence of the loss of the vessel on the voyage, no interest in vessel or freight remained, the ship owner was discharged, but, if any interest in vessel or freight remained, he could not be discharged without surrendering such interest. Therefore, if non-liability be claimed in this case under the general maritime law, the respondents have not put themselves in a position to claim it, because they have not surrendered or offered to surrender what remained of the vessel. On the contrary, the respondents retained what was saved from the steamer, and permitted the decree below to pass against them without surrendering it. If the answer be considered as averring that the steamer was in

such wise and to such extent sunk and destroyed by the collision, that, under the rule of the maritime law, the respondents were discharged from liability, then the answer is not supported by the evidence, for there was something left of the vessel, and what was left was capable of being surrendered.

As the personal liability of the respondents was not discharged, a cause of action in the admiralty existed against them, and the jurisdiction of this court to administer the relief asked by the libel was properly enforced by the process of attachment issued.

The owners of the ship have appealed because the decree below awards them less than the value of the ship, and because it awards them interest at the rate of 6 per cent., instead of 7 per cent., upon the amount of their damage for the loss of the ship and for her freight, and for the personal effects of the master and crew of the ship. I examined the question of the rate of interest in the case of The Aleppo [Case No. 158], and, for the reasons there stated, and in the cases there cited, the rate of interest allowed was correct. The point that the value of the ship was fixed too low, is not insisted on, on such appeal. The proper rate of interest on the value of the cargo is 6 per cent., and the appeal of the republic of Peru, on that point, is not sustained.

The final decree of the district court, besides awarding specified sums for the loss of the ship and of the freight on the cargo, and of the personal effects of the officers and crew of the ship, and of the property of the passenger, awarded to the republic of Peru, as owners of the cargo of guano which the ship was carrying, and which was totally lost by the collision, the sum of $64,731.27, in gold coin of the United States, with interest thereon, in like gold coin, at 6 per cent. This amount was arrived at, in the district court—Dyer v. National Steamboat Co. [Case No. 4,226]—by taking the market price of the guano at the port of New York, and deducting therefrom the costs and charges which would have been incurred from the time of the loss, until it could have been placed in New York ready for sale. It is contended by the respondents, that this rule of damages was erroneous, and that the proper rule in this case is the cost of the cargo at the place of shipment, with the expenses and charges actually incurred, and interest thereon. I had occasion, in the case of The Aleppo, before cited, to examine this general subject, and to consider the decisions in regard to it. In that case, a cargo of wool was lost by a collision on the high seas, a few miles from the harbor of Boston, and it is urged, that the proper measure of damages was the market value of the wool in Boston, on the day of its loss, less duties, freight, charges for landing and cost of insurance from the place of loss to Boston; and that the result arrived at by such method of computation would be the value of the cargo at the time and place of its destruction. But, the result of the principles laid down in the cases cited and considered, was held to be, that the proper rule of damages was the value of the cargo at the port of shipment, including the expense of lading it on board and transporting it to the place of collision, with interest at 6 per cent. from the time of collision; that all beyond that was expected earnings or profits; and that the loss of them was not a proper measure of damages. The cases in the federal courts to which I refer, are those of Murray v. The Charming Betsey, 2 Cranch [6 U. S.] 64; The Lively [Case No. 8,403]; The Anna Maria, 2 Wheat. [15 U. S.] 327; The Amiable Nancy, 3 Wheat. [16 U. S.] 546; Smith v. Condry, 1 How. [42 U. S.] 28; Williamson v. Barrett, 13 How. [54 U. S.] 101; The Ocean Queen [Case No. 10,410]; and The Vaughan and The Telegraph [Id. 9,217], 14 Wall. [81 U. S.] 258, 267.

It is urged, that the owner of the cargo must be indemnified to the extent of the loss sustained; that complete indemnity for such loss cannot be given, in this case, by taking as the rule the market value of the guano at the place of shipment; that there never was a market price, as the evidence shows, for the guano, at the Chincha islands, where it was shipped, it having there neither market value nor ascertainable cost; that, nevertheless, it was an article of value, and could, at the time and place of its loss, have been easily exchanged for gold at a large price; and that, on any other rule, the recovery for the cargo would be only $1,424.25, being the cost of preparing it for shipment and the charges incident to shipment. Indemnity for loss, in the sense of the law of damages, is indemnity to a party for his having lost what he once had. In common speech, a party may lose a market, or may lose an expected profit. But that is not correct language to use in considering the law of damages. The value of this cargo of guano, at the time and place of loss, did not embrace any part of the profits which would have been realized on the cargo if it had safely reached New York. It is impossible to take the market price at New York as the standard, without taking in the probable or prospective profits. To say that this cargo could have been sold to arrive, or could have been easily exchanged for gold, at a large price, at the time and place of its loss, does not meet the difficulty. Selling the cargo to arrive, is only selling it to be paid for if and when it arrives, and leaves it subject to the contingencies of the voyage; and, if it never arrives, the price, which is a New York price, and includes profits, is not paid. The transaction of delivering the cargo at the time and place of loss, on a sale then and there just before the loss, and receiving pay for it on the spot, based on a New York price for it, as if it were at New York, and deducting only the

expense of carrying it to, and landing it at, New York, is not a real or probable transaction. It would be a transaction in which the seller would receive all the profit, and take none of the risk, of the voyage, and one which might as well be supposed to take place at the Chincha islands, in respect to the cargo on board of the vessel, as at any point of the voyage short of the port of destination. The fact that the cargo was lost within but a short distance of New York, compared with the length of the entire voyage, makes no difference in principle, because, the fact of its loss at the place where it was lost, by collision, shows that there was greater danger of its loss by collision at that place than at any previous point in the voyage. If the Scotland had not run into the ship, she might have been run into by some other ship, nearer to New York, or the cargo might have been lost in some other way, nearer to New York. If the collision had occurred one mile farther from New York, and the cargo had thereby been lost, the rule contended for by its owners might have been urged with equal weight; and so, in respect to any collision farther and farther from New York, embracing even a collision close to the port of shipment. The contingency of a safe arrival of the cargo at New York, so as to enable its owners to realize their probable or prospective profits, was, during the whole voyage, a matter of conjecture, and the result shows that there was not any less peril so near to New York than during the prior part of the voyage. To allow such profits in this case would make it necessary to allow them if the cargo had been lost by a collision close to the Chincha islands, and would establish a rule which the supreme court rejected, in Smith v. Condry [supra].

In opposition to this view, two cases are relied on. In Bourne v. Ashley [Case No. 1,699], the question was as to the value of a whale converted in the Okhotsk sea. The court held, that market price was the rule, in the case of articles which had a market price; that the wrong-doer could not escape paying damages by showing the absence of a market for the article; that there was no market price for whales any where, and no market for oil and bone in the Okhotsk sea; that, nevertheless, the fair value of the whale must be paid for; that that could not be arrived at by conjectural testimony of experts as to what they would be willing to give for whales in the Okhotsk sea; that the court was obliged to discover, as well as it might, the value of the whale to a person who happened to want it at the time and place in question; that that value must be the price of the oil and bone in some market, less the expense of making the oil and bone out of the whale and getting it to market; and that, as the market of New Bedford was the controlling market of the country, as well as the home port of both vessels, the proper standard was the value at New Bedford of the oil and bone made, or which might have been made, from the whale, less the average necessary expenses of converting the whale into oil and bone, and freight, insurance and other usual charges, with interest on the sum thus arrived at. In Swift v. Brownell [Id. 13,695], the question was as to the value of a cargo of oil and bone lost in the Arctic ocean, by a collision between two whaling vessels. The court adopted the rule laid down in Bourne v. Ashley [supra], and took the price of the oil and bone at New Bedford at the time when it would probably have arrived there, and not the New Bedford price at the time of the collision. Both of those cases proceed upon the principle, that, if there is an ascertainable market value for the cargo at the time and place of the loss, that ascertainable market value is to govern; and that, if there is no such ascertainable market value, and yet the cargo is of value to its owner, the wrong-doer cannot escape by showing that there is no such ascertainable market value. But, to show that there is no such ascertainable market value, it is not sufficient to show that the place of loss was on the high seas, where traffic does not take place, and buyer and seller do not meet in market. That is the case in every case of loss by collision on the high seas; yet, in such cases, if the cargo came from a port of shipment where traffic in it did or could take place, the value there, and not the value at the port of destination, is the rule laid down. The cases of the whale and the cargo of oil and bone, were exceptional cases. The articles in question in those cases were not shipped at any port of shipment where traffic in them did or could take place, and no value at the time and place of loss, predicated upon any value at any port of shipment, could be affixed to them. Whales and their products commence their existence as property on the high seas, and their value, if to be dealt with as a value of the property in some market, could, in those cases, be dealt with only as a value in the port of New Bedford. The property had never been in a port, or at a place, where any definite or ascertainable value had been, or could be, given to it, as a market value. Not so with this cargo of guano.

This guano, with all the guano at the Chincha islands, was the property of the Peruvian government, which exported it to foreign countries on its own account, and prohibited its exportation by any other parties. It was not bought and sold in Peru as a general article of commerce. Any citizen of Peru was at liberty to take it from the Chincha islands for use in Peru, without paying anything for it, but he could not export it from Peru. Guano, so taken, was sold in Peru, subject to such restriction as to its use in Peru, at $12 a ton, gold. But such guano did not form more than one-twentieth part of the guano taken from the islands. The guano in the Kate Dyer belonged to the Peru-

vian government, and cost it nothing but the labor of digging it out and loading it on the ship, and was being exported by it to be sold on its own account and for its own profit. One sale by the Peruvian government, of 25,000 tons of guano, for $30 gold, per ton, net, in 1864, to be exported, is shown. The price of guano at New York, at the time the Kate Dyer would probably have arrived there, was, probably, $60 a ton, gold. The owners of this guano ought to receive, as compensation, a fair indemnity for its actual loss of guano, but not for its failure to realize probable profits. The value of this guano at the time and place of loss, based on its value in Peru, can, I think, be ascertained from the evidence, in such manner as to give to its owner such fair indemnity, and yet not limit it to the recovery of only $1,424.25, as the expense of shipment, with no value in the guano itself. This can be done without conflicting with the general rule. Because the Peruvian government paid nothing for the guano, it does not follow that no value, as substantially a market value of it in Peru, can be ascertained. Nor, on the other hand, does the $12 a ton, gold, or the $30 a ton, gold, on the exceptional sales referred to, furnish a fair standard of market value.

Mr. Hobson, a merchant, residing in the city of New York, who has been for 30 years in the business of importing goods from the west coast of South America, and other South American ports, testifies as follows: "Q. Suppose an article of merchandise is produced or obtained in Peru, the same not being there sold as an article of commerce for exportation, and for which there is a market in the United States, what would you, as a merchant, consider its value in Peru, in reference to the net proceeds of its sale in the United States, if it could be bought in Peru for exportation? A. With reference to net proceeds, and looking to a fair average profit, I should think it would be worth from 10 to 12 per cent. off from the net proceeds. To get at the net proceeds, I would take out shipping expenses, freight, duties, (if any,) marine insurance, and all port charges here; also, commission for selling. If it could be bought at such rates in Peru, for exportation, that would create a demand for it there, for exportation." By this "fair average profit" the witness states that he means the usual mercantile result, after paying for the article in a foreign country, and all charges on it. There is no testimony in contradiction of this, or naming any other percentage as a deduction for a "fair average profit." The government of Peru, in respect to its guano, was a merchant, exporting it and selling it in the market of New York, and making a mercantile profit on it. To be sure, the government made a larger profit on it than the mere mercantile profit, and which larger profit included the mercantile profit; but the value in Peru which is to be ascertained, is the value of the guano as an article to be dealt with there by a merchant seeking to export it and realize only a fair mercantile profit on it. That value is the proper value in this case, and can be readily ascertained in the method testified to by Mr. Hobson. The rate of profit is a matter of expert knowledge, as to which Mr. Hobson, as an expert, can speak. No expert contradicts him, or gives any other rate than that which he gives. Under the customs laws, where actual market value in the foreign port is required to be stated in invoices, it has been held, that, in the absence of sales, or offers to sell, in the foreign port, the cost of manufactured goods, with a manufacturer's profit added, may be resorted to as a means of ascertaining the market value of such goods in the foreign port. Six Cases of Silk Ribbons [Case No. 12,914]. In every case where market value abroad is sought to be ascertained, and there is no standard by sales abroad, that method of ascertaining such market value, or its equivalent, must be resorted to, which, under all the circumstances of the particular case, furnishes the nearest approach to such value abroad, as that a fair mercantile profit, and no more and no less, will be allowed to the merchant, in view of the net proceeds at the place of importation. That was the view in the case of the silk ribbons, and that is the view in this case. The decree in respect to the guano will be drawn up on the basis indicated.

On the appeal by the owners of the ship, the respondents must have costs of appeal. On the appeal by the respondents, the appellees, other than the republic of Peru, must have costs of appeal; and, on such appeal, as between the appellants and the republic of Peru, the appellants must have costs of appeal. On the appeal by the republic of Peru, the respondents must have costs of appeal. The decree below is affirmed as to damages, except as to the amount awarded to the republic of Peru, and it is affirmed as to the costs it awards, except as it awards costs to the republic of Peru.

[NOTE. Appeals were taken to the supreme court by both libellant and respondent. In that court the decree was affirmed in all things except upon the question of limitation of liability, as to which it was reversed. See National Steam Nav. Co. v. Dyer, 105 U. S. 24. Upon this point, Mr. Justice Bradley, delivering the opinion, after alluding to the construction placed upon the earlier British statutes, said, inter alia: "But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of ship-owners. And public policy, in our view, requires that the rules of maritime law as accepted by the United States, should apply to all alike, as far as it can be properly done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicil. We think they should not be restricted by construction. Our opinion, therefore, is that in

this case the National Steamship Company was entitled to the benefit of the law of limited responsibility."

[Answering the objection that the appellants did not properly and in due time claim the benefit of the statute, under the rules of court, the supreme court said: "The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt. They were not intended to prevent a defense by way of answer to a libel, or plea to an action, if the ship-owners should deem such a mode of pleading adequate to their protection. It is obvious that in a case, like the present, where all the parties injured are represented as libellants or interveners in the cause, an answer setting up the defense of limited responsibility, is fully adequate to give the ship-owners all the protection which they need. But, it is objected that they did not follow the statute, by giving up and conveying to a trustee, the strippings of the wreck and the pending freight. It is sufficient to say, that the law does not require this. It contains two distinct and independent provisions on the subject. One is, that the ship-owners shall be liable only to the value of the ship and freight; the other is, that they may be discharged altogether by surrendering the ship and freight. If they failed to avail themselves of the latter, they are still entitled to the benefit of the former kind of relief."

[A decree having been rendered in the circuit court pursuant to the mandate, the case was again appealed to the supreme court. The questions involved related to damages, interest, and costs, and the decree was affirmed. See Dyer v. National Steam Nav. Co., 118 U. S. 507, 6 Sup. Ct. 1174.]

Case No. 4,226.

DYER et al. v. NATIONAL STEAMSHIP CO.

[7 Ben. 395.][1]

District Court, E. D. New York. July, 1874.[2]

DAMAGES BY COLLISION — RULE AS TO VALUE OF CARGO LOST—GUANO.

1. A ship, loaded with guano, was sunk in a collision near New York, her port of destination. The guano was the property of the republic of Peru, and was shipped at the Chincha Islands. The guano on the islands was the property of the government of Peru, and was exported by the government for its own account. No guano was sold at the islands, but the government allowed Peruvian subjects to go to the islands and dig it for use in Peru alone, and some of the guano so taken was sold in Peru. The owners of the steamship which sunk the ship having been held liable for the damages caused by the collision: *Held*, that the owners of the ship were entitled to recover her value at the time and place of loss;

2. Under the circumstances of this case, the rule of damages, as to the loss of cargo, must be not the cost of shipment, nor the value in Peru, but the value in the port of New York, less the costs and charges of delivering it there.

[This was a libel by Joseph W. Dyer and others against the National Steamship Company.]

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

[2] [Modified and affirmed in Case No. 4,225.]

Scudder & Carter, R. D. Benedict, and W. G. Choate, for libellants.

John Chetwood and T. C. Stillman, for respondents.

BENEDICT, District Judge. This action was instituted to recover of the owner of the steamship Scotland, the amount of damages caused by the sinking of the ship Kate Dyer by the steamer Scotland, in a collision which occurred near the entrance of New York harbor. At the hearing upon the question of liability, an interlocutory decree was rendered—directing that the libellants recover of the owners of the Scotland, the amount of damages by them sustained by reason of the collision in the pleadings mentioned, and a reference to a commissioner was directed to ascertain and report the amount of such damages. [See Case No. 4,224.]

Pending the reference, the commissioner died, and by order of court the hearing of the case upon the question of damages was thereupon directed to be continued before the court.

Under that order, the hearing of the case has been continued before the court upon the question of damages,—the evidence taken before the commissioner being by consent read as evidence taken in court.

In this manner the case has, during the present month, been presented to me to determine the amount of the damages which the libellants sustained by the collision referred to.

The evidence shows a total loss of the ship Kate Dyer and her cargo, by reason of the collision in question. The owners of the ship, the libellants, are entitled therefore to recover her value at the time and place of loss. Upon this item, the testimony of the master appears to me to afford the best evidence in the case by which to determine the value of the ship, at the time and place of loss, and upon that testimony I determine the loss sustained by the owners of the ship to be $56,000, on which sum interest at 6% from the date of the collision to the date of the final decree herein is also allowed them.

The evidence shows damages sustained by one Henry H. Rollins, who is also a co-libellant, in the loss of his personal effects on board the ship at the time of the collision, including $5,000 in gold coin. The testimony fixes the value of this property in currency at $7,625. No objection is made to this amount, and the decree will accordingly award him that sum with interest @ 6% from the date of the collision to the date of the final decree.

The republic of Peru is also a co-libellant, and has been decreed to be entitled to recover for the cargo of the vessel, which was wholly lost with the ship. This cargo consisted of 1,668 tons of Peruvian guano, belonging to the Peruvian government, at the time of the collision being transported from

the Chincha islands via Callao to New York. The guano deposit on the Chincha islands (exhausted since the commencement of this action) belonged to the government of Peru. That government exported the guano to foreign countries, and there sold it for account of the government. Its exportation by any other parties was prohibited, and it was not bought and sold in Peru as an article of commerce. What was there used was given to the Peruvian subjects who might go to the islands, and dig it, to be used in Peru alone. Some of the little so given away was sold in Peru at $12 00 a ton, in gold, but subject to the above stated limitations as to its use.

The cargo in question, if it had arrived in New York, would there have sold for $60 00 a ton, gold. When destroyed it was very near to, but not within, the harbor of New York. Upon this state of facts, the government of Peru claims to be entitled to recover the value of this cargo at the time and place of loss; and it is contended that, upon the evidence, the only proper mode of ascertaining that value is to take the market price of the article in New York, less all costs and charges that would have been incurred from the time of the loss till it could have been placed in New York ready for sale.

The claimants contend that the value of the cargo to the Peruvian government must be taken to be simply the cost of preparing the guano for shipment, and charges incident to shipment, according to which method the Peruvian government would recover $1,424 26 for the loss of this cargo.

As between these two positions, my judgment is with the libellants. It is not necessary, in order to support this determination, to discuss the correctness and justice of the result which has been sometimes arrived at by the application of the rule which gives to the owner of cargo damaged by collision the market value of his goods at the place of shipment as a complete indemnity for his loss. While it may be conceded that experience has shown this rule to be the best one that can be resorted to in most cases, I do not understand that, as matter of law, the rule is always to be applied. The principle of indemnity to the extent of the loss sustained is the unquestioned law of every case; and to this higher law every rule of convenience must be subject, not excepting the one here sought to be applied by the respondents. The result of the application of such a rule to the present case indicates at once that no principle of justice will permit its adoption here. Resort to it is in truth impossible here, for it is based upon the existence, at the place of shipment, of the market price for the merchandise lost. But there never was a market price for guano at the Chincha islands.

The article, owing to peculiar circumstances, had neither market price nor ascertainable cost at the place of shipment.

Yet it was then an article of value; and this particular cargo of it on board the ship Kate Dyer, at the time and place when it was destroyed, could have been exchanged for gold at a large price and without difficulty. The facts then forbidding resort to a market price of this cargo at the place of shipment, by which to determine the value, it becomes necessary to find some other method whereby to ascertain its value at the time and place of loss. No other method seems more likely to work out the desired result than to take the market price of such guano at the near and controlling market of New York, whither the cargo was bound, and where, at the time of destruction, it could have been sold to arrive. The value of the cargo, calculated at this price, less the costs and charges, will represent with much accuracy the real loss sustained by its owners in its destruction.

The items of costs and charges properly to be deducted in a calculation thus based appear not to be in dispute; nor is there any dispute in respect to the freight. I, therefore, leave to the parties the computation of the amounts, in accordance with the views here expressed, with leave to settle the decree before me, if any dispute arises.

[NOTE. Appeals were taken to the circuit court, which modified and affirmed the decree. See Case No. 4,225. The case was then appealed to the supreme court, where the decree of the circuit court was affirmed in part and reversed in part. See National Steam Nav. Co. v. Dyer, 105 U. S. 24. The circuit court having rendered a decree pursuant to the mandate, the case was again taken to the supreme court, and the decree affirmed. See Dyer v. National Steam Nav. Co., 118 U. S. 507, 6 Sup. Ct. 1174].

DYER (TRAVERS v.). See Case No. 14,150.

DYER (WALLER v.). See Case No. 17,108.

DYER (WIGFIELD v.). See Case No. 17,622.

DYERSBURG (GREEN v.). See Case No. 5,756.

Case No. 4,227.

In re DYKE et al.

[9 N. B. R. (1873) 430.][1]

District Court, E. D. Michigan.

BANKRUPTCY—RENT—LIEN—RECORDING OF LEASE.

A landlord petitioned to have his rent paid in full out of the proceeds of certain property of the bankrupt, on which he claimed a lien by the peculiar terms of his lease. *Held*, that he had no lien because the lease was not recorded as required by the statute of Michigan, and petition must be dismissed, but without costs to either party.

[Cited in McLean v. Klein, Case No. 8,884.]

LONGYEAR, District Judge. The bankrupts were partners in trade, and as such were doing business, at the time of the bank-

[1] [Reprinted by permission.]

ruptcy, as druggists, at No. 112 Griswold street, Detroit. They were successors to the late firm of Humphrey & Dyke, composed of one W. Humphrey and the said Thomas J. Dyke, formerly doing business at the same place. The said late firm of Humphrey & Dyke held the store and premises where they carried on business, as tenants of the petitioner, by virtue of a lease bearing date December 1st, 1872. The lease was for the term of four years and three months from date, at the yearly rent of six hundred dollars, payable monthly in advance; and it contains a covenant "that all goods, wares and merchandise, household furniture, fixtures, or other property, which are or shall be placed in or on said premises by them, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property, to secure the rent due or to grow due on this lease." And the lessor is authorized in case of default "to enter upon said premises, or take any of said mortgaged property, wherever the same may be found, and sell and dispose of the same in the same manner as in case of chattel mortgage on default thereof, giving six days' notice," etc., and all benefit of exemption laws are waived. Humphrey & Dyke occupied the store under this lease until July 20th, 1873, when Humphrey sold and transferred his interest in the stock, furniture and fixtures, to the bankrupts and retired, the latter agreeing to pay the debts of the former firm. The bankrupts occupied the store and carried on business until their bankruptcy, about September 4th, 1873. The lease was not filed as a chattel mortgage in the office of the city clerk of Detroit until after Humphrey had sold to the bankrupts, but it was so filed on the 1st day of August, 1873. The bankrupts, as a matter of fact, occupied the store under the terms of the lease; but, as filed in the city clerk's office, the lease was not accompanied by any evidence of that fact. No rent had been paid since about the middle of February, 1873, and the amount in arrears at the time of the bankruptcy was three hundred and thirty dollars, which, together with three dollars and thirty-four cents for water rates paid by petitioner, he has proved in this court as a secured debt, and now asks that the same may be paid as such out of the proceeds of the store furniture and fixtures put into the store by Humphrey & Dyke, and transferred to the bankrupts. To this the assignee, on behalf of the creditors of the bankrupts, Dyke & Marr, objects.

In the first place, the covenant in the lease for a lien, etc., is not a mortgage, because it does not purport to change, in any way, the title to the property. It gives no right in the property itself until reduced to possession under the power to take possession and sell; and I think it admits of much doubt whether the mere agreement for a bare lien placed the petitioner upon any better footing than other creditors, before actual possession under the power. Holmes v. Hall, 8 Mich. 66. My opinion is that the assignee having obtained possession, whatever lien petitioner may have had is gone, and cannot be enforced as against the other creditors. In re Joslyn [Case No. 7,550]. But it is not necessary to rest the case upon this point alone. By the statutes of Michigan (2 Comp. Laws 1871, p. 1458, § 4706) it is provided as follows: "Every mortgage or conveyance intended to operate as a mortgage, of goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides," etc. Therefore, even if considered as a mortgage, or as "intended to operate as a mortgage," the covenant in the lease that it should "constitute a lien or mortgage on said property," was absolutely void as against all the creditors of the original lessees, Humphrey & Dyke, because it was not filed until after that firm had ceased to exist; and it was equally void as against the creditors of Dyke & Marr, the bankrupts, because it was not their covenant, and it was not accompanied by any notice or evidence that they held the property subject thereto. It results that the prayer of the petition must be denied, but without costs to either party as against the other.

DYMOND (DONOVAN v.). See Case No. 3,993.

Case No. 4,228.

Ex parte DYSON.

[3 App. Com'r Pat. 375.]

Circuit Court, District of Columbia. Sept. 21, 1860.

PATENTS—REISSUE — POWER OF COMMISSIONER—EVIDENCE TO SHOW THE ORIGINAL INVENTION—PATENT OFFICE RULES.

[1. Act Cong. 1836, c. 357, § 13 [5 Stat. 122], providing that it shall be lawful for the commissioner to reissue patents inoperative or invalid because of defective descriptions or specifications, where the inadvertency, accident, or mistake is without fraudulent or deceptive intention, is mandatory, and gives no discretion to the commissioner as to cases within the section.]

[Cited in Hussey v. Bradley, Case No. 6,946.]

[2. Under this section the only limitation as to the reissued patent is that it shall be for the same invention.]

[3. On application for a reissue, the office records, though evidence of a high order as to whether or not there was an honest mistake, are not conclusive, but the applicant may introduce any competent testimony in support of his contention.]

[4. The patent office has no power to make rules restricting the evidence in such cases to that furnished by its records.]

[5. Rule 26 of the patent office, limiting evidence on amendment of specification to the records of the office, refers to rejected applications for original patents, and not to cases of reissue under section 13.]

[Appeal from the commissioner of patents.]

DUNLOP, Chief Judge. This is an appeal to me by Jeptha Dyson from the decision of the commissioner of patents, of date 7th July, 1860, refusing him a reissue of his patent of the 20th February, 1849 [No. 6,135], for improvements in carding engines, with amended specifications and claims. The gist of Mr. Dyson's invention is the differential motion of the stripper, A, introduced upon the engine, to clear the main cylinder, C, of the cotton imbedded in it in the process of carding without stopping the machine by this self-acting contrivance. His original specification described only the fast motion of the stripper, A, which fast motion, was of a surface speed, exceeding the surface speed of the main cylinder, C, the effect of which was to make A a clearer of C. It did not describe the slow motion of the stripper, A, reducing its surface speed below the surface speed of the main cylinder, "C," by means of a loose pulley on the shaft of A, the effect of which slow or differential motion of A at intervals made "C" a clearer of A, and enabled A again to resume its functions of clearing the main cylinder, "C," and thus to keep the engine in constant working order. Mr. Dyson's original patent is inoperative and invalid as a self-active contrivance to clear the main cylinder by his failure to describe this differential motion of A. Without it, A cannot be itself cleared when clogged with embedded cotton in it, and so cannot perform its function as a clearer or stripper of C. Mr. Dyson has sworn that his omission to describe in his specification this differential motion was by accident, mistake, or inadvertence, and without any fraudulent or deceptive intention, and that he designed originally to patent it, in February, 1849; and he has proved by four witnesses that before the original patent was applied for they saw Mr. Dyson's engine worked with this differential motion, and that it never was worked otherwise. The office has rejected Mr. Dyson's reissue application because the original specification, model, and drawings do not, nor does either of them, show the differential motion; and they refuse to look at any evidence outside the "record," as they call it. They refuse to receive any proof other than the original record, however plenary it may be, to show this differential motion to be the same invention intended to be patented by him in 1849; although the original specification and claim, in asserting a self-acting contrivance, does point to some other mode of clearing "C" than is set forth therein.

I agree with the office, it is too obscure and vague alone and without further proof in aid of it to be the basis for inserting in the reissue the differential motion. It is at most a circumstance to uphold and fortify the aliunde proof, or the evidence of the witnesses outside the record. Can such outside proof, if plenary and credible, sustain the reissue? This depends upon the true interpretation of the 13th section of the act of 1836 [5 Stat. 122].

The question is not free from difficulty, as will be apparent when I state it has been decided differently by two able and distinguished ex-commissioners of the office. I refer to the Case of Jeremiah Cohart, decided by Judge Mason in 1856, and to the Case of Adriance, assignee of Gale, decided in 1858 by Judge Holt. I have given to the subject the most careful and anxious consideration, and will state the reasons which have controlled my judgment. They have satisfied my own mind, and if they fail to satisfy others whose right may be thereby compromised, I have the consolation to know that these reasons may be reviewed, and, if wrong, reversed, before the proper judicial tribunals. My judgment can only give to Mr. Dyson a prima facie title to his reissue, which is still open to contest in the courts by those who have a standing in them to dispute its validity. The 13th section of the act of 1836, or so much of it as relates to this case, is in these words: "That whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid, by reason of a defective or insufficient description or specification, if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner upon the surrender to him of such patent and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification," &c., &c., (providing for assignees and legal representatives), "and the patent so reissued, together with the connected description and specifications, shall have the same effect and operation in law on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such connected form before the issuing of the original patent."

The first remark I make upon this section is that, as the commissioner is a public officer, and the power conferred on him in this section, concerns others (patentees), and is beneficial to them to have executed, the words in the section, "it shall be lawful for the commissioner upon the surrender to him of such patent," &c., "to cause a new patent," &c., "to be issued," &c., are to be construed as

mandatory, and to be of the same import as if the words had been "it shall be the duty" of the commissioner; that is to say the true meaning is that the commissioner is to have no discretion in the case provided for in the section.

When the case provided for arises, he is commanded to exercise the power, whether he thinks it just and right to exercise it or not. In the case assumed in the section to exist he has no discretion. For this principle of law I refer to the case of Mason v. Fearson, 9 How. [50 U. S.] 249. In that case the supreme court say: "Whenever it is provided that a corporation or officer 'may' act in a certain way, 'or' it shall be lawful 'for them to' act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons." The next remark I make upon this section is that by its terms, when the case of honest mistake arises, or a defective or insufficient description or specification, the only limitation on the reissue patent for his amendment or correction is that it shall be for the same invention. The closest inspection of the section will show no other limitation. By the terms of the section no mode of proof is pointed out to show the invention claimed on reissue to be the "same invention" that is left at large. There is no prohibition of any particular species, or class of evidence. In the absence of such prohibition, how can any legal evidence to establish the invention to be the same invention be excluded? By "legal evidence" I mean all such evidence only as by the rules of law, and the adjudication of the courts is receivable to establish any like fact in controversy before them.

In the case supposed of honest mistake, the section gives to the reissue applicant an absolute, vested right to his amendment, dependent solely upon the condition that his amendment shall cover the same invention originally intended to be patented. As he is not limited to the section to prove this fact by any specially presented testimony, how can it be said the legislature did not intend the whole range of legal proof should be open to him? How can the office rightfully undertake to say he shall only prove it by their record; that is, only by the specification, model, and drawings; that no evidence, however plenary and credible, by competent witnesses, will be listened to, or looked at. Cases, it seems to me, may be put in which this inexorable rule would not only work great injustice to individuals, but in fact repeal this reissue section. The patent laws provide for "inventions" which do not require models and drawings. Models and drawings, are only required by law where they illustrate, the invention claimed, and are thought necessary by the commissioner. Compositions of matter are by law patentable. In such cases there are no drawings and models. They are not needed. All that is required is a specification. The merit and usefulness of the "invention" consist (we may say for illustration) in the admixture of certain ingredients in certain proportions, compounded in a particular manner. If an honest inventor inadvertently and by mistake errs in his original specification as to the ingredients, the proportions, or the mode of mixture, is he to be without remedy by reissue? By the office rule he would be. There is no model or drawing to amend by. They were not required nor necessary. He cannot amend by the "specification;" that is defective, and good for nothing. It is the very thing he wants to make good by amendment, and which the 13th section gives him the right to amend. The office rule excludes him from relief because he cannot prove his case by the record, and the reissue section is virtually repealed by the office.

Again, put the case of a "machine" where a model and drawing are necessary, and have been deposited in the office, according to law. Put the case of the carding machine, now in controversy. It does not properly belong to the model and drawings to show the rate of speed at which the cylinders are driven in that machine. That is the appropriate function of the "specification." The merit of the invention, in this case, consists in that rate of speed. The inventor swears that by mistake he failed accurately to describe the speed, or rather the differential speed, of one of the cylinders, which he intended to patent in 1849, and proves by four witnesses that they know the machine, before the date of the patent and before the patent was applied for by Mr. Dyson, to be worked with this differential motion of the stripper, A, and to be only so worked. Is the invention, in such a case, to be deprived of relief by reissue? The office rule excludes him, because their record does not show any thing to amend by, because it does not show the thing to be amended. It was not, in this case, the function of the model and drawings to show the error, and they are therefore, as to this point, as if they did not exist The only part of the office record by which the inventor could amend is the "specification," and that is the document, he avers, to be mistakenly wrong, and which the reissue section was intended to enable him to put right. If that document is wrong, it can not be put right by itself, and the model and drawings being out of the way, as not the appropriate means to furnish the evidence, such evidence can only be got aliunde or outside of the office record. If this is not received, there is a failure of justice.

Again, put the case in which the model and drawings are necessary, and in which their proper function is to show the whole "invention," and every part of it. If the honest inventor by mistake fails to show his entire invention, either by the specification, model, or drawing, is he to be without remedy? The office rule says he is, but even

there—which is the strongest case against an inventor—the statute does not, in terms, exclude him. I agree, in such a case, where all the three elements of proof which ought to serve him fail, it is strong, if not pregnant, evidence of a fraudulent and deceptive intention; but, after all, even in that case it is only a question of the weight of evidence. It may, I think, under the statute, be met and rebutted by plenary and credible proof outside the record. The commissioner in the Case of Adriance, assignee of Gale, seems to think that on a reissue there is a material difference between a defective and insufficient description and no description at all, and that it is the former only, that the 13th section, truly construed, allows to be corrected. If the commissioner is right in this construction, then, if there was no description in the "specification" of the real invention, although the drawings and model fully set it forth, the applicant would be without remedy; but the office does not now, and I believe never did, press their rule to that extent, and the commissioner's reason for this construction of the statute is that the introduction by reissue of features or devices not described at all or shown in the drawings and model "would destroy the identity of the invention as patented," and hence "the new patent would not, in strictness of language, be for the same invention as the old, which the law requires it shall be." Now, I cannot see that a defective and insufficient description is any better than none. Neither of them is any foundation for an operative patent. If it does not cover the invention the patentee seeks, and secure his rights, it is worthless, and no better than no description. This construction seems to rest on verbal criticism merely. Nor is the reason given, sound and tenable. The reason is that new features introduced would destroy the identity of the invention patented, and would not, in strictness of language, be for the same invention.

Now, it is very clear that the identity of the invention patented is always destroyed by a reissue. The sole object for a reissue, as intended by the applicant and provided for by law, is to give to the patentee something additional, though it be the same invention,—that is to say, something not in the old patent; and to this extent every reissue destroys the identity of the patented invention. There would be no sense or use in the reissue unless it added something to what was already patented. If it left the old patent intact or identical as to invention, the patentee would gain nothing by his application, and the reissue statute, so construed, would fail to effect any good to the patentee, and might as well be blotted from the statute book. What the legislature designed to secure to patentees by this 13th section was to enable them to cure honest mistakes, and to get, substantially, protection for the same invention they had made and intended to be patented, when the original defective patent was granted. The only limitation in the statute is that the invention should be the same. The legislature has not said by what proof the applicant shall show his invention claimed on reissue to be the same invention made and intended to be got on his original application. He is not limited by the statute to prove it by the specification, model, or drawings. Any legal proof to show it to be the same invention, whether found in the record or aliunde, ought to be received and weighed by the office. No authority by law is given to the office to limit the range of the applicant's proof if it is such as, upon the law of evidence, is held sufficient to prove facts before other legal tribunals. The commissioner of patents, by the 12th section of the act of 1839 [5 Stat. 355], has "power to make all such regulations in respect to the taking of evidence to be used in contested cases before him as may be just and reasonable." But the office has no right to make new rules of law, or to divest vested rights by its rules of practice. No such power exists in any court, not even the supreme court. The rules of practice of all courts are made in subordination to law, and no court in this country, so far as I know, can change, abrogate, or limit the known rules of evidence.

If these rules of evidence work injustice, and lead to fraud and perjury, congress must change them, and not the office. But I see no reason to think that fraud and perjury are more likely to be practiced on a reissue than on an original application. Where an invention is valuable, and large gains to be made, fraud and perjury are apt to be practiced, as they are in all other human transactions outside of the office where great profit is to be attained. Fraudulent inventors must be met, as all other fraudulent or perjured actors are, by the ordinary legal remedies. The public and the members of it injured must prove and expose the fraud and perjury, and punish the transgressors. Because this is often difficult to be done, innocent inventors ought not to suffer, who seek to correct errors, the result only of honest mistake, inadvertence, or accident; more especially when such right of correction is expressly conferred by statute. It is said the office may be deceived, and made the innocent instrument of deception by granting patents for the like invention to subsequent claimants. When this is so, the office has only to declare an interference, and then the truth can be brought out. At all events, the subsequent patentee can then bring his adversary face to face, and cross-examine his witnesses, and offer evidence on his own part, to expose any attempted fraud or perjury. The 26th rule of the office is referred to in the Case of Adriance, assignee of Gale, to justify the exclusion of any other evidence on a reissue than is furnished by the "record;" that is to say the specification, model, or drawings. That rule is in these words.

or the portion of it relied on: "A specification cannot be amended in any material part unless there is something to amend by; that is to say, it can only be amended to cause it to correspond with the drawing or model." But this rule applies only to original applications, and is classed and appears under that head. It is furtherance of justice, and to secure the revenue of the office, and not contrary to the statute. An original applicant has no right by law to amendment, unless by the 7th section of the act of 1836, after his first rejection, to conform his specification to the alterations suggested by the commissioner. It is in the discretion of the office, in all other cases, to grant the amendment or not, and, when granted, to impose such terms as are just. The legal right of the rejected original applicant is not to amend, except in the case above alluded to, but to withdraw, his application, leaving ten dollars in the treasury, to pay the office for its trouble.

If this rule did not exist, the original rejected applicant, on the old fee of thirty dollars, might by amendment, make an entirely new case as often as he saw fit, to the annoyance of the office, and in evasion of its rightful revenue. Not so in the case of a reissue. The amendment there is not of grace, but of right. It is secured by the statute. The applicant is to pay fifteen dollars towards the revenue, and is limited to "the same invention" intended to have been embraced in the original defective patent. When these conditions are complied with, his right to the amendment is perfect under the law. This 26th rule therefore does not apply to reissues. It would be void if it did, because contrary to law; and the failure of the office so to apply it contradicts, rather than sustains, the construction of the 13th section now insisted upon. The 44th rule of the office, which does relate to reissues, was not relied on by the commissioner who decided the Case of Adriance, assignee of Gale, although it is relied on by the present commissioner in his answer to the reasons of appeal. That rule is in these words: "The general rule is that whatever is really embraced in the original invention, and so described or shown that it might have been embraced in the original patent, may be the subject of a reissue." This rule is very cautious and general in its terms, and properly so. It does not profess to be without exception. It is only a general rule. It states what may be the subject of a reissue. It does not say what shall not be. It states one mode of showing the invention to be the same invention, and even this in vague and ambiguous terms; but does not prescribe that this shall be the sole and only mode. It leaves special cases, as I construe it, open to be determined by the law applied to their particular circumstances. At all events, it is not, in the bold and peremptory terms of the rule of practice, laid down by the board of appeals in their report in this case. The counsel who has argued this case for Dyson, who was himself long a commissioner, insists that the practice of the office has been the reverse of that alleged in the report of the appeal board. He refers to Couillard or Quillards Case [unreported], in 1838; Woodworths Planing Machine Case, in 1845 [Case No. 18,011]; Pond's Case, in 1847, Letter Book, 345; and in 1856 to Jeremiah Corhart's Case, decided by himself. After all, however, the case must be decided, not by the practice of the office, but by the law applicable to it. The practice and decisions would seem to have been variant under different commissioners.

The liberal spirit in which the patent law ought to be construed in favor of honest patentees is so strongly set forth by Judge Marshall in the case of Grant v. Raymond, in 6 Pet. [31 U. S.] 241, 242, that I will cite passages from that opinion of the supreme court. Before giving the extracts, it is proper to say that the decision was made at Jan. term, 1832, more than four years before the act of 4th July, 1836, and that in that case they sustained the reissued patent, even though the secretary of state, who granted it, had then no express power by law to grant a reissue in cases of accident, mistake, or inadvertence on the part of the patentee. Judge Marshall said: "If the new patent can be sustained, it must be on the general spirit and object of the law, not on its letters. To promote the progress of the useful arts is the interest and policy of every enlightened government," &c. "It cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in the patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to recite the contract fairly, on the part of the United States, &c. That sense of justice and of right which all feel pleads strongly against depriving the inventor of the compensation thus solemnly promised because he has committed an inadvertent or innocent mistake."

"It has been said that this permission to issue a new patent, or a reformed specification, when the first was defective through the mistake of the patentee, would change the whole character of the act of congress. We are not convinced of this. The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals; and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries by the exclusive right to make, use, and sell the things discovered for a limited time. That which

gives complete effect to this object and intention by employing the same means for the correction of inadvertent error which are directed in the first instance cannot, we think, be a departure from the spirit and character of the act, &c." "It has been urged that the public was put into possession of the machine by the open sale and use of it under the defective specification, and cannot be deprived of it by the grant of a new patent; the machine is no longer the subject of a patent. This would be perfectly true if the second patent could be considered as independent of the first, but it is in no respect so considered. The communication of the discovery to the public has been made in pursuance of law with the intent to exercise a privilege which is the consideration paid by the public for the future use of the machine. If by an innocent mistake the instrument introduced to secure this privilege fails in its object, the public ought not to avail itself of this mistake, and to appropriate the discovery, without paying the stipulated consideration. The attempt would be disreputable in an individual," &c., &c., "and, a fortiori, I say, in the government of the United States." The supreme court, in the case before them, enlarged the patent law by construction to give effect to its spirit, and to hold the United States to the fair execution of their agreement with the patentee.

The patent office, in the Case of Dyson, before it, with the express power of reissue conferred by the 13th section of the act of 1836, restrains by construction both its letter and spirit, and denies the reissue, unless the patentee proves his case by the original record, the inadvertent and honest error of which record he wants to put right, and which it was the object of the 13th section to enable him to put right. The model and drawings may, and often do, furnish the means to correct the defective description; not so always. The "differential motion" (as it is called) of the stripper, A, is in this case the very gist of the invention. It does not belong properly to the model and drawings to show this differential motion, or the rate of surface speed of any of the cylinders in the engine. This is appropriately the office of the stipulation. Mr. Dyson does not, as I understand, on this application for reissue, propose to modify his model or his drawings. He presents the same model and the same drawings which were offered and received at the office on his original application, and thinks them sufficient for the reissue. It is true, the board of appeals, in their report, say that the model does not show the loose pulley on the shaft of the cylinder, A, but if it was there it would not necessarily show the differential motion, the reduction by the slow pulley of the surface speed of the stripper, A, below the surface speed of the main cylinder, "C," at intervals so as to make "C" a clearer or stripper of A. The loose pulley is one of the means, and only one, to effect this differential motion. Dyson does not claim a patent for the means, but for the motion. The means are not new, but familiar to every machine. If the fast and loose pulley were on the shaft of the cylinder, A, without specifying the rate of speed to be effected by the loose pulley, it could not be known but that the loose pulley was designed to stop the cylinder,—one of the usual offices, I am told, of the loose pulley. But the 13th section does not, in terms, point to the model and drawings as the sole means of proof, or any means of proof. The whole matter of proof is left at large. It requires that the invention sought to be introduced in the amended description should be the same invention originally intended to be patented, and is silent as to how that is to be ascertained.

The spirit of the section, as well as its letter, is to give to the patentee the invention originally intended; and the supreme court say that the United States ought in good faith to confer this on him, as they have promised to do. He is to prove it to be the same invention intended, but the quo modo of proof is not defined, and of course it is open to the patentee to offer any sufficient legal proof, record or otherwise. If he is confined to record proof alone, the office by construction restricts both the letter and spirit of the reissue clause of the act of congress. I refer to the cases of Baltin v. Taggert, 17 How. [58 U. S.] 83, and Allen v. Blunt [Case No. 216], as throwing light on this question. In the last-mentioned case Judge Story says: "Whether the invention claimed in the original patent and that claimed in the new amended patent are substantially the same is, and must be, in many cases, a matter of great nicety and difficulty to decide. It may involve considerations of fact as well as of law." If the office practice is right as laid down in the report of the board of appeals in this case, I do not see how there can be any dispute about "facts." The record, the office says, is conclusive, and no other proof can be received or heard. It would seem Judge Story had in his view aliunde testimony. For the reasons given in this opinion, I think the appellant has sustained his first and second reasons of appeal, and I do, this 21st Sept., 1860, reverse the judgment of the commissioner of date the 7th July, 1860.

If there be no claimant or subsequent unexpired patent for the same invention claimed on this reissue by Mr. Dyson, then I think Jeptha Dyson, the appellant, is entitled, on the proof, to his reissue as claimed by him; but, if there be such claimant or subsequent unexpired patent, then I think an interference ought to be declared, and the parties litigant heard on proof before the office. I return all the papers, model, and drawings to the Hon. Commissioner of Patents, with this, my opinion and judgment.

Case No. 4,229.

DYSON v. DANFORTH et al.

[4 Fish. Pat. Cas. 133.][1]

Circuit Court, D. New Jersey. Oct., 1865.

PATENTS—VALIDITY—FRAUDULENT CONCEALMENT—REISSUE.

1. Where the patentee described three devices in uniform motion only, and it appeared that they were only successful when used with a differential motion: *Held*, that if the application of the differential principle, and of devices to render it efficient, had been known to the patentee, and only privately revealed to purchasers of licenses, it would be a fraudulent concealment which would void the patent.

2. This principle, although known to the patentee when he made his invention, could not be incorporated in a reissue, if he failed to describe it in his original patent.

This was a bill in equity filed to restrain the defendants [Charles Danforth, John Edwards, John Cook, and Edwin T. Prall] from infringing letters patent [No. 6,135] for "improvement in carding engines," granted to complainant [Jeptha Dyson], February 20, 1849.

The nature of the invention will sufficiently appear from the opinion and from the claim of the patentee, which was as follows:

"The cylinder A, surrounded or clothed with a spiral fillet of metal teeth, in form of wire, or with teeth of metal of the form and description mentioned and described in the fourth specification, as arranged and employed in the third and fourth specifications, in combination with the main cylinder C, and with the cylinder B, or with the main cylinder only, to strip and clear the latter, by a self-acting contrivance, whilst the carding engine is in operation. I also claim the cylinder B, in combination with the cylinder A, and the main cylinder C, as applied to receive the strippings from the former and to deliver them to the latter."

George Harding, for complainant.

J. H. B. Latrobe, for defendant.

GRIER, Circuit Justice. It would be a tedious, as well as unprofitable, task to attempt a description of a carding machine, and explain the technical phraseology connected with it, or to examine the contradictory and irrelevant testimony exhibited by the record. We shall, therefore, content ourselves with stating the result of a careful examination of its contents.

Nor will it be necessary to decide the question as to the validity of the extended patent of complainant, because of his neglect to pay the sum of fifty dollars, required by the act of congress, at the proper time; as we are of opinion that the respondents have succeeded in establishing the defense alleged in their answer, viz.: That the improvement patented by complainant, after trial, has been abandoned by all who have used it as worthless, and that the improved machines, constructed by defendants under a patent to Gambrill & Burgee, in 1857, do not infringe any claim of complainant's patent of 1849.

It is a great desideratum in carding machines to make the machine clean itself. Previous to the invention patented by complainant, the only mode of obtaining this purpose was the use of a cylinder, made to run near the main cylinder of the engine, and so much faster than it that the teeth moving in the same direction (and not in opposite directions, as in the carding process) would comb out the cotton from the teeth of the main cylinder. But this cylinder, called a stripper, soon became clogged itself, and needed something to clean it in its turn.

The plaintiff's patent of 1849 was the first attempt to remedy this defect. His specification claims that he has invented a new and useful improvement in the carding engine, etc., for the purpose of stripping and cleaning the main cylinder of such carding engines, while running, by a self-acting contrivance.

He states that the principle of his improvement consists in the employment of two cylinders (whose functions are described), "it being a leading principle in said improvement to adjust the number or quantity of teeth in the stripping or cleaning cylinder in such a way as to cause it to remove the strippings in such limited quantities, in each revolution of the main cylinder, as will always enable the latter to deliver a sufficient amount of the carded material to the doffer cylinder, and with due regularity."

In order to accomplish this purpose the stripping cylinder must have "a clothing," forming a perfectly regular spiral fillet of teeth round the whole length of the cylinder, as shown in the drawing. This spiral clothing of the stripper is described as an essential part of the complainant's invention. It is to run uniformly faster than the main cylinder. One of the claims of his patent is the combination of this spirally clothed cylinder with the main cylinder.

He could not claim the use of a completely armed stripper in conjunction with the main cylinder. That device had already been tried and abandoned.

He claims, also, the combination of the above devices with another cylinder called a receiver, employed to receive the strippings from the stripper, and deliver them to the main cylinder. His combination of the three cylinders constitutes the improved automaton, or "self-acting machine," of complainant.

The improvement was used in many factories, and was generally abandoned as useless after a short trial.

The patent of Gambrill & Burgee, of 1857, which has proved successful, owes its

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

success to the happy thought that, if the stripper had the effect of cleaning the main cylinder by its increased velocity, by reversing this condition, the main cylinder might be made to clean the stripper.

The efficiency of the defendant's carding machines is due to the fact that the stripper is driven by mechanism at speeds which are alternately faster and slower than the surface speed of the cylinder, so that the main cylinder and stripper alternately strip each other.

The complainant's patent shows that the patentee was in entire ignorance of the application of this principle of alternate action.

His self-acting machine is described as consisting of these three devices in uniform motion. If the application of this principle, and of devices to render it efficient, had been known to complainant, and only privately revealed to purchasers of licenses, it would be a fraudulent concealment which would void his patent.

Without deciding whether he has succeeded in proving this fact, to which he has produced much testimony, it is sufficient to say that his patent exhibits no device to effect the purpose, and no claim to the discovery of the principle of differential movement.

The attempt to have a surrender and reissue of his patent, so as to cover the invention of defendant's patent, very properly failed in the patent office, where his right to claim the discovery and application of this principle was fully tried in an issue between the parties, and properly and conclusively decided. [See Dyson v. Gambrill, Case No. 4,230.]

Now, the stripper of defendant's machines has a continuous surface of card teeth, and does not infringe the plaintiff's device of spiral belts. It is combined with devices to produce the differential movement, which forms the great and peculiar principle of their machine. It does not infringe the claims of complainant's patent, either in form or in substance.

This conclusion is fully proved and explained in the testimony of Mr. Edward S. Renwick, one of the most able and experienced scientific experts, a reference to which will explain more fully the reasons for our decree.

Complainant's bill is dismissed, with costs.

DYSON (FAXON v.). See Case No. 4,705.

Case No. 4,230.

DYSON v. GAMBRILL et al.

[3 App. Com'r Pat. 472.]

Circuit Court, District of Columbia. July 9, 1861.

PATENTS—REISSUE—INTERFERENCE.

[1. No more can be embraced in a reissue than was invented before or at the time of the original patent, and omitted therefrom by accident or mistake, and without fraud or deceptive intention.]

[2. On interference declared on application for a reissue it is not sufficient for the applicant to prove prior invention of the improvement with respect to which interference is declared, but he must show that such improvement was invented before the date of the original patent.]

[Appeal from the decision of the commissioner of patents.

[On interference. Application by Jeptha Dyson for reissue of letters patent No. 6,135. Interference declared with Gambrill & Burgee. From a decision of the commissioner rejecting the application, Dyson appeals.]

DUNLOP, Chief Judge. When this case was before me, in September, 1860, on the ex parte application of Mr. Dyson for the reissue of his patent of the 20th February, 1849, so as to embrace in the reissue the differential motion of the stripper to his carding machine [see Ex parte Dyson, Case No. 4,228] I said in my opinion of the 21st September, 1860, at page six of the printed copy: "It is said the office may be deceived, and made the innocent instrument of deception by granting patents for the like invention to subsequent claimants. When this is so, the office, has only to declare one interference, and the truth can be brought out. At all events, the subsequent patentee can then bring his adversary face to face, and cross-examine his witness, and offer evidence on his own part," &c. And again, at page ten of the same printed opinion, I say: "If there be no claimant, or subsequent unexpired patent, for the same invention claimed on this reissue by Mr. Dyson, then I think Jeptha Dyson, the appellant, is entitled, on the proof, to his reissue as claimed by him; but, if there be such claimant, or subsequent unexpired patent, then I think an interference ought to be declared, and the parties litigant, heard on proof before the office." After the return of my opinion and judgment of the 21st September, 1860, to the office, it seems an interference was declared between Mr. Dyson, on his reissue claim and the unexpired patent of Gambrill and Burgee of the 27th February, 1855, and reissued November 17th, 1857. The principle of the improvement embraced in these interfering claims is doubtless the same, and the office, conforming to my decision, rightly declared the interference.

The four witnesses on whose ex parte evidence I relied in my opinion of the 21st September last on Dyson's ex parte application for reissue have not been examined on the present interference. Gambrill and Burgee have had no opportunity to cross-examine them,—a right asserted by me in my former opinion, at page six, to belong to them. This evidence therefore is not in the present interference, and cannot be looked at or regarded by me now, and is so admitted by

Judge Mason in his argument for Dyson. The evidence in this present interference, giving to it its most favorable aspect for Dyson, does not show Mr. Dyson to be the inventor of the improvement in controversy at a period earlier than the year 1851. Mr. Dyson fails, therefore, on this interference, to show himself entitled to the reissue patent claimed by him. Nothing is more certain than that you can only embrace in a reissue what was invented before or at the time of the grant of the original patent, what was invented and omitted to be put in the original by accident or mistake, and without any fraudulent or deceptive intention, and only such invention is by law the subject of a reissue. It is urged, however, that the sole issue between the parties to this interference, and now before me, is who of the two parties was the first inventor. That is not so. There is no difference, so far as I can see, between this and any other interference. Gambrill & Burgee were no parties to the former proceeding, and had no opportunity to be heard, and my former decision reserved all their rights. In the case of Loveridge v. Dutcher [Case No. 8,553], decided by me the 24th May, 1861, I considered this question, whether priority of invention was the sole issue in interference cases; and I held it was not. I said: "My authority is to determine which or whether either of the applicants is entitled to a patent as prayed for;" and again: "My duty therefore is to inquire into all the facts and circumstances given in evidence which go to invalidate Dutcher's claim."

So in this case my duty is to inquire into all the circumstances which invalidate Mr. Dyson's claim to the reissue asked for by him. It is not sufficient for Mr. Dyson to prove that he invented the improvement before Gambrill and Burgee. To get his reissue, he must prove the invention to have been made by him before the date of his original patent, the 20th February, 1849. I must therefore overrule the appellant's 2nd and 5th reasons of appeal, and I do, this 9th day of July, 1861, affirm the decision of the commissioner of patents of date 19th March, 1861, refusing Mr. Dyson a reissue patent, as claimed, for the reasons above stated by me. I return herewith all the papers, models, and drawings with this, my opinion and judgment, this 9th day July, 1861.

Case No. 4,231.

DYSON v. WHITE.

[1 Cranch, C. C. 359.] [1]

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

COSTS OF CONTINUANCE—ATTACHMENT.

The costs of continuance await the event of the cause, unless there be a special order to the contrary; an attachment will not lie for non-payment of the costs of a continuance until after a rule to show cause, nor unless there has been a personal service of the order of the court to pay the costs; nor unless the bill of costs state the particular items.

Mr. Youngs, for plaintiff [Dyson's administrator], moved for an attachment against the defendant [Thomas White, Jr.], for not paying the costs of the last term, (the cause having been continued at his costs,) grounded on a paper signed by the clerk, stating the costs of the continuance in general terms to be, for witnesses' attendance, $48, and marshal's fees, $3, without stating who were the witnesses, nor how long they attended, nor for what services the marshal's fees arose; nor did it contain any certificate of the order of the court, or even a copy of the entry respecting the continuance. On the back of the paper was an order from John A. Burford, (the plaintiff's husband,) to pay the money to ——, and a memorandum purporting to be signed by the defendant, refusing to pay the bill unless compelled by law.

THE COURT refused the attachment, because there did not appear to be a personal service of the order to pay the costs, or of the entry on the minutes, and because the bill of costs did not state the particulars. The clerk stated that it was not the practice in the court to issue attachments in such cases, but the costs awaited the event of the cause. It also seemed to be the practice, that a rule to show cause why an attachment should not issue, should be granted.

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

E.

Case No. 4,232.

EADS et al. v. The H. D. BACON.

[1 Newb. 274.][1]

District Court, D. Missouri. March, 1853.

ADMIRALTY JURISDICTION — LAKES AND RIVERS—SALVAGE CONTRACT AND LIEN — COMPENSATION —PLEADING—ANSWER AS EVIDENCE.

1. Admiralty jurisdiction extends to the lakes and navigable rivers of the United States; the same above as below tide-water.

[Cited in Seven Coal Barges, Case No. 12,677.]

2. A lien exists for salvage services upon the property saved. Possession is not necessary to give validity to a lien. There is a difference between the right of retainer, merely, and a lien.

3. It requires the most unequivocal acts, on the part of the salvors, to show that they intend to abandon their lien, and resort to the owners for payment.

[Cited in The Sterling, 20 Fed. 752.]

4. A master, when upon a voyage, is the general agent of the owner, and his admissions and declarations as such, and within the scope of his authority, are evidence against the principal.

5. The absurd rule which prevails in chancery courts, that the answer of the defendant when responsive to the bill, is equal to two disinterested witnesses, or to one witness with other circumstances of equivalent force, does not prevail in the admiralty courts.

6. Nor does the same rule prevail, even when the answer is responsive to interrogatories propounded.

7. The true rule of construing salvage contracts, is that they shall be presumed, prima facie to be fair, but if proven to be unconscionable, the court of admiralty, like the court of equity in similar cases, would refuse to enforce them.

[Cited in Bowley v. Goddard, Case No. 1,736.]

8. Admiralty courts have never put the compensation for salvage services upon the basis of pay for work and labor; but have ever considered that it was for the interest of commerce and navigation, that a liberal compensation should be allowed, and in proportion to the benefit received by the owners.

9. When the salvors by the use of their machinery and diving bell, worth $20,000, raised a badly sunken steamboat in the Mississippi, valued at $20,000, in twelve hours, *held* that the contracted price of $4,000, was but just and reasonable.

In admiralty. This suit is a libel in rem against the steamboat H. D. Bacon, brought in November last, by Eads and Nelson, for salvage services rendered by them, in October last, with their diving bell, the Submarine No. 4, in raising the Bacon, which was sunk in the Mississippi river, about one hundred miles below Cairo. The libel states, among other matters, that the plaintiffs were employed by the master of the Bacon—Henry Ealer, then on board and having charge of the Bacon—to raise her with their diving bell, then some two hundred miles below the Bacon, in the Mississippi river: that they repaired, with their diving bell, to the Bacon: that they informed the master that they would charge $4,000 for raising her, to which he made no objection: that they raised her, and that said master refused to pay the said $4,000, and was, at the time of the filing of the libel, about to remove his boat beyond the jurisdiction of the court: that the Bacon was not registered at St. Louis, and that they do not know who are the owners of said Bacon: that she is worth about twenty or twenty-five thousand dollars, and had on board, when sunk, a valuable cargo, being transported by her from New Orleans to St. Louis, on the Mississippi, a navigable river of the United States. An affidavit to the facts stated in the libel, was made by one of the plaintiffs; process to seize the Bacon was ordered by the judge of this court. The boat was seized by the marshal, and released on the filing of bond, in pursuance of the act of congress of the 3d of March, 1847, entitled "An act for the reduction of costs and expenses in proceedings in admiralty against ships and vessels." The owners of the boat filed their answer. They admit the employment of the diving bell: that it assisted in raising the boat: that they have no knowledge, nor do they believe the fact to be, that plaintiffs informed the master that they would charge for raising said boat, $4,000: that they believe the boat could have been raised without the aid of the diving bell, but not in so short a time: that the boat is worth as much as stated by the plaintiffs: that the diving bell was not employed in raising the Bacon more than fifteen hours, and the charge is unreasonable and unjust: that $2,000 would be full, reasonable and just compensation, which they are and were ready and willing to pay. The cause was submitted to the court, on libel, answer, amended answer, and proofs. The evidence was by depositions. On hearing of the cause, the proctor for defendants denied the jurisdiction of this court, which was also denied in the amended answer.

Benjamin F. Hickman, for plaintiffs.

James S. Thomas, for owners of the boat Bacon.

WELLS, District Judge. No one has ever doubted that salvage services, when rendered at sea, or in the navigable rivers, where the tide ebbs and flows, were subjects of admiralty jurisdiction; but the doubt has been, whether the admiralty jurisdiction of the courts of the United States extended on the navigable rivers above where the tide was felt. The supreme court of the United States, in the case of The Thomas Jefferson, 10 Wheat.

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

[23 U. S.] 428, held that the admiralty jurisdiction did not extend above the tide-water. The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, is to the same effect. But in the recent case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, and Fretz v. Bull [Id.] 446, the former cases were overruled, and the admiralty jurisdiction declared not to be limited by tide-water, but to extend to the lakes and navigable rivers of the United States—on the rivers, the same above as below tide-water. The last-mentioned case was one of collision on the Mississippi river. It was also contended by the proctor for the defendants, that this proceeding in rem (against the steamboat), could not be maintained, as it depended on a lien existing at the time of suit brought; and that, in this case, there was no existing lien, it having been lost by the salvors delivering up the vessel after raising it, and permitting the master to proceed upon the voyage to St. Louis. Several answers may be given to this objection: 1. The 19th rule prescribed by the supreme court of the United States for courts of admiralty, provides that, "In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed." 2. That there is a difference between a right of retainer, merely, and a lien—that possession is not necessary to give validity to a lien—that for salvage services there is a lien. Cutler v. Rea, 7 How. [48 U. S.] 729. 3. Admitting that a lien may be abandoned, yet the mere fact that the master and crew of the Bacon were permitted to carry her into port, was no abandonment of the lien. It is nothing more than is usual and almost universal in salvage cases. Is a vessel saved from shipwreck at sea to be kept by the salvors at sea until a libel suit is commenced and the vessel seized? Was it necessary to keep the Bacon in the Mississippi river, one hundred miles below Cairo, until a suit could be brought and a writ served? Or were the salvors obliged to leave their own vessel and take possession of the Bacon and dispossess the master and crew, or failing to do so lose their lien? It would require the most unequivocal acts to satisfy the court, in this case, that the salvors intended to abandon their lien and resort to the owners, when the salvors did not even know who the owners were, or in what place or places they resided. The plaintiffs offered evidence to prove that the master of the Bacon had agreed to give them $4,000 for raising the boat.

The evidence consisted of the admissions and declarations of the master, whilst acting as master, after the arrival of the Bacon at St Louis, and before suit brought. The admissions and declarations were proved by one witness only. To this evidence, the proctor for defendants objected: 1. Because incompetent, the declarations and admissions of the master not being competent evidence to charge the owners; and 2. That the evidence of one witness was not sufficient to negative the answer of the owners, who therein denied the contract.

As to the first objection, the master, when upon a voyage, is the general agent of the owners, and they are bound by his acts. Abb. Shipp. 169, 219, note. "It is a general principle, that the acts of the master, at all events, bind the owner of the ship, as much as if the acts were committed by himself." Pages 169, 220, note. "When the progress of a voyage is interrupted by any casualty, such as capture, shipwreck, or other accidents, the master of the ship becomes, of necessity, an authorized agent for the owners, freighters, insurers, and all concerned. And whatever he undertakes, and whatever expenses he may incur, fairly directed to that purpose, become a charge upon them respectively, in the same manner as if incurred at their special request." The court has no doubt of the power of the master, as the agent of the owners, to use and employ, at their expense, every necessary means to save his sunken vessel. The admissions and declarations of an agent whilst acting as such, and within the scope of his authority, although made after the transaction to which they relate, are evidence against the principal. 2 Starkie, Ev. pt. 4, pp. 56, 57.

As to the second objection, the court is of the opinion that the absurd rule which prevails in chancery courts, that the answer of the defendant, at best only an interested witness, when responsive to the bill, is equal to two disinterested witnesses, or to one witness and other circumstances of equivalent force, does not prevail in the courts of admiralty. [Andrews v. Wall] 3 How. [44 U. S.] 572; 2 Conk. Adm. 620, 621, 622. Nor does it prevail in the admiralty courts even when the answer is responsive to interrogatories propounded.

But there is another answer to this objection, which is, that the rule in courts of chancery, above mentioned, is not applicable to a case like the present, where it is not alleged by the plaintiffs or defendants that the matter was within the personal knowledge of the latter. The plaintiffs state that the contract was made with the master, and that they have no knowledge of the owners. The owners do not allege that they were present on the occasion. Nor do the defendants, in their answer to the interrogatory, deny the contract; but state that "they believe and were so informed by said Henry Ealer (the master), that said petitioners said nothing about the charge they would make for raising said boat, and did not say they would charge $4,000." The court is, therefore, of opinion that the said evidence is competent and sufficient to prove the contract, and that a contract was made to pay $4,000 for raising said boat. Judge Conkling, in his valuable

work upon the jurisdiction, law and practice of the courts of the United States, in admiralty and maritime cases, lays down the law in regard to salvage contracts thus: "Contracts of this nature, however, are not held obligatory by courts of admiralty upon the owners of the property saved, unless it clearly appears that no advantage was taken of their situation, and that the rate of compensation is just and reasonable. In that case the stipulated rate of allowance will generally be adopted and enforced by the court, as just and conscientious;" and several adjudicated cases are cited. 1 Conk. Adm. 280. If the law be laid down correctly in the foregoing extract, it is manifest that a contract would have no force or effect whatever. For, if the compensation agreed upon must be proved to be just and reasonable, the same proof would insure a recovery for the same amount, without any contract—and this without any proof "that no advantage was taken of their situation." But there are certainly many adjudicated cases or dicta to that effect—as well as many ancient laws and usages. The Emulous [Case No. 4,480]; Bearse v. 340 Pigs Copper [Id. 1,193]; Schutz v. The Nancy [Id. 12,493]; Laws Oleron, art. 4, p. 29. The true principle by which such cases should be governed, would appear to this court, with great respect for others, to be that established in like cases in courts of equity; that is, that a contract should be presumed prima facie, to be fair, but if proven to be unconscionable, the court of admiralty, like the court of equity, would refuse to enforce it. But take either view of the law, it becomes necessary to look into the testimony in this case, to ascertain what compensation should be allowed; inasmuch as the defendants insist in their answer that the Bacon could have been raised without the assistance of the diving bell and apparatus, and that the charge of $4,000 is "extortionate, unreasonable and unjust," and that $2,000 would be a full, reasonable and just compensation.

Evidence on the part of the plaintiffs: Captain James Miller—now master of the steamboat Aleonia—been engaged in steamboating, on the western waters, twenty-seven years, the last twelve years as master of different steamboats; was along side of the Bacon after she sunk; remained there and took off part of her freight; did not believe it possible to raise her without the assistance of the diving bell; she was a badly sunk boat; she was badly bent from the after ends of the boilers to the bow; she was careened, and the water over one guard and part of the deck, whilst the other side was dry; she was a good deal worse sunk than the St. Paul. If the Bacon had been his boat, he would have been perfectly willing to give $4,000 to raise her; would have given $5,000 to raise her if she had belonged to him uninsured. Captain Eaton is agent for St. Louis board of underwriters, and has been such for upwards of three years. It is one of his duties to go to boats that are sunk or in perilous circumstances, and on which or on whose cargoes the St. Louis underwriters have any insurance, and to take means to save the boat and cargo; frequently made contracts with bell boats; customary to give a certain per cent. of the property saved: to ascertain what is a fair compensation, reference must be had to the value, difficulty of raising, and the danger of total loss; twenty per cent. of the net value of the cargo saved is the lowest salvage he has ever given a bell boat, and seventy-five the highest; considers $4,000 a reasonable charge for raising the Bacon; she was worth $20,000 as soon as raised, without repairs; the master of the Bacon contracted to pay McKinley fifty per cent. of the cargo of the Bacon as salvage; plaintiffs raised the steamer Pawnee, for which witness agreed to pay them fifty per cent; think it was more difficult to raise the Bacon than the Pawnee; speaks in high terms of the character and judgment of Capt. Miller; plaintiffs raised the Jewess and received fifty per cent. of her value; the amount of labor has nothing to do with the rate of compensation; the bell boat gets nothing if it does not succeed. Franklin L. Ridgley is president of the Union Insurance Company of St. Louis. Plaintiffs received for raising the St. Paul, $4,000; she was insured at the rate of $16,000; thinks the charge of the plaintiffs for raising the Bacon a moderate one; plaintiffs raised the steamboat Republic, worth about $4,500, and received $1,500, and got two-thirds of the cargo, worth at least $6,000; the steam pump of the diving bell Submarine, No. 4, throws from one hundred and fifty to two hundred barrels of water per minute; the Submarine No. 4, cost nearly $20,000; it was worth over $4,000 to raise the Bacon. The above named witnesses were all familiar with steamboating. It also appeared that the Louisville insurance offices had a standing contract with plaintiffs to pay them twenty per cent. on the insured value of boats raised by them, on which there was insurance in any of those offices, when under the value of twenty-two thousand dollars.

On the part of the defendants:—David B. Roach was carpenter on the Bacon when sunk; the boat sunk on Sunday morning, and the diving bell reached her on the following Saturday, in the afternoon; there was a hole in the bottom of the boat, about sixteen inches wide and eight feet long, tapering to a point at each end; commenced pumping a little after dark, on Saturday, and next morning she was afloat. Wm. McKinley was a passenger on the Bacon when she sunk; had been pilot, clerk and master at different times; went for the bell boat about two hundred miles down the river; made a contract with Henry Ealer, the master of the Bacon, by which he (witness) was to have one-half or fifty per cent. of the cargo saved; then considered the boat a total wreck; thinks the

said master was of the same opinion, as he went to Cairo to get boats on which to put the machinery of the Bacon; thinks $2,000 would be an exorbitant price for raising the Bacon; forms his opinion from what he understood was charged for similar services, and from his own knowledge of such services; the similar services alluded to were the raising the Sam Cloon, the Jewess, the Pawnee, the D. A. Givens; thinks his own compensation of fifty per cent. of the cargo, was a fair compensation. James Woodworth was engineer on the Bacon when it sunk; thinks $2,000 would be a big price for what was done in raising the Bacon. James Albright was mate on the Bacon when sunk, and yet is; thinks $4,000 a pretty big price for raising the Bacon, but don't know what it was worth; knows nothing about such services.

On the part of the plaintiff:—Charles F. Dickson knows plaintiffs received from the city of St. Louis $2,500, and the wreck of the Jewess (exclusive of boilers and machinery) for raising and removing her; plaintiffs received $2,500 for raising the D. A. Givens. It also appeared in evidence, that the cargo on board the Bacon was worth twenty-five or thirty thousand dollars, when sunk. The above is a very condensed statement of so much of the evidence as is deemed material to notice.

From the evidence, the court is of the opinion that the Bacon was badly sunk. This appears from the evidence of Captain Miller, Captain Eaton, and of the carpenter. It appears, also, that this was the opinion entertained by the master, as is apparent from the fact that he went to Cairo, a distance of about one hundred miles, to procure boats to receive and carry off the machinery of the Bacon; and from the fact that he contracted with McKinley to give him fifty per cent. of the cargo saved. McKinley also says that the master expected the boat to become a total wreck; McKinley was also of the same opinion. It appears also that it was usual to allow a per centum on the property saved; in other words, that the owners should pay in proportion to the benefit received. This is also the general rule adopted by courts of admiralty, in regard to salvage at sea. It also appears that twenty per cent. was the lowest salvage paid for raising boats by the diving bell; and that a much higher rate had frequently been allowed and paid. The Bacon, when raised, was worth, without repairs, at least $20,000; twenty per cent. on that value, would be $4,000, the amount claimed by the plaintiffs. The witnesses who testify on the part of the plaintiffs, declare that $4,000 was a moderate compensation for raising the Bacon. If they or their employers have any interest or feeling on the subject, it must be in favor of reducing the compensation for such services. But it is not merely a matter of opinion with them. They state what has been paid in many cases, and what is usual and customary, and the principles upon which their opinions are based; all of which are very satisfactory to the court. On the part of the defendants, the witnesses are, or were, all connected with the Bacon. McKinley thinks $2,000 would be an exorbitant price, but swears that the compensation of fifty per cent. on the cargo, allowed himself, was just and fair. His compensation would probably amount to eight or ten thousand dollars. There was neither ingenuity, skill or capital employed by him, and but little labor bestowed or expense incurred. He founds his opinion upon similar services, and the compensation allowed therefor; but it appears that the compensation in the cases alluded to by him, was greater than that claimed for raising the Bacon. The per cent. allowed was greater, although in some cases the amount received was less. In the case of the Pawnee, twenty-five per cent. was allowed, and it amounted to $4,000; that boat being valued at only $16,000. James Woodward, the engineer, thinks $2,000 would be a big price for what was done, but does not tell us why he thinks so; no doubt it was because the plaintiffs only worked some fifteen hours; nor does it appear that he knows anything about such services, or the principles upon which a compensation therefor is based. James Albright, the mate, thinks $4,000 a pretty big price, but frankly confesses he knows nothing about such services. It is stated by Captain Eaton, that to determine what is fair compensation, reference is had to the value of the property to be raised, the difficulty of raising it, and the danger of total loss. And that the labor expended by a diving bell does not enter into the account. The court is satisfied that these considerations form the true rule.

When persons, like the plaintiffs, by great ingenuity and skill, and at great expense, succeed in the construction of apparatus and machinery, by which a boat can be raised in twelve hours, which could not be raised at all without their machinery and apparatus, why should the owner of property complain of the shortness of the time employed? The sooner the property is raised out of the water, the better for the owners; long delay with many kinds of property, would be utter destruction to that property. The compensation which is allowed for marine salvage services does, and necessarily must depend upon other considerations. But there, no diving bells, costing some $20,000, are employed, and when not employed, going every day to decay. Property is not raised from the bottom of the sea, but only prevented from sinking. But yet in such cases, from twenty to fifty per cent. of the value of the property saved is usually allowed. The admiralty courts have never put the compensation upon the basis of pay for work and labor. It is and ever has been considered to the interest of commerce and navigation that lib-

eral compensation should be allowed salvors. Upon the whole case, the court is satisfied that $4,000 is only a reasonable and just compensation, and accordingly will allow that amount.

EAGER (HOCKHOLZER v.). See Case No. 6,556.

EAGER (WHITNEY v.). See Case No. 17,584.

Case No. 4,233.

The EAGLE.

[Olc. 232.] [1]

District Court, S. D. New York. Jan., 1846.

SEAMEN'S WAGES—WHEN SUIT MAY BE BROUGHT—DISCHARGE OF CARGO — SHIPPING ARTICLES—APPEAL FROM COMMISSIONER'S ORDERS FOR PROCESS.

1. Without the aid of an express stipulation, a seaman cannot sue for wages earned on a foreign voyage, until the full completion of that voyage, by the unlading of the cargo or ballast.

2. Quaere. Whether an appeal to the judge lies from an order of a commissioner or justice of the peace, granting certificates of cause for admiralty process, under the act of 1790 [1 Stat. 131]? But the judge or court may stay proceedings, or act upon the petition de novo.

3. If the master or owner defers, beyond a reasonable time, to unload the vessel, such laches may be regarded as equivalent to a discharge of the seamen. The burthen of proof to show a discharge before the unlading of the cargo, rests upon the seaman. His own oath is not sufficient evidence.

4. Under the act of congress of July 20, 1790, the seaman cannot sue until ten days after the discharge of the cargo have elapsed, unless there be a dispute between the master and mariners touching the wages.

5. The act of 1840 [5 Stat. 394] in regard to the erasures in shipping articles, applies to alterations which would vary their effect in respect to seamen. Immaterial erasures will be disregarded.

Burr & Benedict, for libellant.
Joshua Coit, for claimant.

BETTS, District Judge. This was an appeal from the decision of a commissioner granting certificate of probable cause for process of attachment against the vessel for recovery of wages, pursuant to the act of congress of July 20, 1790. The schooner arrived at this port on the afternoon of December 24th, and the libellant, cook of the vessel, on the 26th, two days following, presented his affidavit and application to a commissioner, and procured a summons to be served upon the vessel, to show cause why admiralty process should not issue against her therefor. The affidavit stated that the libellant shipped as cook on the 30th day of October last, for a voyage from New York to Baracao, (Cuba;) that he did duty on board until the 25th of December, when he was discharged out of the vessel by the master, leaving a balance of $15 and upwards due him for wages. On the return day of the summons, and in opposition to the grant of process, the mate was examined, and swore that the cargo was not out of the vessel, that the hatches were first opened that day, (the 27th,) that the cook left the vessel after she was made fast, and all the men went ashore that night, and also the night of the 25th, and did not return to work the day after. He further stated, that a stevedore was employed to unlade the cargo, who commenced on the 27th, and that the libellant had never been discharged from the vessel. One of the seamen testified that he had not been called upon by the officers to assist in unlading the cargo. The libellant called for the shipping articles, and on the production of a copy certified by the custom-house, the name of one man appeared to be erased therefrom. The objections urged before the commissioner, and pressed here as grounds for appeal, are that the period appointed by the act of congress of July 20, 1790, had not expired, so that the seaman had a right to attach the vessel; and that the affidavit of the prosecuting seaman was incompetent evidence upon which to found a certificate. For the libellant it was argued, that the seaman having sworn to facts, authorizing the proceedings to be instituted, it was incumbent on the master to deny these facts under oath; that the discharge of the seaman was to be implied from the employment of stevedores to unlade the cargo; and that an erasure appears upon the shipping articles, which, under the act of 1840, relieves the seaman from the obligation of remaining upon the vessel; that the libellant had accordingly the right to leave at his option, and sue for his wages. As this is the first case which has arisen before me where these questions have been raised, and where a party claims the right to cause an immediate arrest of a vessel on her arrival in port, without proof she was to depart within ten days, I have thought proper to consider them specifically, and present my view of the law arising upon these matters. The competency of the court to entertain an appeal from proceedings before a commissioner, has not been made a question by either party. It is exceedingly doubtful at best, whether the court has any jurisdiction of that kind; but an order to stay proceedings may be made, or the subject may be deemed originally before me; and as all the proofs have been presented and acted upon by both parties, without exception to the appeal, I am disposed to consider and determine the case the same as if the petition had been presented here in the first instance.

The act of July 20, 1790 (section 6), provides, "That as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and that if such wages shall not be paid within ten days after such discharge, or if

[1] [Reported by Edward R. Olcott, Esq.]

any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, to summon the master of said vessel or ship to appear and show cause why process should not issue against said vessel," &c. The statute determines the time at which wages become due in all cases of hiring, when the precise time is not fixed by the parties, that is, on the full discharge of the cargo at the last port of delivery. The time the wages become payable is the subject of distinct regulations. The seaman has no right to proceed in court, the judge has no authority to entertain his claim until the period so fixed has expired, or other contingencies referred to have occurred. Without the aid of an express stipulation, a seaman cannot, accordingly, sue for wages earned on a foreign voyage, until the full completion of the voyage, by the unlading of the cargo or ballast. If the master or owner wrongfully defers beyond a reasonable time to unload the vessel, such conduct will, in respect to the crew, be tantamount to her discharge. The purpose of the law cannot thus be evaded, and the seamen be defrauded of their wages or hindered in their recovery. The express contract of the libellant in this case, "to discharge the cargo," is no extension of his liability under a general shipping agreement, and the cargo being unlivered without fault of the ship, the voyage, in respect to the crew, is no more ended than it was before the vessel was safely moored in port, unless the mariner can show himself absolved from the restrictions imposed upon him by the act of congress, and in this case, also, embodied in the agreement. A plain, distinct discharge of a seaman by the master or officer in command of the vessel, if he chooses to accept it, terminates the contract, and he is then regarded as having fulfilled it on his part, at least as to the period of service. Such discharge from the ship is alleged by the libellant in this case, and it rests upon him to make out the fact, in order to acquire a standing in court, on his demand. He contends that he has established it in this case, first, directly by his own affidavit, and secondly, by implication or presumption, inasmuch as the men were not required to go to work unloading cargo, and further, that the master has not, by his own oath, denied the allegations sworn to by the libellant.

This affidavit, like a libel, may be sufficient to authorize supporting proofs in the first instance, or to furnish ground for an order against parties omitting to appear or show cause; but upon a contestation in court, neither becomes proof in favor of the action, nor do they when the owner comes in on summons, and gives evidence counterbalancing or conflicting with the affidavit of the petitioner. He then, in common with other litigant parties, is compelled to meet such contradictory evidence, and support his application by legal testimony, on his part. His own oath cannot avail him to accomplish this object. The Crusader [Case No. 3,456]; The Lord Hobart, 2 Dod. 101. Here the evidence was full to show that the contract entered into had not been fulfilled, and accordingly that the seaman had no right to demand his wages and attach the vessel, upon the allegation that the voyage was completed. The mate, who was in command when the libellant went ashore, also testifies that the libellant was not discharged. It would be changing all the principles of evidence to permit a party, by his own ex parte oath, to displace a defence by disinterested witnesses, and entitle himself to an award of an attachment and arrest of the vessel. No fact is established by the proofs which affords reasonable color for an inference that the men were released from the duty of discharging the cargo. One of them testifies that he did not assist in it, and the mate proves that stevedores were employed in unloading, on the 27th, the third day after the vessel arrived, and also says the crew were not at the vessel that day, or the 26th; they all went ashore on Christmas day. It is not even proved that the residue of the crew have been paid by the owners, or their omission to perform the service been assented to or acquiesced in. If the libellant had proved that the master was not interested in the case, the omission of the owners to call him as a witness might be calculated to induce a belief that he had directed or assented to the discharge of the libellant; still, as the owners were not bound to examine him, their not doing so cannot amount to a legal implication that he did discharge the petitioner, nor can the court impute fault to them for not calling in his testimony. It must, moreover, be observed, the master was a competent witness for the libellant, and as he avers that he was discharged by that officer, it was incumbent upon him to confirm that most material allegation. It is to be remarked, that unless such discharge is proved, the fact that the voyage is completed with the unlivery of cargo, does not entitle the seaman to sue for wages "until ten days more have elapsed," unless a dispute arises between the master and mariner, "touching the wages." It is not shown that any such dispute has arisen in this case; the only defensive allegation before the court is, that the contract is not yet fulfilled, and wages are not payable. The contestation of this point does not fall within this provision, for it relates to the proceedings of the seaman after his contract is performed, and his right to wages has become perfected, and the ordinary delay given by the statute, probably to enable the master to collect freights, is taken away when he disputes the right of the seaman to wages at all. I cannot perceive, therefore, that the act of July 20,

1790, removes the impediment or supplies the authority for this proceeding. The libellant, however, further insists that he is liberated from the vessel and the restrictions of the act of 1790, by the provisions of the act of 1840, because of an erasure made upon the shipping articles.

The duplicate articles and list of the crew of the vessel, appear to be a fair copy, with the usual custom-house authentication, and has nothing exceptionable or suspicious on its face, unless it be that the name of one individual inserted originally is erased, with the note "run" against it. Everything else, except the custom-house certificate, is written in one and a uniform hand. The 4th subdivision of the act of 1840 prescribes the consequences of erasures in shipping articles; "they shall be deemed fraudulent alterations, working no change in such papers, unless explained," &c. There is nothing conducing to show that this alteration, if added to the duplicate or found in the original, affects the libellant, or any provision in the contract. It had relation to a man shipped as cook, who abandoned the vessel, and whose place, it is alleged, was supplied by the libellant. But apply the whole effect of the law to this change, and what would it amount to? No obligation or privilege of the crew is touched by it. The line, if restored, would only add the name of some man to the list and remove the word "run," now opposite to it. This would not in any manner lessen or enlarge the stipulations of the contract, or reach the interests of those who signed the shipping articles. The policy of the act is most obvious. It is manifestly to prevent any alterations of shipping articles, which work a change in respect to the rights of seamen. Accordingly the custom-house copy is to be taken as the authentic and true agreement, and variations made in a different handwriting are declared by the law presumptively fraudulent; and accordingly, before they can affect the rights of any one, must be satisfactorily explained to the court. This law has relation to a condition of the papers wholly different from that presented in the present case; to changes made in the duplicate articles after the certificate has been given, and not to changes before the crew list is filed. The 10th subdivision of the section does not accordingly apply to the case. "All interlineations, erasures or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes, and the provisions of law which guard the rights of mariners." Act Cong. July 20, 1840 [supra]. The shipment of the libellant was regularly and legally made, and the duplicate list had nothing to do with that transaction. The engagement was upon the original articles, from which this duplicate is copied. The libellant could not, accordingly, leave the service of the vessel because of any illegality committed in his shipment. The 10th subdivision is to be read in connection with the 8th, and not as operating upon the contract originally entered into in port, before the shipping articles or even the list is deposited in the custom-house. My opinion is, that the libellant has not made out a case in which he is entitled to a certificate of cause for admiralty process, and his application for an attachment against the vessel is denied.

EAGLE, The (NORTH v.). See Case No. 10,309.

EAGLE, The (TUDOR v.). See Case No. 14,230.

EAGLE INSURANCE CO. (OHL v.). See Cases Nos. 10,472 and 10,473.

Case No. 4,234.

EAGLE MANUF'G CO. v. DRAPER et al.

[14 Blatchf. 334.] [1]

Circuit Court, S. D. New York. Oct. 10, 1877.

BILLS OF EXCEPTIONS—SIGNING AND FILING—VACATING JUDGMENT.

The rule stated, as to when a bill of exceptions may be signed and filed, and as to the circumstances under which a judgment will be vacated for the purpose of allowing a bill of exceptions which was not signed at the proper term, to be subsequently signed and filed.

[Cited in Whalen v. Sheridan, 5 Fed. 438.]

[This was a suit by the Eagle Manufacturing Company against John H. Draper and Henry Draper, executors of Simeon Draper, deceased.]

James Thomson, for plaintiffs.

Stewart L. Woodford, Dist. Atty., and Henry E. Tremain, Asst. Dist. Atty., for defendants.

SHIPMAN, District Judge. These are motions to vacate the judgments in above-entitled causes, and continue the same to the next term, and that time be given to file bills of exceptions. The following facts are found to be true: Verdicts in favor of the respective plaintiffs were rendered in this court, in January, 1874. Bills of exceptions in each of said cases were served upon the plaintiffs' counsel on February 27th, 1874, and were noticed for settlement on March 27th, 1874. By successive written "consents" of counsel, the settlement of said bills of exceptions was adjourned or extended to June 9th, 1874. The bills, with the plaintiffs' amendments, were presented to the court for allowance, at that time. They were, upon presentation and examination, in fact disallowed, upon the ground that they were not in proper form, and were returned

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

to the defendants' counsel, who were requested to draft new bills in conformity with the expressed views of the court. No order of disallowance was formally entered. On December 21st, 1874, the counsel for the defendants gave notice to the plaintiffs' counsel, that the proposed bills of exceptions and the amendments thereto would be moved to a hearing again, on December 22d, 1874. According to my recollection, which is not distinct in regard to this hearing, the counsel were again instructed to draw new bills. Judgments were entered on the verdicts October 13th, 1875, as of October 9th, 1875, by consent of the parties. A new bill of exceptions in the Wright case was drawn by the defendants' counsel, and was served upon the plaintiffs' counsel, January 5th, 1876. On June 8th, 1876, the plaintiffs' counsel in each of said cases stipulated in writing, that the time wherein the defendants could prepare and file bills of exceptions, and file the records in the supreme court, should be extended for sixty days from said date. By two successive written stipulations, said time was extended for sixty days from August 3d, 1876, when the written stipulations ceased. On or about October 24th, 1876, the defendants' counsel made the written motion, dated October 20th, 1876, as on file. When said motion was made, the court inquired whether new bills of exceptions had been drafted, and was informed that one bill, which, when made satisfactory to the parties, could serve as a guide or model, mutatis mutandis, for the two others, had been drawn and served. The counsel for the plaintiffs said that they had not examined this bill, but would do so promptly. The court urged prompt attention to such examination, and, without further discussion, the matter dropped, and was not again brought to the attention of the judge during his stay in New York. The second bill of exceptions has never been presented to the court for allowance. Upon August 24th, 1877, at the request of the defendants' counsel, the formal order on file upon the motion of October 20th, 1876, disallowing the first bill, was signed, and the petition on file was then presented, and an order to show cause was issued, returnable on September 18th, 1877. Upon the hearing, the petition was withdrawn, and the questions were discussed upon the order to show cause. Further consents by the plaintiffs' counsel for leave to perfect bills of exceptions are refused, and the proposed order to vacate the judgments is opposed. The objection of the court to the original bills was, that they were not in the form which is directed in Lincoln v. Claflin, 7 Wall. [74 U. S.] 132.

The questions which arise upon the foregoing facts are, whether the court has power to vacate the judgments which were entered in October, 1875, without the consent of the plaintiffs' counsel, and whether, if the power exists, it should be exercised.

In Muller v. Ehlers, 91 U. S. 249, it is held by the supreme court, that the power to reduce exceptions taken at the trial to form, and to have them signed and filed, is, "under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances." It is asked that the judgments be vacated, so that the bills of exceptions may appear to have been allowed and signed before or at the term when final judgments were rendered. The power of a court to vacate or alter a judgment, at a term subsequent to the entry of the judgment, is examined and stated in Bank of U. S. v. Moss, 6 How. [47 U. S.] 31. It has also often been held by the circuit courts, that they have power to open judgments which had been rendered at a previous term, for the purpose of correcting errors in the assessment of damages. Crookes v. Maxwell [Case No. 3,415]. Without deciding the strict question of power, I am of opinion, that, if it exists, it should be exercised for the mere purpose of permitting bills of exceptions which have not been presented and signed at the proper term, to be subsequently filed and signed, only in those cases in which the supreme court has declared that the bill itself can be signed subsequently to the term at which the judgment was rendered; i. e., in the absence of an express order of the court during the term when the judgment was rendered, or in the absence of consent of the parties, only under extraordinary circumstances. An exercise of power under other circumstances would be an evasion of the rule which has been declared by the supreme court.

In this case, bills were prepared during the term when the verdicts were rendered, but were disallowed, of which fact counsel were aware, as is manifest from their drafting a new bill. At the October term, 1875, judgments were rendered. A new bill was prepared in January, 1876, (within the October term, 1875,) but this bill has never been submitted to me for allowance. It is admitted that the motion of October 24th, 1876, related to the old bills. The delay was, however, cured by written consent, until October 3d, 1876. Additional consent is now refused.

The circumstances which call upon the court to vacate the judgments are, that parties have been manifestly reluctant to discharge the irksome duty which was imposed upon them, and long delay has been occasioned by this reluctance. These circumstances are not so extraordinary as to induce me to exercise a power which should be exercised, if at all, only in cases of peculiar hardship.

The motions are denied.

EAGLE SCREW CO. (PIERSON v.). See Case No. 11,156.

EAGLE WORKS MANUF'G CO. (BLAKE v.). See Case No. 1,494.

Case No. 4,235.

EAKEN v. UNITED STATES.

[1 U. S. Law J. 545.]

District Court, S. D. New York. 1822.

REFERENCES—FOLLOWING STATE LAWS—ACCOUNTS.

Under the thirty-fourth section of the act of congress to establish the judicial courts of the United States—2 Bior. & D. Laws, 70 [1 Stat. 92]—the district judge of the United States for the southern district of New York has power to refer cases, involving long accounts, to referees, in conformity to the practice of the supreme court of judicature of the state of New York, under the second section of the statute of the state of New York for the amendment of the law, and the better advancement of justice (1 Rev. Laws, 516, § 2).

A suit was commenced in the district court of the United States for the southern district of New York, against Samuel H. Eaken, in favor of the United States. The defendant, it seems, had been a district paymaster during the late war between the United States and Great Britain, for the military district embracing a portion of the states of New York, New Jersey, and Connecticut; and, in the discharge of his duty, had disbursed between two and three millions of dollars. In the settlement of his accounts at Washington, a controversy arose in relation to certain charges, and items which he preferred against the government. The United States claimed a balance in their favor, and the district paymaster also considered himself entitled to a balance against the United States. A suit on behalf of the government was commenced; and when the case was reached on the calendar, in the district court, the counsel for the defendant, on reading an affidavit, which stated that the case involved long and intricate accounts, moved the court that the same be submitted to referees. His honor, Judge Van Ness, remarked that the application was new, and he should order the motion to be argued on a future day, which was done.

On a subsequent day of the term, the motion was argued by the counsel for the defendant and the counsel for the United States. The counsel for the defendant read the thirty-fourth section of the judiciary act (2 Bior. & D. Laws, 70 [1 Stat. 92]), and the second section of the statute of New York (1 Rev. Laws, 516), under which the supreme court of that state has proceeded to order causes to be submitted to referees, and also referred to the 55th rule of the district court, adopting the practice of the supreme court of the state of New York in cases where the district court has not adopted special rules for itself. They also cited [Brown v. Van Braam] 3 Dall. [3 U. S.] 344; [Hamilton v. Moorel Id. 373; [Inglee v. Coolidge] 2 Wheat. [15 U. S.] 363; [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 129; U. S. v. Wonson [Case No. 16,750); Craig's Case [Id. 3,325]; Golden v. Prince [Id. 5,509].

The counsel for the United States read the seventh article of the amendments of the constitution of the United States, and cited [M'Culloch v. State of Maryland] 4 Wheat. [17 U. S.] 344; U. S. v. Wonson [supra]; Van Reimsdyk v. Kane [Case No. 16,872]; Campbell v. Claudius [Id. 2,356].

J. O. Hoffman, J. Anthon, and C. G. Haines, for defendant.

R. Tillotson, Dist. Atty., for the United States.

VAN NESS, District Judge, in consequence of severe indisposition and a pressure of business, did not deliver an opinion in extenso. He said that he should grant the motion, and go into the state practice. He conceived that the thirty-fourth section of the judiciary act of the United States placed the case within the second section of the New York statute for the amendment of the law, and the better advancement of justice; and, while he thought the practice of submitting cases involving long and intricate accounts legal, he viewed it as highly conducive to the administration of justice. From the affidavit on which the motion in the case was grounded, it appeared that between two and three millions of dollars had been disbursed for the United States by the defendant, and that it might take a jury several days to give a full and perfect examination to the great mass of accounts and vouchers involved in the suit. Referees were accordingly appointed, and a rule duly entered by the clerk of the court.

Case No. 4,236.

EAKIN v. ST. LOUIS, K. C. & N. R. CO.

[3 Cent. Law J. 655.][1]

Circuit Court, E. D. Missouri. Sept. Term, 1876.

LEASE BY RAILROAD COMPANY—RATIFICATION BY ACQUIESCENCE — CONSTRUCTION OF STATUTE — CONNECTED RAILWAYS.

1. A statute of Missouri (1 Wag. St. 312) provides that any railroad company may lease or purchase all or any part of a railroad with all its privileges, etc., if the lines of the road or roads of said companies are continuous or connected at a point either with or without this state, and provided that no such lease, etc., shall be perfect until ratified by a majority of the stockholders of the companies, parties to such agreement. A lease in perpetuity was made by the St. Louis, Council Bluffs and Omaha Railroad to the defendant company, with the consent of the stockholders of the former road, but the stockholders of the defendant company took no formal action on it until March, 1875, when they voted it down, although the company had made three semi-annual payments of interest on bonds issued under and secured by said lease. *Held*, that although the directors and officers of the defendant company, under

[1] [Reprinted by permission.]

the act of 1870, above quoted, could not rightfully consummate and perfect a lease of another railroad company without the assent of the stockholders given as therein provided, yet having undertaken to do so in execution of the agreement of August 13, 1871, and having reported that fact to the stockholders at their annual meeting in 1873 and 1874, the defendant company having availed itself of the benefit of the lease, and operated the leased road thereunder, and carried out the provisions of the lease by making three semi-annual payments of interest on the coupons—all with the knowledge of, but without objection from the stockholders—that the lease in question has been, as in law it may be, ratified by acquiescence and action thereunder, as respects the innocent holders of bonds in question, and that the defendant company is estopped to insist as to such holders, that the lease is void because not formally assented to by the stockholders by an express vote or writing.

2. The line of the St. Louis, Council Bluffs and Omaha Railroad was within the meaning of the above act so "connected," with the line of the defendant company, as to authorize the latter to lease the former.

Plaintiff [Eakin] brings this action [against the St. Louis, Kansas City and Northern Railroad Company] to recover upon interest coupons which were attached to certain bonds issued by the St. Louis, Council Bluffs & Omaha Railroad Co., and the essential facts in the case were agreed upon as follows:

First. That the plaintiff is a citizen of the state of New York, and the bona fide holder of the coupons sued on, and also of the bonds to which said coupons were attached.

Second. That defendant is a corporation organized January 2, 1872, under the general railroad laws of the state of Missouri, as per articles of association attached, marked "A."

Third. That the St. Louis, Council Bluffs and Omaha Railroad Company was organized on the 20th day of September, 1870, under the general railroad laws of Missouri, as per articles of association, marked "B."

Fourth. That defendant was organized in furtherance of the purposes of a voluntary, unincorporated association, formed on the 13th day of August, 1871, known as the Illinois, Missouri and Kansas Association, a copy of the agreement under which said association was formed, being hereto attached, marked exhibit "C."

Fifth. That said association, on the 26th day of August, 1871, purchased in the name of Morris K. Jessup, the North Missouri Railroad, at a sale thereof, under a second mortgage, as per deed to Jessup, marked "D."

Sixth. That on the 6th day of February, 1872, Morris K. Jessup conveyed said North Missouri Railroad to defendant, as per deed marked "E;" that the holders of a majority of defendant's stock, assented to the purchase of the North Missouri Railroad from Jessup, at a meeting called for that purpose by the directors, and held at its office in the city of St. Louis, on the 2d day of February, 1872.

Seventh. That the Chillicothe and Brunswick Railroad Company was organized, under special act general assembly, state of Missouri, approved January 26th, 1864.

Eighth. That before the 14th of September, 1872, the Chillicothe and Brunswick Railroad had been completed from Brunswick to Chillicothe, a distance of 38¾ miles; and the St. Louis, Council Bluffs and Omaha Railroad had been completed from Chillicothe to near Pattonsburg, a distance of 41⅛ miles. That both roads had been constructed partly through pecuniary and other aid of the North Missouri Railroad Company — were continuously operated by the North Missouri Railroad Company, then by Jessup, and afterwards by defendant, until May 21st, 1874, as a branch of its main line.

Ninth. That on the 14th day of September, 1872, the Brunswick and Chillicothe Railroad was sold by trustee, under a second mortgage (subject to a first mortgage thereon, to secure $500,000 at eight per cent.) and purchased by the St. Louis, Council Bluffs and Omaha Railroad Company, as per deed marked "F."

Tenth. That from the date of the purchase last aforesaid, until the 7th day of August, 1873, the St. Louis, Council Bluffs and Omaha Railroad Company was the owner (to the extent to which by such purchase it could become the owner) of the entire line from Brunswick to Pattonsburg.

Eleventh. That on said 7th day of August, 1873, the Brunswick and Chillicothe Railroad was again sold by trustee, under said first mortgage, and purchased by George W. Rice as per deed marked "H."

Twelfth. That on the 18th day of February, 1873, the president and secretary of defendant in its behalf executed the lease in question, a copy of which is marked "I."

Thirteenth. That said lease was duly ratified by the stockholders of the St. Louis, Council Bluffs and Omaha Railroad Company, at a meeting held on the 20th day of November, 1872, and that the bonds in question were issued in accordance with the terms of said lease, and dated on the 14th day of September, 1872, the date of the aforesaid purchase of the Brunswick and Chillicothe Railroad by the St. Louis, Council Bluffs and Omaha Railroad Company.

Fourteenth. That the proceedings of the defendant for the years 1872 and 1873, in relation to said lease, were as set forth in transcript thereof, marked "K;" and that the proceedings of the St. Louis, Council Bluffs and Omaha Railroad Company in relation to said lease, were as set forth in said transcript marked "L."

Fifteenth. That the whole series of bonds were issued in the form of the one herewith filed, marked "M."

Sixteenth. That during the whole period of the negotiability of said lease, T. B. Blackstone was the president, and James F. Howe the secretary of defendant; and that during said period J. H. Hammond was the

president, and James F. Howe the secretary of the St. Louis, Council Bluffs and Omaha Railroad Company; and that all the meetings of the St. Louis, Council Bluffs and Omaha Railroad Company (held during said period) were held at defendant's office in the city of St. Louis.

Seventeenth. That said bonds were openly negotiated in the cities of St. Louis and New York, in the year 1873, and thereafter. That no proceedings were taken by the stockholders of the defendant, or any of them, or by any one representing defendant, to stop the issue or negotiation of the bonds aforesaid.

Eighteenth. That after the execution of said lease, and the issue of said bonds, defendant continued as theretofore to use and operate the whole line of road from Brunswick to Pattonsburg—had possession of all the rolling stock thereon, and continued to use and operate said road, as a branch of its main line, until said 31st of May, 1874, when it discontinued such operation.

Nineteenth. That defendant paid at his office, when due, the semi-annual coupons on said bonds, which fell due March 14th, 1873, September 14th, 1873, and March 14th, 1874, directly to the holders of the same, as per the agreement in said lease.

Twentieth. That the charter of the North Missouri Railroad Company, and the acts amendatory thereof, the printed copies of annual reports of the president of defendant, for the years 1873, 1874, 1875, with accompanying documents, are to be admitted in evidence.

Twenty-first. That the stockholders of defendant never, by any formal vote or writing, assented to the lease in question, or took any direct or affirmative action thereon prior to a meeting held March 2d, 1875, at which meeting said lease was submitted to them for their ratification or rejection, and one hundred and forty-seven thousand one hundred and forty-one (147,141) shares of stock were voted against the ratification of said lease, and thirty-four thousand five hundred and twelve (34,512) shares of stock were voted in favor thereof.

Twenty-second. That the black line upon the map of Missouri, herewith filed, represents the main line of defendant's railroad, that the blue line thereon represents the Brunswick and Chillicothe Railroad, and the red line the St. Louis, Council Bluffs and Omaha Railroad.

Twenty-third. That either party is at liberty to make any objection, upon the trial, to the competency or relevancy of any of the foregoing statements, documents and papers, as fully as though this agreement had not been made.

The 13th article of exhibit "C" above referred to is as follows: "Thirteenth. This association to lease the St. Louis, Council Bluffs & Omaha Railroad from Brunswick to the end of the present letting of the work, at or near the Gentry county line, say eighty-two miles more or less of road, when the same is completed, the work to be well done with necessary side tracks, depot buildings and water stations, and to be completed as a first-class western road according to the specifications furnished by Superintendent Arthur, and to pay therefor an annual rent of thirteen hundred and fifty dollars per mile, on a perpetual lease, with the right of the lessees to extend and own said road under its charter, with all the rights granted and held under the corporate powers of said company; provided said St. Louis, Council Bluffs & Omaha Railroad Company shall, on or before the tenth day of September next, notify the committee named in these articles, of its acceptance of this proposition, and shall, when requested, execute a lease in proper form upon the terms above named, to such persons or corporations as said committee shall designate, the lessees to pay all taxes. Said road to be delivered free from all liabilities except the first mortgage bonds, interest of which is not to exceed the rent herein named, and said rent is to be applied to payment of interest or dividends on said mortgage bonds or guaranteed stock. Lessors to have the right to issue new mortgage bonds to renew the bonds first placed on said road as they mature. The St. Louis, Council Bluffs & Omaha Railroad Company shall have the right, if they prefer to do so, to issue in lieu of bonds a guaranteed preferred stock to an amount that the rent will pay seven per cent. interest upon said stock, to be secured by a mortgage or deed of trust."

The other exhibits referred to are omitted as not essential to an understanding of the questions of law decided by the court.

Frederick N. Judson, for plaintiff.
Wells H. Blodgett, for defendant.

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

DILLON, Circuit Judge. This cause has been submitted upon an agreed statement of facts. The plaintiff seeks to recover of the defendant the amount of certain interest coupons attached to bonds issued by another company, viz., the St. Louis, Council Bluffs & Omaha Railroad Company. These bonds, 937 in number, each for $1,000, and dated September 14, 1872, contain this statement: "The payment of interest on this bond is further secured by a lease of the road to the St. Louis, Kansas City and Northern Railroad Company, at a rental equal to the interest on the whole series of bonds, and which rental said latter company will pay by paying the coupon annexed to said bond." On the back of each of said bonds is the following endorsement: "This bond is secured by a mortgage upon a railroad which is leased to the St. Louis, Kansas City & Northern Railroad Company, for a fixed rent equal to the amount of interest upon the whole

series of bonds, and by the terms of the lease the rent is to be applied by the lessee directly to the payment of that interest. (Signed) T. B. Blackstone, President. James F. Howe, Secretary. St. Louis, Kansas City & Northern R. R. Company."

A lease in perpetuity was made by the St. Louis, Council Bluffs & Omaha Railroad Company to the defendant company of its road from Chillicothe to Pattonsburg, from the 14th day of September, 1872, at an annual rental of $65,000, semi-annually to be paid by the defendant company, of the semi-annual interest on the said 937 bonds, directly to the holders thereof. It is not denied in argument, that the defendant company is liable in this action, if this lease and the covenants therein contained are binding upon it. The defence is that this lease is ultra vires of the chartered or statutory powers of the defendant corporation, and is based upon the act of 1870 (1 Wag. St. 315). This act is as follows: "Any railroad company, organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed on between said companies respectively * * * provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected until a meeting of the stockholders of the said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of the majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented in writing, and a certificate thereof signed by the president and secretary of said company or companies shall have been filed in the office of the secretary of state." This lease was duly assented to by the stockholders of the lessor company, but it was never by any formal vote or writing assented to by the stockholders of the defendant company, and in March, 1875, the stockholders of that company voted it down. The defendant company operated the leased road, including the line from Brunswick to Chillicothe, as a branch of its main line, from the date of the said lease, (as well as before) down to May 31st, 1874, and meanwhile paid to the holders of the coupons of said 937 bonds the interest coupons thereon which matured March 14th, 1873, September 14th, 1873, and March 14th, 1874, without objection from any of the stockholders.

The defendant's counsel, in his brief, states that the following are the questions involved: 1. Were the lines of railroad of the two companies "continuous" or so "connected" as to authorize the defendant to lease the road of the St. Louis, Council Bluffs & Omaha Company? 2. Had the board of directors and officers of defendant the power to make and perfect a valid and binding lease of another railroad, without the consent of a majority of defendant's stock? 3. Have the stockholders of defendant, since the execution of said lease by its officer, done any act which amounts to a ratification thereof? 4. Have the stockholders of defendant either before or since the execution of said lease by its officers, done any acts. or made any representations which estop the defendant from questioning the validity thereof?

Under the agreed statement of facts, we are of opinion that the line of the St. Louis, Council Bluffs & Omaha R. R. Co. was within the meaning of the act, so "connected" with the line of the defendant company as to authorize the latter to lease the former. This makes it necessary to determine whether the innocent holder (which the plaintiff is admitted to be) would be bound to ascertain at his peril whether the lines of the two companies were a connected line; and also whether under its chartered franchises the defendant company, irrespective of the act of 1870 above quoted, might not, under the power to extend and build branches, have executed that power by making a contract for a perpetual lease of a branch line.

Admitting that the directors and officers of the defendant company, under the act of 1870, above quoted, could not rightfully consummate and perfect a lease of another railroad company without the assent of the stockholders given as therein provided, yet having undertaken to do so, in execution of the agreement of August 13, 1871 (exhibit "C"), and having reported that fact to the stockholders at their annual meetings in 1873 and in 1874; and the defendant company having availed itself of the benefit of the lease and operated the leased road thereunder, and carried out the provisions of the lease by making three semi-annual payments of interest on the coupons. all with the knowledge of, but without objection from the stockholders; this court, guided by the principles sanctioned by the supreme court in the quite analogous case of Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381, re-asserted and applied in Bessel v. Jeffersonville, 24 How. [65 U. S.] 287, 300; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772; Railroad Co. v. Howard, 7 Wall. [74 U. S.] 412; Pendleton Co. v. Amy, 13 Wall. [80 U. S.] 305, and other cases, is of opinion that the lease in question has been, as in law it may be, ratified by acquiescence and action thereunder, as respects the innocent holder

of bonds in question, and that the defendant company is estopped to insist as to such holders that the lease is void because not formally assented to by the stockholders by an express vote or writing. This provision is intended for their protection. and they may renounce or waive its benefits, or may become estopped by their laches, acquiescence and conduct from insisting upon its use as a sword to cut down the rights of others. Judgment for plaintiff.

EAKIN v. UNITED STATES. See Case No. 4,235.

EAKIN (VIRGINIA v.). See Case No. 16,960.

EAKIN (WELLFORD v.). See Case No. 17,379.

Case No. 4,237.

Ex parte EAMES.

[2 Story, 322;[1] 1 N. Y. Leg. Obs. 212; 5 Law Rep. 117.]

Circuit Court, D. Massachusetts. May Term, 1842.

BANKRUPTCY — STATE INSOLVENCY PROCEEDINGS — INJUNCTION.

1. The bankrupt law of the United States [of 1841 (5 Stat. 440)] upon going into operation in February, 1842, ipso facto suspended all action upon future cases arising under state insolvent laws, where the insolvent persons were within the purview of the bankrupt law.

[Cited in Sullivan v. Hieskill, Case No. 13,594; Goodwin v. Sharkey, 5 Abb. Pr. (N. S.) 64; Re Wallace, Case No. 17,094; Van Nostrand v. Carr, 30 Md. 128; Thornhill v. Bank of Louisiana, Case No. 13,992; Day v. Bardwell, 97 Mass. 246; Re Mallory, Case No. 8,991; Re Independent Ins. Co., Id. 7,017; Re Reynolds, Id. 11,723; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

2. Where A took advantage of the insolvent law of Massachusetts after the bankrupt law of the United States went into operation, and an assignee was duly appointed in pursuance of the law of Massachusetts, and A subsequently petitioned to be declared a bankrupt under the law of the United States, it was *held*, that an injunction ought to issue against B to restrain him from intermeddling with the property of A.

[Cited in Re Mallory, Case No. 8,991; Re Brinkman, Id. 1,884.]

This was a case certified from the district court upon a point arising in bankruptcy. The petition stated, that on the nineteenth of April, 1842, the petitioner [Lucius Eames] filed his petition in the district court, praying, that he might be declared a bankrupt, pursuant to the statute; that, prior to the filing of the said petition, and on the fourteenth day of February, 1842, Charles Arnold and Henry Adams, merchants, and partners, under the name of Charles Arnold & Company, of Boston, being creditors of the petitioner and one Hamlin, his late partner, to the amount of upwards of fourteen hundred dollars, caused certain property, to wit: the stock in trade of the petitioner, of the value of about twenty-seven hundred dollars, to be attached, and taken into the possession of the sheriff of the county of Essex, by virtue of a writ sued out by them against the petitioner on the fourteenth day of February, 1842, and made returnable at the court of common pleas for the county of Suffolk, then next to be holden in Boston in April, which said suit was still pending and undecided; that on the twelfth day of March, 1842, and prior to the filing of said petition, being unable to pay his debts, the petitioner applied to David Roberts, Esq., a master in chancery, of the county of Essex, for the benefit of an act entitled, "An act for the relief of insolvent debtors, and the more equal distribution of their assets," enacted by the authority of the state of Massachusetts, on the twenty-third day of April, 1838; supposing said law to be unrepealed and in full force at the time of his said application for the benefit thereof; that upon his said application, a warrant was issued and publication made and other proceedings had, pursuant to the act last named, and that on the twenty-eighth day of March, 1842, John Ayers, of Boston, was duly appointed the assignee of the goods and estate of the petitioner, and accepted said trust under the act aforesaid; that after the appointment of said assignee, he was informed that doubts were entertained respecting the validity of said proceedings under the said insolvent act, and that he was advised by counsel, that the same had been repealed, from and after the first day of February, 1842, by force of the statute of the United States, establishing a uniform system of bankruptcy, and was recommended, in behalf of his creditors, to file his said petition in this honorable court, for the purpose of protecting the property aforesaid for the benefit of all his creditors, if the assignment aforesaid should be adjudged invalid; that said Arnold & Company were seeking and intended to secure payment in full of the debt due to them from the petitioner and his partner, out of the property aforesaid, and to levy an execution thereon, by means of the suit and attachment aforesaid, to the great injury and detriment of the other creditors of the petitioner, and contrary to law and equity; that said Ayers was seeking to obtain possession of said property under his said appointment as assignee as aforesaid, and that if, as the petitioner had reason to apprehend, the proceedings under said act of the state of Massachusetts should prove to be invalid, or if said Arnold & Company should levy any execution upon said property, the assignee of the estate of the petitioner, who might be appointed upon the said petition, would be put to great trouble and expense in recovering said property, or its value, for the benefit of all the creditors of the petitioner under the said statute of the United States. Wherefore he prayed, that an injunction might issue to restrain said Arnold & Company from prosecuting further their said suit, and to restrain them and

[1] [Reported by William W. Story, Esq.]

said Ayers from further intermeddling with said property; and for general relief. Upon the hearing in the district court, the following question was ordered to be adjourned into the circuit court: "Whether, by law, an injunction can be issued against said Ayers, as prayed for in the said petition."

Mr. Dehon, for petitioner.

STORY, Circuit Justice. The question for the decision of this court is, whether by law an injunction can be issued against Ayers, the assignee of Eames, under the insolvent act of Massachusetts, as prayed for in the petition of Eames; and this involves the simple consideration, whether the bankrupt act of the United States of 1841, c. 9, when it came into operation in February last, suspended the operation of the insolvent act of Massachusetts, as to persons within the purview of the bankrupt act, who might afterward become insolvents. If it did, then the injunction ought to be granted; if it did not, then it should be refused.

My opinion is, that, as soon as the bankrupt act went into operation in February last, it, ipso facto, suspended all action upon future cases, arising under the state insolvent laws, where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different considerations would, or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the bankrupt act went into operation. It appears to me, that both systems cannot be in operation or apply at the same time to the same persons; and where the state and national legislation upon the same subject, and the same persons, come in conflict, the national laws must prevail, and suspend the operation of the state laws. This, as far as I know, has been the uniform doctrine, maintained in all the courts of the United States.

Indeed, I consider this whole matter in effect disposed of by the reasoning of the supreme court in the case of Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122. Mr. Justice Washington and myself were of opinion in that case, that the power to pass a bankrupt law was exclusively vested in congress by the constitution of the United States; and that no state could pass a bankrupt law, or an insolvent law, having the effect of a bankrupt law, where it discharged the debtor from the obligation of his prior contracts.[2] Mr. Justice Todd was absent from indisposition, and therefore did not sit in the cause. The other four members of the court (constituting a majority,) concurred in the decision, which was pronounced by Mr. Chief Justice Marshall. But all the court were agreed, that when congress did pass a bankrupt act, it was supreme, and that the state laws must yield to it, and could no longer operate upon persons or cases within the purview of such act. The enactment of such an act suspended the state laws on the same subject, and created a disability in the states to exercise powers of the like nature. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 196. The court went further; and asserted that the bankrupt act of 1800, c. 19, had that very operation, except so far as the 61st section of the act modified or allowed the exercise of the power by the states. Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 201, 202. The case of Ogden v. Saunders, 12 Wheat. [25 U. S.] 213, 264, 269, 273, 276, 278, 296, 311, 314, fully recognized, and has always been understood to confirm and settle, the same principle. It seems to me, therefore, that nothing remains, upon which an argument can be founded, that the insolvent laws of Massachusetts are not, as to persons and cases, within the provisions of the bankrupt act, completely suspended. Each system is to act upon the same subject-matter, upon the same property, upon the same rights, and upon the same persons—creditors, as well as debtors. Both cannot go on together, without direct and positive collision; and the moment that the bankrupt act does or may operate upon the person or the case, that moment it virtually supersedes all state legislation.

I shall, therefore, direct it to be certified to the district court, that in this case, by law, an injunction can be issued against the said Ayers, as prayed for in the said petition of Eames.

[2] See Mr. Justice Washington's opinion in Ogden v. Saunders, 12 Wheat. [25 U. S.] 263, 264.

Case No. 4,238.

EAMES v. CAVAROC et al.

[Newb. 528.][1]

District Court, E. D. Louisiana. March, 1856.

CHARTER PARTY — AFFREIGHTMENT AND SPECIAL OWNERSHIP—FREIGHT—WAIVER OF LIEN—CHARTERER'S CONSIGNEES—DAMAGE TO GOODS—EVIDENCE.

1. There are two kinds of contracts passing under the general name of charter party, differing very widely from each other in their nature, their provisions, and in their legal effects. In one, the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. In the other, the vessel herself is let to hire and the charterer takes her into his own possession, and has not only the use but the entire control of her. He becomes the owner during the term of the contract.

2. Where the general owner retains the possession and command of the ship, and contracts to carry the cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership.

3. Where the master complies with the stipulation in the charter party which requires the delivery of the cargo to the holders of the bills of lading as a condition precedent to his receiving the freight, he loses his lien on the cargo; and his recourse for compensation is against

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

the consignees, as the representatives of the charterers.

4. Independently of the charter party the ship is bound for the merchandise, and the master is bound to transport and deliver the cargo according to the terms of the bills of lading, and is responsible for any damage the cargo may have sustained.

5. The stipulation in the charter party which imposes upon the consignees of the charterers, the duty of collecting the freight, makes it their duty necessarily to ascertain the reasons why payment is withheld by the holders of the bills of lading.

6. The general declarations of the owners of damaged goods, unaccompanied by any specific statements of disinterested persons, showing the nature and extent of the damage, are entirely insufficient and will be rejected by the court.

[This was a libel by Ithacar B. Eames, master of the ship Horatio, against Charles Cavaroc & Co.]

Durant & Hornor, for libellant.
H. D. Ogden, for respondents.

McCALEB, District Judge. The libelant sues upon a contract of affreightment by charter party to recover the amount of freight which is stipulated to be paid in the instrument. The charter party is signed by the master of the ship Horatio, of the one part, and M. Depas and L. Meric, merchants of Bordeaux, of the other part, and is dated at Nantz on the 7th of March, 1853. The libelant binds himself to put his vessel of 509 75-95 tons measurement at the disposal of the charterers, to go round to Bordeaux as soon as possible, and there receive on board within a specified time, a full and complete cargo of lawful goods, not exceeding what the vessel could stow and carry with safety, and also passengers to be transported to New Orleans. He further binds himself, whenever his vessel is laden and he has signed the bills of lading and obtained his clearance, to make sail with the first fair wind and proceed direct to the port of destination, where, after a faithful delivery of the cargo to the bearer of the bills of lading, he is to receive for freight in ready cash, without any discount, the sum of $2,000. In consideration of this sum he lets the whole capacity of the hold of his vessel and the between decks to the charterers. He reserves only room enough between decks for five water casks and ten barrels of provisions. A commission of two and a half per cent. is stipulated to be paid by the master to the charterers on the amount of the freight, and also a like commission to the correspondents of the charterers at New Orleans. Upon these correspondents is expressly imposed the duty of collecting the freight. For the performance of the clauses and conditions of the charter party, the contracting parties mutually pledge the ship and cargo. This action is instituted against the consignees or correspondents of the charterers, who have duly accepted the charter party, and thus bound themselves to collect the freight according to the stipulations of the contract They, however, resist the demand of the libelant for the sum of $616.04, being the balance due on the sum of $2,000, upon the ground that the goods of various holders of bills of lading, have in the aggregate been damaged to that amount on the voyage from Bordeaux to this port. There are two kinds of contracts passing under the general name of the charter party, differing from each other very widely in their nature, their provisions, and in their legal effects. In one the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over the vessel, but the owner is in fact, in contemplation of law, the carrier of whatever goods are conveyed in the ship. The charter party is a mere covenant for the conveyance of the merchandise, or the performance of the service, which is stipulated in it. In the other kind of contract by charter party, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for the lease of the vessel. The owner parts with possession and the right of possession, and the hirer has not only the use but the entire control of the vessel herself. He becomes the owner during the term of the contract. He appoints the master and mariners, and is responsible for their acts. If goods are taken on freight, the freight is due to him; and if by barratry or other misconduct of the master or crew, the shippers suffer a loss, he must answer for it. Drinkwater v. The Sparta [Case No. 4,085]; The Volunteer [Case No. 16,991].

From these general principles regulating the two kinds of contracts of affreightment by charter party, it follows that a person may be owner for the voyage, who, by contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry the cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership. The distinction here drawn, is in strict accordance with the decisions of the American courts, as will be seen by reference to the case of Hooe v. Goverman, 1 Cranch [5 U. S.] 214, and to that of Manscardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 39. The language of Lord Tenterden in moving for the affirmance of the judgment of the exchequer chamber in the case of Colvin v. Newberry, 6 Bligh [N. S.] 189, would lead to the conclusion, that the principles of law applicable to this subject, are differently understood in England from what they are in this country. But the decisions of the supreme court of the United States must necessarily control my

own judgment. And looking to those decisions, I have no hesitation in saying that by the terms of the charter party now under consideration the general owner was the owner for the voyage. Through his agent, the master, he retained the possession, command and navigation of the ship, and contracted to carry the cargo on freight for the voyage. The charter party is therefore to be considered as a mere affreightment sounding in covenant; and the freighter is in no just or legal sense clothed with the character or responsibility of ownership.

Having then ascertained the true position occupied by the parties under the stipulations of the charter party, we will now proceed to determine their rights in the present suit, and it is evident that this can only be done by a consideration of all the terms of the instrument taken together. The libelant has sought his remedy for the enforcement of his rights in the only mode which has been fairly reserved for him under the contract. By his compliance with the obligation imposed upon him to deliver the cargo to the holders of the bills of lading, as a condition precedent to his receiving the freight, he has lost his lien on the cargo; and his recourse for compensation is clearly against the consignees as the representatives of the charterers. The mutual pledge of the ship and cargo for the faithful performance of the contract, contained in one of the clauses of the instrument, does not alter the case. Such a pledge is but the affirmation of the general principle of the maritime law that the ship is pledged to the merchandise, and the merchandise to the ship, for the contract of shipping; and would undoubtedly have the effect of preserving the lien on the cargo in the absence of any inconsistent stipulation, which may be fairly construed into waiver of the lien. Lord Tenterden, in his treatise on Shipping, has deduced from the cases this general result; the right of lien for freight does not absolutely depend on any covenant to pay freight on delivery of the cargo, but it may exist if it appears that the payment is to be made in cash or bills before or at the delivery of the cargo; or even if it does not appear that the delivery of the cargo is to precede such payment. The correctness of this principle is also recognized by Mr. Justice Story, in the case of The Volunteer and Cargo [supra]. In the present case we have seen that it is expressly stipulated in the charter party that the freight is to be paid after the delivery of the cargo to the holders of the bills of lading. It was in accordance with the stipulation that the delivery took place, and a part payment of the freight, to the amount of $1,383.96, was made by the consignees. They refuse to pay the balance claimed in the libel, for the reason already stated; and the question is, are they justified, under all the circumstances of the case, in longer withholding it?

Independently of the charter party, the ship was bound for the merchandise, and the master was bound to transport and deliver the cargo according to the terms of the bills of lading. He is responsible for any damage the cargo may have sustained. But the stipulation in the charter party which imposed upon the respondents, as consignees of the charterers, the duty of collecting the freight, made it their duty, necessarily, to ascertain the reasons why payment was withheld by the holders of the bills of lading. It became their duty to ascertain, within a reasonable time, in some satisfactory mode, the nature and extent of the damage alleged to have been sustained by the cargo. It was for them to cause examinations to be made by disinterested persons capable of estimating the amount of the damage; and thus furnish the court the requisite evidence to guide its judgment. Except in reference to the damage sustained by that portion of the cargo consigned to W. F. Vredenburgh & Co., no legal or satisfactory evidence has been introduced. The general declarations of the owners of the damaged goods, unaccompanied by any specific statements of disinterested persons, showing the nature and extent of the damage, are entirely insufficient, and must be rejected by the court. The libelant has placed himself in a position to entitle him to the equitable consideration of a court of admiralty. It is in evidence that while urging upon the respondents his right to be paid the amount of freight stipulated by the charter party, he at the same time tendered them a bond, with sufficient security, to hold them harmless against the claims of the holders of the bills of lading, for the alleged amount of damages sustained on the different consignments. This offer of security was refused by the respondents, and the libelant has been compelled to resort to these proceedings for the assertion of his legal rights. I shall order that a decree be entered in his favor for whatever balance may be due him, after deducting the amount of damage sustained by that portion of the cargo consigned to Vredenburgh & Co., and also the commissions stipulated in the charter party, to be paid by him to the respondents, as consignees of the charterers. I shall further decree that the costs of this suit be paid by the respondents.

Case No. 4,239.

EAMES v. COOK.

[2 Fish. Pat. Cas. 146.][1]

Circuit Court, D. Massachusetts. Dec., 1860.

PATENTS — ANTICIPATION — WHAT ARE MATERIAL DIFFERENCES—NEW RESULT — UTILITY — BOOT TREES.

1. In comparing the plaintiff's patent with any other machine, in order to determine whether the mechanism is the same, we must first see whether such other contains substantially the same devices; and, if it does, then

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

whether the arrangement, or mode of applying them, is the same.

2. If either the devices or the mode of applying them, in any other machine, be substantially different, then the machine is not the same.

3. If the mode of operation be different, it is evidence that the mechanism is different. Or, if the result be different, then, reasoning from effects to causes, we may presume that some new instrumentality has been introduced.

4. But if, upon examining the mechanism, we find that it is substantially different in two machines, then they are not the same, although they may produce the same result.

[Cited in Seymour v. Osborne, Case No. 12,688.]

5. If an invention be new and useful, it can not be impeached because it does not accomplish all that a sanguine inventor has claimed for it.

6. If the mechanism employed by the patentee is materially different from that used by a prior inventor, and especially if it be of such increased utility as to have wholly superseded the prior machine, it is no answer to his claim for a patent to say that, after all, the boot was as well treed by the prior machine as it is by that of the patentee.

7. The practical utility of a new invention is frequently increased by new improvements or by the use of old instrumentalities or appliances which the inventor has not mentioned, either because it did not occur to him, or because he deemed it wholly unnecessary to point out what must be plain to every operator.

This was a motion for a new trial. A verdict had been rendered for the plaintiff [Charles T. Eames] in an action [against Aldrich S. Cook] on the case tried before Judge Sprague and a jury, to recover damages for the infringement of letters patent [No. 14,951] granted to plaintiff May 27, 1856, for an "improvement in boot trees."

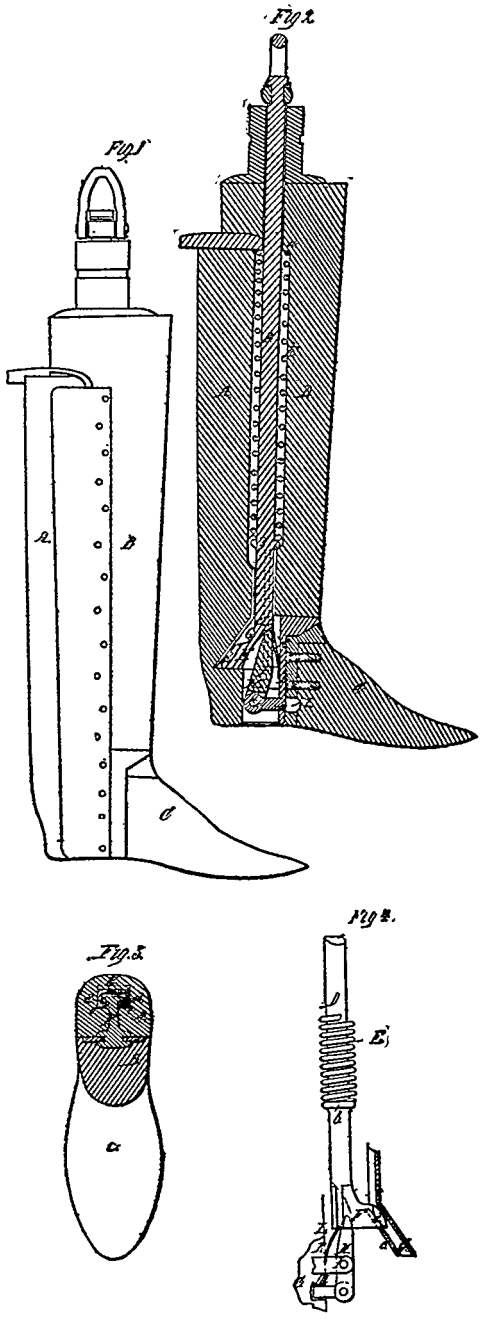
The patentee says: "I do not claim the employment of either two levers or cam, arranged so as to simultaneously operate against both the upper and lower part of the back portion of the leg of the tree; but I claim the arrangement or mode of applying a single cam F and inclined plane G, with respect to the foot and leg portion of the boot tree, whereby the said devices are made to first perform the function of setting the foot part C of the tree firmly into the foot of the boot; and next that of stretching the leg of the boot—the application of stretching mechanism directly to the upper part of the leg of the tree being rendered unnecessary.

The decision of the motion turned mainly upon the construction of the patent, and a comparison of the invention of Eames with a prior patent [No. 5,876] granted to Jarvis Howe, October 24, 1849.

F. A. Brookes, for plaintiff.

Causten Browne, for defendant.

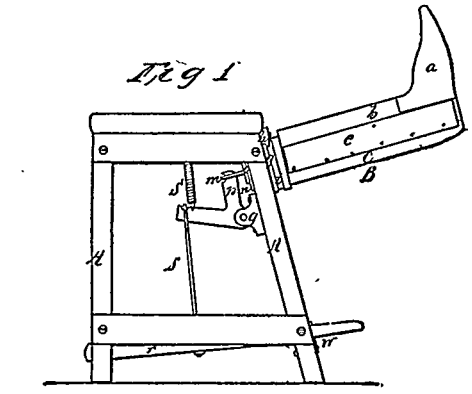
SPRAGUE, District Judge. Upon a re-examination of the case, the view which I have taken of the patent and the application of the evidence which was given at the trial is as follows: The claim at the close of the specification of plaintiff's patent is in these words: "The above-described arrangement or mode of applying a single cam and inclined plane, with respect to the foot and leg portions of the boot tree, whereby the said devices are made to first perform the function of setting the foot parts of the tree firmly into the foot of the boot, and next that of stretching the leg of the boot—the application of stretching mechanism directly to the upper part of the leg of the tree being rendered unnecessary." This claim may be divided into two parts: first, the mechanism, and second, the effect or result attained by the mechanism. The first, i. e., the mechanism, is the arrange-

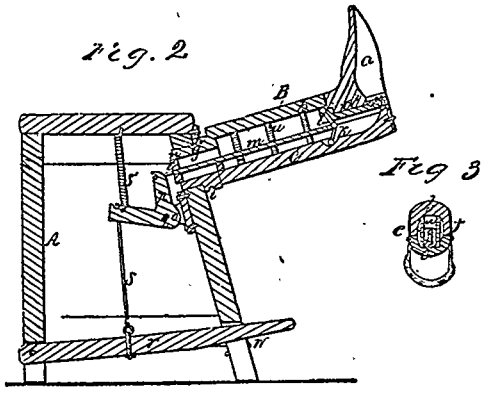


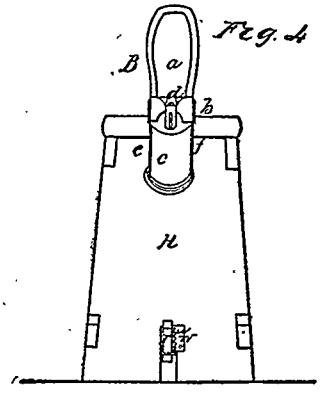
[Drawings of the Eames patent, No. 14,951, granted May 27, 1856, and published from the records of the United States patent office.]

ment or mode of applying a single cam and inclined plane. And this consists of two parts: First, the devices, and second, the mode of applying them. The mechanism, if it do not embrace all that is material in the plaintiff's patent, is at least an essential part of it; and when inquiring whether any other machine is similar, we must ascertain whether it embraces both its elements, viz: the devices, and the mode of applying them.

The first element, the devices, consists of a single cam and inclined plane, requiring no explanation. The second element viz: the arrangement or mode of applying these devices is to be ascertained only by looking at the previous specification. We there find that the leg part of the tree is divided into the back and front parts, called A and B, and that within the front part B is a rod, the lower end of which carries a cam, which works against an inclined plane, so that when the cam is moved upward by the rod, it will separate the back and front parts. The inclined plane is arranged within the back part A, so that it shall project both above and below the vertex of the angle of the instep of the foot, and the front side of the front part B. The cam E when drawn up by the rod, will work both above and below such vertex. The lower part of the inclined plane is placed about as high as the top of the heel. This is the arrangement of the devices. The cam is placed in the front part, and is moved up and down by means of a rod, to the end of which it is affixed, and so placed that it presses against and traverses the surface of the inclined plane. The inclined plane is fixed in the back part so that it projects both above and below the vertex of the angle made by the instep and leg, and its lower part is placed about as high as the top of the heel. The cam will thus work both above and below the vertex. In comparing the plaintiff's patent with any other machine in order to determine whether the mechanism is the same, we must first see whether such other contains substantially the same devices, and if it does, then whether the arrangement or mode of applying them is substantially the same, that is, does it contain a single cam and inclined plane, arranged, placed and applied in the manner above set forth? If either the devices or the mode of applying them, in any other machine, be substantially different from the plaintiff's, then it is not the same. In order to determine whether the mechanism of any other machine is the same as the plaintiff's, we may not only look at the mechanism itself, that is, the devices and the arrangement of them, but also at their mode of operation, and their effects or results. If the mode of operation be different, it is evidence that the mechanism is different. Or, if the result be different, then, reasoning from effects to causes, we may presume that some new instrumentality has been introduced. If, upon examining the mechanism, we find that it is substantially different in two machines, then they are not the same, although they may produce the same result. That would be the common case where the same end is attained by different processes or instrumentalities. But, if a materially different result is reached, it is evidence of some new cause or means, although the mechanism may, apparently, be substantially the same. Hence, a greater degree of utility being achieved by one machine is evidence, and sometimes conclusive evidence, of novelty in the means or instrumentalities which are used.







[Drawings of the Howe patent No. 5,876 granted October 24, 1848, and published from the records of the United States patent office.]

In comparing the plaintiff's patent with the Howe machine we see that the devices are different, and the mode of applying them is different. The cam and inclined plane have been long known devices for certain purposes. But is not their application to a boot tree new, and is there not invention in passing from Howe's device—the toggle joint—and its mode of application, to the cam and inclined plane, and their mode of application?

First. By Howe's the power is applied at one point one inch and a half above the vertex of the above-mentioned angle. By the plaintiff's, the power is applied successively below and above that angle. Second. During the whole operation of the toggle joint, its power is constantly increasing, while that of the cam and inclined plane is always the same. Third. The toggle joint exerts its power at a fixed single joint only in the back and front part of the tree respectively. But the cam, moving upward on the inclined plane, exerts its power successively on all parts of the plane. Fourth. By this motion of the cam upward on the plane, their power is first applied more directly to the filling of the foot, and, afterward, more directly to the fitting of the leg. Whereas, by the toggle joint, the point of applying the power being always fixed, it does not operate any more directly to fill either the foot or leg at one time than at another. Fifth. The rod in the front part of the tree leg, to the end of which the cam is affixed, has a mechanism by which it is moved up and down, thus carrying with it the cam, and thus exerting its force on the inclined plane; while in Howe's there is no such rod or cam or mechanism to impart motion to any rod or cam. Sixth. The toggle joint fastens the front and back part of the tree together, which is not done by the cam and inclined plane. Seventh. By the mode in which the toggle joint is fixed to the front and back of the tree, it is rendered necessary that those parts should be made of metal; whereas, the mode in which the cam and inclined plane are affixed admits of their being made of wood.

We now come to the comparative utility of the two machines. It is admitted that the plaintiff's is of so much greater practical usefulness that it has superseded Howe's, and driven it out of use. As we have before stated, greater utility implies a difference in the machines. But it is insisted that in the present case that rule does not apply, because it is said that this greater utility arises from two causes: first, that the back and front not being fastened together in the plaintiff's machine, the backs may be changed with greater facility than in Howe's, and second, that the plaintiff's may be made of wood, whereas, Howe's require metal. But this explanation shows that the plaintiff's machine has capabilities important to its practical use, which Howe's has not, and these new capabilities are at least some evidence that the means, the machine, are different.

We have thus far not inquired into the ultimate effect of the one tree or the other; nor whether the plaintiff's machine will accomplish the work of treeing a boot any better than Howe's. It is insisted by the defendant that the plaintiff's has no such quality as he claims for it, of filling the foot first, and the leg afterward, any more than Howe's; and that in both, the foot and the leg are practically filled successively in the same manner and with equal facility and utility, at least when applied to the common run and various classes of boots, although it is admitted that as to a single class of boots the plaintiff's may have some advantage over Howe's in dispensing with the strap at the top. If this were so it would by no means follow that the two machines are the same. There are many instances of distinct patentable inventions producing the same result, that is, accomplishing the same work. For example, the Woodworth and Norcross planing machines not only plane a board equally well, but both do it by means of a rotary cutter applied to the surface. Yet the mechanism being different both properly received patents. A new machine which accomplishes the same end as a former, but by substantially different means, is patentable.

If, therefore, the mechanism used by Eames is materially different from that used by Howe, and especially if it be of such increased utility as to have wholly superseded Howe's, it is no answer to his claim for a patent to say, that after all the boot was as well treed by Howe's as it is by the plaintiff's. And it is unnecessary to enter into the question whether it was so or not. But it is insisted that the plaintiff's machine will not accomplish what he asserts it will. Now, if an invention be both new and useful, it can not be impeached because it does not accomplish all that a sanguine inventor has claimed for it. Still, let us see how far this objection is founded in fact. The useful result, which the plaintiff asserts that he has attained, is set forth in the close of his claim in the following words: "Whereby the said devices are made to first perform the function of setting the foot parts of the tree firmly into the foot of the boot, and next that of stretching the leg of the boot, the application of stretching mechanism directly to the opper part of the leg of the tree being rendered unnecessary." He here asserts that three things are achieved. In the first place, setting the foot parts of the tree firmly into the foot of the boot, and next the stretching the leg part of the boot, and rendering the application of the stretching mechanism to the upper part of the leg of the tree unnecessary. As to the third, the defendant does not deny that it is fully accomplished. But is the foot of the tree first set firmly into the foot of the boot, and then the leg stretched? That the practical operation is, first, to set the

foot of the tree into the foot of the boot, and then to stretch the leg is clear, both from the testimony of operatives, and the laws of nature, and the only question that can arise of the perfect correctness of the plaintiff's statement is, whether the foot of the tree is set firmly into the foot of the boot before the leg is stretched? It is insisted by the defendant that, although the foot of the tree is first thrust into the foot of the boot, and next the leg stretched, that then the foot of the tree is again pressed into the foot, and more tightly than before. Now, if this were so, still the effect claimed by the plaintiff, that of first setting the foot of the tree firmly into the foot of the boot, is attained in a greater degree by the plaintiff's than it was by Howe's, because the force is applied at a lower point, and, therefore, more directly to the foot. And there is little foundation for the criticism upon the word "firmly," a word admitting of degrees. If the results, which the plaintiff asserts will be produced, are substantially attained, it is sufficient. The plaintiff's assertion as to the practical operation of his machine is substantially correct, even when compared with Howe's. This precludes the necessity of considering how far that assertion is material, and what would have been the consequence if the operation or result had been different from that asserted by the plaintiff. But, although it is not necessary to decide this question of construction, I would remark that it is not said in the closing part of the claim that the devices and arrangement must be such as to produce that result: far from it. The devices and their arrangement are distinctly described. And then it is said that these devices so arranged will produce two successive results. It would seem, therefore, that this closing assertion does not qualify or limit what precedes. In other words, that the invention claimed is the arrangement or mode of applying the devices, and that that arrangement or mode of applying is positively prescribed in a manner not to be varied whether the operation or effect attributed to them be attained or not.

The defendant insists that in the ordinary use of the plaintiff's machine for various classes and sizes of boots, it is necessary to use a strap at the top to limit the operation of the stretching force and prevent the leg from being split or ripped; and that the plaintiff has nowhere in his specification noticed this necessity. Very great stress is laid upon this objection. It is beyond controversy that the plaintiff's machine will operate usefully without such strap or check at the top, and, indeed, that there is no occasion for it when the boots to be treed are all of a certain size. Now, if a new machine is invented by which one class of boots is usefully treed, why is not such invention patentable? It may be true that the plaintiff's invention is rendered more useful by the use of a strap. But how frequent it is that the practical utility of a new invention is increased by new improvements, or by the use of old instrumentalities or appliances which the inventor has not mentioned either because it did not occur to him, or because he deemed it wholly unnecessary to point out what must be plain to every operator. But the defense, when scrutinized, really seems to consist in this, that the plaintiff only claims to have discovered a certain point or space where the power could be applied with greater advantage than it can be within any other space; and that he has made no such discovery: insisting that the point selected by Howe is as good as that pointed out by the plaintiff. This assumption that the plaintiff's claim is confined to the location of his devices, is unfounded. That is a part, but not the whole of his claim, which is expressly for the arrangement or mode of applying the devices "with respect to the foot and leg portions of the boot tree." A part of that arrangement or mode is the fixing the inclined plane in the back part of the boot tree, and the cam at the end of a rod in the front part of the boot tree, which rod is moved up and down by mechanism, carrying the cam with it and against the inclined plane as before described. And the question is whether the cam and inclined plane, and the whole arrangement or mode of applying them, are substantially different from Howe's patent or machine? This question has already been considered. New trial denied.

EAMES (McGUIRE v.). See Case No. 8,814.

Case No. 4,240.

EAMES v. RICHARDS.

[3 App. Com'r Pat. 240.]

Circuit Court, District of Columbia. Nov. 19, 1859.

PATENTS—TESTIMONY IN INTERFERENCE PROCEEDINGS—PRIORITY—SOLE-CUTTING MACHINES.

[1. On an interference, depositions of an inventor, who has assigned his rights, and of his wife, as to priority of invention, are incompetent and inadmissible.]

[2. On a second interference, granted for cause shown, testimony taken on the former interference is admissible, although a new party has been introduced, by way of assignment.]

[3. On an interference the fact of priority is alone important; the length of time of such priority, whether a day, month or year is immaterial.]

[4. Prior invention of an arrangement of vibrating knives in a sole-cutting machine is awarded on interference to William S. Richards, assignee of Caleb H. Griffin, as against Eames & Hathaway, assignees of J. W. Wilder.]

[Appeal from the decision of the commissioner of patents.]

[On interference between Eames & Hathaway, assignees of J. W. Wilder, and W. S. Richards, assignee of Caleb H. Griffin.

Eames and Hathaway appeal from a decision of the commissioner of patents awarding priority of invention to Caleb H. Griffin.]

MERRICK, Circuit Judge. The claims in dispute between the parties consist in certain improvements in machines for cutting soles of boots and shoes, and in the specification of appellant are summed up as follows: "Arranging and vibrating the knives around the centers 'p' & 'q' in the manner and for the purposes set forth." In the specification of appellee the invention is stated to consist in "vibrating the knife or knives in the arc of a circle or a curve, approximating thereto in the manner set forth." The claims are identical, amounting to such an arrangement of the cutting apparatus that the knives in their operation shall alternately ascend and descend upon the cutting table in a curved line, the knives being inverted as to their lengths towards one another, so that one cutting out the heel at one side of the table, the other shall cut out the toe on that same side, thus effecting a saving in the leather and in operative power. The reasons of appeal take no exception to any principle of law decided by the commissioner. They only impeach the processes and means by which the commissioner reached his conclusions of fact, and assign substantially two errors in fact: First, that Griffin was not the first to conceive the idea of the improvement in question, and to give such expression to the idea that a person skilled in the business could, from such description, construct a working machine; and, second, that conceding such first expression of the complete idea, he did not use reasonable diligence thereafter, in perfecting the machine and adapting it to use. The first class of reasons which impeach the processes and means by which the commissioner made up his judgment, present no point proper for the consideration of an appellate tribunal.

We have only to deal with the two specific errors of fact just mentioned. In considering the testimony in the cause I have totally disregarded the depositions of Griffin and his wife as altogether incompetent and inadmissible upon an issue to which in form and substance he is a party. It would be of dangerous consequence to the cause of truth and justice to permit an inventor, whenever a contest about the priority and originality of his claim had sprung up, to go into the market with his own oath, and vend it at the highest price to ignorant or corrupt purchasers. The temptations to perjury, in such cases, would often be too great for the infirmity of human nature to resist. The inventor himself being incompetent, his wife cannot be heard, for her interests are always identical with her husband's.

An objection was made by the appellee to the admissibility of the testimony taken on the former interference. The force of the objection I do not perceive. A second interference is nothing more than a rehearing of the same case, granted by way of especial grace (for good cause shown) to the losing party, and to say thereby the testimony originally competent was avoided would be imposing the intolerable burden on the successful party of incurring a second time expense without fault on his part. The circumstances of a new party being introduced upon the second by way of assignment makes no difference in the case. The assignee has no other or greater right than his assignor, and is bound by every act of his assignor done in good faith towards him prior to the assignment. Passing from these objections, and omitting to notice other minor ones not material to real issues between the parties, it appears from the testimony on both sides that the appellant dates his discovery in the month of November, A. D. 1855. Its earliest dawn in his mind was not before that time, and his machine was matured into a patentable shape in January, 1856.

The appellee asserts that his conception of the machine was consummated in December, 1854, and that he presented it by a drawing about that time. If it appears that he anticipated the appellant, it is immaterial by what length of time, whether a day, a month or year, and inasmuch as a number of witnesses, viz: Currier, Frame, Oliver, B. P. Ravel, Woodward, and Wheeler, depose in the most explicit manner to the general fact, that during the spring, summer and early part of the fall of 1855 Griffin fully explained to each of them the principle and mode of operating his sole-cutting machine, and to several of them he exhibited drawings of it, and showed to all of them at different times a mode or models of his invention, it is safe to say that at midsummer, 1855, he had completed the invention. The testimony of B. P. Ravel is distinct and positive on this point. The witness himself being a manufacturer, using and deeply interested in such machines, and scarcely capable of being mistaken in such a matter, being corroborated by the deposition of Charles Merrill and E. A. Ravel, and no attempt made to assail his disinterestedness or his veracity, his deposition alone would be enough to establish the fact in question. There is nothing to break the force of the testimony of this cloud of witnesses anywhere in the record; each sustains the other, and their testimony, moreover, so far confirms the prominent facts deposed to by Solomon Martin, as to rescue his testimony from the discredit with which the appellants have endeavored to overwhelm him. The testimony of W. H. Kimball, if it could be sustained by itself or by external aid, would be the bulwark of the appellant, and would show that all the efforts of Griffin were abortive, and that he had conceived no complete idea of an operative machine before Wilder's machine was finished. But his own self-contradictions are so apparent as to de-

stroy any reliance upon the dates he assigns to his construction of Griffin's models.

In his testimony on first interference 5th direct answer, he says he was not employed by Griffin upon his swing arm model until the year 1856, about April, and not until after his marriage (2nd cross), and that he never made but one model for a swing-arm machine (13th cross). In his examination on second interference he admits that he first went to work on the model in November, 1855. Were he not so flatly contradicted by the witnesses already named, these inconsistencies, coupled with the fact that the perfected model was deposited in the patent office in May, 1856, would destroy our reliance upon his memory of the date of the transactions with Griffin. But his testimony, read by the light of the above-named witnesses, and also of some of the witnesses for the appellant who speak of Griffin's purchase of certain castings from J. O. Marshall and others, proves that while Griffin had fully developed the principle of the swing arm machine, he did not for a moment rest upon that, but was diligently engaged in the effort to arrange the machine so that it would cut all-sized soles with one set of knives, and that all the various drawings, sketches and parts of models which Griffin had at Kimball's shop at different times were brought by him for that purpose, and that the abortive efforts of which Kimball speaks were efforts in the direction of his finally improved machine with wrist joints, &c., and so far from proving a failure in the great principle now in dispute, are cogent evidence, and coupled with ultimate success, conclusive evidence that Griffin was not slothfully resting upon the general thought, but was keeping it back until he could clothe it with the completeness of adaptation to the varying wants of the trade, in the manner finally accomplished.

And in arriving at this conclusion it must be borne in mind, that Griffin is not presented by any part of the testimony when properly weighed, as a mere private of other people's thoughts. At the outset of this case he appears as an inventor of the machine called the "Otis & Griffin Patent," conceded to be in the then state of the art, the best machine known in this business. His thoughts were from that time forth constantly engaged with the subject. He was all the while occupied through the summer and fall of 1855, and the spring of 1856, with these machines. That he did not apply for a patent the moment he had developed his ideas in the model spoken of by Ravel and others, without waiting until he had achieved the wrist joint with its accessories, so far from detracting from his merit, rather commends his case to the favor of the court, since the result has been a greater benefit to the public, springing from a motive within the especial policy of the patent law, viz:—the perfection of his machinery. Upon the whole case I am clearly of opinion that Griffin was the first to conceive and give expression to the idea of the machine in question in such clear and intelligible manner that a person skilled in that business could construct the machine; and that he used reasonable diligence in perfecting his invention and adapting it to use, and that consequently he is entitled to a patent for his discovery as against the junior inventor and patentee, J. W. Wilder.

Now therefore, for the reasons aforesaid, I hereby certify to the Hon. W. D. Bishop, commissioner of patents, that having assigned the time and place for hearing said appeal, and both parties being fully heard by their counsel, I have read and considered the papers in the cause, the reasons of appeal and the response of the commissioner to those reasons, and that there is no error in the decision of the office. The judgment of the commissioner is affirmed, and a patent must be issued to W. D. Richards, assignee of Caleb H. Griffin, as prayed.

Case No. 4,241.

The E. A. PACKER & The JOHN NEILSON.

[10 Ben. 520.][1]

District Court, S. D. New York. July, 1879.

COLLISION IN NORTH RIVER—VESSEL AT ANCHOR—TUG AND TOW—LOOKOUT—HARBOR REGULATIONS—FOREIGN VESSEL.

1. A schooner was lying at anchor in the North river, near the foot of 30th street, and within 300 feet of the end of the pier. A regulation of the port prohibited the anchoring of vessels within 300 feet of the line of the docks. The vessel was from Maine, and her master was not aware of the regulation. The schooner had a proper anchor-light set and a proper anchor-watch on deck. The tide was flood. A tug, with a barge in tow on a hawser astern, came up the river, and the master of the tug, thinking he could land the barge at a pier at 32d street better by having the barge alongside, slowed the tug when about off 23d street, and signalled the barge to cast off the hawser, which was done and those on the tug began to haul it in. As the barge came up by the tug, the captain of the tug hailed the captain of the barge to look out for the barge till he got round on the starboard side of her, and the captain of the barge answered in substance that he would. The barge went ahead with her own momentum and the tide, and, while the tug was in the act of making fast, struck the schooner and sunk her. Shortly before she struck, the captain of the tug called to the captain of the barge to starboard his wheel. The wheel of the barge was starboarded before the collision. The owners of the schooner filed a libel against both tug and barge to recover their damages: *Held*, that, on the evidence, the light of the schooner was not seen by those on the barge as soon as it should have been, by reason of a negligence in looking out, her captain being at the wheel and no one else on the lookout; and that the helm of the barge was not starboarded as soon as it should have been.

2. The barge did show that, if she had kept a better lookout, the collision would still have happened; that, even if the barge was cast loose

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

by the act of the tug, that would not excuse her from the prompt and vigilant use of such means of avoiding danger as she had; and that the barge was in fault, therefore, and that such fault contributed to the collision;

3. The master of the tug, knowing the speed of the barge and the strength of the tide and knowing that the barge had but two men on board, one of whom must be engaged with the lines and the other at the wheel, ought to have let go of the barge at a sufficient distance from the schooner to enable the tug to make fast to the barge again before she reached the schooner.

4. The tug, also, after casting off the barge, failed to keep a good lookout, and failed to warn the barge to starboard her wheel as soon as it should have been done. The tug was therefore also in fault, and such fault contributed to the collision.

5. The schooner was not chargeable with a fault contributing to the collision in anchoring where she did, notwithstanding the regulation of the port, especially as it appeared that vessels were in the habit of anchoring where she did.

[Cited in Ralli v. Troop, 37 Fed. 891.]

Scudder & Carter and Geo. S. Black, for libellants.

E. D. McCarthy, for the tug.

P. Cantine, for the barge.

CHOATE, District Judge. This is a suit to recover damages caused by a collision between the schooner N. H. Hall and the barge John Neilson, on the evening of the 24th of September, 1878. The schooner had arrived in the North river, off 30th street, in the afternoon of the 23d of September, with a cargo of paving stones from St. George, in the state of Maine, and at about four o'clock on that day she came to anchor, to await her turn to discharge at the pier at the foot of 30th street. She anchored about 180 feet out into the river from the end of that pier and about the same distance down the stream from the pier. The collision took place between seven and eight o'clock in the evening of the next day after she came to anchor. The tide was flood, and she was heading down the river. It was after dark, and she had a proper anchor-light set in her fore-rigging. She was laden with about four hundred tons of stone. The evening had been rainy, but it was clearing away, and some stars were visible, and lights of vessels could be seen without difficulty. The steam-tug E. A. Packer took in tow the barge John Neilson at pier 4, East river, at about six o'clock, to be towed round to a pier just below 33d street, North river. This pier was a short pier between the two long piers at 30th and 33d streets. The barge had been a side-wheel steamer. She was 175 feet long and 28 feet wide, sharp forward under water, having a main deck, and over that a roof or upper-deck some twelve feet above the main deck, and on top of that forward a pilot-house or wheel-house in which was the wheel by which she was steered. From the rail to the roof or upper-deck were curtains on both sides, so that she offered a large surface to the wind. Her crew on this occasion consisted of two men, one her captain, who was not a licensed pilot, and was stationed in the wheel-house, and the other a deck hand. She was towed by a hawser forty or fifty fathoms in length. As the tug with the barge in tow came up the North river she ran along on the New York side, and when she reached the vicinity of 23d street ferry slip, they were about three hundred feet out from that ferry slip and heading directly up the river. In order to put the barge into her berth, the captain of the tug concluded to take her alongside instead of keeping her on the hawser, not feeling sure that those in charge of her could bring her safely and properly up to her berth, if brought up by the hawser. He desired to take the barge on his port side as the tide then was, in order to put her at the dock. For the purpose of making this change, when the tug was opposite 23d street ferry slip, and then heading with her tow directly up the river, and a little to the westward of the schooner, the tug slowed, sheered off a little to port, and gave a signal to the barge to throw off the hawser, and those on the tug immediately commenced hauling in on the hawser. The barge with the momentum which she had, prior to the slowing of the tug, kept on up the river, passing the tug on the tug's starboard side and very close to her, the tug meanwhile reversing her engine, intending to go under the stern of the barge and come up on her starboard side when the barge had got by, and there make fast to her starboard quarter. The captain of the barge testifies that the hawser was thrown off only a short distance below 30th street; but he is evidently mistaken, and the overwhelming weight of the testimony from both vessels is that this manoeuvre was commenced as low down as 23d street, and that the barge came up to and passed the tug about off 25th street. As the barge passed the tug the captain of the tug called out to the captain of the barge to look out for the barge till he got round on the other side, and the captain of the barge replied, saying in substance that he would look out for the barge. The tug then came up on the starboard quarter of the barge and they were in the act of making the lines fast between the barge and the tug when the barge came into collision with the schooner. The starboard bow of the barge struck the starboard bow of the schooner, knocking a hole in her so that she sank in about five minutes, and her crew took to their boat, losing all their effects. Shortly before the barge struck the schooner, the captain of the tug, which was then lapping the starboard quarter of the barge, and just passing her lines to the barge, saw the danger and called to the captain of the barge to starboard his wheel. The testimony tends to show that he called to him twice to this effect. The captain of the barge testifies that he did starboard his wheel, as

soon as he saw the schooner, and had it hard a-starboard at the time of the collision. Although this witness is very seriously contradicted on other points, I think there is not sufficient ground to reject his testimony on this point; but it is obvious enough that if his statement is true, he did not starboard soon enough to steer clear of the schooner, with such steerage way as the barge then had.

The light of the schooner had been seen on the tug before she signalled to the barge to throw off the hawser, as well as the lights of quite a number of other vessels at anchor, lying to the westward and northward of the schooner. The space between the schooner's light and the next westerly light observed by those on the tug, seemed to them to be about a hundred yards, and the testimony shows that this judgment was about right. The captain of the tug judged that the space between these two lights was sufficient for him to go through in safety, though he was not certain whether the light on the schooner was a vessel's light or a light on the end of the pier at the foot of 30th street. The distance from him of the schooner, and the nearest of these other lights, when he slowed and gave the signal, was about a third of a mile. These lights, including the schooner's light, were also seen by the deck-hand on the barge, when she was about off 24th street, before she passed the tug, and he observed that the barge then headed a little to the westward of the schooner's light. But so far as appears, he did not report the light to the captain, who acted as wheelsman, and also as lookout, so far as there was a lookout on the barge. The captain of the barge says that the tug obstructed his view of the light till he got within about a barge and a half's length from the schooner, and that then, the tug getting out of his way, he saw the light, and immediately starboarded to clear it. But as, on the other point above referred to, his testimony as to the time and place when and where the tug got out of the way of the barge, is clearly overborne by all the other evidence, and he is on this point also evidently mistaken, and if he did not see the schooner's light from a point off 24th street, or thereabouts, it was because he was negligent in his observation and kept no good lookout. It may well be that he did starboard when he saw that he was running into her.

It is evident enough that the collision was caused by the negligence of the tug, or of the barge, or of both of them. The libel charges that it was caused by the "negligence and unskilfulness of those in charge of said tug and barge, in that said barge was brought by said tug into such close proximity to said schooner, and said barge was improperly navigated by those in command of her, and was without any lookout or light, and that no sufficient lookout was kept upon said tug-boat, nor was the speed of said barge and tug slackened in due time, and in allowing said barge to collide with a vessel at anchor." No point is now made that the barge had not proper lights. The tug and the barge, while both insisting that the schooner was anchored in an improper place, a point hereafter to be considered, attempt to throw on each other the fault of the collision. The barge insists that so far as she was concerned, the collision was inevitable; that she was cast off by the tug at such a rate of speed, and so headed towards the schooner, and at such a short distance from her, that when the tug, by sheering to port, first uncovered to her the schooner's light, it was impossible, by the utmost exertions of her wheelsman, to clear the schooner; that she did all she could, but the distance was too short to sheer the barge sufficiently. The tug, on the other hand, insists that the barge, from the time she was cast off, had entire control of herself, so far as the avoidance of the schooner was concerned; that she had steerage way and could, by starboarding in time, have avoided the collision; that it was not negligent to cast her off at the time when and under the circumstance under which it was done, and that the collision was, aside from the improper anchorage of the schooner, caused solely by the gross negligence of the wheelsman of the barge, in not steering her properly, and by the obstruction of the cleats and chocks on the barge, which, it is claimed, delayed the efforts of those on the tug, in making fast to her, when the danger was discovered, and when, if the tug could have been immediately made fast, she might, by backing, have saved the barge from striking the schooner.

As regards the plea of the barge, it is enough to say that the alleged facts, on which it is based, have no support in the evidence. There is, indeed, great conflict of evidence, or rather of opinion, whether the barge continued to have steerage way up to the time she reached the schooner, and also as to her speed through the water at the time she was cast loose, and how much it was diminished before the collision; but there is little or no doubt upon the evidence that for a considerable part of the distance between these two points, she had steerage way, and that if her captain had, at an earlier point of time, observed the schooner's light, and starboarded, he could have avoided her. It is quite clear that he did not keep a good lookout, and there was nobody else on the barge acting as lookout. This throws on the barge the presumption that the want of this lookout was the cause, or one of the causes, of the disaster. And she has not shown, and cannot show, that if she had kept a better lookout, the disaster would still have happened. It is urged, on behalf of the barge, that her being thus cast loose was wholly the act of the tug, that she was not informed, at the time she was taken in tow, of the intention of the tug to take her

alongside. This may be, but it certainly does not excuse the barge from the prompt and vigilant use of such means of avoiding danger as were within her control, when she thus found herself cast loose from the tug. It might excuse her for not having a full and proper complement of men for her navigation in such unlooked-for circumstances, provided her crew were full and sufficient for the mode of navigation she had a right to expect; but clearly it does not excuse the failure of the men she did have to use proper skill and vigilance. The charges of the libel are therefore made out.

As to the plea of the tug, the real questions are, first, whether it was a safe and prudent thing to do to cast off the barge under all the circumstances existing; and secondly, whether, if it might have been in itself safe and prudent so to do, the tug was chargeable with negligence in the lookout she kept and the mode of her navigation after casting off the barge, and whether this want of care in either respect caused or contributed to the disaster. The argument on the part of the tug is, that the barge having good steerage, there was no fault in casting her loose; that from that time the tug ceased to control or be responsible for her movements; that she had plenty of room to pass on the schooner's starboard hand, and that therefore there was no negligence in casting her off. It is true, that when she was cast off, new duties as to keeping a lookout and as to steering devolved on the barge; but while the actual connection between the tug and the barge was for the moment dissolved, the barge was still under the general care and charge of the tug, and the tug was surely bound to common vigilance and skill in guarding against and avoiding any dangers to which, while thus separated, the barge should be exposed, or to which she might expose any other vessel. While it is true that the barge had some power over her movements by her wheel so that she could sheer one way or the other, she was in all other respects helpless. She had no means of accelerating or retarding her forward movement. She must go forward just as she was acted upon by the tide and wind, and by the momentum she had received till that was spent. The evidence is very conflicting as to the speed she had. The weight of the evidence is, that, when she was cast loose, she was going at least five or six miles an hour through the water, and with the tide in her favor a mile and a half to two miles faster. The evidence, also, is that when she struck the schooner she had still some headway through the water. At any rate, it is certain that she was shot out up the river with sufficient momentum to carry her in a very short time by her momentum alone, together with the effect of the tide and wind, over the intervening space between her and the schooner, and some distance beyond, It is in proof that as the speed of such a barge diminishes, she loses very rapidly her steerage way, and is easily diverted from a straight line, and not easily controlled by her rudder; that the wind, unless it is very nearly with her, or against her, has a very considerable effect in throwing her stern off, and thus in altering her heading. The wind, at this time, was not strong, and was southeasterly, striking somewhat on her starboard quarter, and may have been sufficient to affect somewhat her course, changing her heading to the eastward. The captain of the tug had full notice of all these peculiarities of the barge, and of all these other matters. He also knew that the barge had but two men on board, and that one of these would necessarily be occupied with attending to the lines, till the vessels were again made fast to one another, thus leaving the wheelsman alone to act as lookout on the barge. It has been so often held improper for the same person to act as wheelsman and lookout, that it is unnecessary to cite any authority to show that the tug thus had notice that in executing this manoeuvre the barge would be left with a defective lookout, which is itself negligence, and held to be presumptively the cause of a collision that may be attributable to the want of a proper lookout. I think, therefore, that it was in itself negligent and improper, and showed a want of due care for the tug, to launch this barge out in the direction of this schooner and these other vessels, at a distance which was not clearly sufficient to enable her to overtake and make fast to the barge before reaching them. It involved too much risk of collision through a necessarily defective and insufficient lookout on the barge and through possibilities not easily calculated of her becoming unmanageable before she was again secured. I think it was not shown that there was any appreciable delay in the tug's making fast to the barge by reason of the cleats and chocks on the barge being blocked by freight. Nor have I given any consideration as against the tug to the suggestion, which has some support in the testimony, that the usual and more skilful mode of putting this barge in her desired berth, would be to have kept her on a hawser, gone up the river and rounded to and brought her down head to the tide, in which case she would have gone outside this fleet of vessels. I do not see that the tug would be chargeable with negligence or want of care towards the schooner, in executing the manoeuvre she undertook to execute, even if it were not the usual and best one for effecting the purpose she had in view, provided she did it in a safe and proper way, and had room enough to execute it without danger of collision with the schooner, and her liability rests not in her executing an unusual, or even foolish, manoeuvre, so far as berthing the barge was concerned; but upon doing it in a way and under circumstances involving danger to this schooner. It is also clear that the tug did not, aft-

er casting off the barge, keep a good lookout. In fact, she did not pretend to keep any lookout at all. As above suggested, her duty of vigilance was not discharged by her casting off the barge. In fact, the captain and all hands went aft to attend to getting the hawser in and to making the change to the other side. If he had kept a lookout on the tug, or put a lookout on the barge, he might at least have discovered the danger sooner. He thought it his duty to warn the captain of the barge to starboard his wheel when he did discover the danger, and no doubt it was; but if he had warned him sooner, the collision might have been averted altogether. The charges of the libel against the tug are therefore also made out.

It is, however, claimed by both the tug and the barge, that the schooner was guilty of negligence which caused or contributed to the disaster, by anchoring in an unsafe place, much frequented by vessels going into and coming out from the piers in that vicinity. I think this is no answer for these vessels, which had her in plain sight all the time. Apart from the question raised as to the rules of the harbor-masters, she was lawfully there, and they knew she was there, and there is no fault on her part which contributed to the injury.

It was proved that by regulations then in force, adopted under the provisions of the New York statute of 1862, c. 487, all vessels are prohibited under a penalty from lying at anchor within three hundred yards of the line of the docks at this place. She was violating this regulation, but it was proved that her master had no knowledge of the regulation; that the vessel belonged in the state of Maine and was a stranger here. It also appeared that, notwithstanding the regulations, vessels do constantly lie at anchor in that vicinity inside the line, and while she was lying there, quite a fleet of vessels was anchored there within the line. And it also appeared that the captain of the tug was in the habit of going up and down the river, and was therefore aware of the practice. Under these circumstances, it would be manifestly unjust to hold this schooner to have forfeited her right to compensation by her violation of the regulation, nor do the authorities so hold. No case is cited where a vessel has been held to the rule of contributory negligence in such a case, unless notified of the rule. All persons may be held to take notice of laws, but such regulations, though made in pursuance of lawful authority, are not laws. In the case of The McDonald, decided by Judge Betts [Case No. 8,755], there was express notice of the regulation. It seems, also, that such municipal regulations may be shown to have been waived by the acquiescence in their non-observance by the local authorities charged with making, altering and enforcing them. The John Frazer, 21 How. [62 U. S.] 188. Such a waiver was proved in this case.

It is also claimed, on the part of the claimants, that the schooner was in fault in not having a proper anchor-watch, and in not slacking her chain at the instant of collision so as to fall back. This defence is not fairly raised by the pleadings, but it has no support in the evidence. The lookout on the schooner had no reason to suppose the tug and tow would strike the schooner till just at the instant of collision, and it neither appears that there was time to do anything to avoid it, nor that slacking the chain, if it could have been done, would have been effectual. The Lady Franklin [Case No. 7,984].

Decree for the libellants against both tug and tow, with costs, including that part of stenographer's fees paid by the libellants and left by stipulation subject to the direction of the court.

Case No. 4,241a.

EARHART v. CAMPBELL.

[Hempst. 48.] [1]

Superior Court, Territory of Arkansas. April, 1827.

NONSUIT—DEFECTIVE DECLARATION—AFFIRMANCE ON ERROR—SUIT BY ASSIGNEE.

1. If a declaration is fatally defective, the court will affirm a judgment nonsuiting a plaintiff, without considering whether nonsuit was proper.

2. A person who sues as assignee is bound to allege an assignment to show title in himself.

[This was a suit by Rodney Earhart, assignee of Mathew Patterson, against Sarah Campbell, administratrix of J. Campbell, deceased.]

Before JOHNSON, ESKRIDGE and TRIMBLE, Judges.

OPINION OF THE COURT. This is an action of debt, brought by Earhart, assignee of Mathew Patterson, against Sarah Campbell, administratrix of J. Campbell, deceased. Upon the trial in the circuit court, upon motion of defendant, a judgment of nonsuit was rendered against the plaintiff. We deem it unnecessary to consider the question or point that influenced the court below in rendering a judgment of nonsuit against the plaintiff, as we are clearly of opinion that the declaration is fatally defective. On this ground the judgment of the circuit court must be affirmed. The plaintiff, Earhart, brings his suit as assignee of Mathew Patterson, and so styles himself in the declaration, but fails in any part to set out the assignment, or show any title in himself derived from Patterson. After declaring as assignee, he was bound to allege an assignment, that the defendant, if she thought proper, might deny, by plea, the assignment of the note. This, we think, is a fatal defect in the declaration. It is further defective in not alleging the time when the note became due and payable,

[1] [Reported by Samuel H. Hempstead, Esq.]

which it was necessary to aver in the declaration. It is also defective, substantially, in failing to allege or aver a promise to pay at any time, which is an indispensable requisite in the declaration. As the declaration is defective and sets out no good grounds of action, there is no error in the circuit court in nonsuiting the plaintiff. Judgment affirmed.

EARHART (UNITED STATES v.). See Case No. 15,018

Case No. 4,242.

EARL v. DEXTER et al.

[1 Ban. & A. 400;[1] 1 Holmes, 412; 6 O. G. 729.]

Circuit Court, D. Massachusetts. Sept., 1874.

PATENTS—INFRINGEMENT SUITS—DEFENSE OF PRIOR USE—NOTICE.

In a suit in equity, to restrain the infringement of a patent, it is not admissible to give in evidence, against the objection of the complainant, copies of drawings of foreign patents, with evidence respecting them, for the purpose of showing, that the patentee was not the original and first inventor of the improvement, where the answer of the defendant denies that the patentee was such original and first inventor, but does not, in compliance with the statute, give any notice of the persons by whom, or the places where, the alleged invention was known or used before the invention of the patentee.

[This was a bill in equity by Benjamin A. Earl against Richard Dexter and others for the alleged infringement of letters patent No. 47,938, granted to Earl and Holcraft, May 30, 1865.]

C. Howson and A. K. P. Joy, for complainant.

H. L. Parker and Dane & Baker, for defendants.

SHEPLEY, Circuit Judge. The defendants have offered in evidence, against the objections of the complainant, certain exhibits purporting to be copies of drawings of foreign patents, accompanied with evidence respecting them, for the purpose of showing that the patentees were not the original and first inventors of the improvement in apparatus for oiling wool, described in the patent, for an alleged infringement of which, this bill is brought. The answer of defendants denies that the patentees were the original and first inventors, but does not, in compliance with the statute, give any notice of the persons by whom, or the places where, the alleged invention was known or used before the invention of the patentees.

The only question, presented by the record, is one of infringement. Treating the patent as a good and valid one, as I am compelled to do on this record as against these defendants, I must come to the conclusion that the mechanism used by the defendants for oiling wool, consisting of an oil reservoir and a sprinkler, having such a movement imparted to it that it will enter the oil in the reservoir, and then, by percussive action, discharge the adhering oil, in the form of drops or spray, on to the wool, so as to effectually and uniformly saturate the traversing wool, is an infringement on the mechanism, patented to B. A. Earl, as assignee of B. A. Earl and Henry Holcraft. Decree for injunction and account.

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

EARL (DUNHAM v.). See Case No. 4,149.

Case No. 4,243.

EARL v. RAYMOND et al.

[4 McLean, 233.][1]

Circuit Court, D. Michigan. June Term, 1847.

RES JUDICATA — JUDGMENTS OF STATE COURTS — CONFLICTS OF JURISDICTION — LEVIES BY SHERIFF AND MARSHAL—DEFAULT — PLEA IN ABATEMENT.

1. The pendency of a suit in the state court, may be pleaded in abatement, to a suit subsequently brought by the same parties, and for the same cause, in the circuit court of the United States.

[Cited in Lawrence v. Remington, Case No. 8,141; Radford v. Folsom, 14 Fed. 100.]

2. In this respect, the state courts are considered as exercising a jurisdiction, being first assumed, which must abate the suit in the courts of the Union. No other course can prevent a conflict of jurisdiction.

3. So when a sheriff first levies on personal property, under a state judgment, there is a prior lien, over a levy made on the same property by the marshal.

4. One of joint promisers filed the plea in abatement, the other suffered a default. A motion being made for judgment on the default, the court refused the motion, on the ground that the plea showed there could be no procedure against him.

Mr. Clark, for plaintiff.

Mr. Douglass, for defendant.

OPINION OF THE COURT. This is an action of assumpsit against the defendants, as partners, and makers of a promissory note for $1067 48. There are two counts in the declaration, one upon a note, the other upon an account stated. One of the defendants, Samuel A. Raymond, pleads in abatement, "that before the filing and service of the said declaration upon him, to wit, in the term of October, in the year one thousand eight hundred and forty six, to wit, on the eighth day of January, 1847, in the circuit court for the county of Berrien, in the state of Michigan, the said plaintiff impleaded the said defendants, Samuel and William A. Raymond, and exhibited his declaration against them in a certain plea of trespass on the case upon the very same identical promises and

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

undertaking as in the declaration in the present suit, etc., and said suit is still pending, etc., in said court. To this plea the plaintiff demurs.

The courts of the United States have uniformly held, under the constitution and acts of congress, the judgments of the state courts as domestic judgments, and consequently, as purporting upon their face absolute verity. In this respect the same effect is given to them, or should be given to them, in every other state as in the one where the judgment was rendered. It is true, an execution can not be issued on the judgment of a sister state, but in every other respect the effect is the same. When a court is called to act on a judgment in the state where it was originally entered, or in any other state, it will see if the court had jurisdiction of the matter, and also, whether due notice was given to the party against whom judgment was rendered. Different views were entertained by some of the state courts, and especially by those of New York, but for some years past, the decisions of the supreme court of the United States, in this respect, have been generally followed by the state courts. That the pendency of a former suit, in a court having jurisdiction of the same, may be pleaded in abatement, is a principle well established. It is so held, to prevent a multiplicity of suits being brought for the same cause. To tolerate the pendency of several suits, at the same time, for the same cause, would be a reproach to the administration of justice. Courts of justice were instituted to afford speedy and effectual remedies for the redress of wrongs, and not to afford a litigious person the means of oppression.

The recovery of a judgment for the same cause of action in the state court, closes the controversy, and merges in the judgment the cause of action. And in this respect, the same doctrine is held in the courts of the United States, in regard to the judgment of a state court, as a judgment given by a court of the United States. The courts of the United States are not foreign to the states. They administer the laws of the state, following the established construction of its statutes by its own courts. And, if this effect be given to the judgment of a state court, it would follow, that the pendency of a suit, in such court, may be pleaded in an action for the same cause, in the courts of the United States. There is no other mode by which a conflict of jurisdiction can be avoided. It may be laid down as a general rule of action for the federal and state courts, that which ever shall first take jurisdiction of a case, the jurisdiction of the other may be defeated ,by a plea in abatement. And to avoid a conflict between the ministerial officers of the federal and state courts, the officer who first levies his execution, is entitled to a preference, the same as where both executions emanate from a state court or courts. This court takes cognizance of the laws of the state, and they know that the circuit court of Berrien county is a court of general jurisdiction. The decision of the supreme court has removed the objection that the adoption of the revised statutes abrogated the circuit courts of the state.

The demurrer to the plea is sustained.

This decision being announced, a motion was made for judgment against the other defendant, who had suffered a default.

If one of two joint promisers plead infancy or bankruptcy, the action may be prosecuted against the other. But, if the plea of one be to the merits, and the plea is sustained, the other is discharged, because the plea shows that neither can be charged. If the note was given without consideration, or for a consideration forbidden by law, or against the policy of the law, the plea of one would discharge both. In this case the plea filed showed equally a want of jurisdiction, as to both parties. The default confesses the jurisdiction, but the plea shows there can be no jurisdiction; the same as a plea to the merits, that there can be no recovery. 2 Serg. & R. 280; 1 Chit. Pl. 44a; Bing. Judgm. 13 Law Lib. 95, margin; 10 Johns. 573; Woodworth v. Spaffords [Case No. 18,020].

The motion for judgment is overruled.

Case No. 4,244.

In re EARLE.

[3 N. B. R. 304 (Quarto, 81).][1]

District Court, S. D. New York. Nov. 15, 1869.

BANKRUPTCY—EXAMINATION OF WITNESSES BEFORE REGISTER—PRODUCTION OF BOOKS.

Witness must answer all proper questions relating to his trade and dealings with the bankrupt prior to bankruptcy, and if necessary to answer such questions must produce any book containing the transactions with the bankrupt.

[Cited in Re Stuyvesant Bank, Case No. 13,582.]

[In the matter of Mortimer L. Earle, a bankrupt.]

Extract from examination by James L. Flint.

Before Edgar Ketchum, Register:

"Q. 75. Do you now produce a copy of your transactions with the bankrupt as contained in your book, or the books themselves for the period of one year previous to the bankruptcy of the bankrupt, say from July 1st, 1869? A. I do not. Q. 76. Do you decline to produce it? A. I do."

The register decides that the copy of transactions as required by the counsel of the assignee ought to be produced. The witness declines to produce the same.

BLATCHFORD, District Judge. The foregoing matter contained in questions 75 and

[1] [Reprinted by permission.]

76, and the answers thereto, having been referred to me by the register, under section 7 of the act, I decide that the witness must answer all proper questions on matters relating to his trade and dealings with the bankrupt prior to the commencement of the proceedings in bankruptcy, and that if, to answer properly and fully and truthfully any such question it is necessary that the witness should produce a copy of any transaction of his with the bankrupt, as contained in any book of the witness's, such copy must be produced.

The clerk will certify this decision to the register, Edgar Ketchum, Esq.

Case No. 4,245.

EARLE v. The ALIDA.

[13 Leg. Int. 369.]

District Court, Pennsylvania. 1856.

WHARFAGE—LIEN BY LOCAL LAW—CONTRACT—DOMESTIC VESSEL.

[1. The lessee of a wharf is entitled, under the statute of Pennsylvania, to a lien for wharfage upon vessels using the wharf.]

[2. The charge can only be allowed for the time the vessel actually occupies the wharf, and, though a matter of contract, it must be pursued in the same manner as if there was no contract; hence a recovery cannot be had for the entire contract price where the vessel was not at the dock the whole period.]

[3. A domestic vessel can be subject to no lien for wharfage except that given by the local law.]

[In admiralty. Libel by Justus E. Earle against the steamboat Alida.]

PER CURIAM. The question raised in this case on the merits is whether the lessee of a wharf for a fixed period of time has a lien upon the vessel for wharfage.

Held, that the act embraces wharfage under whatever title it is used, unless the vessel is placed there in wrong of the owner. She is in pawn or pledge to the owner of the wharf for the value of her accommodation, and the statute preserves the effect of the pledge for ten days after her removal. The charge can only be allowed for the time the vessel actually occupies the wharf, and must be pursued in the same manner as if the case was without bargain as to terms and duration. Accordingly, a recovery cannot be had for the entire contract price, when the vessel was not at the dock the whole period; the lien being given by the statute can be availed of only pursuant to the appointment of the statute, although the rate of wharfage may be matter of agreement between the parties. The vessel being a domestic one, can be subject to no lien not given by the local law. This case does not stand on the footing of a petition for payment of wharfage out of proceeds in court. It is an original proceeding in rem against the vessel itself, and must be governed by the rules applicable to suits of that character. It is not necessary, in order to avoid its effect, that the claimant should plead in bar of lien. It belongs to the libelant to prove in the first instance that his case makes the privilege of the statute. Ordered, a reference to a commissioner to ascertain and report the amount of lien on these principles.

Case No. 4,246.

EARLE et al. v. HARLOW et al.

[2 Ban. & A. 264;[1] 9 O. G. 1018.]

Circuit Court, D. Massachusetts. April, 1876.

PATENTS—INFRINGEMENT—SHEEP-SHEARING IMPLEMENTS.

The claim of the complainants' patent for "the shearing implement consisting of the handle and comb-plate extending from its end, the engine supported by said handle, and a moving shearing-cutter, arranged to operate with the comb-plate, and operated by said engine through power supplied from a reservoir situated at any desired point," *held*, to be infringed by the use by the defendants of a shearing implement, having a portable handle with an engine in the handle for actuating the cutting mechanism at and below the other extremity of the handle, notwithstanding the defendants' engine differed from the complainants' in the fact that the hollow handle is divided at its rear portion into two air-tight chambers by a central flexible partition or diaphragm, operated by the alternate admission and withdrawal, through tubes opening into said chambers, of air, so as to vibrate laterally a lever connected with the diaphragm, which communicates the desired reciprocatory motion to the cutting device.

[This was a bill in equity by William Earle, Jr., and others against Charles F. Harlow and others for the alleged infringement of letters patent No. 42,572, granted to A. I. Fullam May 3, 1864, and reissued December 23, 1873, No. 5,701.]

George E. Belton, for complainants.
James E. Maynadier, for defendants.

SHEPLEY, Circuit Judge. The question presented in this case is mainly one of infringement. The complainants are the owners of the patent reissued to them as assignees of Adoniran I. Fullam, December 23, 1873, for a new and useful improvement in devices for shearing sheep. The object of the invention is described to be, first, to actuate the cutters of a portable device, which is designed for shearing wool or hair, and which is guided and controlled by the hand of an operator, by means of steam or other equivalent elastic agent introduced into an engine, which is mounted upon the support which carries the handle and cutters of the device; second, to provide for conveying the power to the said device through a flexible pipe or hose, which will allow all the required manipulations of the instrument while in operation.

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

The device of Fullam consists, first, of a handle of convenient size to be grasped by the hand. In one end of this handle is a small engine, which is substantially a miniature high-pressure reciprocating engine, which furnishes motive power for actuating a cutter-bar provided with V-shaped cutters, like the cutters of a harvesting-machine, which work over fixed cutters of a similar form—these cutters placed below the other end of the handle, so as to allow sufficient space for the operator to grasp the handle and conveniently manipulate the device while shearing an animal; secondly, there is a flexible pipe connecting the portable engine and shears with the generator of the required power, the flexible pipe serving as a conduit of the power from the generator to the portable engine, and at the same time, by its flexibility, allowing the cutting device to be conveniently moved over an animal in every direction without restraint; third, a generator or reservoir of power.

The patentee states, that if steam be the agent employed for operating the shears, it may be generated in a small boiler, and alcohol or coal-oil used as the fuel, the boiler being located at any convenient point remote from the operator. The generator is treated simply as a generator or reservoir of power, of steam or other suitable elastic agent.

The claim in the patent is for—"The shearing implement consisting of the handle and comb-plate extending from its end, the engine supported by said handle, and a moving shearing-cutter, arranged to operate with the comb-plate, and operated by said engine through power supplied from a reservoir situated at any desired point, substantially as described."

The device used by the defendants is the one described in the patent to Hamilton and Harlow, September 1, 1864, No. 154,603, for improvements in shearing animals. This has a portable handle with an engine in the handle for actuating the cutting mechanism at and below the other extremity of the handle. The engine differs from complainants' engine in the fact that the hollow handle is divided at its rear portion into two air-tight chambers by a central flexible partition or diaphragm, operated by the alternate admission and withdrawal, through tubes opening into said chambers, of air, so as to vibrate laterally a lever connected with the diaphragm, which communicates the desired reciprocatory motion to the cutting device.

Considering an engine as a device for converting power into motion, or as a contrivance by which physical power is applied to produce a given physical effect, there is an engine in the hollow portable handle of defendants' contrivance, as well as in the complainants', an engine which operates in substantially the same manner to produce substantially the same effect.

The mistake of defendants' experts is in assuming to construe the patent of Fullam as limited to an engine operated by the expansive force of steam, a limitation not imposed upon the complainants' patent by any fair construction of the specification or claims.

In place of the two flexible tubes which Fullam uses, one for the passage of the steam or compressed air from the generator to the engine, and another for the escape of the exhaust steam, Harlow uses two flexible tubes for conducting the air into and out of, alternately, the two air-tight chambers of the hollow handle, which, with the addition of the flexible diaphragm and connected lever, constitute the engine for actuating the cutter device. These flexible tubes are connected with any suitable device or apparatus for supplying and withdrawing air to and from the handle, the air being first admitted to one of the chambers and withdrawn from the other, and vice versa.

Here, then, we find the same combination of substantially the same elements operating in substantially the same manner to produce the same result in both machines. Each has its shearing implement, consisting of its movable cutting device, an engine inclosed in, and supported by, the portable handle, the shearing-cutter arranged to operate with the comb-plate, and operated by the engine in the handle through power supplied through the flexible tubes from a reservoir or "source of supply" of power situated at any desired point.

Although, in a certain sense, it may be true that the column or current of air which passes through the flexible tubes in the Harlow device operates merely to communicate power from the air chamber, or "the apparatus or device for supplying and withdrawing air" from the engine in the handle, as a water-pitman operates through a flexible tube, this distinction is one rather verbal and ingenious, as applied in this instance, than real and substantial. The change of name is not in this instance accompanied with any change of function. The same remark applies to the criticism on the word "reservoir" in the complainants' patent, which is used only to designate the location of the source of supply of the power.

In the Fullam machine, the steam or compressed air communicates the power which has been generated by the heat under the boiler, or the manual or other force working the pump to compress the air, from the source of supply, through the flexible tubes, to the engine.

In the Harlow machine, the power generated by the manual or other force working the piston-rod is transmitted from the source of supply through the flexible tubes to the engine, by means of the alternating supply and withdrawal of the air.

The fact that the air which passes through the Harlow tubes, as compared with the steam or compressed air in the Fullam tubes, is practically in elastic, does not change the

mode of operation, which is, that in each case a power generated at a source of supply at a desired point is transmitted through a flexible tube, so as to be available to actuate an engine in the portable handle, which converts that power, at any other point where the will of the operator may from time to time direct it, into the desired motion.

Decree for complainants.

Case No. 4,247.

EARLE v. SAWYER.

[4 Mason, 1;[1] 1 Robb, Pat. Cas. 490; Merw. Pat. Inv. 502.]

Circuit Court, D. Massachusetts. Oct. Term, 1825.

PATENTS—PATENTABLE COMBINATION — DRAWINGS AS PART OF SPECIFICATIONS — DAMAGES FOR INFRINGEMENT.

1. A combination, if simple and obvious, yet if entirely new, is patentable; and it is no objection to it, that up to a certain point it makes use of old machinery.

[Cited in Whitney v. Emmett, Case No. 17,585; Aiken v. Bemis, Id. 109; Hotchkiss v. Greenwood, 11 How. (52 U. S.) 269; Hoffheims v. Brandt, Case No. 6,575; Piper v. Brown, Id. 11,180; Gibbs v. Hoefner, 19 Fed. 324.]

2. Drawings annexed to a specification, and referred to by numbers and letters in the specification, constitute a part of the specification, and may be referred to in aid of the description to give it certainty.

[Cited in Hogg v. Emerson, Case No. 6,586; Irwin v. Dixion, 9 How. (50 U. S.) 31; Forbes v. Barstow Stove Co., Case No. 4,923.]

3. As to the proper rule of damages in cases of infringement of patents.

[Cited in Allen v. Blunt, Case No. 217; Spaulding v. Page, Id. 13,219.]

Case [by Willard Earle against Elisha Sawyer] for the infringement of a patent [granted to plaintiff December 28, 1822]. After a verdict found for the plaintiff, a motion for a new trial was made by F. Dexter for the defendant, which was opposed by Bliss and Webster for the plaintiff. The facts and arguments are fully discussed in the opinion of the court.

STORY, Circuit Justice. The plaintiff, on the 28th of December, 1822, procured letters patent for "a new and useful improvement in the machinery for manufacturing shingles, called the 'shingle mill,'" and filed a specification in the patent office, a copy of which, with the explanatory drawings and figures referred to therein, is annexed to the letters patent. In this specification, he describes his invention as follows: "Said improvement consists in such new arrangement and change of parts of my former machine for the like purpose, for which letters patent were granted to me by the president of the United States, bearing date the third day of November, A. D. 1813, as to admit the use and application in said machine of the circular saw, instead of the perpendicular saw heretofore used, and the substitution of such other parts as are rendered necessary by these alterations, in order to effect the required timing and proper movements of the respective parts thus altered, in connexion with other parts of said machine." He then proceeds to describe these alterations with great minuteness, and annexes drawings of the whole machine with the new combination of parts, and distinguishes in those drawings, by appropriate colouring and descriptions, what is new from what belonged to the old machine. The former machine, here alluded to and patented by the plaintiff, is a machine for manufacturing shingles, called the "improved shingle mill," in which a perpendicular saw, with the appropriate machinery to move it, was exclusively used. The present patent claims, as an invention of the plaintiff, the substitution of a circular saw, with the appropriate machinery in the old machine, for the like purpose of sawing shingles. With the exception of this substitution, all the other parts of the old machine, such as the carriage to move the block to be sawed, and the alternate motion on a diagonal line of each end of it, so as to present first a thick and then a thin end to the saw, were unaltered.

At the trial it was proved, that the defendant had made and used a machine with a circular saw in substance like the plaintiff's, though with some slight variations of form, so as to cover up the evasion of the patent. The defendant had previously applied to the plaintiff to buy one of his improved shingle mills for use in the town where he resided, which the plaintiff declined upon the ground (as was suggested), that he had already entered into some contract with other persons for the exclusive use there. The defendant, upon that refusal, intimated that the plaintiff would find that other persons could make shingle mills as well as he; and soon afterwards the defendant had his constructed and put in operation.

There was no evidence in the case to show, that any person had ever, before the plaintiff's asserted invention, applied a circular saw in any manner to the plaintiff's old machine. But the whole evidence established, that the first application was suggested by him, and first put in operation by him, before he obtained his patent. Some testimony was offered to prove, that in a machine for cutting clapboards the circular saw had been in use in Brunswick in Maine for several years, but the testimony as to the structure of this machine, and its identity with the plaintiff's invention, as well as its priority in point of time, was so loose and uncertain and unsatisfactory, that though it

[1] [Reported by William P. Mason, Esq. Merw. Pat. Inv. 502, contains only a partial report.]

was left to the jury, it was not deemed of any serious importance in the cause.

There was considerable conflict of testimony in the cause (which was left to the jury), as to the question whether the application of the circular saw to the old machine was an invention or not, scientific witnesses differing in opinion on the subject. It was proved that circular saws were in use before, for the purpose of veneering and sawing picture frames, but they were small; and it was testified, that the machinery, by which a circular saw should be substituted for a perpendicular saw, in the plaintiff's old machine, was so obvious to mechanics, that one of ordinary skill, upon the suggestion being made to him, could scarcely fail to apply it in the mode which the plaintiff had applied his. This testimony was encountered by suggestions and proofs of the difficulties, which the plaintiff himself (who is an ingenious mechanic) had encountered in making his own substitution. But this also was left for the consideration of the jury.

It was proved that the plaintiff's old machine sold for 60 or 70 dollars, and his machine with the improvement sold for 150 or 200 dollars.

The jury found a verdict for the plaintiff for 300 dollars; and the defendant has applied to the court for a new trial, for reasons which he has filed in the cause, upon which I shall have occasion to comment, only stating at present, that the opinions imputed to the court are not admitted to be accurately laid down, although the inaccuracy is doubtless unintentional on the part of the counsel for the defendant. The original reasons assigned for the new trial, state the following as misdirections of the court: 1. That if any man makes or constructs a machine, which is new and useful, he is entitled to a patent: 2. That if he makes an improvement in any machine, which improvement is new and useful, he is entitled to a patent: 3. That if the plaintiff were the first to take out the perpendicular saw from his original shingle mill, and put in a circular saw (meaning, I presume, with the proper machinery), that if it be useful (meaning, I presume, new and useful), it is sufficient to entitle him to a patent: 4. That if the plaintiff were the first to apply or combine a circular saw with his original shingle mill for the purpose of making shingles, although the shingle mill were in common use, and the circular saw were in use (meaning, I presume, separately, and not in combination), and there were nothing new in the mode or machinery, by which it was applied (but meaning, I presume, that the combination itself was new), still the plaintiff is entitled to a patent. In the directions thus supposed, with the explanations and additions above inserted, which seem necessary to express the true sense of the propositions, I do not at present perceive any error. But I rather wish to state the real opinions expressed to the jury, with which, upon more mature reflection, I confess myself entirely satisfied.

The main question was, and still is, whether there is any thing new in the improvement patented by the plaintiff. He was already the patentee of the original shingle machine, which operated with a perpendicular or reciprocating saw. The other part of his apparatus for adjusting the logs to be sawed, was very ingenious, but not being in controversy, requires no consideration. By his present patent, he claims to be the inventor of the application of a circular saw, as a substitution for the perpendicular saw. He does not claim (which is very material) to be the inventor of the circular saw, or of any mode or machinery, by which it may be applied to sawing generally, or to sawing logs, or to sawing shingles. He claims to be the inventor of a combination of it in a particular manner with his old machine, for the purpose of sawing shingles. In what manner is the claim met? Not by showing that any other person ever thought of, or invented such combination before, for it is admitted that the plaintiff is the first person who conceived or executed it; but by showing, that he is not the inventor of a circular saw, or of the particular machinery of belts and drums and wheels, &c. by which such a saw is commonly put in operation; and that the combination itself is so simple, that, though new, it deserves not the name of an invention.

The whole argument, upon which this doctrine is attempted to be sustained, is, if I rightly comprehend it, to this effect. It is not sufficient, that a thing is new and useful, to entitle the author of it to a patent. He must do more. He must find it out by mental labor and intellectual creation. If the result of accident, it must be what would not occur to all persons skilled in the art, who wished to produce the same result. There must be some addition to the common stock of knowledge, and not merely the first use of what was known before. The patent act gives a reward for the communication of that, which might be otherwise withholden. An invention is the finding out by some effort of the understanding. The mere putting of two things together, although never done before, is no invention.

It did not appear to me at the trial, and does not appear to me now, that this mode of reasoning upon the metaphysical nature, or the abstract definition of an invention, can justly be applied to cases under the patent act. That act proceeds upon the language of common sense and common life, and has nothing mysterious or equivocal in it. The first section[2] enacts, "that when any person &c. shall allege that he has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine,

[2] Act 1793, c. 11 [1 Stat. 318].

manufacture, or composition of matter, not known or used before the application, &c. it shall be lawful for the secretary of state to cause letters patent to be made out, &c. granting the exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery," &c. The thing to be patented is not a mere elementary principle, or intellectual discovery, but a principle put in practice, and applied to some art, machine, manufacture, or composition of matter. It must be new, and not known or used before the application; that is, the party must have found out, created, or constructed some art, machine, &c. or improvement on some art, machine, &c. which had not been previously found out, created, or constructed by any other person. It is of no consequence, whether the thing be simple or complicated; whether it be by accident, or by long, laborious thought, or by an instantaneous flash of mind, that it is first done. The law looks to the fact, and not to the process by which it is accomplished. It gives the first inventor, or discoverer of the thing, the exclusive right, and asks nothing as to the mode or extent of the application of his genius to conceive or execute it. It must also be useful, that is, it must not be noxious or mischievous, but capable of being applied to good purposes; and perhaps it may also be a just interpretation of the law, that it meant to exclude things absolutely frivolous and foolish. But the degree of positive utility is less important in the eye of the law, than some other things, though in regard to the inventor, as a measure of the value of the invention, it is of the highest importance.

The first question then to be asked, in cases of this nature, is, whether the thing has been done before. In case of a machine, whether it has been substantially constructed before; in case of an improvement of a machine, whether that improvement has ever been applied to such a machine before, or whether it is substantially a new combination. If it is new, if it is useful, if it has not been known or used before, it constitutes an invention within the very terms of the act, and, in my judgment, within the very sense and intendment of the legislature. I am utterly at a loss to give any other interpretation of the act; and, indeed, in the very attempt to make that more clear, which is expressed in unambiguous terms in the law itself, there is danger of creating an artificial obscurity. With these views, I did not hesitate to tell the jury at the trial, that the true question for them to decide was, whether the improvement, secured by the patent, had ever been thought of, or applied to the original machine, by any other person, before the plaintiff conceived and executed the combination. If they were of opinion that it had not been, and that he was the author of it, then he was the inventor within the meaning of the act, and entitled to a patent. All the other remarks, introduced as the ground-work of the motion for a new trial, were mere illustrations of this single principle, which was brought home to the case on trial, by a direct application. My judgment on this point remains unshaken by the subsequent arguments, urged at the bar.

The case of Brunton v. Hawkes, 4 Barn. & Ald. 541, is thought to countenance the doctrine contended for on behalf of the defendant. If it did, it might be very material to consider, whether it could govern in the construction of our own patent act. But, upon the most careful consideration of that case, it does not appear to me to break in at all upon the law, as the court has held it on the present occasion. One question there, was, whether there was any novelty in an alleged improvement in the making of ships' anchors. It was proved, that the same operation had been long known and applied for similar purposes in the adze anchor and the mushroom anchor. The court thought, upon the evidence, the plaintiff's invention, as to the anchor, was not new. Lord Chief Justice Abbott said, "a patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result is produced, is good, because there is a novelty in the combination. But here the case is perfectly different; formerly three pieces were united together; the plaintiff only unites two; and if the union of those two had been effected in a mode unknown before, as applied in any degree to similar purposes, I should have thought it a good ground for a patent. But, unfortunately, the mode was well known and practised." It strikes me, that the doctrine here laid down is perfectly correct, and such as has been often recognised in this court. And a careful perusal of the opinions of all the judges, in that case, will fortify, in no small degree, what has been delivered by this court in the present trial. How, indeed, can it be possible, that an English court should deem some intellectual labour, beyond the novelty of the combination, necessary for a patent, when it is the acknowledged law of England (different in that respect from our own), that the first importer of an invention, known and used in foreign parts, may be entitled to a patent as the inventor in England? What of intellect is employed in the mere importation of a known machine? An inventor, in the sense of the English law, is the first maker, or constructor, or introducer, in England.

I will now briefly notice some other grounds in support of the motion for a new trial, which have been filed at a later period, and relied upon at the argument. I shall not dwell on the first and second reasons, because they do not correctly state the facts connected with the opinion of the court. They rest upon suggestions respecting the clapboard machine, and its supposed identity with the plaintiff's machine. In summing up to the jury, the court took notice of

the very imperfect and loose testimony on this point, brought suddenly into the cause, at its very close, and suggested to the jury, whether under the circumstances they could, upon such testimony, believe, that the machine for sawing clapboards was identical with the plaintiff's improved machine for sawing shingles; and added, that the proof of that fact rested on the defendant, as also, that it was in existence before the plaintiff's invention. The court further stated, that unless the machine were substantially the same, in principle and operation, no objection could arise from this source to the plaintiff's patent, since he did not claim an improvement upon any or all clapboard machines, but only an improvement upon his original shingle machine. To this opinion also my mind still adheres.

Another ground is, that the court directed the jury, that the drawings annexed, and referred to in the specification, constituted a part thereof; and that they might be resorted to, to aid the description, and to distinguish the thing patented from other things known before. In point of fact, the drawings were annexed to the specification in the patent, and it made perpetual references to them, distinguishing thereby the new parts from the old, so that it was unintelligible without them. The court, therefore, in the first part of the direction, did no more than state the fact, as it was; and the other part was correct, unless the description must be wholly in writing. The argument now is, that by the very terms of the patent act, there must be a written description (without any reference to drawings), in such full, clear, and exact terms, as to distinguish the things patented from all other things; and that, in case of a machine, the act requires drawings in addition thereto. For this position, the case, Ex parte Fox, 1 Ves. & B. 67, before Lord Eldon, has been cited. It was a petition to the lord chancellor for the grant of a patent, against which a caveat had been entered. On hearing the parties, Lord Eldon granted the patent, and on that occasion is reported to have said, "I take it to be clear, that a man may, if he chooses, annex to his specification a picture or a model, descriptive of it; but his specification must in itself be sufficient, or I apprehend it will be bad." As I understand this language, it is not intended to assert the doctrine for which it is cited. It means, that the specification must in itself be sufficient, and that the mere annexation of a picture or model will not help any defect in the specification. This may be true, where such picture or model is not referred to, as constituting a part of the specification itself. But if the explanations of the specification call for the drawings, and refer to them as a component part in the description, they are just as much a part of the specification, as if they were placed in the body of the specification. Indeed, in many cases it would be impracticable to give a full and accurate description of the form, adjustments, and apparatus of very nice and delicate machinery, without drawings of some of the parts, as every thing might depend on size, position, and peculiar shape. Lord Eldon could not have meant, that if drawings and figures were necessary to a full description of a machine in the specification, there was still some stubborn rule of law prohibiting it. That would be to require the end, and yet to refuse the means. One of the objections in Boulton v. Bull, 2 H. Bl. 463, was, that the specification was imperfect, and it was pressed, that there ought to have been drawings to explain the machinery. How was this objection met? Not by stating, that by law no explanatory drawings would help a specification, even if referred to in it, but by showing the specification sufficient without them. Mr. Justice Rooke said (page 480), "As to the objection of a want of a drawing or model, that at first struck me as of great weight. I thought it would be difficult to ascertain, what was an infringement of a method, if there was no additional representation of the improvement, or thing methodised." "If they (the jury) can understand it without a model, I am not aware of any rule of law, which requires a model or drawing to be set forth, or which makes void an intelligible specification of a mechanical improvement, merely because no drawing or model is annexed." See, also, Davies, Pat. p. 440, and Bovill v. Moore, 2 Marsh. 211; Eden, Inj. 249, 260.

It seems to me then there is no ground for this objection to the charge, even upon the law of patents in England, where the specification constitutes no part of the patent itself, but is required by a proviso in every grant, to be enrolled in the court of chancery, within a limited time, and particularly to describe and ascertain the nature of the invention, and in what manner the same is to be performed. Davies, Pat. 8, 34. But how stands our own law on this subject; for by this the question must, after all, be decided? The patent act requires, that the inventor "shall deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, &c., &c.; and in the case of a machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions; and he shall accompany the whole with drawings and written references, where the nature of the case admits of drawings," &c. This is an explicit direction to annex drawings, where the nature of the case admits of them, with written references; and when so annexed, they become part of the written description required by the act. They may be indispensable to distinguish

the thing patented from other things before known. Surely, then, the act could not intend studiously to exclude them as part of the written description. That would be to require the end and deny the means.

I pass over some other grounds, which are not relied on or not proved, to the last assignment of error in the charge of the court. It is, that the court stated the measure of damages to be the price of the plaintiff's new machine, after deducting therefrom the price of the plaintiff's old machine. To this objection it is a sufficient answer, that the court gave no such direction to the jury. It was not called upon to express any opinion on the subject. The counsel, on both sides, argued the question of damages at large, and coincided in opinion, that, under the circumstances of the case, if the plaintiff was entitled to any damages, the difference of price between the new and old machine was a fair measure of damages. In cases of this sort, where the damages are open to full inquiry, and where the counsel on both sides are content with a measure prescribed by themselves, it is not usual or necessary, for the court to interfere at all. In summing up to the jury, the difference of price between the new and old machine was suggested to the jury as evidence of the value of the improvement, and its public utility, and it was left open to them as an ingredient in estimating the damages, but without the slightest intimation that they were bound by it. There certainly is no reason for granting a new trial on account of damages, given according to a rule admitted by the party himself to be a proper one in his own case. But in truth the case does not enable the court now to say, that the jury, in their estimate of damages, had the least regard to the price of the machines. They were expressly told by the court, that they were to give the plaintiff his actual damages only; and in what manner they made up their verdict is unknown to us all. There were circumstances in the case calculated to inflame the damages, if the jury should have felt at liberty to go beyond mere compensation for loss; for there was a meditated infringement of the plaintiff's patent; and the principal point of defence appeared to be a mere after thought to excuse the deed.

But I wish to add a few words in relation to the point of law, which the objection suggests, and which is founded upon the decision of this court, in the case of Whittemore v. Cutter [Case No. 17,601]. To that decision, as founded in just principle, I still adhere, although I confess with subdued confidence, since I have reason to believe, that it has not met the entire concurrence of other and abler judicial minds. It has been maintained, by some learned persons, that the price of the invented machine is a proper measure of damages, in cases where there has been a piracy by making and using the machine, because, in such cases, the verdict for the plaintiff entitles the defendant to use the machine subsequently, and in short transfers the right to him in the fullest manner, and in the same way, that a recovery in trover or trespass, for a machine, by operation of law, transfers the right to such machine to the trespasser, for he has paid for it. See Toll. Ex'rs, bk. 2, c. 7, p. 239. If I thought such was the legal operation of a verdict for the plaintiff, in an action for making and using a machine, no objection would very forcibly occur to my mind against the rule. But my difficulty lies here. The patent act gives to the inventor the exclusive right of making and using his invention during the period of fourteen years. But this construction of the law enables any person to acquire that right, by a forced sale, against the patentee, and compels him to sell, as to persons or places, when it may interfere essentially with his permanent interest, and involve him in the breach of prior contracts. Thus the right would not remain exclusive; but the very attempt to enforce it would involve the patentee in the necessity of parting with it. The rule itself too has no merit from its universality of application. How could it apply, when the patentee had never sold the right to any one? How, when the value of the right depended upon the circumstance of the right being confined to a few persons? Where would be the justice of its application, if the invention were of enormous value and profit, if confined to one or two persons, and of very small value if used by the public at large; for the result of the principle would be, that all the public might purchase and use it by a forced judicial sale. On the other hand, cases may occur, where the wrong done to the patentee may very far exceed the price, which he would be willing to take for a limited use by a limited number of persons. These, among others, are difficulties which press on my mind against the adoption of the rule; and where the declaration goes for a user during a limited period, and afterwards the party sues for a user during another and subsequent period, I am unable to perceive, how a verdict and judgment in the former case is a legal bar to a recovery in the second action. The piracy is not the same, nor is the gravamen the same. If indeed the plaintiff, at the trial, consents that the defendant shall have the full benefit of the machine for ever, upon the ground of receiving the full price in damages, and the defendant is content with this arrangement, there may be no solid objection to it in such a case. But I do not yet perceive, how the court can force the defendant to purchase, any more than the plaintiff to sell, the patent right, for the whole period it has to run. The defendant may be an innocent violator of the plaintiff's right; or he may have ceased to use, or to have employment for such a machine. There are other objections alluded to in Whittemore v. Cutter [supra].

Struck with similar difficulties in establishing any general rule to govern cases upon patents, some learned judges have refused to lay down any particular rule of damages, and have left the jury at large to estimate the actual damages according to the circumstances of each particular case. I rather incline to believe this to be the true course. There is a great difference between laying down a special and limited rule, as a true measure of damages, and leaving the subject entirely open, upon the proofs in the cause, for the consideration of the jury. The price of the machine, the nature, actual state, and extent of the use of the plaintiff's invention, and the particular losses, to which he may have been subjected by the piracy, are all proper ingredients to be weighed by the jury in estimating the damages, valere quantum valeant.

Upon the whole, my judgment is, that the motion for a new trial ought to be overruled. Judgment accordingly.

EARLE (WASHING-MACHINE CO. v.). See Case No. 17,219.

Case No. 4,248.

EARNEST v. EXPRESS CO.

[1 Woods, 573.][1]

Circuit Court, N. D. Georgia. Sept. Term, 1873.

CARRIERS OF GOODS — LIMITATION OF LIABILITY BY CONTRACT — NEGLIGENCE — VALUATION OF PACKAGES.

1. A common carrier may by contract limit his common law liability, but he cannot contract for immunity from liability for his own negligence or misconduct.

2. Common carriers have a right to demand good faith and fair dealing from those whom they serve. So where by notice brought home to a shipper, an express company made known that it would not be liable to a greater amount than fifty dollars for the loss of unvalued packages, and the shipper to avoid paying the regular charges of the company failed to disclose the value of a package delivered for carriage, and led the company to treat it as of small value, whereby it was lost, it was held that the shipper could only recover fifty dollars, although the package was of much greater value, and although the company, had the value of the package been made known to it, might have been considered guilty of negligence.

[Cited in Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 156.]

This cause was tried at the September term, 1873, by Erskine, District Judge, and a jury. There was a verdict for plaintiff for fifty dollars. At the same term a motion for new trial made by plaintiff was argued.

E. N. Broyles and Reuben Arnold, for the motion.

N. J. Hammond, contra.

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

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge. The evidence upon the trial as appeared by the brief thereof agreed to by counsel, established these facts. The plaintiff was a jeweller in the city of Atlanta in the habit of sending to and receiving from New York City valuable packages by express. He was furnished by the express company with a book containing the blank receipts of the company. On the 8th of February, 1869, he went to the agent of the defendant in Atlanta, with a small package containing four diamond rings valued at $735. The package was a paper box about three inches long by two and a half wide and was covered with brown paper and directed to a firm in New York. There was no value stated upon the package nor other mark to indicate its value. The plaintiff when he delivered the package to the defendant's agent presented one of defendant's receipts which he had taken from the book furnished by the express company and had filled up in his own hand. This receipt read as follows:

"Read this receipt. Southern Express Company. Express forwarders. Domestic bill of lading. Atlanta, February 8, 1869. Received of E. E. Earnest, package valued at (not given) dollars, and for which amount the charges are made by said company, marked S. & M. N. Strauss, New York."

Then followed several printed stipulations among which were the following: "It is a part of the consideration of this contract and it is agreed that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots or in transit, leakage or breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants, unless specially insured by it and so specified on this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated to the shipper at the time of shipment and stated in the receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss or damage to each package herein receipted for." The receiving agent of the defendant asked the plaintiff the value of the package, and he refused to give it. The charge upon the package for transmission to New York was one dollar. If the value had been fixed, there would have been an additional charge

of one-half of one per cent., amounting to three dollars and a half and upwards. The plaintiff had been frequently informed by defendant's agent of this rule in reference to additional charges on value. The contents of the package and its value remained unknown to defendant's agent. The defendant's agent upon the refusal of plaintiff to make known the value of the package, stated to plaintiff that the express company would not be liable for more than fifty dollars on the package unless he fixed a value, which proposition the plaintiff disputed and claimed the law to be otherwise; whereupon his attention was called to the clause in the receipt bearing upon that point.

Valued packages delivered to defendant for transportation are put in sealed pouches and these pouches in an iron safe, and the messenger receiving the pouch receipts for it to the one delivering it. Unvalued packages for convenience merely and not for security, are placed in a wooden box, and there is no rule of the company to prevent throwing them upon the floor of the car. They are delivered from one messenger to another, the latter simply receipting the way bill and receiving the goods in bulk. The package in question was safely carried as far as Dalton, Georgia, as an unvalued package. It was there delivered to a second messenger to be transferred with other express freight to another car. When the second messenger before starting examined the packages transferred to his own car to see if they were all there, this package was missing. There was some testimony tending to show that in the transfer of the express freight from one car to another, this package was stolen by one Green, who assisted in making the transfer. Green was not in the employ of either the railroad or express company, but was the servant of the express agent at Dalton, and sometimes assisted in transferring heavy express freight from one car to another. The express messenger at Dalton who delivered the package and the one who received it, both testified that they were careful and diligent in the discharge of their duty touching this package, supposing it to be one not worth more than fifty dollars, and there was no evidence to rebut this proof except the fact of the loss of the package. The jury returned a verdict of fifty dollars for the plaintiff, and the plaintiff now moves for a new trial on the ground that upon the facts the verdict should have been for the value of the diamonds.

A motion for a new trial is addressed to the sound discretion of the court, and if upon a review of the case the court is of opinion that substantial justice has been done, and a correct result reached by the verdict, a new trial will not be granted, even though there may have been error in the progress of the trial. Proceeding upon this principle, we nave considered the case as presented by the agreed facts, to determine whether the verdict is right or wrong, and have reached the conclusion that it is right and ought not to be disturbed. The modern doctrine both in England and this country is now well settled, that a common carrier may by express contract, or by notices brought home to the knowledge of the owner of the goods before or at the time of delivery to the carrier, if assented to by the owner, limit his common law liability. "As the extraordinary duties annexed to his employment concern only in the particular instance the parties to the transaction, involving simply rights of property, the safe custody and delivery of the goods, we are unable to perceive any well founded objection to the restriction or any stronger reasons for forbidding it, than exist in the case of any other insurer of goods to which his obligation is analogous and which depends altogether upon the contract between the parties. The owner by entering into the contract virtually agrees that in respect to the particular transaction the carrier is not to be regarded as in the exercise of a public employment, but as a private person who incurs no responsibility beyond that of an ordinary bailee for him, and answerable only for misconduct or negligence." Nelson, J., in New Jersey Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 382. See, also, Sager v. Portsmouth, S. & P. Ry. Co., 31 Me. 228; Bean v. Green, 12 Me. 422; Cooper v. Berry, 21 Ga. 526; Dorr v. New Jersey Steam Nav. Co., 1 Kern. [11 N. Y.] 485; Atwood v. Reliance Transp. Co., 9 Watts, 87; Verner v. Sweitzer, 32 Pa. St. 208; Parsons v. Monteath, 13 Barb. 353; Moore v. Evans, 14 Barb. 524. It is generally held, however, in this country that a common carrier cannot, by special notices brought to the knowledge of the owner of the goods or by contract even, exempt himself from the duty to exercise ordinary care and prudence in the transportation of goods. Cole v. Goodwin, 19 Wend. 251; Atwood v. Reliance Transp. Co., 9 Watts, 87; Camden & A. R. Co. v. Baldauff, 16 Pa. St. 67.

According to the agreed facts in this case, the stipulations of the receipt were brought distinctly to the knowledge of the plaintiff. After presenting the receipt filled out by his own hand he was informed by the agent of defendant that, unless he stated the value of the package, the defendant would only be liable for $50. This the plaintiff disputed, when the agent called his attention specially to the provision to that effect in the receipt. Instead of demanding that such stipulation be stricken out, he accepted the receipt as it stood. According to the authorities, this amounted to a contract between the plaintiff and defendant.

The point urged by the plaintiff is this: The jury, having found a verdict in his favor for fifty dollars, must have been satisfied either of the negligence of the defendant, or that a servant of the defendant had converted the

goods, and that the verdict should therefore have been for the full value of the package. In other words, that if the defendant cannot, by contract, exonerate itself from liability for its negligence, neither can it contract that in case of negligence it shall be liable for less than the real damage sustained. We do not think it follows, from the finding of the jury, that the verdict should have been for the full value of the package. The negligence found by the jury was negligence in handling a package supposed to be worth not more than fifty dollars, and, in effect, represented to be of that value, and no more. While it is conceded that a common carrier cannot protect himself, by contract, from liability to pay full damages in case of negligence, yet he may, by contract, require a full disclosure of value, and his case is to be judged just as if the value represented were the true value. What would be diligence, in the care of an unvalued package, might be gross negligence in the care of one worth a thousand dollars. The authorities sustain these views. In the case of Farmers' & Mechanics' Bank v. Champlain Transp. Co., 23 Vt. 186, the court said: "But we regard it as well settled, that the carrier may, by general notice brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions; as having notice of the kind and quantity of things deposited for carriage, and a certain reasonable rate of premium for the insurance, paid beyond the mere expense of carriage."

So Mr. Greenleaf, in his treatise on the Law of Evidence (volume 2, § 215), declares: "It is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents; as, for example, that he will not be responsible for the value of goods above a certain sum, unless they are entered as such and paid for accordingly." In Batson v. Donovan, 4 Barn. & Ald. 21, the court held that "the plaintiff, by delivering a box containing bills, checks and notes to the value of £4,072, without intimating that the contents were valuable, when he knew the carrier expected a premium for insurance in such cases, was guilty of such fraud and deception as to preclude a recovery except for such gross neglect as would be reprehensible if the parcel had been of less value than £5, the limit named in the carrier's notice." See also American Exp. Co. v. Perkins, 42 Ill. 458; Relf v. Rapp, 3 Watts & S. 21.

If public policy allows a common carrier to make such a contract, it must be enforced. Common carriers have a right to demand good faith and fair dealing from those who do business with them. It strikes the common sense as a gross injustice that a party who, to avoid paying the regular charges therefor, conceals the value of a package, and thereby throws the carrier off his guard, and induces him to treat the package as of small value, whereby it is lost, should recover its full value when he has expressly agreed, in case of loss, that he would only demand a stated sum, much less than the true value. That is the case here. It is evident from the facts that if the value of the package had been stated, it would not have been lost. It would have been put in a pouch, and the pouch in an iron chest. The package, being unvalued, was supposed to be of little value, and was treated as such by the carrier. He was induced to relax the care and vigilance he would have used had the package been marked with its true value. By reason of that relaxation, the package was lost. Its loss is the direct consequence of the conduct of the plaintiff in refusing to give its value in order that he might escape the payment of full charges. He has agreed that in case of loss his compensation therefor should be fifty dollars, and he is bound by his contract. There is a plain, well understood contract between these parties. If such contracts are ever to be enforced, we see no reason why this one should not be. We think the verdict of the jury does substantial justice between the parties, and ought to stand. The motion for new trial will therefore be overruled.

Case No. 4,249.

EARTH CLOSET CO. v. FENNER et al.

[5 Fish. Pat. Cas. 15.][1]

Circuit Court, D. Rhode Island. Feb., 1871.

PROVISIONAL INJUNCTIONS—DISCRETION OF JUDGE—PATENT CASES.

1. In applications for provisional injunctions, the law makes the judge's discretion the rule, not unheedful that, in the qualities of mind which give character to an exercise of discretion, individuals differ scarcely less than in form and features. The judge is bound to decide a question of this kind as, in his judgment upon the particular case before him, the principles of equity and the practice of its courts warrant or dictate. For precedents in any recognized sense of the word, it is idle to search.

2. The patent having been reissued just before the bringing of the suit, no exclusive possession of the invention for any considerable time, accompanied by acquiescence by the public, nor any verdict, judgment, decree, or judicial order recognizing the validity of the claim having been shown, nor irreparable injury to the complainant having been averred, a provisional injunction was refused.

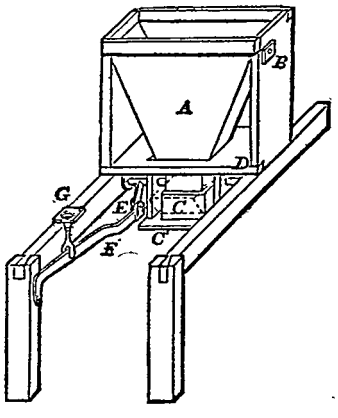
In equity. Motion for provisional injunction.

Suit brought [by the Earth Closet Company against William H. Fenner and others] upon letters patent [No. 91,474] for "im-

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

provement in deodorizing apparatus for water-closets," granted to Henry Moule and Henry J. Girdlestone [June 15, 1869]; assigned by them to Joseph W. Beach, and by him to the complainants, to whom they were reissued October 4, 1870, in two divisions, numbered 4,137 and 4,138 respectively, of which, however, No. 4,137, only, was involved in the present suit. The invention will be understood by a reference to the drawing, in connection with the claims.

The claims of the original patent were as follows: 1. The oscillating hopper A, the chucker C, upon the oscillating shaft E, the shelf C', pivoted lever F, and handle G, combined to operate within the case, substantially as described, for the purposes specified. 2. The oscillating hopper A, the chucker C, upon the oscillating shaft E, and the weighted levers, in combination with each other, and the seat, substantially as described, for the purpose specified.



The claims of the reissue No. 4,137 were as follows: 1. A vibratory or movable hopper, constructed and operating substantially as and for the purposes described. 2. A swinging distributor or chucker, arranged to operate substantially in the manner and for the purposes set forth. 3. The deflector-plate C', in combination with the chucker, operating as and for the purposes set forth.

Tillinghast & Carpenter, for complainants.
B. F. Thurston, for defendants.

KNOWLES, District Judge. Upon the pending motion in this cause, the parties have been fully heard at chambers. It is for a special, that is, a preliminary injunction, prayed for in the complainants' bill, charging an infringement of certain letters patent; and the state of facts, in view of which it is pressed, is substantially this:

On May 28, 1860, letters patent were issued from the patent office of Great Britain to the Rev. Henry Moule, of Fordington, in the county of Dorset, clerk, and James Bannehr, of Exeter, agent, for the invention of "improvements in the nature and construction of closets and commodes for the reception and removal of excrementitious and other offensive matter, and in the manufacture of manure from them." And it would seem that as early as October or November, 1867, there was in circulation, in London, a pamphlet of twenty-four pages, issued by a "Moule Patent Earth Closet Company," giving the public full information in regard to earth closets and commodes, their utility, convenience, and economy, and showing, by numerous wood-cuts, the form and structure of the articles manufactured for sale by the company. On the title page of the pamphlet, among the names of the company's officers, are those of "Messrs. H. J. & J. W. Girdlestone, Consulting Engineers."

On March 29, 1869, said Moule and Henry J. Girdlestone made application to the commissioner of patents of the United States, who, on June 15, 1869, issued to them letters patent for a new and useful "improvement in deodorizing apparatus for water closets," which letters patent the grantees, on August 9, 1869, transferred and assigned to one Joseph W. Beach, who, on September 2, 1869, assigned them to the complainants, the "Earth Closet Company," a corporation under the laws of Connecticut.

On March 24, 1870, this corporation filed a bill of complaint in this court against the present defendants, charging an infringement of their said patent, to which the defendants answered, on May 17, 1870, in such terms that the complainants, after filing a general replication on July 4, withdrew their suit on October 17, 1870, paying defendants' costs, having already, on surrender of the patent of June, 1869, procured a reissue thereof on October 4, 1870 (No. 4,137), in which the invention is denominated an "improvement in deodorizing apparatus for closets," the patentees' specifications and claims having been amended and enlarged in such manner as to sustain a charge of infringement against the defendants, as the users, without license, of two of the three improvements, specified and claimed as such under the reissue.

On October 15, 1870, the complainants filed a second bill, now pending, charging an infringement of their patent as thus reissued, and praying an account and an injunction, and also a preliminary injunction. On January 12, the complainants moved, in effect, that a preliminary injunction issue, and, on February 16, at chambers, this motion was heard.

The defendants, it is proper to add in this connection, in their affidavits, admit that, in the spring of 1869, they did manufacture earth closets of the form and kind depicted in the pamphlet above referred to, and that some of these thus manufactured had been sold since the reissue of the patent; denying, however, that since that reissue any of these articles had been made by them. They further say that no one of these closets made by them, saving some twenty or twenty-five, made prior to the date of the Moule & Girdle-

stone patent (June 15, 1869), comprised "an oscillating hopper," which, as they contend, was and is the only portion of the mechanism covered by that patent, as originally granted, and therefore the only portion covered de jure by the reissue of October, 1870.

Such being the facts, the complainants, presenting their reissue patent of October, 1870, as a valid patent from and after the date of the original (June 15, 1869), contend that, under existing laws and the rules of practice in the circuit courts of the United States, they are entitled to the injunction asked.

In opposition to this claim, the defendants submit several propositions, which they contend are tenable, in view of the facts admitted and in proof, and the law, as found in the Statutes at Large and in the recorded adjudications of the federal judiciary. Thus they say:

1. The said patent is void, inasmuch as the reissue is not for the same invention described in and protected by the original patent, which, say they, was simply for an "oscillating hopper," and not for the "chucker" or "deflector" specified in the reissue, and which alone have been used by the defendants.

2. Said patent is void, inasmuch as the so-called improvements of Moule & Girdlestone are in truth but modifications of the apparatus patented in 1860, to Moule & Bannehr —covered by and included in that patent— and therefore not patentable in the United States in 1869. This, they argue, was the view of Moule and his associates, the owners and controllers of the English patent, wherefore no patent for these was ever taken out in England. And if this be not a tenable position, then, as an alternative one, they contend that these improvements, by whomsoever devised, were abandoned to public use—given to the world—by the publication of the pamphlet referred to, with its pictorial illustrations, shown by the evidence to have been in circulation in November, 1867, but believed to have been (as the defendants hope to show conclusively at a future day) in circulation, in substance, at a much earlier date.

3. Said patent is void, inasmuch as the reissue was granted to the complainants, without the oaths of the inventors that they were the inventors of the chucker and deflector, specified as patentable improvements in the reissue, though ignored as such (as defendants contend) in the original patent, granted upon their oaths. In a word, say the defendants, Moule & Girdlestone obtain a patent in June, 1869, making oath that they were the joint inventors of certain mechanism, so described that the defendants could, without infringing the patent, continue the business in which they had engaged prior to its issue; and, in October, 1870, that patent is surrendered by its owners, and a reissue granted to them, without the inventors' oath, under which (if the reissue be a valid patent) the defendants are bound, and may be compelled to abandon that business.

To these positions of the defendants, the complainants reply that their patent is prima facie proof of title on their part, and that this is not rebutted, or even appreciably weakened, by the proofs or arguments of the defendants; contending that upon some points the patent is in itself conclusive and unimpugnable proof, and upon others that the evidence of the defendants is pointless or unreliable. That the first and second points are legitimate grounds of defense to the bill, as well as to this motion, is not controverted; and that some of the questions presented are questions of evidence, of fact, and not of law, must be admitted in deference to the ruling of the supreme court in Bischoff v. Wethered, 9 Wall. [76 U. S.] 812. They are, moreover, questions upon which much testimony can and probably will be offered, and in regard to which it is to be anticipated even experts the most skilled and most truthful may differ. Hence I shrink from passing upon them, unaided by illumination from any other quarter than the affidavits of the two defendants and a zealous amateur adviser on the one side, and those of J. W. Beach (grantor of the complainants), C. W. Waring (agent of the complainants), and C. W. Beach, on the other. Said Justice Story, Barret v. Hall [Case No. 1,047]: "My humble knowledge does not permit me to venture on such difficult topics, and fortunately my duties as a judge do not require me to master them. I am content on this, as on other occasions, to hear from those who can give the proper instruction, and then to apply it to the solution of such questions of law as are fit to be entertained here." Happily, however, any expression of opinion upon the incidental questions raised at the hearing is unneeded in this connection. Are the complainants upon the case made entitled to a preliminary injunction? is the question addressed to me; and my answer, whether an affirmative or a negative, must not be construed as indicating concurrence with either party in their views of the questions of law and fact raised and discussed. These may, at a subsequent stage of the cause, again become subjects of discussion, under circumstances more favorable to correctness of judgment than is a hurried hearing at chambers upon but the fragmentary evidence of parties in interest, in the unsatisfactory form of ex parte affidavits. Until then, in my judgment, can with great propriety be deferred any expression or even intimation of my views upon the merits of the complainants' case, or the tenableness of the defendants' positions in justification.

The motion is one of that class addressed, in technical parlance, to the discretion of the court. For precedents, in any recognized sense of that word, it is therefore idle to search. By one judge, an injunction may be

granted to-day, under a given state of facts, and by another, be refused to-morrow, upon identically the same state of facts, and yet neither functionary be chargeable with even error in judgment. The law makes the judge's discretion the rule, not unheedful that, in the qualities of mind which give character to an exercise of discretion, individuals differ scarcely less than in form and features. The judge is bound to decide a question of this kind as, in his judgment upon the particular case before him, the principles of equity and the practice of its courts warrant or dictate—and this, whether his decision be in accord or at variance with that of his brother officer, of whatever grade or whatever locality. The largest liberty imaginable is his, "with no rules to restrain—no after-reckonings to dread." Neither upon appeal, nor by writ of error, nor even by petition for revisory action, can a judge's rulings or findings upon a motion for a preliminary injunction be subjected to correction or even criticism on the part of his superiors in official rank or in judicial acumen.

In the decisions of the supreme court, therefore, are found neither authoritative rules, nor even suggestive dicta, bearing upon the subject of preliminary injunctions. But this want, if such it be, we find supplied in the reports of decisions in the circuit courts of the several districts—decisions, in most instances, by justices of the supreme court, sitting as circuit judges—and from these, as would naturally be supposed, may be deduced some propositions entitled to grave consideration upon the part of the inexperienced judge called to pass upon a motion of this character. The inquirer learns by a glance at the circuit reports that motions of this sort are not infrequent in the several districts, and that many of the judges have, as occasion required, stated at length or curtly indicated their views of the judicial duty when the injunction power of their respective courts was invoked. For instance:

Justice Nelson, in Sickles v. Youngs [Case No. 12,838], says: "As this is a motion simply for a preliminary injunction, and not a case upon pleadings and proofs, for a final hearing, I shall not look further into the mass of papers before me than to ascertain whether or not a case has been made, which, upon established principles of equity, to prevent an irreparable injury, requires the court to interfere, pending the litigation, and restrain the defendants from the further use of the apparatus or machinery charged with infringement, until the right is finally determined. And upon these principles, it is well settled that, unless the right is clear upon the papers and proofs presented, and upon which the motion is founded, in favor of the plaintiffs, the injunction will be withheld, and the rights of the parties be left unaffected and unchanged, until the case is matured for the final hearing, and definitely disposed of."

In this paragraph is clearly stated the principle or rule to be kept in mind by counsel, parties, and court. And if we turn to the reports of decisions in the first circuit, while we find nothing in conflict with this rule, we find in almost every volume recorded adjudications in harmony with it. Nor is this all. In many instances, the judges in this circuit (Story, Woodbury, Curtis, Clifford) have had occasion to state in what cases—that is, under what state of circumstances—a preliminary injunction would be granted or refused by them respectively in the exercise of a judicial discretion—as does Justice Woodbury in Orr v. Littlefield [Case No. 10,590], and Perry v. Parker [Id. 11,010]; and in Woodworth v. Rogers [Id. 18,018]. See, also, Foster v. Moore [Id. 4,978]; Sargeant v. Seagrave [Id. 12,365]; Forbush v. Bradford [Id. 4,930]; and Clum v. Brewer [Id. 2,909],—to name no others.

An examination of the decisions of the judges of this circuit, be it cursory or critical, it is believed, warrants the assertion that, by no one of the distinguished jurists above named, has it ever been held that a preliminary injunction should issue at the instance of a complaint, in a patent cause upon a state of facts not widely distinguishable from that shown in the case at bar, in several very important particulars. These it can subserve no desirable end here to specify. It seems sufficient to say that, taking as sound the dicta of Justice Nelson, as above quoted, I can find in the evidence and arguments of the complainants no sufficient ground for the pending motion, especially as a contrary conclusion would, in my view, be irreconcilable with the recorded adjudications of each and all of my predecessors in this circuit.

No exclusive possession of the invention for any considerable time, accompanied by acquiescence in their claim by the public, nor any verdict, judgment, decree, or judicial order, recognizing that claim, do the complainants show or attempt to show, and (what is not less noteworthy in my view) it is not to be pretended that the injunction prayed for can, under the circumstances of this case, avert from the complainants any injury to which the epithet irreparable would not be glaringly inappropriate. The motion is overruled.

Case No. 4,250.

EASBY v. FLETCHER.

[1 Hayw. & H. 35.][1]

Circuit Court, District of Columbia. April 27, 1841.

APPRENTICES—UNAUTHORIZED ABSENCES—REMEDY—CONTEMPT.

1. Where an apprentice absents himself from his master without consent, the court [after expiration of the apprenticeship] will compel the apprentice to serve his master the number of

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

days lost by his absence, to commence from the expiration of his apprenticeship.

[2. For failure to obey the order of the court, the apprentice may be punished as for a contempt, and for that purpose, and until the order is obeyed, the cause will be continued from term to term.]

This was a suit brought by the petitioner [William Easby] for compensation for the loss occasioned by the absence of the respondent [Archibald Fletcher] from the petitioner's service without consent. The petition is as follows: "Archibald Fletcher was, on the 19th day of February, 1838, duly and lawfully bound as an apprentice to the petitioner, to learn the trade and mystery of a ship carpenter, and to serve as such until the 18th day of January, 1840. He came into the service of the petitioner as such apprentice and remained and continued under indenture until the 26th day of March, 1839 [when he absented himself], and continued absent until the 20th day of May, 1839, and again on the 27th day of August, 1839, when he ran away and absented himself from the service of the petitioner, and hath remained and continued so absent hitherto to the present time, and although often requested to return, hath hitherto refused to return to his service or to make the petitioner any compensation for the loss he has thereby sustained. The petitioner averred that he well and truly kept and performed all the warranties of the indenture required of him; that the apprentice's service was of great value to him." The petitioner prayed that he may be awarded such compensation either by service or by payment of money as justice and equity may require. The case was submitted on the petition and the indenture accompanying it, after being argued by the respective counsel.

Joseph H. Bradley, for petitioner.
Brent & Brent, for respondent.

OPINION OF THE COURT. It appears that the respondent, Archibald Fletcher, was, on the 19th day of February, 1838, lawfully bound out by his father as an apprentice to the petitioner, William Easby; the said Archibald being then 19 years and 11 months of age; and that by the terms of said indenture, the time which he had to serve expired the 18th day of January, 1840; and that during the said time which he had to serve as aforesaid, he absconded from his said master, and absented himself from the service of his said master from the 26th day of March, to the 22d day of May, 1839, and from the 27th day of August, 1839, to the 18th day of January, 1840, making in all 150 working days. The court, therefore, on this 27th day of April, 1841, upon the petition of the said William Easby, and upon the appearance of the said Archibald Fletcher, and upon full hearing of the parties by their counsel, doth award and order that the said Archibald Fletcher make compensation to the said William Easby, for his loss of the services of the said Archibald Fletcher, by serving him, the said William Easby, as an apprentice, for the term of one hundred and fifty working days, commencing on the 3d day of May next. And in case the said Archibald Fletcher should refuse to obey this order, the said William Easby will have leave to apply to this court for an attachment of contempt or other process to enforce the same, for which purpose this cause will be continued from term to term until the further order of the court.

EASLEY (KELLOM v.). See Case No. 7,668.

Case No. 4,251.

The EAST.

[9 Ben. 76.][1]

District Court, N. D. New York. March, 1877.

JURISDICTION IN REM—SEIZURE IN THE ST. LAWRENCE RIVER—FOREIGN JUDGMENT—DAMAGES.

1. This court has jurisdiction, in a suit in rem, in admiralty, for a collision, of a vessel seized under process in the suit, in that part of the river St. Lawrence which is within the territorial limits of this district, without reference to the character of the vessel or of her voyage.

2. A judgment obtained in Canada by the libellant, in a suit at law against the owners of the vessel, for the same cause of action sued on here, is not a bar to the suit in rem here.

3. But such judgment is res adjudicata as to the extent of the damages sustained by the libellant by the collision, and is conclusive evidence as to the amount to be recovered here.

WALLACE, District Judge. Upon the facts stipulated, it appears that the East was a Canadian vessel, seized within the territorial boundaries of New York, while upon the St. Lawrence river, bound on a voyage between Canadian ports. The position, that this court will deal with the offending thing when brought within its jurisdiction, irrespective of the circumstances under which jurisdiction is acquired, is not tenable, to the extent urged by the libellants. This court should refuse to entertain jurisdiction where the offending vessel was seized in Canadian waters and wrongfully brought within the territorial jurisdiction of the court, and would not allow its own process to be used to invade the domain of a foreign sovereignty, and would decline to enforce a jurisdiction so obtained. But, although the waters of the St. Lawrence, upon which the seizure was made, are a highway, and, as such, common, for the purposes of navigation, to both Canada and the United States, that portion of the river within which the seizure was made is within the territorial limits of New York, and, therefore, within the territorial jurisdiction of this court; and, this being so, the character of the vessel, or

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

of her voyage, or of the waters whereon she was seized, is of no materiality. The vessel was subject to seizure during all that portion of her voyage which was made within the boundaries of New York.

It appears that the libellants commenced an action at law against the owners of the vessel, in the court of queen's bench in Canada, and recovered judgment for the damages sustained by the collision which is the cause of action set forth in the libel. That judgment, I hold, is not a bar here. The libellants had a maritime lien arising from the collision. They had a right also to proceed in personam. Their lien was not merged in the judgment recovered in the Canadian court. Their cause of action was not satisfied by the recovery of the judgment. Until satisfaction, they have the right to enforce their lien.

The judgment of the court of queen's bench is, however, res adjudicata as to the extent of the libellants' damages sustained by the collision, and, as evidence of the amount the libellants are entitled to recover, it is conclusive.

The claimant, as the official assignee in insolvency of the owners of the vessel, has the right to intervene, and has sufficiently pleaded his right.

A decree is ordered for the libellants, in accordance with the views here expressed. I have not deemed it necessary to pass specifically upon the several exceptions to the claim and answer filed, as, under the stipulation of the parties, all the facts necessary to a decision of the case upon its merits are presented. Costs are awarded to the libellants.

EASTBURN (BRADFORD v.). See Case No. 1,767.

Case No. 4,252.

EASTBURN et al. v. YARDLEY.

[30 Leg. Int. 404;[1] 5 Leg. Gaz. 381.]

Circuit Court, E. D. Pennsylvania. Nov. 21, 1873.

BANKRUPTCY—RESTRAINING COLLECTION OF JUDGMENT AGAINST DEBTOR.

1. An execution creditor having levied upon the personal property of the debtor by virtue of a fi. fa. issued on a judgment entered more than six months before the levy and before a petition in bankruptcy is filed, can, upon the debtor filing his petition in bankruptcy, be restrained for equitable reasons by injunction on a bill in equity of a creditor in the circuit court of the United States, from selling the personal property of the bankrupts previously levied upon, until an assignee in bankruptcy be chosen or appointed, the lien of the levy remaining.

2. Where such an execution creditor has a twofold security on real estate as well as on personal property, an injunction will be issued to prevent a sacrifice by sale of the personal property of the bankrupt, at least until an assignee in bankruptcy can be chosen or appointed, or for a sufficient time to enable the unsecured creditors to raise money to pay off or take an assignment of the judgment of the execution creditor, although the judgment was entered more than six months before the fi. fa. issued and the petition in bankruptcy was filed after levy made.

Bill in equity. In this case, Elizabeth Yardley, executrix of the last will and testament of Mahlon Yardley, deceased, issued a fi. fa. out of the court of common pleas of Bucks county, and levied upon the real and personal property of Isaac S. Eastburn, her debtor. A levy was made thereon by John M. Purdy, Esq., high sheriff of the county of Bucks, and bills put up November 15th, 1873, advertising the personal property for sale on the 22d day of November, 1873. On the 17th day of November, 1873, the said Isaac S. Eastburn, filed his petition in bankruptcy in the district court of the United States for the eastern district of Pennsylvania, and afterwards on the 20th day of November, 1873, a joint bill in equity was filed in the circuit court of the United States, for the eastern district of Pennsylvania, by Isaac S. Eastburn, the then bankrupt and Henry Haines, an unsecured creditor to the amount of $3,000, praying (inter alia,) that an injunction be issued to enjoin and restrain the execution creditor and sheriff from proceeding to sell the personal property of bankrupt, in order to prevent a sacrifice of the same, until an assignee in bankruptcy be chosen or appointed. November 21st, 1873, the case came on to be heard, and after hearing, a temporary injunction was granted. It had been refused upon a previous application of the bankrupt as a sole complainant.

Abraham H. Jones, for complainants.

George Lear, for execution creditor and sheriff.

The following interlocutory decree was made by CADWALADER, District Judge:

The court, as at present advised, does not see sufficient cause to order a temporary injunction, except as to the personal effects levied upon; nor as to those effects for any reason that should prevent them from being ultimately liable to the execution. But forasmuch as the execution creditor may have a twofold security on real estate, as well as on the said personal effects, and the creditors in bankruptcy only a single security, to wit: on these effects, and a brief period ought therefore, to be allowed the said creditors to pay the execution creditor, and obtain a transfer of her judgment and execution, or to enable them to obtain such other equitable relief as may not impair her rights. Therefore the defendant, Elizabeth Yardley, execution creditor as aforesaid, is restrained, until further direction, from proceeding under the said execution, as to the said personal effects, so, however, as not to impair any security under the levy thereon, which is to stand and avail her against the assignee and estate in bankruptcy, as if this order had not been made.

[1] [Reprinted by permission.]

Case No. 4,253.

EASTERN KY. R. CO. v. SLACK.

[22 Int. Rev. Rec. 247.]

Circuit Court, D. Massachusetts. Jan., 1876.

INTERNAL REVENUE—TAX ON RAILROAD BOND COUPONS.

[A railroad company, which purchases from an improvement company a railroad, subject to an existing mortgage thereon, is liable for taxes subsequently assessed upon the coupons of the mortgage bonds, under the act of July 14, 1870 (16 Stat. 260).]

This suit was brought, June 17, 1873, in the state court, after appeal duly made to the commissioner of internal revenue, to recover the amount of certain internal revenue taxes, paid to the defendant [Charles W. Slack] as collector of internal revenue for the third Massachusetts internal revenue district. The action was duly removed to this court by certiorari, and was here heard upon agreed facts. The taxes, the amount of which was sought to be recovered, were taxes on coupons of the Kentucky Improvement Company. The circumstances under which the bonds bearing these coupons were issued are shown in the statement of the facts of the case of the Kentucky Improvement Co. v. Slack [Case No. 7,718], to which reference is to be had. The coupons upon which the tax was assessed fell due February 15 and August 15, 1871, and February 15, 1872. The tax assessed upon the coupons falling due February 15, 1871, was $93.75, and it was paid by the plaintiff corporation July 31, 1871; the tax assessed upon the coupons falling due August 15, 1871, was $371, and upon those falling due February 15, 1872, was $281.25, and both these sums were paid by the plaintiff May 29, 1872. There was no dispute as to the amount of the tax that the plaintiff corporation should pay upon these coupons if it was legally liable to pay any tax thereon.

The plaintiff company was duly organized under an act of the general assembly of the commonwealth of Kentucky, approved January 18, 1870, which provided as follows:

"Section 1. Be it enacted, etc., that Nathaniel Thayer . . . or any five of them who may act, are hereby appointed commissioners, and they, their associates and successors, are created a body politic and corporate for the purpose of constructing a railway with a single or double track, etc., etc."

"Sec. 2. The name and style of the corporation hereby created shall be 'The Eastern Kentucky Railway Company.' Said company through its board of directors shall have, and may exercise, all the powers, and shall have all the privileges and rights usual and incident to such corporations."

"Sec. 7. The said company shall have power to purchase, acquire and hold, any line of railway finished or unfinished, lying on or near its line, or crossing the same, or between its termini, with all the chartered privileges held or properly exercised by the company from whom such railway may be bought or acquired, and all the property, real and personal, rights of way, etc., of such company, and may make payment for any railway and other property so bought or acquired, on such terms and conditions as may be agreed between the parties."

Other provisions of the charter recognized the right of the company to engage in the general business of common carriers upon their line or lines of railway.

By deed dated February 28, 1870, the Kentucky Improvement Company conveyed to the plaintiff company "all the property of the party of the first part (i. e. the Kentucky Improvement Company), real, personal and mixed, including its franchise, subject, however, to a certain mortgage made by the party of the first part bearing date August 15, 1866, to Nathaniel Thayer and others, of the landed property and improvements of said party of the first part at that date, in trust to secure a certain issue of bonds bearing even date therewith, to the extent of $500,000, as therein more particularly set forth, and which mortgage is still in force, so far as the same is applicable to and covers the property proposed to be hereby conveyed"—that is to say the issue of bonds bearing the coupons, the tax on which is in controversy.

F. W. Palfrey, for plaintiff.

George P. Sauger, U. S. Atty., for defendant.

CLARK, District Judge, took the case under advisement, and in July, 1876, filed in writing the following opinion of the court:

In the case of the Kentucky Improvement Company v. Slack [supra], I held that the plaintiff company was a railroad company, and liable to the tax assessed upon the coupons of the bonds issued for building its road, and secured by a mortgage of its property and improvements, for reasons there stated. The Eastern Kentucky Railway Company in pursuance of authority in its charter, purchased "all the property" of the Kentucky Improvement Company "real, personal, and mixed, including its franchise, subject, however, to a certain mortgage made" by said Kentucky Improvement Company, August 15, 1866, to secure a certain issue of bonds by said improvement company to the amount of $500,000. The statute of July 14, 1870, § 15 (16 Stat. 260), provided "that there shall be levied and collected for and during the year 1871, a tax of two and a half per centum on the amount of all interest or coupons paid on bonds," etc., issued and payable in one or more years, etc., by any of the corporations mentioned in the section among which were railroads. The Eastern Kentucky Railway Company having purchased the property of

the Kentucky Improvement Company, including its railroad, subject to the mortgage to secure the bonds and coupons in question, the inference is that they were to pay said bonds and coupons, and were liable to the tax assessed. Judgment for the defendant and for his costs.

EASTERN RAILROAD, The. See Case No. 13,039.

EASTERN RAILROAD, The (MILLER v.). See Case No. 9,567.

EASTERN RAILROAD, The (SMITH v.). See Case No. 13,039.

Case No. 4,254.

The EASTERN STAR.

[1 Ware (185), 184.] [1]

District Court, D. Maine. Dec. Term, 1830.

SEAMAN'S WAGES—SATISFACTION OF LIEN—ORDER ON OWNER OR CHARTERER.

The seaman does not lose his lien on the vessel for his wages by taking an order on the owner or charterer, for the balance due at the close of the voyage.

[Cited in Packard v. The Louisa, Case No. 10,652; The Bolivar, Id. 1,609; The Niphon's Crew, Id. 10,277; Leland v. The Medora, Id. 8,237; The Eliza Jane, Id. 4,363; The Galloway C. Morris, Id. 5,204; The Helen M. Pierce, Id. 6,332; The Bristol, 11 Fed. 163; Southard v. Brady, 36 Fed. 562; The Atlantic, 53 Fed. 608.]

This was a suit in rem for seamen's wages. It was not disputed that the services had been performed, and that there was a balance due to the libellants. At the time when the contract was made with the seamen, the vessel was owned by Mr. Houdlette; a few days after, she was conveyed to Mr. Amory, as security for a debt which Houdlette owed him, but the vessel remained under the direction of Houdlette, and was employed for his benefit. On her return from her voyage, the master ascertained the balance of wages due, and gave to each of the men an order on Houdlette for the amount. The master, whose deposition was taken, stated that these orders were not considered by him as payment, but mere memorandums, showing the amount due, and that they were so considered by the seamen. They were presented and not paid, but a verbal promise was given to pay them when Houdlette should receive the proceeds of the sale of the cargo. On this promise, the seamen delayed to enforce their claims, and the vessel proceeded on another voyage.

The right of the seamen to recover against the vessel was objected to on two grounds. 1. That the orders given on Houdlette were to be treated as bills of exchange, and that the acceptance of these was a discharge of their lien on the vessel. 2. That the lien was lost by neglect to enforce it in due season.

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

G. Jewett, for libellants.

Fessenden & Deblois, for respondents.

WARE, District Judge. The only question presented in this case is, whether the seamen have lost their lien on the vessel as a security for their wages. The policy of the marine law has studiously connected the right of the seamen to wages, with the fortune of the vessel, and the vessel herself, on her return, with the freight which she has earned, constitute, says Emerigon, that fortune of the vessel which is to the crew the pledge of their wages. 2 Traité des Assurances, 263. It is their natural and best security, and that which they habitually look to; and though they have also their personal remedy against the owners and master, it is a case to which the rule justly applies, "Plus cautionis in re est quam in persona," (Dig. 50, 17, 25,) and which they ought not lightly to be presumed to have abandoned. The lien of a seaman is a privileged hypothecation, jus in re, and continues until it is destroyed in some of the modes of dissolving an hypothecary interest known to the law. These are, ordinarily, 1. By the destruction of the thing. 2. By the extinction of the principal obligation, that is by payment, or that which the law holds as equivalent to payment. 3. By a voluntary renunciation of his right by the hypothecary creditor. 4. By prescription or laches. Poth. Traité de l'Hypothèque, c. 3; Poth. Pand. liv. 20, tit. 6.

It was argued that the seamen had forfeited their rights by not enforcing them in season. There is no particular period fixed by the laws of this country which operates as a bar to this action, on the principle of a prescription. But it is not doubted that a seaman may lose his lien by lying by for a length of time, and suffering the vessel to be sold to a person ignorant of his claim, without giving him notice. But in the present case, though the vessel was sold after the contract was made, yet it was before the wages were earned, and it is the services and not the contract that create the lien. It was therefore created while the vessel was in the hands of the present owner; and she has been permitted by the libellants to make but a single voyage before they have proceeded to enforce their demand. This is not such a delay as will constitute a waiver of their lien.

If the lien is lost, then, it must be in consequence of the extinguishment of the debt by payment, or by that which the law regards as equivalent to payment. It is contended that the acceptance of the order on Houdlette, and the giving of time, without notice to the drawer or owners, operate as an extinguishment of the debt, at least so far as to discharge the lien, and by parity of reasoning, the master and owners, the acceptor having become insolvent after the acceptance. If this be admitted, it must

result from the rigor of legal principles, and against the manifest intentions of the parties. The decision of Lord Stowell, in The Wm. Money's Case, 2 Hagg. Adm. 136, is referred to as a case in point. But the facts in that case were materially different from those in the present case. Money was discharged at Calcutta, and his wages were offered him in money at the time of his discharge, but wishing to remit a part of them to England, he preferred to take a bill of exchange on the owners, rather than receive the money in Bengal. The owners and drawer failed before the bill arrived at maturity, and he proceeded against the vessel. Lord Stowell said that, as he preferred to take the bill when the money was tendered to him, he must stand by the risk. Under the circumstances, the acceptance of the bill was held to be a discharge of the wages. In the present case, there was no offer of the money, but when the men called on the master for their pay, he drew an order on the owner. Even if he had made the draft payable to order, which he did not, I should have hesitated long before holding it to be a discharge of the wages, under the presumptions of the local law of the state, that a negotiable instrument is intended to be a discharge of a preëxisting debt. But as the drafts were not negotiable, they would not be held as payment, under the local law, between merchant and merchant. The reasonable construction of the drafts, and that which is conformable to the intention of the parties, is that they were mere memorandums, showing to the merchant the balance of wages due and unpaid, and their receiving them was not a waiver of any of their rights against the vessel or the master or owners.

EASTERN STATE, The (WHEELER v.). See Case No. 17,494.

EASTERN TRANSP. LINE (HOPE v.). See Case No. 6,680.

EASTHAM (MURPHY v.). See Case No. 9,949.

EAST HAMPTON BELL CO. (BEVIN v.). See Case No. 1,379.

EAST HAMPTON RUBBER THREAD CO. (BOSTON ELASTIC FABRICS CO. v.). See Case No. 1,676.

EASTLAND (COFFEE v.). See Case No. 2,945.

Case No. 4,255.

EASTMAN v. BODFISH.

[1 Story, 528;[1] 2 Robb, Pat. Cas. 72.]

Circuit Court, D. Maine. May Term, 1841.

EXTENSION OF PATENT — INFRINGEMENT — PLEADING — SEPARATE COUNTS FOR CLAIM UNDER EXTENSION AND ORIGINAL PATENT.

1. Where a patent for the circular saw clapboard machine expired by lapse of time on the 15th of March, 1834, and congress by the act of 3d of March, 1835, c. 86, renewed it to A for the space of seven years, from the time when it expired, and the declaration in the writ, which was dated on the 13th of January, 1838, recited the original patent and the subsequent act of congress, and then stated generally a violation of the patent right for a long time, to wit, for the space of three years and eight months, next preceding the date of the writ; It was *held*, that if the plaintiff intended to claim under the old patent, he should have filed a distinct and independent count; and that he had restricted himself to proof of a violation of the patent right during the space of the said three years and eight months, specified in the declaration.

[Cited in Lepage Co. v. Russia Cement Co., 51 Fed. 949.]

2. Whenever time is material, whether in matters of contract, or of tort, the plaintiff is strictly bound by the time specified in the declaration.

Case for infringement of a patent right "for a new and useful invention called the circular saw clapboard machine." The cause was tried upon the general issue. The original patent was granted to the plaintiff, Eastman, and one Josiah Jaquith, as the original inventors, on the 16th of March, 1820. The patent expired by lapse of time; and congress by the act of 3d of March, 1835, c. 86 [6 Stat. 613], Jaquith being then dead, granted to the plaintiff, as survivor, the full and exclusive right and liberty of making, constructing, and vending to others, to be used, the same invention for the term of seven years, from the 15th of March, 1834, when the original patent expired. The declaration was founded upon the act of 1835 (chapter 68), and after reciting the original patent and the act of congress of 1835, and the new patent granted under the same, alleged as a breach, that the defendant "unlawfully, against the will of the plaintiff, and without any permission or license of the plaintiff, in infringement of the right and privilege secured to the plaintiff by the letters patent, &c., did make, construct, and use and vend to others to be used, the said saw and useful invention and continue the use thereof for a long time previous to the date of the writ, to wit, for the space of three years and eight months next preceding the date thereof." The writ was dated the 13th of January, 1838.

Mr. Deblois, for plaintiff, contended, that he was entitled under the allegations in the declaration, to go into evidence to establish a violation of the patent by the defendant, under the original patent, which had expired, as well as under that of the act of 1835.

Fox & Codman, a contra, insisted, that the plaintiff could not go into evidence of any such violation of the original patent; but was confined to the time, since the grant of the patent under the act of 1835; and at all events, that the breach itself tied up the inquiry to the period of three years and eight months before the date of the writ.

[1] [Reported by William W. Story, Esq.]

STORY, Circuit Justice. I have no doubt whatsoever in the present case. By the frame of the declaration, the right of action is exclusively founded upon the act of 1835; and there is nothing in the declaration, which points to any breach under the old patent, which expired on the 15th of March, 1834. In short, I cannot understand, that the declaration purports to found any claim under the old patent, but the latter is merely recited as introductory to the right and title under the act of 1835, and the violation thereof. If the plaintiff intended to have made any claim under the old patent, he should have filed a distinct and independent count. Moreover, I am of opinion in this case, that the plaintiff has by the breach, as stated in the declaration, tied himself up to a violation of the patent right within three years and eight months before the date of the writ; that is, before the 13th of January, 1838. In cases under the patent laws, I conceive, that the plaintiff is confined to giving evidence of the making, constructing, or using the invention in violation of his patent right during the period, which he specifies in his declaration. If it were otherwise, the recovery in the suit would be no bar to another action for any anterior breach, since it could not judicially appear, that any damages had been recovered for any such anterior breach; and the form of the declaration itself, specifying the term, would repel any presumption to the contrary. Besides, the length of time of the use is, or at least may be, a very material ingredient in the ascertainment and assessment of the damages by the jury; and the plaintiff ought to give notice by his declaration of the term of the user, for which he seeks damages. It is by no means true, that the specification of time is in all cases immaterial to be proved, as laid in the declaration. Wherever time is material, not only in matters of contract, but in matters of tort, the plaintiff is strictly bound by that time. Now, in trespass with an allegation of a continuando, or diversis diebus, if the plaintiff insists upon proving repeated acts of trespass, he will not be allowed to give evidence thereof, unless committed within the time specified. 1 Chit. Pl. (3d Ed.) p. 258; 1 Wms. Saund. p. 24, note 1; Brook v. Bishop, 2 Ld. Raym. 823; Monckton v. Pashley, Id. 974, 976; Com. Dig. "Pleader," C, 19; 2 Starkie, Ev. (2d Lond. Ed.) 210. In truth, the usual mode of declaring in actions for an infringement of a patent is, to allege, that the defendant on such a day (naming it) "and on divers other days and times between that day and the day of the commencement of the suit (or exhibiting the bill) did unlawfully, &c. make and sell and use, &c." 2 Chit. Pl. (3d Ed.) pp. 356, 357; Phil. Pat. (Ed. 1837) p. 522. The District Judge concurred in this opinion.

Mem. The cause afterwards proceeded before the jury, who found a verdict for the defendant.

Case No. 4,256.

EASTMAN v. HINCKEL.

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

Circuit Court, E. D. Pennsylvania. Dec., 1879.

PATENTS—VALIDITY—INFRINGEMENT.

Letters-patent granted to Robert Eastman, August 29th, 1871, numbered 118,440, for an "improvement in composition for soap:" *Held*, valid and infringed by the defendants.

Francis D. Pastorius, for complainant.

H. W. Gimber and Thos. Greenbank, for defendants.

BUTLER, District Judge. Letters-patent No. 118,440, were issued to Robert Eastman, August 29th, 1871, for an "improvement in composition for soap." The specifications describe it as intended "for cleaning tin, brass, iron, earthenware, woodenware, polishing marble, all metals, etc.," and as consisting "of the ingredients and the proportions hereinafter given, as follows: To one thousand pounds of tallow, and caustic soda sufficient to saponify the tallow, add two hundred and fifty pounds resin, and sufficient lye to saponify the resin, and water enough to make the mass weigh about seven thousand pounds, then add from three and a half to four parts of pulverized quartz to one part of the above mixture, and boil the whole in any suitable kettle or vessel until the proper consistency is had, after which, it should be poured into frames and cut into cakes or bars of any required length when cool." The claim is in the following language: "A soap composed of the ingredients, and in about the proportions given."

The plaintiff charges the defendants with making and vending the above described soap. The defendants deny this, and also assert that the complainant has not manufactured soap according to the process covered by this patent, and that he was not the first inventor of this process. A careful examination of the proofs has satisfied me that the soap made by the defendants, and that covered by the patent are the same, substantially. The defendants, probably, use a greater proportion of resin, and there is some disagreement in the testimony respecting the effects of this. The weight of the evidence, however, is that the quality of the soap is not changed. Mr. Day, called by the defendants, and other witnesses, say it simply increases the bulk, and thereby "cheapens" the article. The sal-soda and borax, added by the defendants, are also unimportant. In the quantities employed, at least, they can have no material effect. It is not improbable, indeed, that these immaterial variations from the plaintiff's process were made in the hope of escaping, thereby, responsibility for infringement. Mr. Cliver had been in the plaintiff's employment, and was familiar with his process. He projected the business

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

which the defendants have carried on, and it was his knowledge and experience, doubtless, that induced his co-partners to unite with him in the enterprise. At the outset, if the testimony of Mr. Dutton is true, (and Mr. Cliver did not appear before the commissioner to contradict it) he openly avowed his purpose to produce the same article that the plaintiff manufactured, and when reminded of the patent, and the risk, replied that "he didn't care, he had as good a right to make it as any one else."

As respects the question of priority and prior use, the burden of proof is on the defendants; and, while they have produced evidence bearing on the question, I do not consider it sufficient to overcome the prima facie case presented by the patent, supported, as it is, by the counter evidence furnished by the plaintiff. The plaintiff's process, as respects the use of pulverized quartz, is new. The principal object of the other ingredients is to hold the particles or quartz in a compact mass. Similar soap, omitting the quartz, has been long in use; and sand, pulverized quartz, and other similar substances have been employed in scouring for many years. Soap and sand, and other gritty substances had been combined long before the date of this patent; but the result was not satisfactory, and the need of a better scouring material led many persons to seek for it. Others than the plaintiff were, and for a considerable time had been experimenting in that direction, but it is not proved that any one successfully employed the process and ingredients here involved, in advance of him. The testimony of witnesses in respect to what they saw or did years ago, in describing machinery or other articles of manufacture, must be received with caution. The production of the machine or other articles involved would be much more satisfactory. The failure to produce them is of itself entitled to no little weight in considering the value of such testimony. Experience shows that men are not slow to claim letters-patent for any new and useful thing discovered or invented; and the absence of any such claim here, by others who were experimenting at the same time the plaintiff was, or before, is not without importance in considering the question of priority. A decree will be prepared in the plaintiff's favor.

EASTON, In re. See Case No. 8,780.

EASTON (BECKWITH v.). See Case No. 1,212.

Case No. 4,257.

EASTON v. CUTTER.

[15 Alb. Law J. 194.]

District Court, D. Massachusetts. Feb. 23, 1877.

SURETYSHIP—SURETY ON BOND OF ASSIGNEE—HOW FAR LIABLE.

In an action by a creditor of the estate of R., and at the time the assignee thereof in bankruptcy, against the former assignee and a surety on his official bond, it was admitted that the principal in the bond has lost a part of the money collected by him as assignee, and was justly accountable for it, but it was further admitted that the default was actually complete before the bond was given. *Held*, that under these circumstances the surety in a bond of this nature was not to be presumed to undertake for past and already accrued losses or defalcations, unless the language of the bond was such as to prove clearly such an intent.

[Nowhere reported; opinion not now accessible.]

Case No. 4,258.

EASTON et al. v. HODGES et al.

[7 Biss. 324.][1]

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

EVIDENCE—EFFECT OF STATE STATUTES—CONFLICT OF LAWS.

1. A party to an action at law cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized, and the production of books and writings must be enforced according to modes of procedure not deriving their origin from state statutes or practice.

[Cited in Colgate v. Compagnie Francaise du Telegraphe de Paris a New York, 23 Fed. 83.]

2. In cases where congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation should be followed, although opposed to the forms and mode of proceeding prevailing in the state courts and established by state statutes.

[Cited in Bryant v. Leyland, 6 Fed. 126.]

This was an action [by James H. Easton and Alfred E. Bigelow against Lyman F. Hodges and James H. Smith] to recover damages for the alleged conversion by the defendants, of a certain quantity of wheat claimed to have been the property of the plaintiffs. After issue was joined in the cause, the plaintiffs gave the defendants written notice that they desired the examination before trial of the defendants, and the production on such examination of certain letters and writings, and a subpoena was issued and served, requiring the defendants to appear before a United States circuit court commissioner and testify in the cause, and also commanding them to produce on their examination, certain letters and documents.

This proceeding conformed to the practice in such cases authorized by the state statutes, and a motion was made on the part of the defendants, to vacate and set it aside as unauthorized by the statutes of the United States, and the practice in the federal courts.

Finches, Lynde & Miller, for plaintiffs.

De Witt Davis and D. G. Hooker, for defendants.

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

DYER, District Judge. The statutes of this state relating to evidence provide that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, but that a party to an action may be compelled, at the instance of the adverse party, to give testimony in the same manner as other witnesses. These statutes also provide that an examination of such party may be had before trial, at the option of the party claiming it, before a judge or court commissioner on notice. and that such examination may be read by either party on the trial. Rev. St. Wis. c. 137, §§ 54, 55.

The proceeding taken by the plaintiffs to secure an examination of the defendants before trial is regular in form under the practice authorized by the statutory provisions referred to. The question is, can such a proceeding be taken in an action at law pending in the circuit court of the United States.

By statute of the United States (section 914, Rev. St.), the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, are made to conform as near as may be to the practice, pleadings and forms and modes of proceeding existing in like causes in the courts of record of the state within which such circuit or district courts are held. In applying this provision to the prosecution of causes in the circuit and district courts, it has not been construed as requiring those courts to adopt forms and modes of proceeding prevailing in the state courts, in cases where congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued. Now the sections of the state statute relating to the examination of a party before trial are part of the body of statutory law of the state, relating to evidence. Congress has enacted general statutory provisions on the same subject, which are embodied in chapter 17, of the Revised Statutes, entitled "Evidence." By these provisions modes of proof and examination are adopted, methods of taking the testimony of witnesses by deposition are established, and the common law disqualification of interest is removed. Under section 858, it is no longer doubted, that a party to an action may be compelled to testify on the trial at the instance of the adverse party, and that the deposition de bene esse of such party, may be rquired and taken in a case where the causes enumerated in the statute exist for taking depositions. Texas v. Chiles, 21 Wall. [88 U. S.] 488. Since congress has thus legislated so generally and fully upon the subject of evidence and modes of proof and examination, it must be held to govern in the federal courts, and to exclude the application in those courts, of the practice in the state courts upon that subject. It is to be observed also, that section 861 declares "that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided." The cases thus excepted are such as are provided for in subsequent sections authorizing the taking of depositions de bene esse, and under á dedimus potestatem, and, in perpetuam rei memoriam. Section 861 clearly includes the parties to an action. since under section 858 parties are placed upon the same basis as other witnesses. It is to be borne in mind in this connection, that section 914, which is part of what is known as the "Practice Act of 1872" [17 Stat. 197], and section 861, with the entire chapter on "Evidence," were re-enacted in the Revised Statutes, and must therefore be construed together, and so construed, I am clear that chapter 17 must be held to prescribe the only mode of taking the testimony of witnesses, applicable in the circuit and district courts. The principle of construction here applied, has been enforced in this court in other branches of practice, covered by general provisions of the statutes of the United States, as in cases involving methods of service of process.

Concerning the production of books and papers, congress has also legislated. Section 724 of the Revised Statutes provides that, in the trial of actions at law, parties may be required on motion and notice, to produce books or writings in their possession or power, containing evidence pertinent to the issue, "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery;" and certain consequences follow a failure to comply with an order of the court, for the production of such books or writings. Rules of court prescribe the formal methods to be adopted to obtain an inspection of the original books and documents and copies of the same. Section 869 of the Revised Statutes also provides for procuring the issuance of a subpoena duces tecum, under a dedimus potestatem. In view of existing statutes of the United States relating to the entire subject of evidence and the examination of witnesses, and giving to those statutes, as I think we must, exclusive application here, the conclusion is, that a party to an action at law cannot be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized, and that the production of books and writings must be enforced according to modes of procedure not deriving their origin from state statutes or practice.

Motion to vacate proceedings granted.

[NOTE. The cause afterwards proceeded to trial, and judgment upon a special verdict was rendered for plaintiffs for $12,554.89. Upon writ of error this judgment was reversed by the supreme court, and the cause remanded for a new trial. Hodges v. Easton, 106 U. S. 408, 1

Sup. Ct. 307. A new trial was had in December, 1883, but the jury disagreed. Easton v. Hodges, 18 Fed. 677.]

EASTON (JACKSON v.). See Case No. 7,134.

EASTON (MACKAY v.). See Case No. 8,843.

Case No. 4,259.

EASTON et al. v. NEW YORK & L. B. R. CO.

[30 Leg. Int. 124;[1] 9 Phila. 475.]

Circuit Court, D. New Jersey. April 1, 1873.

INTERSTATE COMMERCE—ERECTION OF BRIDGE BY STATE AUTHORITY — NONACTION OF CONGRESS—NAVIGABLE STREAMS.

1. The federal court will not enjoin the erection of a bridge over the Raritan river authorized by an act of the New Jersey legislature, although it may completely intercept navigation, except as accommodated by draws, where congress has not legislated on the subject.

2. The federal courts cannot be called on to prevent a wrong resulting from the exercise of the power of a state, to erect bridges over its own navigable streams, until congress has taken the initiative by enacting a commercial regulation with which the exercise of such a power is inconsistent.

[This was a bill in equity by Easton and McMahon against the New York & Long Branch Railroad Company.]

M. W. Acheson, Mr. Beebe, and John F. Stockton, for complainants.

Geo. Shiras, Jr., Benj. Williamson, and Cortlandt Parker, for respondents.

McKENNAN, Circuit Judge. This motion was heard by me at Pittsburgh, upon the bill and affidavits exhibited by the complainants. Assuming the truth of the facts therein presented, the complainants' case is one of conspicuous merit, loudly calling for relief, by some appropriate and constitutional method of interposition. A bridge is in process of erection by the defendants over the Raritan river, at its mouth, only ten feet in height above the water, which will completely intercept the navigation of the river, except as it may be accommodated by two draws, each one hundred feet in width. This river is the outlet to the seaboard of the Delaware and Raritan Canal, and is the highway for an immense commerce, exceeding in its tonnage that of the whole foreign trade of New York by Sandy Hook. It is shown that the erection of the bridge will duplicate the expense of conducting this commerce, besides subjecting it to great perils, which might be avoided by elevating the bridge sufficiently to allow most of the vessels engaged in the navigation of the river to pass under it. Important as are both of the great interests involved in controversies like this one—the commerce conducted upon and across navigable streams—either may lawfully be subjected to such reasonable restrictions as may be essential to the maintenance and development of the other. But when restrictions assume the proportions of a destructive or onerous burden, no just principle of public policy will justify their imposition or sanction their continuance. In this latter category the bridge complained of seems to be placed by the evidence before me. Considering the case, therefore, with this impression of it, it is to be regretted that the relief invoked by the complainants must be denied to them.

The Raritan river is wholly within the territory of the state of New Jersey, and, in the erection of the proposed bridge the defendants are acting under the authority of a law of that state. It is not alleged in the bill that the plan of the bridge is not in conformity to the law, but its erection is opposed solely upon the ground that it will seriously obstruct the navigation of the river. It was, however, very earnestly urged by the learned counsel for the complainants, that, assuming the bridge to be such an obstruction, it must necessarily be an unlawful structure, because the state law cannot be construed to authorize the erection of a nuisance. But this conclusion by no means follows. The erection of the bridge is clearly authorised. No condition is imposed as to its height, or as to the length of its spans, but the construction of two draws, each of the width of one hundred feet, is required. In the absence of any express restriction, therefore, the elevation of the bridge, and the distance between the piers, must be taken as intended to be left to the discretion of the defendants, and the implication is clear, that a provision for two draws of prescribed width was deemed by the state the only requisition necessary to accommodate the interests of navigation. The only question then is, is the law itself valid; because, if it is, the defendants cannot be restrained from doing what it clearly authorises them to do.

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In neither of these modes is what is called the police power of the states, taken away from them. By virtue of it the states respectively may pass laws respecting the health of their inhabitants, their internal commerce, the establishment of ferries, the opening of roads, and the erection of bridges. Thus, in the great case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, the court says: "Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike

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roads, ferries, &c., are component parts of this mass." And in the Case of the Passaic Bridges, 3 Wall. [70 U. S.] 782, Mr. Justice Grier says: "The police power to make bridges over its public rivers is as absolutely and exclusively vested in a state as the commercial power is in congress." And again: "That the police power of a state includes the regulation of highways and bridges within its boundaries, has never been questioned." It must, therefore, be regarded as unquestionable, that the law in controversy is within the range of the legislative power of the state. But it is equally clear that the power to regulate commerce is vested in the general government, and that it is paramount to the authority of the state. The bridge in question obstructs the navigation of a highway of commerce, materially affects its interests, and is, therefore, practically and necessarily a regulation of it. How then can the maintenance of the bridge be reconciled with the paramount control of the general government over the subject?

The police power to erect bridges embraces within its scope the right to prescribe their location, the height of their piers, the width of their spans, the dimensions of their draws, and the manner in which they shall be erected, managed and used. All the consequences which result from such regulations are within the protection of the legitimate exercise of the power to make them. More or less obstructing navigation, and abridging its freedom, they operate as regulations of commerce. But these effects are incidental only, and do not necessarily imply the assertion or exercise of a power directly to regulate the subject upon which they operate. So long as they do not interfere with the exercise of a power which is superior, they can not be challenged as encroachments upon it. Actual collision must occur, before an occasion can arise for demanding that the subordinate shall yield to the paramount authority. While, therefore, the commercial power of the general government is dormant, it is beyond the province of the courts to enforce an abridgement of the police power of the states. It is with a law of congress that the legislation of a state must come in conflict before the latter can be adjudged invalid. This is the principle established by a series of decisions of the supreme court, and, as I understand its definition in Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, it is applicable alike to navigable streams, which flow through or between several states, and to those which are entirely within one state, but are accessible from abroad through the waters into which they empty.

It was declared by Ch. J. Marshall, in Wilson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 250, where a dam was erected across a navigable inlet from the Delaware river, by authority of a law of the state of Delaware, and it was said: "But the measure authorized by this act, stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States, to regulate commerce," &c. * * * "But congress has passed no such act. The repugnancy of the law of Delaware to the constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering Blackbird Creek Marsh Company to place a dam across the creek, can under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." It was reiterated in the Wheeling Bridge Case, 18 How. [59 U. S.] 430, where the structure condemned was a bridge over the Ohio river, which obstructed the passage of steamboats during periods of high water, and then only those which carried very high chimneys. In Gilman v. Philadelphia, 3 Wall. [70 U. S.] 272, the court says: that, in the bridge case, the court placed its judgment on the ground, "that congress had acted upon the subject, and had regulated the Ohio river," and that the law of Virginia authorizing the erection of the bridge, "was in conflict with the acts of congress, which were the paramount law."

It must be considered as sanctioned, at least in the Case of the Passaic Bridges, in which Mr. Justice Grier, in his opinion in the circuit court, dismissing the bill, said: "The police power to make bridges over its public rivers, is as absolutely and exclusively vested in a state, as the commercial power is in congress; and no question can arise as to which is bound to give way, when exercised over the same subject matter, till a case of actual collision occurs;" and his decree was affirmed, although by a divided court. And so again in Silliman v. Hudson River Bridge Co. [Case No. 12,852], 1 Black [66 U. S.] 582, and 2 Wall. [69 U. S.] 403, where the question was presented, whether the court had power to enjoin the erection of a bridge over the Hudson, at Albany, proposed to be constructed under a law of the state of New York, "in case the plaintiff being the owner of vessels holding coasting licenses, shows, to the satisfaction of the court, that such bridge, if erected, will materially obstruct, delay or hinder such vessels in the navigation of said river, while engaged in commerce between said state of New York, and other states," and upon a dismissal of the bill by the circuit court,

its decree was affirmed by division of the supreme court.

Although the two last cases were decided by an equal division of the judges, and according to the usage in such cases, no opinions were delivered, yet the question stated, as primary and jurisdictional, necessarily engaged the consideration of the court. The judgments pronounced, must, therefore, be regarded as authorities binding upon subordinate courts, in cases involving the same question. But in Gilman v. Philadelphia, supra, the subject is fully examined, the true import of the judgments in Wilson v. Blackbird Creek Marsh Co. [supra] and the Wheeling Bridge Case [supra] defined, and the conclusion announced that, in the absence of congressional legislation, the exercise of the power of a state to erect bridges over navigable streams within its limits, is unquestionable in the federal courts. The controversy related to the Chestnut street bridge over the Schuylkill river, at Philadelphia, the erection of which was authorized by a law of Pennsylvania, and which entirely cut off all navigation above it by vessels with masts. The circuit court dismissed the bill of a riparian owner, whose property above the bridge was greatly reduced in value; and the supreme court affirmed the decree, saying: "Until the dormant power of the constitution is awakened and made effective, by appropriate legislation, the reserved power of the states is plenary, and its exercise in good faith, cannot be made the subject of review by this court." As long as these decisions stand, the law must be considered as settled, that a federal court cannot be called upon to prevent a wrong resulting from the exercise of the power of a state to erect bridges over its own navigable streams, until congress has taken the initiative by enacting a commercial regulation, with which the exercise of such power is inconsistent. No such regulation is shown to exist in reference to the stream over which the bridge complained of is about to be erected, and so the law of the state of New Jersey is a complete justification of the defendants. The motion for a preliminary injunction is, therefore, denied.

EASTPORT, The (PACIFIC COAST WRECKING CO. v.). See Case No. 10,646.

EAST TENNESSEE, V., ETC., R. CO. (VAUGHAN v.). See Case No. 16,898.

EASTWICK (HALL v.). See Case No. 5,930.

EATON (EVANS v.). See Cases Nos. 4,559 and 4,560.

EATON (HAMILTON v.). See Case No. 5,980.

EATON (HEDDEN v.). See Case No. 6,318.

EATON (JORDAN v.). See Case No. 7,520.

EATON (NICHOLS v.). See Case No. 10,241.

Case No. 4,259a.

EATON v. SUPREME LODGE K. OF H.

[22 Cent. Law J. 560.] [1]

Circuit Court, S. D. Ohio. Oct. 28, 1885.

BENEFIT SOCIETY—CONDITIONS—BURDEN OF PROOF—EXCUSES FOR NONPAYMENT OF ASSESSMENTS—INSUFFICIENT NOTICE—AGENT'S UNAUTHORIZED ACT—WAIVER—OFFICER—MISAPPROPRIATION—FRACTIONS OF DAY—DRAFTS ON TREASURY—SICK BENEFITS.

1. In a suit on a contract of life insurance, with conditions precedent which are referred to on the face of the contract, the burden is on the plaintiff to prove a compliance with such conditions, or a sufficient excuse for non-compliance.

2. If the excuse be a want of sufficient notice to pay an assessment, plaintiff must prove the insufficiency.

3. The act of an agent in receiving money at a time not authorized by the rules of the society does not bind the society.

4. To establish a waiver as to such act, plaintiff must show knowledge and acquiescence on the part of the managing officers of the central society.

5. In the Knights of Honor, the financial reporter of the local lodge is not an officer of the supreme lodge.

6. If the member fails to object to a misappropriation of the funds contributed by him, his beneficiary cannot complain thereof.

7. Such a misappropriation would not excuse the non-payment of subsequent assessments, or justify a member in refusal to pay.

8. The rule charging with assessments all members who take the final degree "on and prior to" a certain date, makes them liable to contribute to all deaths occurring during that calendar day.

9. Moneys in the hands of the treasurer of the order, if already legally drawn upon to a less sum than $2,000, are not "in" the W. and O. B. fund, so as to prohibit the caling of a new assessment.

10. It is optional with the local lodges to allow sick benefits, and they are under no legal duty to pay the amount thereof, when allowed, upon the assessments of their members.

This action was brought upon a certificate issued by defendant to the husband of plaintiff, assuring to her the sum of $2,000, from the "Widows' and Orphans' Benefit Fund," if her husband, Lyman B. Eaton, should die while a member in good standing of the order. The petition alleges that said Lyman B. Eaton died on the 27th day of April, 1883, being at the time a member in good standing, and that plaintiff is entitled to said sum in accordance with the provisions of her certificate. The answer denies that Eaton was a member in good standing at the time of his death, and alleges that the constitution and by-laws of the order provide that any member failing to pay an assessment when due, having received thirty days notice thereof, ceases to be a member in good standing; that Eaton having received due notice failed to pay assessment No. 111 when due, and that plaintiff was there-

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fore not entitled to participate in the widows' and orphans' fund.

The reply is a general denial of the allegations contained in the answer. The testimony introduced by plaintiff shows that the assessment in question (No. 111), was called December 23, 1882, falling due January 22, 1883, and that it was not paid by Eaton within that time. It also appears that he had received notice of the assessment previous to January 22, but how long previous thereto did not appear. The delinquency was reported at the ensuing meeting of the local lodge to which he belonged, held on February 1, and his suspension was noted upon the minutes. On February 4, Eaton sent the amount by a messenger to the financial reporter of his local lodge, who received the same without objection at the time, entering credit therefor on Eaton's pass-book, and also upon his own cash book; but a few days thereafter notified Eaton that he could not receive the money. The entry thereof in the cash book was erased and the money was not turned over to the treasurer of the lodge, but several weeks afterwards was returned to Eaton. It was claimed on behalf of plaintiff that Eaton was wrongfully suspended for non-payment of this assessment, in support of which claim, testimony was introduced tending to show: 1. That the financial reporter of the local lodge had previously received assessments from Eaton after expiration of the time allowed for payment. 2. That Eaton had been suffering with inflammatory rheumatism since the middle of December, and was unable to fully attend to business, for which reason he was entitled to "sick benefits" from his lodge, which should have been applied by the lodge to payment of this assessment. 3. That Eaton had been unlawfully included in assessment No. 54, which was called upon a death occurring on the same day whereon he became a member, but before the hour; that the money collected from him on that assessment had been paid to the treasurer of the supreme lodge, and should be applied to payment of assessment No. 111. 4. That when assessment No. 111 was called, there was more than $2,000 in the treasury to the credit of the widows' and orphans' fund, and that the laws of the order do not authorize an assessment until the amount to the credit of that fund is reduced below that sum. 5. That money derived from assessments in which Eaton was included had been applied to death losses to which he was not bound to contribute.

The constitution and laws of the order were offered in evidence, included in which were the following provisions: "No member shall be assessed for a death that occurs prior to his attaining the third or degree of manhood." "After paying said benefit, if the sum of two thousand dollars is left in the supreme treasury, no assessment will be made, but when less than two thousand dollars is left in the supreme treasury, after paying a benefit, then a call will be made on each lodge for the amount of one assessment on all members upon whom the degree of manhood was conferred on and prior to the date of the death of the deceased brother." "Each member shall pay the amount due, on the notice of the reporter of his lodge, within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days, shall, by such failure, stand suspended from membership in the order, and his name shall be so entered and carried upon the books of the reporter and financial reporter of his lodge." "He (the financial reporter), shall close his account with each assessment at the expiration of thirty days from the date of said assessment and shall not receive money thereon from any member except the suspended member shall have fully complied with the law governing suspended members." "Any member in good standing, and not in arrears for dues or fines, having six months previously obtained the degree of manhood, who may become disabled by sickness or other disability, from following his usual business, or some other occupation, may be entitled to receive from the funds of this lodge such weekly benefits (to be paid weekly), as this lodge may in its by-laws prescribe, which may not be less than one dollar per week: provided said sickness or disability has not originated from intemperance, vicious or other immoral conduct or practice; and the lodge may by by-law enact that no benefits shall be paid for the first week's sickness or disability."

At the conclusion of plaintiff's testimony, the court was asked to instruct the jury to return a verdict for defendant upon said testimony, which motion was fully argued by counsel.

J. R. Von Seggern and J. J. Glidden, for plaintiff.

James O. Pierce and Channing Richards, for defendant.

SAGE, District Judge (orally instructing jury). The question presented by the motion is, whether the evidence offered on behalf of the plaintiff, allowing to it its greatest probative force, is sufficient to support a verdict.

1. The petition alleges full compliance by deceased with all conditions of the certificate, and that he was a member of the order in good standing at the time of his death. These allegations are denied by defendant, and it is necessary for plaintiff to establish the same by evidence. The burden is upon her to prove that he had complied with the laws governing the order, that being a condition of the certificate; or to show a valid excuse for non-compliance.

The evidence she has introduced shows that Eaton did not pay assessment No. 111 when due, and under the laws of the order such non-payment deprives a member of good standing; but she attempts to excuse non-payment on various grounds.

2. The testimony does not show when notice of this assessment was served upon Eaton, but it does show that the assessment was called on December 23, 1882, and was payable on or before January 22, 1883, and if plaintiff relies upon want of due notice to excuse non-payment, she must herself prove it.

3. The receipt of an assessment after maturity is expressly forbidden by the laws of the order, and the receipt of the assessment on February 4, by the financial reporter of the local lodge, was not binding upon defendant, unless authority, express or implied, was given to receive it. No express authority has been shown, but it is claimed the receipt of previous assessments by him from Eaton after the same were past due, amounted to a waiver of prompt payment. The financial reporter of the local lodge is not an officer of the supreme lodge, or under its control; at most he is only its agent, and to establish a waiver as against defendant, by reason of his previous conduct, it must be shown that the managing officers of the supreme lodge had knowledge thereof, and acquiesced in it. There is no such testimony from which a waiver can be found.

4. It is further claimed that assessment No. 54 was improperly collected from Eaton, and the amount so collected should be credited upon No. 111. That assessment was called upon a death occurring on the same day Eaton attained the third degree in the order. The laws of the order provide that an assessment shall be collected from all members, upon whom the third degree was conferred on and before the date of the death upon which the same is called. Plaintiff has offered testimony tending to prove that No. 54 was called upon a death occurring at 9 p. m., about an hour before the degree was conferred on Eaton, and for the purposes of this motion that is to be considered as a fact established. The general rule of law is to disregard fractions of a day. If the circumstances show that it was otherwise intended, such division may be made; but in this case the language of the by-law does not warrant it, and the facts do not require it. Moreover, no objection was made by Eaton. He permitted the application of his money to that assessment, and it did not remain to his credit in either the local or supreme lodge.

5. It appears that the treasurer of the supreme lodge had a large sum of money in his hands to credit of the widows' and orphans' fund, when assessment No. 111 was called; but it also appears that orders had been drawn against it to pay death losses, sufficient when paid to reduce the fund below $2,000, which authorized the call of a new assessment. It was not necessary to await payment of the outstanding orders; the money on hand having been appropriated to the payment of certain claims, it was not in the treasury so as to prevent an assessment to provide for the payment of further claims which had been proved.

6. As to any misappropriations of previous assessments, if any there were, there is no testimony to sustain any claim of plaintiff on that account. Inasmuch as Eaton had acquiesced in such appropriation, she cannot object, and in any event it would not excuse non-payment of an assessment made to pay claims for which he was clearly liable.

7. As to "sick benefits," their allowance was within the discretion of the local lodge. There is no testimony to show that any such provision had been made by this lodge, and if there were, it was expressly made applicable to other purposes, and could not be applied by the lodge to payment of an assessment.

8. Upon the whole testimony the court finds that no valid excuse has been shown for non-payment of the assessment, and plaintiff has therefore failed to establish the allegations of her petition.

The jury is therefore instructed to return a verdict for defendant. (Which was accordingly done.)

A motion for a new trial was made on behalf of plaintiff, which, after full argument and consideration, was overruled on March 30, 1886.

NOTE. I. Conditions Precedent. It seems well established, as to the contract of life insurance made by a mutual benefit association, that the rules and regulations of the order are conditions precedent to the contract. Knights of the Golden Rule v. Ainsworth, 71 Ala. 436; Coleman v. Supreme Lodge K. of H., 18 Mo. App. 189; Karcher v. Knights of Honor, 137 Mass. 368; Chamberlain v. Lincoln, 129 Mass. 70; Grosvenor v. United Soc., etc., 118 Mass. 78. "The written contract, so far as it goes, is the measure of the rights of all parties." Supreme Lodge K. of H. v. Nairn, 60 Mich. 44, 26 N. W. 826. "The charter and by-laws constituted the terms of an executory contract to which the member assented when he accepted admission into the order." Hellenberg v. Order of B'Nai Berith, 94 N. Y. 584. "They must be complied with, in order to secure the benefits arising from the connection with this association." Harrington v. Workingmen's Ben. Ass'n, 70 Ga. 341. So the contract of the old-style life insurance company may be by its own terms conditioned that if the premium be not paid on the stipulated day, the policy shall "cease and determine;" and in such a case, the condition is precedent to the continuance of the contract, and is self-operative. Equitable Life Assur. Soc. v. McLennan (Tenn.) 4 Cent. Law J. 150; Marston v. Massachusetts Life Ins. Co., 59 N. H. 92. Such condition is "the very substance of the contract." Klein v. New York Life Ins. Co., 104 U. S. 91; Robert v. Ins. Co., 2 Disn. 106. It is not a "mere mode of securing payment;" it is intended "to enable the company to promptly make payment in case of death;" and therefore, a failure to perform "destroys the life of the policy." Insurance Co. v. Rob-

inson, 40 Ohio St. 273, 274. Sickness of the member is no excuse for non-payment. Klein v. New York Life Ins. Co., 104 U. S. 88; Thompson v. Knickerbocker Life Ins. Co., Id. 252. Nor is his insanity an excuse. Yoe v. Masonic Mut. Ben. Ass'n (Md.) 24 Am. Law Reg. 546.

II. Burden of Proof. Payment of assessments being a condition precedent to the continuance of the contract, the onus probandi as to payment was on the plaintiff. Such is the general rule as to all conditions precedent. Tayl. Ev. § 365; Buny. Life Ins. p. 81. Archbold says, as to life insurance, "If the matter of any averment be a condition precedent to the plaintiff's right to recover, it must be strictly averred, and as strictly proved." 2 Nisi Prius, p. 293. This rule applies to two classes of conditions, viz: (1) Conditions precedent to the contract, and (2) conditions precedent to the right of action. Authorities are numerous, in cases of both classes, to the effect that the burden of proving compliance rests on the plaintiff. Worsley v. Wood, 6 Term R. 710; Huckman v. Fernie, 3 Mees. & W. 510, 517; Ashby v. Bates, 15 Mees. & W. 589, 596, 597; Craig v. Fenn, 1 Car. & M. 43; Graig v. U. S. Ins. Co. [Case No. 3,340]; Bobbitt v. Ins. Co., 66 N. C. 78, 79; Wilson v. Hampden F. Ins. Co., 4 R. I. 171, 172; Peoria Mar. & F. Ins. Co. v. Walser, 22 Ind. 73; Insurance Co. v. Terry, 15 Wall. [82 U. S.] 580. Lord Denman said, of a condition precedent to the contract: "It lies on the plaintiffs to establish that which is the very condition of the insurance." Rawlins v. Desborough, 2 Moody & R. 70. In Seamans v. Life Ins. Co. [3 Fed. 325], which turned on the alleged fault of the defendant as an excuse for failure to perform, it was "conceded that the premium was not in fact paid, and that unless plaintiff has shown a waiver of payment, or that the non-payment resulted from the fault of defendant, the policy sued on is forfeited." So, a petition on a policy which does not aver performance of conditions precedent appearing on the face of the policy, or else a waiver thereof, is bad upon demurrer. Home Ins. Co. v. Lindsey, 26 Ohio St. 356. And if plaintiff declares on a policy, without conditions, but offers in evidence a policy containing such conditions, this will be a fatal variance. Rockford Ins. Co. v. Nelson, 65 Ill. 418. The burden is not shifted by the fact that the answer, in addition to a denial of performance, specifically enumerates several instances of failure to perform. Mehurin v. Stone, 37 Ohio St. 50. Nor is the neglect of plaintiff to prove performance of a condition precedent cured by evidence on the part of defendant which leaves the question in doubt. Cornell v. Hope Ins. Co., 3 Mart. (N. S.) 223.

III. Waiver. The receipt of money by the agent of the insurance company, outside of its rules, is ultra vires. Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 81. So the agent of a mutual benevolent society cannot bind it by his acts which are outside of its established rules, in the matter of reinstatement after suspension. Painter v. Industrial Life Ass'n, 14 Ins. Law J. 556. The mode of transacting its business, prescribed by the rules of the society, is exclusive of all other modes. Coleman v. Supreme Lodge K. of H., 18 Mo. App. 189. The waiver of the condition in such a case, must be a waiver by the company, not by its agent only. "The material question is whether the company had authorized its agent to waive the forfeiture." Insurance Co. v. Norton, 96 U. S. 239. "The representations, declarations or acts of an agent, contrary to the terms of the policy, of course will not be sufficient, unless sanctioned by the company itself." Insurance Co. v. Eggleston, Id. 577. It is the waiver by the company itself, through its managing officers, which will bind it. Phoenix Mut. Life Ins. Co. v. Doster, 106 U. S. 32 [1 Sup. Ct. 20]. One act of receiving money ultra vires, or even a custom so to receive it, confers no right upon the other party to continue so to pay. Illinois Masons' Ben. Soc. v. Baldwin, 86 Ill. 479; Marston v. Massachusetts Life Ins. Co., 59 N. H. 92; Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 259.

IV. Fractions of a Day. It was once considered a general rule of law that fractions of a day are not to be regarded. It may now be said that there is no general rule on the subject, but that courts will regard or disregard fractions of a day, according as the substantial justice of the particular case may demand. The authorities on both sides of the question are collated with some fullness in Burgess v. Salmon, 97 U. S. 381, and Louisville v. Portsmouth Sav. Bank, 104 U. S. 469, in each of which cases divisions of the day were noticed. In Maine v. Gilman, 11 Fed. 214, Lowell, J., thought the ancient maxim "now chiefly known by its exceptions." In Lapeyre v. U. S., 17 Wall. [84 U. S.] 191, and U. S. v. Norton, 97 U. S. 164, it was held that the president's trade proclamation of June 13, 1865, took effect at the beginning of that day, so as to include transactions occurring during that day. In Burgess v. Salmon, it was held that the approval by the president of a revenue law at a late hour on a certain day did not operate to make illegal a transaction completed at an earlier hour in conformity with the previous law. In Louisville v. Portsmouth Sav. Bank, it was held that the popular adoption of a constitutional provision did not make such provision applicable to a transaction, otherwise constitutional, which occurred before the close of the constitutional election. The question whether the repeal of the bankrupt law on March 3, 1843, affected a petition in bankruptcy filed on the same day was decided in contrary ways, in two different districts, by Prentiss, J., in Re Welman, 20 Vt. 653; and Story, J., in Re Richardson [Case No. 11,777]. In both these cases, it was thought proper to ignore arbitrary rules, and attempt to establish one which should be practicable and convenient. Prentiss, J., said: "Of what practical importance can it be, whether a law takes effect on one or another part of a particular day? If it be meant that no law should go into operation, before the people have had the means of knowing its provisions, the proposition is a plain one and easily understood; but it is not so easy to see or understand how it can be very material, so far as it respects the people's knowing or having the means of knowing the law, whether it takes effect the first or last part of the day on which it is approved. As it is known and understood that laws, after passing through the different legislative stages, take effect in general, and unless it is otherwise specially provided, the day they are approved and signed by the president, there is very little reason for saying there is any surprise upon the public." Story, J., applying the same rule of convenience, reached a contrary result, suggesting that as to offenses against the law, the constitutional prohibition upon ex post facto legislation required that the hour of the day be looked to; and said: "In cases of doubt, the time should be construed favorably for the citizens; the legislature have it in their power to prescribe the very moment, in futuro, when a law shall have effect; and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect." In Lapeyre v. U. S., the majority opinion of the supreme court approves the reasoning employed by Judge Prentiss, while in Louisville v. Portsmouth Sav. Bank, the opinion of Judge Story receives like approval. These apparently conflicting authorities may be reconciled by adopting the view that the substantial justice of the particular case should govern, as it probably did do in both the cases last named. In the principal case, the language of the by-law seems to have been intended to avoid all questions of doubt,

and to establish the rule that the entire day was included. The language, making liable to the assessment "all members upon whom the degree of manhood was conferred on and prior to the date of the death of the deceased brother," includes, (1) all members upon whom the degree was conferred on the date, and (2) all upon whom the degree was conferred prior thereto; and the word "date" has evident application to the entire day to which such date is given by the custom of business men.

V. Sick Benefits. In the holding that the allowance of "sick benefits" was wholly within the discretion of the local lodge, and that when allowed such benefits could not be by the lodge alone applied to the payment of an assessment, the principal case is in accord with the case of Ancient Order of United Workmen v. Moore, 9 Ins. Law J. 539, decided by the court of appeals of Kentucky. In that case, the provisions of the by-laws were substantially the same as in the Knights of Honor. It was held that (1) sick benefits when allowed, were for the present relief of the member and his family, and (2) the right of the member to receive them as such deprived the local lodge of the power to apply them, without his direction, to the payment of an assessment. The object of paying sick benefits being a charitable one, the member who seeks to recover them is not to be considered as simply a creditor; he must show a case arising under the by-laws, and adequate action actually taken by the society in reference thereto. St. Patrick's M. Ben. Soc. v. McVey, 92 Pa. St. 510. To declare that he is entitled by the by-laws to sick benefits, without declaring that the society has acted, is insufficient as a pleading. Irish Catholic Ben. Ass'n v. O'Shaughnessey, 76 Ind. 191. Where the laws of the order provide for a settlement of all disputes as to sick benefits, which settlement is to be final, in case the tribunal of the order has acted, the courts will not interfere. Order Red Men v. Murbach, 13 Ind. 91; Black & White Smith's Soc. v. Vandyke, 2 Whart. (Pa.) 309; Woolsey v. Independent Order of Odd Fellows, 61 Iowa, 492, 16 N. W. 576. And where the by-laws provide for the approval by a committee of the application for sick benefits, the member must comply with this regulation before he can appeal to the courts. Harrington v. Ben. Ass'n, 70 Ga. 340; Robinson v. Ben. Soc. (Cal.) 14 Ins. Law J. 790. So, where after the death of the member, the beneficiary claims, as in the principal case, that there was a right to sick benefits that should have been recognized, she is no less than the member himself bound by the rule that made it his duty to exhaust all the remedies provided by the society before complaining to the courts. Karcher v. Knights of Honor, 137 Mass. 368.

EATON (WASHINGTON v.). See Case No. 17,228.

EATON (WINANS v.). See Case No. 17,861.

EATON, The BARNEY. See Case No. 1,028.

EATON, The JAMES W. See Case No. 7,337.

EATON, The L. W. See Case No. 8,612.

EATON & H. R. CO. (DUNHAM v.). See Case No. 4,150.

E. BENJAMIN, The (LOWRY v.). See Case No. 8,582.

EBERT (UNITED STATES v.). See Case No. 15,019.

EBNER (UNITED STATES v.). See Case No. 15,020.

Case No. 4,260.

ECFORT et al. v. GREELY.

[6 N. B. R. (1873) 433;[1] 4 Chi. Leg. News, 209.]

District Court, W. D. Missouri.

BANKRUPTCY — PROVABLE DEBTS — FRAUDULENT DISPOSITION OF PROPERTY BY BANKRUPT.

A, finding himself unable to meet his liabilities, compromised with all his creditors, except B, whom he proposed to pay in full if he would give a large extension of time; to this B agreed, and received, as security, an assignment of two judgments, and also a deed for a lot, which together were supposed to exceed in value the amount of B's claim. At the time of this transfer an agreement was entered into, in effect that whatever was paid on the judgments should be credited on the claim, and the lot was to be returned within twelve months from the date of the transfer, providing the indebtedness was all liquidated. The claim was not paid, however, and more than six months after the assignment a petition in bankruptcy was filed against A by B, alleging that he had made a disposition of his property out of his usual and ordinary course of business, with intent to hinder and delay his creditors. *Held*, 1. That B's claim was an existing indebtedness provable in bankruptcy. 2. That A made a disposition of his property with the intent to delay, hinder and defraud his creditors, and that he had committed an act of bankruptcy.

[Cited in Re Ryan, Case No. 12,183; Re McKibben, Id. 8,859; Re Hamlin, Id. 5,994.]

Luebke & Player and Mr. Judson, for creditors,

Phelps & McAfee, for defendant.

KREKEL, District Judge. This case calls for the determination of two questions:

First. Did Ecfort & Petring have a claim or debt provable under the bankrupt law? and

Second. Did Greely make a transfer, sale, or conveyance of his property with intent to delay, hinder or defraud his creditors?

The evidence as to the first question is, that Greely was a partner of a mercantile firm (Brutsche & Greely) which, in the fall of 1867, became embarrassed and asked an extension of time, which was granted by their creditors, of whom Ecfort & Petring were the largest, they having a claim of upwards of thirty-two hundred dollars. In the spring of the year 1868, the firm, finding that they could not meet their liabilities, entered into a composition agreement with their creditors, by which they were to pay fifty cents on the dollar, and which was paid to all except Ecfort & Petring, whom they proposed to pay in full, if they would give a large extension of time. This proposition was accepted by Ecfort & Petring, on condition that they would secure them as far as they were able. This the debtor firm agreed to do, and afterwards assigned two judgments, which amounted, when collected, to thirteen hundred and forty dollars. They also made a conveyance of a lot in Jerome, a station on the present At-

[1] [Reprinted from 6 N. B. R. 433, by permission.]

lantic and Pacific Railroad, at its crossing of the Gasconade river, which was estimated at two thousand five hundred dollars. As to the nature of this conveyance a controversy arises, Greely claiming that the assignment of the judgments and conveyance was in full satisfaction of the Ecfort & Petring indebtedness, while it is claimed by the latter firm that the conveyance, though in form absolute, was collateral only. The extension above referred to was granted on the twentieth day of September, 1867, as shown by the notes executed on that day; the compromise with the creditors the spring following, 1868, and the assignment of judgments and deed on the sixteenth day of March, 1869. On the day of the assignment of the judgments and the making of the deed, two papers were signed by Ecfort & Petring and delivered to Greely, who produces them in court, one receipting for the judgments, closing with these words: "And the amounts realized on said judgments to be placed to their credit as soon as received by us;" the other stating that they had received Brutsche & Greely's warranty deed for lots eleven and twelve in block twenty-four in Jerome, with the improvements thereon, valued at two thousand five hundred dollars, and proceeding to say: "And we hereby agree with Messrs. Brutsche & Greely to return them said property within twelve months from date, provided they shall by that time have liquidated their indebtedness," and setting out that the deed was in the name of Kleinschmidt. Construing these papers together, it is difficult to arrive at the conclusion that a final settlement and payment of the indebtedness of Ecfort & Petring was thereby intended. The assignment of the judgment shows, upon its face, that the amount realized therefrom should be credited on the indebtedness. But, aside from this, the amount of the judgments and the estimated value of the Jerome property is far greater than any claim Ecfort & Petring had against Brutsche & Greely, and it is not to be supposed that they would pay more than their debt.

The peculiarity of the language of the receipt for the deed is easily understood when examined in the light of the evidence. Greely was deeply interested in Jerome, and hoped to be able to control the influence of the railroad company to again make it the terminus, for a time, at least, of the railroad then building, and hence his desire to have the right to possess the property he had improved and occupied at one time. The witnesses, except Greely, are unanimous in declaring the Jerome property valueless in 1869, the time it was conveyed. The receipt itself speaks of a then existing indebtedness, and only when that had been paid was it to be effective. If any doubt as to the nature of the conveyance could still exist, a letter of February 1, 1870, addressed by Ecfort & Petring to Greely, and the response thereto, would solve it. Among other matters, Ecfort & Petring write: "We also request you to come forward and settle off the old affair, as we are informed that you are amply able to do so," to which a response comes, dated February seventh, saying: "As soon as I can manage to pay the balance due on B. & G.'s debt I will do so, meantime it is secured by the judgment assigned to you, which will be paid. * * * I must beg pardon for not calling on you before this, upon this matter, but will do so shortly and explain to you my situation financially." There never was a claim that a final settlement and payment had been made with Ecfort & Petring set up by Greely until about the time of the suits that E. & P. instituted. The notes were never given up by E. & P., and the attempt by Greely to explain why this was not done is unsatisfactory. Besides all this, the evidence in the cause greatly preponderates in favor of the deed being intended as collateral.

The difficulty which might arise in holding that the possessor of collateral is entitled to sue without having exhausted his security, is removed by the concurring testimony of all the witnesses that the Jerome property is comparatively valueless.

Attention has been called to the course E. & P. saw cause to pursue in first having instituted suit in the circuit court of the county in which Greely resides, and that when Greely appears and puts in a plea of payment the plaintiffs dismiss their suit and make the present application. The causes assigned by the petitioning creditors as acts of bankruptcy on the part of Greely, the disposing of his property with the intent to hinder, delay, or defraud his creditors while the suit in the circuit court was pending, would seem to explain what caused the petitioning creditors to move in the bankrupt court. Be that, however, as it may, their right to do so is beyond dispute.

The first question must be solved in favor of petitioning creditors, as having an existing indebtedness provable in bankruptcy.

The second question—did Greely make a disposition of his property with the intent to delay, hinder, or defraud his creditors?—presents more difficulty; and in order to arrive at a conclusion it becomes necessary to carefully examine the evidence. We find Greely, in 1867, engaged as a merchant, partner of the firm of Brutsche & Greely, doing business on the line of the present Atlantic and Pacific railroad. In the fall of 1867 they became embarrassed, obtained an extension of time, and in the spring of 1868 compromising with their creditors at fifty cents. The same partners continue business for about eighteen months, to September, 1869, when they dissolve, Greely undertaking to settle up the affairs of the partnership. Greely testifies that out of the affairs of said partnership there remained to him about two thousand dollars, but this statement comes in conflict with his partner, who swears he never got more than three hun-

dred dollars out of the assets of the firm, which he himself collected. The Ecfort & Petring debt remains unsettled. Greely commences business in the fall of 1869, on his own account, insures, is burned out in 1870, and commences anew soon after the fire. He had purchased his homestead in the fall of 1869, and improved it afterwards by expending from three to five thousand dollars, as variously estimated by witnesses. He also builds a store-house on one of his lots, expending about two thousand dollars, in the meantime carrying a stock of from five to ten thousand dollars. He estimates his property at the time these proceedings were instituted in round numbers as worth twenty-one thousand five hundred dollars, consisting of store goods, six thousand dollars; homestead, eight thousand dollars; Jerome property, one thousand dollars; notes and accounts, three thousand dollars; mining stock, one thousand dollars; store, one thousand five hundred dollars (after deducting mortgage of one thousand six hundred dollars); Verona real estate, one thousand dollars, making up the amount. When he is asked how he has accumulated so much property in so short a time, under such adverse circumstances, he accounts for it by large profits, which he claims to have made, without in any way supporting this affirmation. The evidence shows that the three thousand dollars of accounts, and one thousand dollars mining stock are utterly valueless. Add to this a one thousand five hundred dollar homestead, and the assets, as estimated by himself, are reduced to sixteen thousand dollars. Of debts, he recounts from memory, six thousand dollars due to various merchants, add one thousand eight hundred dollars to Ecfort & Petring, and three thousand five hundred dollars obtained of his father-in-law, and mortgaged on homestead four hundred dollars, and we have nearly twelve thousand dollars of liabilities, all due, except the three thousand five hundred dollars obtained from his father-in-law, of which, he says, he does not know whether that is a debt or not, but that he gave a paper acknowledging the receipt of the money. Witnesses estimate the Greely property variously at from twelve to fifteen thousand dollars. All agree, that if the property, situate as it is, had to be sold within say six or nine months, it would not bring over one-half of their estimates. It will thus be seen that by very careful management Greely might be able to pay his debts, provided his own time were given him. But to be solvent, when a merchant, does not mean that he can pay his debts in the manner suggested.

In a late case (Toof v. Martin [13 Wall. (80 U. S.) 40]) the supreme court of the United States, December term, 1871, with precision defines insolvency, when applied to merchants and traders. The court says: "It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is the general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them, it is the sense intended by the act of congress." Applying this definition to the case before the court, Greely may well be said to be insolvent, with more than eight thousand dollars of debts due, and unable to pay two comparatively small claims presented to him, at the very time he was making such large and sudden changes in his property. It is true that this question of insolvency is not directly in issue, but the effect it has upon determining what a debtor may do or not do with his property, under such circumstances as are shown, is too obvious to need elucidation. We find Greely merchandising with a stock of goods estimated by him at near six thousand dollars, exchanging the one-half thereof, the shelf goods and broken packages, for small pieces of realty, and two second-hand billiard tables, a transaction plainly shown to be out of his usual and ordinary course of business. He disposes of another part of his goods, drawing an order for the pay thereof in favor of one of his creditors. He turns in and sells his store-house, (which he had before rented for a year,) the purchaser assuming a mortgage of one thousand six hundred dollars, and giving him a note for one thousand five hundred dollars, "payable at any bank in St. Louis," for the balance. When payment of the note is enjoined, under the bankruptcy proceedings, he tells the payee that it is in the hands of an innocent purchaser, and that he will have to pay it. The attempted explanation made by Greely of the conversation, in which he is charged to have said this, leaves at least a very unfavorable impression as to what he meant by it. We find the note, after it becomes due, in his hands, with no design to transfer it to his creditors, as far as known, certainly with no effort on his part to turn it into the channel of paying his debts. When asked whether he was going to continue in business in Marshfield, he emphatically asserts that he is, while he himself testifies that he was preparing to go to Mississippi to engage in railroad enterprises. The question of intent to hinder, delay, or defraud his creditors, must be solved by looking at what Greely said and did, and the effect thereof. That the effect of the disposition which Greely had in part made of his property when he was stopped by the bankruptcy proceedings was to hinder and delay his creditors, this court has not the least doubt. That he must have known this to be the case, may readily be inferred from what he said to Potter, that goods could be more

readily made available to pay debts than real estate. If there were any doubts as to Greely's intention to hinder or delay his creditors generally in the collection of their debts, there can be none as to Ecfort & Petring. From the moment they instituted suit he declared his intention not to pay them, and the reason he assigns for so doing is by no means satisfactory to the court. The plea put forth, that they had received payment by the assignment of the judgments and the Jerome deed, has so little to support it in evidence that it must be rejected as conclusive, or persuasive. The fact that Ecfort & Petring were the largest creditors of Brutsche & Greely, and headed the composition agreement entered into by them with their creditors, and without which they could not have succeeded in obtaining the terms they did, and afterwards trying to secure and now claiming their whole debt, arrested the attention of the court, and had there been anything in the testimony showing bad faith on their part toward the other creditors, the court would not be slow in ordering them not to come here without clean hands. But not the least testimony tending in the direction of bad faith has been given by any one, and hence the transaction must be looked upon as made bona fide. In compromises of this character, it may be well to remark, there should not only be the utmost good faith among the creditors, but it would be well to avoid everything calculated to thrown the shadow of a doubt upon them.

The first question, as to an existing, provable debt, having been answered in favor of petitioning creditors;

The second question—Did Greely make a disposition of his property with intent to hinder and delay his creditors?—being also answered in the affirmative;

Greely is, therefore, declared a bankrupt, and adjudged accordingly.

ECHER (MADISON MUT. INS. CO. v.). See Case No. 8,937.

Case No. 4,261.

ECHEVERIA v. NAIRAC.

FERRER v. SAME.

[Wall. Sr. 29.] [1]

Circuit Court, D. Pennsylvania. May 15, 1801.

TRIAL—NEW GROUNDS OF DEFENCE—CONTINUANCE—ABSENT WITNESS.

Where the defendant, by mistake, gives notice of a new ground of defence, to repel which, the plaintiff sends away his principal witness to obtain testimony, who is still absent, though defendant offers to take the old ground, yet plaintiff is entitled to a continuance, notwithstanding a rule to try or non pros. has been taken.

The causes were commenced in April, 1800, at issue in October term, 1800, and rules taken on the part of the defendant, for trials this term or non pros.

Moylan, Duponceau & Rawle, for plaintiffs, now moved for their continuance. They stated, that the transaction, on which the action was brought, arose in New York. Ferrer, as the agent of Echeveria, had put into the hands of Nairac, 12,000 dollars, to be by him laid out in the shipment of a single cargo, to some of the Spanish colonies in South America; and generally to be accountable for that sum to Echeveria, or Ferrer his agent. Nairac, as they stated, had given Ferrer a receipt for the money, containing this engagement. These actions were brought against Nairac, to produce an account of the moneys. The defendant had pleaded on the 8th of October, 1800, and on the 18th of the same month, during the court which began the 11th, Ingersoll for the defendant, wrote a letter to Moylan, attorney for the plaintiffs, stating, that the defendant would insist for his defense against the suits, upon his right to retain the moneys on account of "cargoes" shipped to one Meunos, a Spaniard, and for which Echeveria was accountable as contractor, &c. The counsel for the plaintiffs stated, that this notice entirely shifted, in their opinion, the nature of the defence expected. They had no idea, until then, that Nairac could mean to involve the appropriation of this 12,000 dollars with his shipments to Meunos, which amounted to near a million; and with which, as far as respected this transaction, Ferrer or Echeveria had not any concern, this being a distinct and separate affair, and relative to a single shipment in the brig —— to Meunos. However, on receiving the notice which related to "cargoes," they deemed it necessary to prepare to meet a defence of that kind; and in the same term of October, 1800, prayed commissions to La Vera Cruz, with a view of obtaining the necessary testimony relative to those immense transactions. in order to show, that the defendant could have no right to retain these moneys on the general account.

It appeared that this commission, with the interrogatories, was not sent away until the 18th January, 1801, and then went by the way of the Havanna, there being no direct trade with La Vera Cruz. The commission was not returned; and the plaintiffs fearing some failure, Ferrer himself had, three months ago, been despatched by land to La Vera Cruz, with duplicate commissions to obtain the testimony, and was now on his journey. They accounted for the delay in sending the first commission, by stating, that the circuit court of the United States, in October 1800, held a long time; that the state fall courts, which were very long and full of business, succeeded; and that many transactions, and an infinite deal of investigation and preparation of exhibits, &c. became necessary in order to complete the commission; and that on the whole it might be expected, the commission would have been returned to

[1] [Reported by John B. Wallace, Sr., Esq.]

this court, notwithstanding it did not go out until the 18th January, 1801; as the indirect voyage to La Vera Cruz and back to Philadelphia, could be made in that period.

E. Tilghman and Mr. Ingersoll insisted on the non pros. They said Nairac was a foreigner extremely desirous of going out of the country; and had been detained here solely by this suit, much to his detriment: that there were evident laches in suing out the commission. They had obtained it somewhere about the 18th of October, and did not send it away until 18th January, 1801, a space of three months. They could have no reasonable ground to look for its return to this court, after such delay; for that four months was too short a time, within which to expect its remission from La Vera Cruz: though, indeed it did appear that it might be executed and returned in that time with very favorable passages. It was enough, however, that there appeared negligence in sending it out. But to put an end to the whole pretext about the commission to La Vera Cruz, Ingersoll said that they had no intention in the defence of their client to go out of the single transaction of the cargo of the brig ——, and though the word "cargoes" had slipped into his notice, it was never contemplated to involve this deposit with Nairac by Ferrer, in the general shipments to Meunos. As, therefore, the commission had been taken out merely to meet a supposed defence, and which would not be set up, the plaintiff Echeveria could be in no difficulty whatsoever.

The counsel for the plaintiff admitted, that this offer and explanation removed every objection on the score of preparation, except one; which was, that Ferrer, who, from being the agent in the transaction, was the principal witness for Echeveria, and on whom they depended, had been sent away to La Vera Cruz, in consequence of the notice of the 18th of October from the defendant's attorney, with duplicate commissions to procure this evidence, which now, indeed, appeared to be of no consequence.

TILGHMAN, Chief Judge. This is the second term after issue joined. The defendant's notice of a defence which was not expected, and which induced on the part of the plaintiff the necessity of a commission to La Vera Cruz, was given during October term last. It was certainly, very strict practice for the defendant to take a rule for trial or non pros. the very term he gave this notice; and had the plaintiffs resisted the rule under those circumstances, it might have been refused: but it was obtained as a matter of course, and we must dispose of it on proper principles. We are of opinion, on the whole of the circumstances, that the causes should be continued. No affected delay appears on the part of the plaintiffs: on the contrary, a very great anxiety to get the evidence from La Vera Cruz, by sending Mr. Ferrer by land with duplicate commissions to effect it. It was certainly a great while to keep the commission from October to January; but this is in some measure accounted for from press of courts, and the very elaborate translations, &c. necessary to attend the commission. Besides, it does appear that a return of it might be looked for from the course of the voyage, though sent in January. It is true the explanation and offer now made, removes the necessity of this evidence; but then Ferrer, the principal witness as to the individual transaction to be tried, is gone in consequence of the notice of the 18th of October, 1800, which brought into view a different defence. To compel Echeveria to proceed without him, would, possibly, be more injurious, than to have gone on without the commission, had that evidence been material. We are desirous of despatch, and will not easily overlook laches; but in this case we think there is sufficient ground for continuing the causes. Let a continuance be entered.

Case No. 4,262.

ECHEVERRIA et al. v. BARNEY.

[5 Blatchf. 193.][1]

Circuit Court, S. D. New York. Nov. 14, 1863.

CUSTOMS DUTIES—DISCRIMINATING DUTIES—ACT AUG. 5, 1861.

Under the 3d section of the act of August 5, 1861 (12 Stat. 293), in regard to discriminating duties, the ten per cent. ad valorem duty imposed by that section is imposed only as an additional duty to duties imposed by that act, and cannot be imposed on goods which are not charged with a duty by that act.

This was an action [by Manuel Echeverria and others] against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties paid, under protest, on an importation of wool, lead in bars, goat skins, and cotton, in the Spanish barque Tereseta, from Matamoros, September 4th, 1862.

Sidney Webster, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. The duty paid and protested against was a discriminating duty of ten per cent. ad valorem, claimed to be authorized by the 3d section of the act of August 5, 1861 (12 Stat. 293). The 1st and 2d sections of that act impose certain duties on articles specially enumerated in each section. The 3d section provides, that "all articles, goods, &c., imported from beyond the Cape of Good Hope, in foreign vessels not entitled, by reciprocal treaties, to be exempt from discriminating duties, &c., and all other articles, goods, &c., not imported direct from the place of their growth or production, or in foreign vessels entitled by re-

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

ciprocal treaties to be exempt from discriminating duties, &c., shall be subject to pay, in addition to the duties imposed by this act, ten per centum ad valorem."

It is admitted, that Spain has no such treaty as is mentioned in the section, and hence there is no difficulty in imposing this discrimination against her in all cases where the section applies. But no one of the articles in this importation except "lead in bars" is charged with a duty in the two preceding sections, or in any other section, of the act; and, therefore, the 3d section, imposing the ten per cent., according to its very terms, does not apply. The words are: "in addition to the duties imposed by this act, ten per centum ad valorem."

The 1st section imposes "on lead in pigs or bars" a duty of one dollar and fifty cents per one hundred pounds. The 3d section applies, therefore, to this article, the Spanish vessel not being exempt by treaty from the discrimination which, in addition to the above rate, charges it with the ten per cent. ad valorem.

Wool is charged with a duty, under the 12th section of the act of March 2, 1861 (12 Stat. 183), and goat skins and cotton are charged with duties under the 8th section of the act of July 14, 1862 (Id. 550). That section provides, that, from and after the 1st day of August, 1862, "in lieu of the duties heretofore imposed by law on the articles hereinafter mentioned, and on such as may now be exempt from duty, there shall be levied, &c., the following duties, &c.: on cotton, one half cent per pound;" "on hides, raw, and skins of all kinds, &c., ten per centum ad valorem." Before this, the duty on "raw hides and skins of all kinds" was five per cent., under the 10th section of the act of March 2, 1861 (12 Stat. 183); and, under the 23d section of the same act, cotton was free of duty. Whether, therefore, we look to the 3d section of the act of August 5, 1861, which subjects the articles, under the circumstances stated in the section, to a duty of ten per cent., in addition to that imposed by the act in the previous sections; or, to the 8th section of the act of July 14, 1862, which imposes the duty in lieu of the duties theretofore imposed by law, it is quite clear, that the discriminating duty in question does not apply to the articles of wool, goat skins, or cotton.

The difficulty appears to me insuperable, to undertake to apply the 3d section of the act of August 5, 1861, to the article of wool, which is subjected to duty under the act of March 2, 1861, or to the articles of goat skins and cotton, which are charged with duty under the act of July 14, 1862, when, by the very terms of such 3d section, the additional duty there imposed is in addition to the duty fixed by that act, of which the section is a part. If the language used had been, as in some of the sections of the act of July 14, 1862, "in addition to the duties heretofore imposed by law," or, if the section had used language, which has never yet been used, I think, in any tariff act, "in addition to the duties that may hereafter be imposed by law," the construction claimed by the government might very well be sustained. But no such language is used. On the contrary, the language is, as we have seen, "in addition to the duties imposed by this act."

Case No. 4,263.

The ECHO.

[7 Ben. 70.][1]

District Court, S. D. New York. Dec., 1873.

TUG AND TOW—HAWSER.

A brig was towed out from a pier by a tug, by means of a hawser furnished by the brig. The tug controlled the brig, whose master and crew took no part in the work, except as directed by the master of the tug. The hawser parted, and the brig went foul of another vessel and received damages, to recover which she filed a libel against the tug. *Held*, that the tug was not responsible, as between herself and the brig, for the condition and strength of the hawser, and, as it was not shown to have been parted by negligence in the tug, she was not liable for the damages.

This libel was filed by Braddock Nickerson and others, owners of the brig John Shay, to recover damages for injuries sustained by the brig while being towed out of a pier at the foot of Seventh street, East river, in the harbor of New York, by the tug Echo. The brig was towed out by a line furnished by herself, and, while she was being towed out, the line parted, and she came in collision with a bark, which lay at the same pier. She alleged that she was under the charge and control of the tug alone, and that the collision was caused by negligence in the tug. This was denied by the tug.

E. H. Owen, for libellants.
W. R. Beebe, for claimant.

BLATCHFORD, District Judge. Assuming it to be true, as alleged in the libel, that, at the time of the injury to the brig, the tug was under the sole control of the master and crew of the tug, and that the master and crew of the brig took no part in the work of moving her, except as they were directed by the master of the tug, I am not satisfied that the libellants have made out the charge of the libel, that, in moving the brig, those navigating the tug conducted the business so carelessly, negligently, and improperly, that the brig received the injury which happened to her. The weight of the evidence is, that it was the parting of the hawser between the brig and the tug which caused the rigging of the brig to foul with the yard of the bark. For the condition and strength of that hawser, the tug was not,

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

as between herself and the brig, responsible, in the event of injury to the brig from the weakness of such hawser, whatever might have been the responsibility of the tug for the strength of such hawser, as between herself and vessels other than the brig, in the event of injury to them from the weakness of such hawser. The brig must bear herself all loss occurring to herself from the parting of such hawser, as it is not shown to have parted through any negligence on the part of the tug.

The libel must be dismissed, with costs.

Case No. 4,264.

The ECHO.

[3 Ware, 289.] [1]

District Court, D. Maine. Nov., 1861.

COLLISION—FISHING VESSEL DRAGGING ANCHORS—ABSENCE OF MASTER—INSUFFICIENT ANCHORS.

[1. A custom of leaving fishing vessels at anchor in the harbor all night without any one on board can only extend to and be justified in ordinary weather, and not in time of storm.]

[2. The fact that the master of a fishing schooner left her at anchor in the harbor, without any one on board, at a critical state of the weather, for the purpose of taking his supper on shore, is not so grave a fault as to require him to bear all the loss occasioned by a collision resulting from dragging her anchors in the night, it appearing that he made all reasonable attempts to get on board, but was prevented by the roughness of the sea.]

[3. A sheet anchor of 170 pounds and a smaller anchor of 130 pounds are insufficient for a fishing schooner of 54 tons burthen, it appearing that a total weight of 400 pounds is the least that is allowed for a vessel of that size among experienced fishermen; and this insufficiency renders her liable for a collision resulting from dragging her anchors in a storm.]

In admiralty.

Mr. Fox, for libellant.

Mr. O'Donnell, for claimant.

WARE, District Judge. A collision took place in Portland harbor between the Echo, a fishing schooner of about 54 tons burthen, on the night of Nov. 2, and the Nettle. Neither vessel had a man on board at the time of the accident. The Nettle, which was used as a pilot boat, was safely moored at her usual anchorage and fitted with everything requisite for her employment. In the course of the trial no fault has been found with this vessel. She remained in her place and was sunk by the Echo, where she was anchored, and she is acquitted of all blame. The Echo was a fishing schooner, and arrived from a trip to the shore fishery Friday about 8 o'clock in the evening. She had a crew of four men and a boy, and these all remained on board from Friday evening until Saturday at three o'clock p. m. Then the weather being threatening they let go an additional anchor and all went ashore. The crew dispersed to their several places of residence, and the master, Wallace, a young man, at eight o'clock Saturday evening left his residence for the purpose of going on board the vessel and remaining through the night. But such at that time was the state of the weather, that, though he made the attempt, he was unable to succeed in getting on board, and after making fruitless attempts to get assistance, he could find no one who was willing to trust himself in the boat, and finally gave up the attempt. He remained on the wharf until 11 o'clock and then went to his house. He returned as soon as it was light the next morning. In the meantime the Echo had dragged her anchor and the mischief was done.

The first fault found with the Echo is, that she was left through the night with no one aboard. But it was proved at the trial, that in this port it is customary to leave fishing vessels at anchor over night without a man on board. Some masters, of more than ordinary vigilance, may have at all times some one aboard to look after and take care of the vessel; but in good weather this is not the general custom. But this custom extends to, and can only be justified in ordinary weather, and at this time a storm had commenced and the elements were threatening. A more than ordinary care was therefore required. But this vessel was not finally abandoned. The master only left it temporarily for his supper, intending to return on board himself and to remain. He returned about eight o'clock, but in the mean time the wind had increased and he was unable to reach it. I am satisfied from the evidence, that Wallace acted in good faith when he left the Echo and when he attempted to return, and was only prevented by the elements; and that he made every exertion that could reasonably be expected. In my opinion his leaving for the short time, though the weather was in a critical state, was not a great fault on his part, not such an one that all the misfortune of the night ought to be borne by him. He stated very plainly in his examination, that if he had been aboard he should have given more scope to the anchors; and that they had not more is one of the complaints against this vessel. Though the evidence on this subject is somewhat contradictory, as to the sufficiency of the scope, I am satisfied, that if more had been given, the vessel would have rode out the storm with more safety and ease. But the real question in this case is not what ought to be given for the purpose of encountering one of the severest gales we ever have, but whether it was sufficient for the time the master intended to be absent. The cables were measured after the gale, and one had eighteen fathoms and a fraction and one had twenty-one. This, though the weather was threatening, was, I think, sufficient for the time the master intended to be absent. If the master could be justified in leaving for a short time, I think he could also

[1] [Reported by George F. Emery, Esq.]

be justified in leaving the anchors as they were.

This brings us to the last complaint which has been made against this vessel, the original insufficiency of the ground tackle, and on this I have found more difficulty in coming to a satisfactory conclusion, than on any other. The weight of anchors for a vessel employed in the fisheries, according to her tonnage, is not precisely determined. But, on two points, there seems to be a general agreement confirmed by practice and experience. The first is, that the ground tackle for a fishing vessel need not be so heavy as for a vessel of like tonnage employed in the coasting trade. In the latter, from whatever cause it may be, vessels have heavier anchors and a longer scope to their cables. The second is, that there is now commonly used, in even fishing vessels, a heavier ground tackle than formerly. Experience has taught those who are engaged in this branch of industry, that they began their trade with too light anchors and they have gradually increased their weight. The Echo was a schooner of 54 tons burthen, and it seems to be agreed that for a sheet anchor to a vessel of that tonnage, 200 pounds weight is the smallest that is allowed, and a somewhat lighter one for a second anchor, to be used in ordinary weather. And accordingly, the whole current of testimony, on the part of the claimant, has been to bring up the weight to that amount, the smallest that experience would allow for a vessel of that tonnage. But we have the account of Mr. Thurston who sold that anchor for the vessel, and at the time it was not a new, but a secondhand one. It was not weighed but was estimated and sold for 170 pounds. This agrees very nearly with the estimated weight from an imperfect weighing after the accident took place, that being 169 pounds. The second anchor, which was sufficient for ordinary weather, by usage as well as reason, might be a little lighter. This was also imperfectly weighed after the accident, with the wooden stock and the end of the cable that held it, and they, together, weighed 165 pounds. It would be a liberal estimate that would bring this up to 130 pounds. The whole weight of her anchors would be but about 300 pounds. Now, according to the whole testimony in the case, for a vessel of this tonnage the anchors, together, ought to weigh nearly 400 pounds. My opinion is, therefore, that the ground tackle of the Echo was too light, being nearly one quarter lighter than that allowed by usage for such a vessel, and that she was in fault for not being sufficiently provided for such a gale.

I am not insensible that it is the duty of every one, according to his abilities and opportunities, especially in this part of the country, to encourage the fisheries. Fishermen are a most useful and meritorious class of men. They furnish those who have more easy means of living, a luxury in peace, and to all an ornament and safeguard in war. They follow an occupation full of danger and hardships, and they follow it for a sparing profit. It is an old remark of political economists, that employments like fishing and hunting, that are pursued, for the pleasurable excitement they afford, by persons in easy circumstances, are the hardest of any for those who are destined to gain their living by them. Their labor and sufferings are greatest, and their gains are smallest. The government patronizes them by an exclusive privilege of salt bounty in their favor. But with this they are obliged to practice the utmost economy, and to indulge themselves in the fewest luxuries. It cannot be a matter of surprise, though it may be of regret, that in fitting out a fishing vessel, this economy should be not only pushed to the greatest extreme, but sometimes beyond what can be allowed by law. Whatever standard that has affixed, such is human nature, and, it may be added, human necessity, that at times it will be passed. When so, while those bound only by the common obligation of humanity, may pardon the transgressor, courts of law are hardly excusable in departing from what usage and reason have prescribed as the rule for this case. It is with some regret that I pronounce for the condemnation of the Echo in this case. But I do it without costs.

ECHO, The (McCULLOUGH v.). See Case No. 8,740a.

ECHO, The (UNITED STATES v.). See Case No. 15,021.

ECKEL (UNITED STATES v.). See Case No. 15,022.

Case No. 4,265.

In re ECKENROTH.

[1 Cin. Law Bul. 206.]

District Court, S. D. Ohio. Aug. 3, 1876.

BANKRUPTCY OF TENANT — LANDLORD'S SECURITY FOR RENT—LIEN ON FIXTURES—CHATTEL MORTGAGE.

[1. A stipulation in an unrecorded lease that the landlord shall have a first lien for his rent upon all the fixtures and furniture in the store, or to be placed therein by the tenant, is void as against the tenant's subsequent assignee in bankruptcy, in so far as it purports to include articles not in the store at the time possession was given under the lease; but it is good in equity as to articles already in the store at that time.]

[2. An unrecorded bill of sale of fixtures and furniture, given by a tenant as security for past-due rent, within two months prior to the filing of a petition in bankruptcy, is void as an attempt to create a preference. Rev. St. § 5128.]

[This was a suit in bankruptcy in the matter of Henry Eckenroth.]

Sage & Hinkle, for Mrs. Robison.

Long, Kramer & Kramer, for assignee.

By F. Ball, register:

On the 29th of January, 1876, Mary H. Robison filed proof of her claim against the

estate of the bankrupt for two months and nine days' rent of the storehouse which he had held under lease from her, amounting to $766.67, and asserted a lien thereunder prior to all other liens, upon all the fixtures and furniture in the store, according to one of the covenants contained in said lease, which is as follows: "It is hereby further agreed that the upper stories of said building shall not be used for families to live in, except by the family of the lessee. It is further agreed that said lessor shall have a first lien prior to all others upon the safe, counters, show-cases and other furniture and fixtures that may be contained in the said store, or that may be placed therein by said lessee, for the payment of the rent above specified; and in case said rent shall not be paid as agreed by the lessee, then said furniture and fixtures shall become the property of said lessor, without process of sale thereof on execution or without other legal process. The lease was executed and acknowledged February 17, 1875, but was never recorded, either as a lease or a chattel mortgage. The term was for three years from April 1, 1875, at the rate of four thousand dollars per year. Possession was not taken by the lessee until May 1, 1875, and the fixtures and furniture were not placed upon the premises until after possession was taken. The lessee had a safe and some other things which he brought from his old store, but the residue, and by far the greater part of the furniture and fixtures, were newly made, and placed in the store after he took possession. On the 3d of August, 1875, Eckenroth made a bill of sale of the safe, eight marble-top counters, and other articles therein enumerated, to secure the rent then due, and which may thereafter become due; but this mortgage was never filed for record. The petition in bankruptcy was filed September 28, 1875. The property has been sold by the assignee, and, by agreement between the parties, the proceeds stand in the place thereof. On behalf of Mrs. Robison, it is claimed by counsel that the lease itself creates a valid lien upon the property; that the premises were leased on condition that the fixtures and furniture to be placed there should be security for the rents reserved, and that on the faith of such security she parted with value—namely, the use of her property for three years. I do not so construe the lease, nor the state of facts then existing. The lease is an ordinary one, and is made subject to no such condition, and the fixtures and furniture were not placed in the premises until more than a month after the term had commenced. The agreement for a lien is merely a covenant, closely following the covenant to pay rent and the other ordinary covenants. She parted with her property on the faith of the covenants in the lease, and gave possession under them.

It is also claimed on her behalf, that the chattel mortgage, although never recorded, is good between the parties, there being no actual fraud and no intervening mortgage or lien holder. Whatever exception to the effect of the statute relating to bills of sale, may have been made by the state courts in such a case, such exception is not applicable here, because this mortgage, as shown by the evidence, was given to secure a pre-existing debt, as well as installments of rent to become due, and having been made within two months prior to the filing of the petition in bankruptcy, it was an attempt to secure a preference in violation of the bankrupt act, and this is made void by section 5128 of the Revised Statutes (section 35). On the other hand it is claimed by counsel for the assignee that inasmuch as the lease was not recorded, the covenant to create a lien is not enforceable as against creditors who trusted the bankrupt on the faith of the property of which he was possessed, and there appears to be much force in the proposition. So far as it concerns the right of the tenant to occupy for the term, the lease although unrecorded, was a good license to enter, and the tenant on keeping his covenant, had a right to remain during the term. But the creditors had no means of knowing that an attempt had been made in the lease to create a continuing lien for the enormous rental of $333.33 per month. They had a right, from the appearance of the premises, and its furnishing and fixtures, to consider the bankrupt engaged in a prosperous business. To hold that covenant in the lease to be a valid chattel mortgage would, I think, be working injustice to them. But is there an equitable mortgage on the property, or any part of it, in favor of Mrs. Robison? The only thing of value existing at the date of the lease and which has come to the hands of the assignee, is the iron safe, which sold for $250. That article was seen by Mrs. Robison's agent, and was regarded as valuable. It was worth nearly the price of one month's rent, and was a thing not easily moved. The other articles were not then in existence, and were not introduced into the store until long after the term had commenced. I do not think that such other articles can upon any principles of equity be considered as subject to any lien in favor of Mrs. Robison, and in view of all the authorities cited by counsel on both sides, which I have carefully examined, I find an equitable lien in her favor for the proceeds of the safe, less its fair proportion of the expenses of sale, and award her $225 for its share of its proceeds, to be deducted from her claim, and permit her to receive dividends on the balance, in common with other unsecured creditors. I may add, that in my judgment the taking of the chattel mortgage, if not a waiver, is evidence, of an intention that she did not rely on the lease as a chattel mortgage.

ECKERT (BANERT v.). See Case No. 837.

Case No. 4,266.

ECKERT v. BAUERT et al.

[4 Wash. C. C. 370.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1823.

SUBPOENA IN EQUITY—SERVICE ON ATTORNEY FOR FOREIGN DEFENDANT.

The court will not order service of a subpoena in equity on the defendants' attorney at law to be a good service, except in cross suits, and injunctions to stay proceedings at law, on the ground of the defendants' residing out of the state.

[Cited in Ward v. Seabry, Case No. 17,161; Segee v. Thomas, Id. 12,633; Gregory v. Pike, 29 Fed. 590.]

The plaintiff having filed a bill on the equity side of the court, to carry into effect the award and agreement stated in the case between the same parties, Ewing, for the plaintiff, moved for an order that service of the subpoena upon the attorney of the defendants at law should be considered as good service, the defendants being all foreigners, and residing beyond sea. This was opposed by Ingraham, the attorney at law.

WASHINGTON, Circuit Justice. This court has never, to my recollection, made this order, except in injunction cases, to stay proceedings on a judgment at law, and in cross suits, where the plaintiff at law in the first, and the plaintiff in equity in the second case, resides beyond the jurisdiction of the court. In the case of Hitner v. Suckley [Case No. 6,543], decided in this court at the April term 1810, a motion was made that the service of a subpoena upon an injunction bill to stay waste, upon the attorney of the defendant, in an action of law depending in this court against the plaintiff in equity, for slandering his title to the land, which formed the subject of the bill, should be considered as good service. The court then laid down the general rule as to injunction cases to stay proceedings on a judgment of law; but denied the motion in that case; being of opinion that the attorney of the defendant at law, could not be considered as representing him in equity, and that the subjects in controversy in the two suits were totally unconnected. I understand the practice of this court to conform to that of the English court of chancery. Motion overruled.

ECKERT (CHAMBERLAIN v.). See Cases Nos. 2,576 and 2,577.

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

Case No. 4,267.

ECKLE et al. v. FITZGERALD.

[4 Cranch, C. C. 90.][1]

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

INSOLVENT ACTS—DISCHARGE—PRISON-BOUNDS BOND.

1. What allegations are sufficient to prevent a discharge under the insolvent act of the District of Columbia.

2. Upon a verdict against the petitioner, he will not be ordered into close custody, if he is out upon a prison-bounds bond.

[Cited in McClean v. Plumsell, Case No. 8,693.]

Fitzgerald petitioned the chief judge for a discharge under the insolvent law of the District of Columbia. Eckle and others, his creditors, opposed his discharge, and filed two allegations: 1. That he disposed of certain property (specified) with intent to defraud his creditors, by selling the same, and withholding the same from his creditors, and applying the proceeds to his own use. 2. That he disposed of the same property, with intent to defraud his creditors by secreting the same.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the allegations were sufficient.

Verdict. Guilty.

THE COURT made the same order as in Plumsell's Case [Case No. 8,693], at this term.

ECKSTEIN (FOX v.). See Case No. 5,009.

Case No. 4,268.

The ECLIPSE.

[3 Biss. 99;[2] 4 Am. Law T. Rep. U. S. Cts. 187.]

District Court, E. D. Wisconsin. Aug. Term, 1871.

PURCHASE OF SUPPLIES IN FOREIGN STATE—NOTE NOT A WAIVER OF LIEN.

1. If the owner of a vessel orders necessary supplies in a port of another state, and the ship chandler charges them directly to the vessel, without any special arrangement for payment, he has a lien on the vessel therefor.

2. A note taken for the amount of the supplies will not waive a maritime lien on a vessel unless so understood at the time. The note must, however, be returned or surrendered in court at the hearing.

[Cited in The Napoleon, Case No. 10,011; The Illinois, Id. 7,005.]

3. The fact that the vessel is in a foreign port is prima facie evidence of a necessity for the credit of the vessel.

[Cited in Harney v. The Sydney L. Wright, Case No. 6,082a.]

In admiralty. This was a libel by G. B. Dunham and J. P. Hoit, ship chandlers of

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

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

Chicago, for supplies furnished this schooner. It was charged in the libel that the supplies were furnished on the credit of the vessel, the master and owner not having either money or credit to purchase them. This charge is denied in the answer, with the allegation that the owner of the vessel, William B. Selleck, was in good credit when the supplies were furnished and was able to pay for the same, and that libellants accepted his note for the amount, payable at a future day.

Selleck resided in Kenosha, in the state of Wisconsin, and the Eclipse was employed in the lumber trade, between ports in the state of Michigan, and Chicago, in the state of Illinois. Selleck also owned another schooner, named the Lewis Ludington, and had ordered the libellants to furnish such supplies for the schooners as might from time to time be called for by the masters. The account charged to the schooner Eclipse commenced in April, 1870, running from time to time until the month of October of the same year. When Selleck made application for the supplies, he made no arrangement for their payment, nor were any inquiries made of him as to his pecuniary circumstances. The charges were made directly to the vessel. He purchased the Eclipse early in the year 1870, and he knew that she required new rigging to fit her for service that season. [When the supplies for which this libel is brought were ordered by Selleck, no inquiries were made of him as to his pecuniary circumstances. The account was made directly to the vessel.][1] After the account had been running several months, libellants called Selleck's attention to it, and in August, 1870, he gave them his note for $1,136.85, the balance then due libellants, on bills for supplies to his two schooners and a small bill of his own of about $50. Further supplies were furnished to the Eclipse, and on December 14, 1870, Selleck took back his note, and paid $700, and gave libellants a new note, payable June 1, 1871, for $780.27, the amount remaining unpaid, and for which amount this libel was brought.

Further facts are stated in the opinion.

Finches, Lynde & Miller, for libellants.
Carys & Cottrill, for respondents.

MILLER, District Judge. It is contended by respondents' proctors that $97.31, balance of account against the Ludington is included in the last note, and that a receipt at the foot of said account, dated December 14, 1870, of payment by Selleck's note, payable June 1, 1871, is evidence of that fact.

The evidence is, that on December 14, 1870, the parties made a final accounting of all accounts, and in their presence the appropriation of the payment of $700 was made. And I am satisfied from the explanation given, that the account against the Ludington was paid out of that money. The receipt was open to explanation, and I think it may be fairly considered that the correct credits were made, leaving the balance against the Eclipse.

When Selleck gave the last note the libellants expressed their satisfaction of his pecuniary circumstances at that time. The supplies were furnished for the schooner Eclipse and charged to her by name, without regard to the ability of Selleck, the owner.

There is no doubt, from the facts in evidence, that the supplies furnished were necessary for the vessel. And I am satisfied that they were furnished by the libellants on her credit. The owner resided in an adjoining state, some distance from Chicago. The schooner was as to the libellants a foreign vessel. There was no agreement between libellants and the owner, when the order was made for the supplies, or when they were being furnished, that the owner should be exclusively liable for payment. The order was given by the owner for supplies to the vessel, which were furnished and charged to the vessel, without further inquiry or agreement.

It is not pretended that the master had funds wherewith to pay libellants for the supplies. In the case of The Kalorama, 10 Wall. [77 U. S.] 204, it is decided that it is no objection to the assertion of an admiralty lien against a vessel for necessary repairs and supplies to her in a foreign port, that the owner was there and gave directions in person for them, the same having been made expressly on the credit of the vessel. The Grapeshot, 9 Wall. [76 U. S.] 129; The Guy, Id. 758; The Lulu, 10 Wall. [77 U. S.] 192.

It is contended on the part of respondents that libellants waived their maritime lien on the vessel by accepting the note of the owner.

On the 14th of December, 1870, the parties made a final accounting, and the balance of the account against the Eclipse remaining unpaid was $780.27, for which the note was given by Selleck, payable on the first day of June, following. It is expressly testified by Dunham, one of the libellants, that the note was not accepted in payment of the account against the schooner. Selleck paid $700 in full of his small private account and of the Lewis Ludington account, and reduced the account of the Eclipse; and he stated that he could not pay more at that time, and gave the note. There is no evidence tending to contradict the testimony of Dunham, that the note was not accepted in satisfaction of the balance of the account against the Eclipse. Without such evidence it is fair to presume that libellants would not waive their maritime lien, by the acceptance of a promissory note payable nearly six months ahead. It is not to be presumed that a party would release a higher security upon acceptance of a less; taking a less security does not necessarily waive a higher.

From the non-payment and return of the first note, it may not be inferred that libel-

[1] [From 4 Am. Law T. Rep. U. S. Cts. 187.]

lants consented to waive their maritime lien by accepting the last note or either of the notes. In the case of Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, it did not appear that the negotiable note of the respondent had been given up, or surrendered, at the hearing in the district court, and for this reason the decree dismissing the libel was affirmed. This position is sanctioned in the opinion in the case of Andrews v. Wall, 3 How. [44 U. S.] 568. And in the opinion in The St. Lawrence, 1 Black [66 U. S.], on page 532, the court remark: "Has this lien been forfeited or waived? It does not appear to have been forfeited or waived, under any provision in the New York statute, nor was it waived upon the principles of maritime law, by the acceptance of Graham's notes, unless the claimants can show that the libellants agreed to receive them in lieu of, and in place of, their original claim. The notes in this instance have been surrendered and were filed in the proceedings in the district court. And the language of the court in the case of Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, and of Judge Story in commenting upon that case in 3 How. [44 U. S.] 573, necessarily imply, that if the notes had been surrendered the party would have a right to stand upon his original contract, and to seek his remedy in the forum to which it originally belonged, as fully as if the notes had never been given." It also will appear from the statement in the case of The Guy, 9 Wall. [76 U. S.] 758, that it should be made to appear by the claimant that the acceptances were taken in absolute payment. Nor does the pendency of an action at common law for necessary repairs or supplies bar a libel in the admiralty. The Custer, 10 Wall. [77 U. S.] 204–218. In Dike v. The St. Joseph [Case No. 3,908], the libel claimed contribution from the vessel on a general average, for which bonds had been given. The court decided that though there may be a remedy at law, yet that does not take away the jurisdiction in admiralty. The maritime law in cases of material men, where it gives a tacit hypothecation or lien, gives the lien upon the vessel as an auxiliary to the personal security of the owner. It allows the party to give credit because it is for the general benefit of navigation and trade. The Nestor [Case No. 10,126]; The Chusan [Id. No. 2,717].

In the case of The Betsey and Rhoda [Case No. 1,366], a seaman accepted the promissory note of the owner for his wages; the note not being paid, he returned it and libelled the vessel; the court held that such a note will not be an extinguishment of the claim for wages, nor of the lien of the seaman against the ship, unless it is distinctly stated to him at the time that such will be the effect, and the note is accompanied by some additional security or advantage to the seaman as a compensation for his renouncing his lien on the vessel. Also in the case of The Harriet [Id. 6,098], the libel was sustained after suit had been brought at law on a note accepted by a material man for supplies returned into court, it being held that the acceptance of the note did not extinguish the maritime lien. Harris v. The Kensington [Id. 6,122].

In Moore v. Newbury [Case No. 9,772], it is held that a note given by the owner for supplies to his vessel did not extinguish the lien. The same decision is made in the case of The Active [Id. 34]. Also, in Page v. Hubbard [Id. 10,663], and in Raymond v. The Ellen Stewart [Id. 11,594].

And in Carter v. Byzantium [Case No. 2,473], it is held that a lien for repairs and supplies furnished at Norfolk, Virginia, on a ship owned in Maine, is not lost by the creditor taking bills of exchange on one of the owners, which bills were produced to be surrendered or cancelled. See, also, Baker v. Draper [Id. 766].

It seems to be well settled that the party claiming a maritime lien, must either return or offer to return the note or other security accepted by him, or bring it into court and surrender it to be cancelled, as is done in this case, before the lien will be enforced by decree in the admiralty.

In decreeing for libellants, this court follows its own decisions heretofore made in cases involving these questions.

NOTE. A somewhat different rule is given in the case of The Lady Franklin [Case No. 7,582]; Davis, J., following the rule in Pratt v. Reed, 19 How. [60 U. S.] 359. Where there is no real or apparent necessity for pledging the credit of a vessel, there is no lien for supplies furnished. The 12th rule of admiralty was only intended to regulate practice, and the question of the liability of the ship, freight, master or owner does not depend upon it, but upon general admiralty and maritime law. The Eledona [Case No. 4,340]. The fact that a vessel which is repaired or supplied is not in her home port, makes, in the absence of other circumstances, a case of apparent necessity for the credit of the vessel. This, however, may be dispelled by proof. The Washington Irving [Id. 17,244]. An admission in the pleadings that the vessel was in a foreign port is an admission of apparent necessity for the credit of the vessel, and unless special facts are set up, the only question on the pleadings is whether the supplies were furnished. Id. If neither master nor owners are known to have credit at a foreign port, the presumption is that credit was given to the vessel, and a lien is created. No express pledge, intention or declaration is necessary, and money advanced to discharge other advances or liabilities may become a lien. The Emily B. Souder [Case No. 4,456]; The A. R. Dunlap [Id. 513]. And in a foreign port it is not necessary to show that the owner was without credit. The James Guy [Id. 7,195]. For numerous authorities on the questions of maritime liens, in their different phases, consult The Celestine [Id. 2,541]; The Maitland [Id. 8,979].

Case No. 4,269.

The ECLIPSE.

[1 Tex. Law J. 197; 17 Alb. Law J. 192.]

District Court, E. D. Texas. Feb. 20, 1878.

VESSELS AT ANCHOR—NECESSARY LIGHTS—ACCIDENTAL EXTINGUISHMENT.

1. Before a conviction can be had for a violation of the following section (section 4233, rule 10,) "All vessels, whether steam or sail vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile," it must be made to appear that before the time of filing the libel the vessel had been seized by the collector of customs.

2. Should the light be extinguished, from some unusual and unexpected cause, for a short time, not from want of proper care on the part of the owners of the vessel, it would not render such owners liable for prosecution.

MORRILL, District Judge. Section 4233, rule 10, provides: "All vessels, whether steam or sail vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, and at a distance of at least one mile." Section 4234 provides: "Every such vessel that shall be navigated without complying with the provisions of the preceding article shall be liable to a penalty of two hundred dollars; one half to go to the informer, for which sum the vessel so navigated shall be liable, and may be seized, and proceeded against, by way of libel, in any district court of the United States having jurisdiction of the offense." Admiralty rule 22 provides: "All informations and libels of information upon seizures for any breach of the navigation laws of the United States, shall state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information or libel shall propose, in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process, why the forfeiture should not be decreed."

Based on the statute and rule, the district attorney, on August 3d, 1877, filed in this court a libel in the name of the United States, and in behalf of the government and B. G. Shields, Esq., collector of customs for the port of Galveston, stating that the informer, Shields, on the night of March 27th, 1877, did seize a certain vessel called the "Eclipse," and then had the same in his custody, for violation of the navigation laws, by failing "to exhibit where it would best be seen, at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, between the hours of one and three a. m., praying for process, proceeding and judgment in the premises as to the law and justice of the matter shall appertain." On the same day, August 3d, 1877, the clerk issued a writ of seizure of the Eclipse, which was executed by the marshal on the same day, and the owners having filed a claim bond for the vessel, it was redelivered to them, on the 20th of August, 1877, by the marshal.

Claimants set up three different defenses: 1. That at no time previous to the filing of the libel was the vessel seized by the collector of customs as alleged in the libel. 2. A former judgment in their favor on the same subject-matter. 3. A general denial of the charge. By permission of the parties, the case was submitted to the judgment of the court. The judge dismissed the libel.

A motion for a new trial has been made, and the reasons for the motion are:

1. "The testimony clearly showed a violation of the law in question, and the court erred in supposing the absence of proof of an intent to violate the law was necessary to the condemnation of the vessel." A clear violation of the law would be, in the language of the law, "a failure to exhibit the required light between sunset and sunrise." It seems to me that where a party showed an intention to comply with the law, by exhibiting the required light, which, from some cause not connected with neglect on the part of the owners of the vessel, was extinguished for a short time only during this period of time, that the alleged violation of the law is not so clear as it appears to be to the district attorney.

But, as this was not the pivotal point upon which the decision of the case turned, we pass to the second assigned reason for a new trial, which is: "Though there was no proof of a seizure of the vessel by B. G. Shields, collector of customs, as alleged in the libel of information, yet the claimants, by bonding the property and pleading to the merits of the case, are to be considered as having submitted to the jurisdiction, and were precluded thereby from afterwards questioning said jurisdiction on the ground of a preliminary seizure." There is an admission that the vessel was not seized when the libel was filed, and that the statement in the libel as to seizure was erroneous. The statute herein quoted plainly provides that

the seizure shall precede the libel. The rule 22 expressly declares that the libel shall state the place of seizure, etc. It is presumed that no attorney-at-law would contend that a court had jurisdiction of a case, "in rem" without the case was properly before the court and subject to its jurisdiction. It is further presumed, that had the libel failed to state that the ship had been seized, that there would be no question of the case being demurrable on this ground.

As has been heretofore stated the claimant of the ship expressly excepted to the cause of action for the cause that there had been no seizure, and this was the first question for the judge to decide. But the district attorney insists that because he has, in addition thereto, set up other answers that he has waived his first answer and has relied upon the decision of Justice Story in the case of The Abby [Case No. 14], and seems to regard that case as parallel with this. A short statement of the case, taken from the opinion of Justice Story, will show that the cases are not, in the least, similar. The judge says: "It was objected that the seizure of the Abby was made in Portland within the judicial cognizance of the district court of Maine, and, therefore, the district court of Massachusetts has not attached. The seizure of the Abby was first made about five miles off Cape Elizabeth, and was, therefore, on the high seas. After the seizure she was permitted to go into Portland harbor. The master of the Abby voluntarily offered to conduct his vessel into Portland, and agreed to redeliver her again to the seizer. Upon her arrival at Portland, the Abby was faithfully redelivered to the seizer. I accede to the position that the court below had no cognizance of the case if the seizure on which the libel is founded was in the port of Portland. Concurrent jurisdiction exists in the district court of other districts only when the seizure is on the high seas." After deciding that the seizure was made upon the high seas, and that it was not abandoned by going into the harbor of Portland, the judge proceeds: "The question has been thus considered by the consent of the parties as if the question of jurisdiction were open upon the record. If the party meant to except to the jurisdiction, he should have filed a declamatory allegation, in the nature of a plea to the jurisdiction. Upon the pleadings in the court, the only question put in issue by the parties is, forfeiture or not, and the court can not travel beyond the defense asserted by the claimants. The question of jurisdiction not having been put in issue cannot be properly in proof before the court, for the proof must be according to the allegations, and no party can be called upon to establish what is not known in controversy by the allegations." We will compare, or more properly, contrast these cases: In the Abby there was a seizure, and the libel was founded on that seizure. In the Eclipse there was no seizure, and, of course, the libel could not be founded on it, whatever might be alleged in it. For the Abby the claimants did not, by pleadings, object to the jurisdiction of the court. In the Eclipse, the exception was made and insisted upon. In the Abby the fish had been caught, and the question verbally, before the court was, whether it should be cooked at Portland or Boston. In the case of the Eclipse the fish had never been caught, and yet we are asked to cook him! Any respectable cook-book is sufficient authority to decide that the fish must be caught before cooked.

2. A third reason assigned is that, by the record in the case, it is manifest that justice has not been done, and that by accident, oversight, mistake or misapprehension the "decree" is erroneous. In giving the pleadings, I have already stated that the second plea of the claimants was a former judgment in their favor upon the same subject matter. It appeared, on trial, that this second plea was true, and that the only difference in the two libels was that, in the first, the libel charged that B. G. Shields did ascertain, etc., relative to the ship. In the case under consideration it is alleged that the ship was the ship seized, when, in fact, it was not. I admit the position assumed by the district attorney when he says "that, by the records, it is manifest that justice has been done," since it is a maxim of the law, "that a man shall not be twice vexed for one and the same cause." But I do not draw the same inference that he does, "that by accident, oversight, mistake or misapprehension the decree is erroneous." My impression is "that, by accident, oversight, mistake or misapprehension," or misinformation as to the seizure having been made, that the suit was erroneously brought. It is not in the "decree" that there was error, even if the suit had been correctly instituted and there had been no defence of a declamatory character, or of former judgment. But, as before stated, the cause was submitted, generally, on all the defences, and since, if any one of the three defences was available for the defendant, the libel must be dismissed; and, furthermore, as there would be no doubt of the fact that the suit between the same parties, on the same subject-matter, had been once before the court and a final judgment rendered, from which there was no appeal, this fact would, of itself, leave no doubt in the mind of the judge as to the disposition of the case. It is too late now to retry the case. I would not be understood as admitting that if the suit had been properly instituted, and there had been no former judgment, or if their defenses had not been insisted upon, that I should, upon the facts of the case, necessarily have decided in favor of the United States. I do not believe that because a light, from some unusual and unexpected cause, happened to be extinguished for a short time, not from want of attention or proper care on the part of the owners of the ship, that the United States would have

been injured in their dignity, sovereignty or treasury. Nor does it appear that any of the good citizens of the United States have been injured. It is to be presumed that the collector of customs considered that it was not plain case of violation of the statute, inasmuch as he made no seizure but simply made a report of the case to the United States district attorney.

Because, therefore, there was no seizure before libel; and because there has been a former judgment upon this identical cause, and the defendants have properly pleaded their facts in their defence; and because there is great doubt in the mind of the judge that the spirit of the statute has been violated; for each and all of these reasons a new trial is refused.

NOTE. We are informed that the first trial of this protracted and important case was conducted by United States District Attorney Baldwin, under the official allegation that the vessel had been seized. The subsequent proceedings were conducted by Assistant United States District Attorney Burns.

ECLIPSE, The (HARRISON v.). See Case No. 6,134.

ECLIPSE, The (UNITED STATES v.). See Case No. 15,023.

Case No. 4,270.

The E. C. SCRANTON.

[2 Ben. 25.] [1]

District Court, S. D. New York. Nov., 1867.

COLLISION AT A PIER—PRACTICE—HARBOR MASTER.

1. In a cause of collision against two vessels, if one of them is found to have been solely in fault, a decree may be rendered against her alone, although the libel charges the collision to have been caused by the joint negligence of both.

2. Where a vessel, lying at a pier, was injured by another vessel, in an effort made by the latter to get into a berth at the next pier, by carelessness on the part of the latter: *Held*, that the latter vessel was liable for the damage.

3. Where a harbor master had, by forgetfulness, assigned two vessels to the same berth, and both came to the place about the same time, and one, in trying to get in, was swept down by the tide, away from the berth, against a vessel lying at the next pier, and the other, coming in properly and finding the berth vacant, went into it, it being charged that, in so doing, she broke a line which the first vessel had got out, and thus caused her to drift down upon the vessel lying at the next pier: *Held*, that the second vessel was not in fault in taking the berth, and, on the facts, was not guilty of negligence in going in.

Beebe, Dean & Donohue, for libellant.
Isaiah T. Williams, for the E. C. Scranton.
Daniel D. Lord, for the Emerald Isle.

BLATCHFORD, District Judge. This is a libel in rem, filed by John Collins, Jr., as charterer and pro tanto owner of the steamboat John Hart, against the ship E. C. Scranton and the ship Emerald Isle, to recover damages for a collision which occurred on the 15th of September, 1855. The John Hart was lying on that day, about half-past two o'clock in the afternoon, at her proper berth on the east side of pier No. 35, East river, New York, preparatory to leaving, at a quarter past three o'clock the same afternoon, for Norwalk, in Connecticut, between which place and New York she regularly plied. While she was in this position, the ship E. C. Scranton was seen coming up along the piers from the westward, in tow of a steam-tug, the tug being lashed to the starboard side of the E. C. Scranton. The tide was running strongly ebb, it having been high water that day at eleven o'clock, a. m., at the Battery. The tide was thus against the E. C. Scranton. The John Hart, as she lay, headed to the south, her stem being about even with the south end of the pier, and the E. C. Scranton and her tug headed to the eastward. When the E. C. Scranton and her tug came to a point about opposite to the slip, between the east side of pier No. 35 and the west side of pier No. 36 (pier No. 36 being the next pier to the westward of pier No. 35), the libellant, who was the master of the John Hart, saw that the E. C. Scranton was making for a berth which was vacant along the west side of pier No. 36, there being no vessel then either at the west side of pier No. 36, or at the outer end, which was the south end of that pier. The way was thus clear for the E. C. Scranton to take a berth at the west side of pier No. 36. But the master of the John Hart saw that, with the tide running as strongly ebb as it was running at that place, the E. C. Scranton, with a tug on her starboard side, would, in attempting to come into the slip head on (which was her movement), and put her starboard side lengthwise against the west side of pier No. 36 (which was what she must do to reach the berth she was aiming for), probably drift down against, and come into collision with, the John Hart. The master of the John Hart, therefore, hailed the pilot of the E. C. Scranton, and warned him that there was danger of his striking the John Hart. The pilot paid no attention to the warning, but persisted in bringing his vessel into the slip in the manner referred to. The result was, that the E. C. Scranton came into collision with the John Hart and damaged her seriously. The tug, being on the starboard side of the E. C. Scranton, was obliged to cast loose, in order to enable the ship to come up to pier No. 36, and to prevent being herself jammed between the ship and the pier. The result was, that the E. C. Scranton, being deprived of all adequate motive power that could control her movements, drifted into a position angling across the slip with her stem to the northeast, and

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

near to pier No. 36, her port bow resting against a sunken crib at the northeast corner of the slip, and her stern, on the port side, crushing against the John Hart. For the damage caused to the John Hart by this collision, the E. C. Scranton is clearly responsible. She was navigated with great carelessness. With the tide such as it was, it was very reckless in her to attempt to go into the slip head on with the tug on her starboard side. If the tug had been on her port side, probably the collision would not have occurred, for then the tug would not have been obliged to cast loose from her before she was safely moored to pier No. 36, and would have been able to keep her up to that pier and away from the John Hart. Testimony was put in to show that it was safe to berth vessels at the west side of pier No. 36, at such a stage of an ebb tide as that which prevailed at the time of this transaction, but this testimony only goes to show the carelessness in navigating the E. C. Scranton. If it was not safe to berth a vessel there at that time, then it was negligence to attempt to do so. If it was safe to do so, provided the vessel was properly navigated and managed, the fact that it was not safely done in this case, shows that the vessel was not properly navigated or managed. There was nothing wrong in the attempt of the E. C. Scranton to take the berth in question, provided she did so in a proper way and at a proper time, for she was authorized to do so by the harbor master of the port, who was the proper authority in the premises. She is responsible, however, for her navigation, in attempting to take the berth.

As to the Emerald Isle, it appears that, after this collision between the E. C. Scranton and the John Hart, the Emerald Isle, having been assigned by the same harbor master to the same berth, at the west side of pier No. 36, to which the E. C. Scranton was assigned, came to take the berth. The error of the harbor master in assigning two vessels to the same berth appears to have been one of forgetfulness, in the hurry and press of business, and neither vessel was guilty of any illegal act, in the mere abstract attempt to take the berth. The Emerald Isle had two steam tugs lashed to her sides, one on her starboard side and one on her port side. She approached from the southward from across the East river, heading directly to the northward, in a line parallel with the west side of pier No. 36, and sufficiently to the westward of it to enable her to make the berth properly. Her navigation appears to have been in all respects proper. As she approached, the berth was clear of obstruction. The E. C. Scranton was lying in the angling position before described, with her starboard bow ten or twelve feet away from pier No. 36, and her stern, on her port side, against the John Hart. A line was got out from the Emerald Isle and made fast to pier No. 36, and then her starboard tug was cast off, leaving her port tug still fast to her, and in a position, her starboard tug being out of the way, to crowd her up to pier No. 36, which was done, her port tug not being cast loose till the ship was moored close to the pier. I am entirely satisfied that the Emerald Isle never came in contact with the John Hart at all. The master of the John Hart is mistaken in his testimony on that subject. The occurrence took place twelve years ago, and it is very much to be regretted that so long a time has been allowed to elapse before the trial of the cause, for it appears that many disinterested witnesses are either dead or beyond reach. There is one fact, however, which is conclusive to my mind, to show that the stern of the Emerald Isle could not have come into collision with the John Hart in the manner testified to by the libellant. It is in proof that the stern of the port tug of the Emerald Isle projected aft beyond the stern of the Emerald Isle. This being so, it would have been that port tug that would have come against the John Hart, and that tug would have been crushed between the John Hart and the ship. But there is not a particle of evidence that the John Hart was touched by that tug, or that that tug was injured. It may very well be that the flag staff of the John Hart, as she went out of the slip after the collision, came into contact with some projecting part of the Emerald Isle and was broken, but, if so, that was not because of any fault on the part of the Emerald Isle.

It is sought to make the Emerald Isle responsible for a part or the whole of the damage to the John Hart, on the ground that, in coming into her berth she willfully ran against and parted a taut line which it is claimed the E. C. Scranton had at the time got out from her quarter to pier No. 36, and that the effect of the parting of this line was to throw the E. C. Scranton anew against the John Hart, she having at the time, as is alleged, been warped by means of the line to a point some distance to the eastward of the John Hart. But I do not think it is made out that the Emerald Isle parted any such line, nor, if she did break or overrun any line which ran from the E. C. Scranton to pier No. 36, is it satisfactorily shown that her doing so caused the E. C. Scranton to inflict on the John Hart any more injury than she would otherwise have inflicted. And, although, as the Emerald Isle came up alongside of pier No. 36, her port bow came in contact with the starboard bow of the E. C. Scranton, yet, from the position in which the E. C. Scranton lay with her port bow crowded against the corner of the sunken crib, and the place where the Emerald Isle came in contact with her, the Emerald Isle could not, by thus coming in contact with her, have caused her to inflict any additional injury on the John Hart.

The effort on the trial, on the part of each of the two vessels sued, was to free herself

from blame and to throw the blame on the other, and each also contended, that, even if she herself was wholly to blame, yet no recovery could be had in this suit unless a joint fault was proved in respect to the two vessels, and then only as to injuries which resulted to the John Hart from matters in respect to which the two vessels were jointly in fault. In other words, the E. C. Scranton contends, that if it appears that she was wholly to blame, no recovery can be had against her in this suit, for the reason that the libel sues the vessels jointly, and is not sustained unless it is shown that the vessels were jointly concerned in every act in respect to which the court awards a recovery. In this case I hold the E. C. Scranton to have been in fault, and the Emerald Isle to have been free from fault; and the case of Sturgis v. Boyer, 24 How. [65 U. S.] 110, is an authority for allowing a recovery against the E. C. Scranton and dismissing the libel as against the Emerald Isle.

The libel must be dismissed as against the Emerald Isle, with costs; and there must be a reference to a commissioner, as respects the E. C. Scranton, to ascertain and report the damages caused by the collision, and for such damages, with the costs of the suit, there must be a decree against the E. C. Scranton.

[NOTE. During the pendency of the reference the claimants applied to the court for an order staying all proceedings before the commissioner until the libelant should appear and submit to cross-examination by claimant's counsel. The application was refused. Case No. 4,271, following.]

Case No. 4,271.

The E. C. SCRANTON.

[2 Ben. 81.][1]

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

PRACTICE—REFERENCE—EXAMINATION OF WITNESS.

1. The proceedings, on a reference to a commissioner to compute damages, are to be conducted in the usual manner in which they are conducted before a referee or a master in chancery.

2. Where, on such a reference, the libellant was examined and partially cross-examined, and the libellant's counsel, claiming that the cross-examination had been closed, refused to produce the libellant for further cross-examination, and thereupon the claimants applied to the court for an order staying all proceedings before the commissioner until the libellant was so produced, but it did not appear that the matter had been in any way brought up before the commissioner: *Held*, that where important questions as to leading principles arise on a reference, it is proper practice for the commissioner to apply to the court for directions, but this is always to be done on his certificate.

3. Where a commissioner is proceeding irregularly, or refuses to allow necessary testimony to be taken, it is proper to apply to the court, on a certificate from the commissioner as to his proceedings, for relief. That it is not proper to make such application to the court unless the question is one on which the commissioner has passed one way or another, or has refused to pass.

[See The E. C. Scranton, Case No. 4,272.]

4. As there was here no certificate from the commissioner as to his proceedings, and it appeared that he had not passed upon the matter, the motion would be denied.

[This was a libel in rem by John Collins, Jr., as charterer and pro tanto owner of the steamboat John Hart, against the E. C. Scranton and the Emerald Isle, to recover damages growing out of a collision. The libel was dismissed as to the Emerald Isle, and a decree rendered against the E. C. Scranton, with a reference to ascertain the damages. Case No. 4,270. The cause is now heard on application of the claimants for an order staying all proceedings before the commissioner until the libellant shall appear and submit to a cross-examination.]

I. T. Williams, for claimants.

Beebe, Dean & Donohue, for libellant.

BLATCHFORD, District Judge. The 44th rule of the instance rules in admiralty prescribed by the supreme court, provides, that, "in cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit, to one or more commissioners to be appointed by the court, to hear the parties, and make report thereon; and such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises." Under this rule the order of reference in this case was made, referring it to a commissioner of this court to ascertain and compute the amount of the damages sustained by the libellant, and report thereon to the court. Under such an order the libellant has a right to put the reference into the hands of any regular commissioner of this court. Ben. Adm. § 339. The proceedings before a referee under an order made under the 44th rule, are to be conducted in the usual manner in which proceedings are conducted before a referee or a master in chancery.

In the present case, the claimants, during the pendency of the reference, and after some progress has been made in it before the commissioner to whom it was given in charge by the libellant, apply to the court, on affidavit, for an order that all proceedings in the action be stayed, until the libellant shall appear before the commissioner and submit to a cross-examination by the counsel for the claimants, or that the direct testimony of the libellant be stricken out. The ground, set forth in the moving affidavit, for this application, is, that the counsel for the libellant has objected to permitting

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

the counsel for the claimants to further cross-examine the libellant, on the ground that his testimony has been closed, and has refused to produce the libellant for such further cross-examination, and has declared that the claimants, if they want him, must subpoena him as their own witness. It does not appear that the matter has been in any way brought before the commissioner, or that he has made any ruling in regard to the same.

It is proper practice, when a reference is pending before a referee or a master, and important questions as to leading principles arise, for him to apply to the court for directions; but this is always to be done on his certificate, and the discretion of submitting such matters to the court should be sparingly exercised, because it is the duty of the referee or master to settle, in the first instance, all questions which arise, and to meet every difficulty until he finds he cannot proceed for want of power. Hoff. Ch. Pr. c. 19, § 7. When, in the course of proceedings before a referee or master, he refuses to allow a question to be put to a witness, as going to matters improper or useless to be inquired into, or for other reasons, the aggrieved party may apply to the court, on a certificate from the referee or master and other papers, for an order that the referee or master allow the question or examine as to the point. Hoff. Office of Master, 34, 35. In Hallett v. Hallett. 2 Paige, 432, on a reference before a master, an application was made to him by the plaintiff for leave to inspect certain books and papers which the defendants had delivered under an order therefor, and to examine the defendants to see if they had delivered everything required by the order. The master refused the application, and the plaintiff, on a certificate of the facts, applied to the court to direct the master to examine the defendants as to the delivery. The court held that the master had erred, and made an order giving leave to the plaintiff to inspect the books and papers and examine the defendants. So, where, on an examination before a master, a party, on the advice of his counsel that a question is improper or irrelevant to the matters referred to the master, and after a decision by the master that it is proper for him to answer the question, refuses to answer it, the matter is to be brought before the court, on an application to compel him to answer, and to punish him for the contempt in refusing to answer, if the question was not an improper one. Gihon v. Albert, 7 Paige, 278. Where a master proceeds irregularly, or where it is necessary to take some testimony which the master erroneously refuses to permit to be taken, the proper course is to make a special application to the court, upon a certificate from the master as to the proceedings, and on due notice to the adverse party, for relief. Renwick v. Renwick, 10 Paige, 420, 422. So, also, if a master omits to report as to some matters upon which he is directed to report by the order of reference. the remedy is not to except to the report, but to move the court that the report be referred back to the master, with instructions to him to correct the report, so as to make it embrace all the matters of the reference. Stevenson v. Gregory, 1 Barb. Ch. 72. It is, therefore, proper to bring before the court, otherwise than by exceptions to a report, matters arising on a reference. But it is not proper to do so unless the question is one which has been passed upon by the referee in one way or another, or one upon which he has directly or practically refused to pass; and, in all cases, there must be a certificate from the referee as to the proceedings. In the present case no such certificate is presented, nor does it appear that the commissioner has refused to allow to the counsel for the claimants the privilege of further cross-examining the libellant. or has refused to make an order directing the libellant, to appear and be further cross-examined, or to strike out his direct testimony on his failure to comply with such an order. For these reasons the application is refused.

Case No. 4,272.

The E. C. SCRANTON.

[4 Ben. 127.] [1]

District Court, S. D. New York. April, 1870.

PRACTICE IN ADMIRALTY — EXCEPTIONS TO COMMISSIONER'S REPORT.

The propriety of the action of a commissioner, to whom it has been referred to ascertain the damages in a collision case, in refusing to allow a person to be sworn to contradict testimony previously given, cannot be raised by an exception to the report, but must be raised by an application to the court before the report is made.

[Cited in The Transit, Case No. 14,138.]

[See The E. C. Scranton, Case No. 4,271.]

This case came up on an exception to the report of a commissioner, to whom it was referred to ascertain and compute the damages in a case of collision.

BLATCHFORD, District Judge. The exception is disallowed. The question of the propriety of the action of the commissioner, in refusing to allow a person to be sworn to contradict testimony previously given, cannot be raised by an exception to the report of the commissioner. It ought to have been raised by an application to the court, before the report was made, to direct the commissioner to allow the person to be sworn. The Columbus [Case No. 3,041]; Tyler v. Simmons, 6 Paige, 127; Schwarz v. Sears, Walk-

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

er, Ch. 19; Ward v. Jewett, Id. 45; Troy Iron & Nail Factory v. Corning [Case No. 14,196].

Case No. 4,273.

The E. C. SCRANTON.

[3 Blatchf. 50;[1] 11 N. Y. Leg. Obs. 353.]

Circuit Court, S. D. New York. Sept. 29, 1853.

COLLISION—STEAM AND SAIL — MUNICIPAL ORDINANCES REGULATING FERRY-BOATS—EAST RIVER.

1. There is no law or usage which gives to a steam ferry-boat, ascending the East river, opposite the city of New York, a right to keep close to the shore, as against a sailing vessel coming down the river, so as to make it the duty of the latter to change her course to avoid a collision. Nor is such right derivable from the municipal ordinance which forbids vessels from anchoring in the river within a certain distance of ferry-slips.

[Cited in The Amos C. Barstow, 50 Fed. 623.]

2. Exceptions to general rules of navigation are not favored by courts of admiralty.

3. Steam ferry-boats, navigating the East river, at New York, from Peck slip to Williamsburgh, are within the provisions of the state law of April 12, 1848, entitled, "An act in relation to the navigation of the East river by steamboats" (Sess. Laws 1848, c. 321).

[Cited in The George Law, Case No. 5,337; The Rockaway, 19 Fed. 451; The Maryland, Id. 556.]

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

This was a libel in rem, filed in the district court, by the Williamsburgh Ferry Company, owners of the steam ferry-boat Oneota, against the schooner E. C. Scranton, to recover damages for a collision. The district court decreed in favor of the libellants [Case not reported], and the claimant appealed to this court. The facts are sufficiently stated in the opinion of the court.

William C. Prime, for libellants.

William J. Haskett and Washington Q. Morton, for claimant.

NELSON, Circuit Justice. This libel was filed in the court below by the owners of the ferry-boat Oneota, against the schooner E. C. Scranton, in a case of collision, which occurred on the East river, on the 1st of October, 1850. The Oneota had left her berth at Peck slip, and was on her course up the river, close in along the New York shore, on her way to Williamsburgh, Long Island, the ferry being between those two termini. The schooner was beating down the river, and was on her larboard tack, having started upon it from the Brooklyn side, a little below the navy yard. She was close hauled, the wind being about southwest by south, which gave her a direction towards the foot of Clinton street, on the New York side. This point, judging from the eye on the map, is about midway between Peck slip and the terminus of the ferry at Williamsburgh. The Oneota kept her course up the river, about one hundred yards or more from the docks, and encountered the schooner before that vessel had run out her tack. The court below held the schooner to have been in fault, and decreed in favor of the libellants.

It is contended, on the part of the libellants, that the schooner should have tacked about before she reached the track of the Oneota, and not have persevered in her course, as the latter was in the slack water on the New York shore, which it was the duty of the former not to enter before making her tack about. It is also urged, that the city ordinance, which forbids vessels anchoring in the river within a certain distance of ferry-slips, implies that the Oneota had a right to pursue the track she was in without regard to vessels in the situation of this schooner. I cannot agree to either of these positions.

In the first place, the schooner had a right to run out her course as near to the New York side as was practicable, leaving at the time sufficient room to enable her to tack about without danger of getting on shore; and the ferry-boat was bound to know that this was not only her right but her duty and to take the proper steps to pass her in safety. She had no right to make the track she was in the limit of the channel, and require the schooner to tack about when within a proper distance of that line, and thus shorten her course as she was beating down the river. In the next place, the city ordinance does not purport to regulate the navigation of the river; and, if it did, it would, so far as respects any such regulation, be a nullity, the municipal authorities of the city possessing no such power. Consequently, neither of the exceptions attempted to be set up in this case, in order to dispense with the observance of the admitted general nautical rule, has any foundation.

I have, heretofore, had occasion to observe, in these collision cases, that a large portion of them occur in consequence of a departure, by one of the vessels, from the established general rule of navigation; and, as a matter of course, such departure is sought to be vindicated by setting it up as an exception to the rule. It was but the other day I decided a case in which a collision had occurred on this river, a short distance above the place of the present one, in consequence of a supposed usage that the ascending steamer was entitled to the New York side, and to the benefit of the slack water there, and that the descending boat was required to keep out in the middle of the river. Laboring under this misapprehension, as the two boats approached nearly on a line, the master of the ascending boat, instead of porting his helm and taking the right, according to the established rule, starboarded it, and the collision was the consequence. The Niagara [Case No. 10,220]. Before a master can venture, with any

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

prudence, upon an exception to the general rule of navigation, he should be first well satisfied that it has foundation in law; and it will be safe for him always to act upon the assumption, that any exception that the courts can properly recognize and approve, will be one so universally known and acquiesced in by persons engaged in the navigation, that it cannot at any time be a matter of serious dispute. No master can make an exception for himself. The law alone can make it, or a usage so universal, and of such long continuance, as to have become a law of the seas. Courts of admiralty lean against these exceptions; and it would be well for those engaged in navigation to remember this principle. Such exceptions embarrass the navigation of vessels, unless they are as clear and well defined as the general rule itself, and lead to most of the marine disasters that occur.

The case in hand is one among the many instances that have been before this court. If the master of the ferry-boat had not been misled by the supposed exception to the general rule, he would have found no difficulty in clearing the schooner. The river is between one-half and three-quarters of a mile wide where the collision occurred, and was open to him. As the schooner was on her larboard tack, and in a line crossing his track as she approached the New York shore, and, as he should have seen in time that there would be danger if the Oneota kept her course, he should have ported his helm, and passed the schooner's stern, instead of attempting to pass her bow. This would have avoided all danger.

There is another difficulty the ferry-boat has to encounter in this case. By the law of New York, passed April 12th, 1848, entitled, "An act in relation to the navigation of the East river by steamboats," vessels navigating this part of the East river, up or down, are required to keep in the middle of it. This boat in her trips runs back and forth lengthwise of the river, from Peck slip to Williamsburgh, a distance of more than a mile. I have had occasion to apply this rule of navigation, during this term, in the case of the steamboat Worcester. The Bay State [Id. 1,149]. The boats of this ferry fall within this law, and are bound to conform to it. It is quite as applicable to them, for the distance they run, as to any other vessel navigating these waters.

I am satisfied, therefore, that the decree below was erroneous and must be reversed.

Case No. 4,274.

The EDDINGTON.

[The case reported under above title in 9 Hunt, Mer. Mag. 173, is the same as Case No. 2,786.]

EDDS (MICKUM v.). See Case No. 9,531.

Case No. 4,275.

EDDS v. WATERS.

[4 Cranch, C. C. 170.][1]

Circuit Court, District of Columbia. May Term, 1831.

SLANDER—ACTIONABLE WORDS—DEMURRER TO DECLARATION.

Upon a demurrer to a declaration in slander, if any of the words are actionable the judgment must be for the plaintiff.

In slander, the defendant demurred to the whole declaration, which consisted of one count only, containing three distinct charges: 1st, that the plaintiff was a rogue, thief, and murderer; 2d, that he was a rogue; and, 3d, that as keeper of the Georgetown penitentiary he suffered a negro-buyer to escape for a bribe.

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

CRANCH, Chief Judge. The defendant, having demurred generally to the whole declaration, consisting of a single count containing three distinct charges, if any one of them is actionable, the plaintiff must have judgment; for if the defendant wished to prevent the plaintiff from recovering damages for the words not actionable, he should have demurred to so much of the declaration as charges him with speaking those words.

But having, by his demurrer, admitted that he spoke all the words charged in the declaration, and some of them being actionable, the plaintiff must have judgment for the whole.

Case No. 4,276.

EDDY v. BADGER et al.

[8 Biss. 238;[2] 6 Reporter, 194; 10 Chi. Leg. News, 323; 24 Int. Rev. Rec. 212.]

Circuit Court, N. D. Illinois. June 18, 1878.

LOAN OF MONEY—COMMISSION—USURY.

The fact that the borrower of money pays commissions to the loan broker in addition to the lawful rate of interest to be paid the lender, does not make the contract of lending usurious, unless it appears that the claim for commissions was but a device to evade the usury laws.

In equity. The facts in this case were briefly as follows: A. C. Badger and wife, on November 1, 1869, executed a mortgage to James Eddy, of Rhode Island, for the sum of $30,000, payable in four years, with interest at ten per cent., payable half yearly, for which coupons were made. Subsequently a conveyance was made by Badger and wife to the defendant, Leiter. This was a suit by Eddy to foreclose his mortgage. Leiter, to save his land from the foreclosure, interposed as a defense against complainant's demand, that there was an usurious

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

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

agreement for interest, in violation of the laws of Illinois, whereby all interest paid, and to which the complainant might otherwise be entitled, had been forfeited, and should go in reduction of principal.

Herbert, Quick & Miller, for complainant.
John H. Thompson, for defendants.

HARLAN, Circuit Justice (orally, after stating the facts). Waiving any consideration of the question, whether or not Leiter can raise that point in this case, and assuming that he may do so, I have been unable to concur in the views presented so forcibly by the counsel for defendant. The weight of the evidence is that Mr. Badger himself initiated the movement to obtain this loan. Certain it is that Mr. Seelye, who passed between the borrower and lender, had not, theretofore, represented Mr. Eddy in any like business. The transaction was just this: Badger applied to procure a loan of $30,000; Eddy agreed to loan that amount at ten per cent.; nothing was said by Eddy to the effect that Seelye was to be paid commissions, as a condition of the loan. I find no fact or circumstance in the case, showing that any obligation rested upon Eddy to compensate Seelye for effecting the loan. After the loan was completed, or, perhaps, at the time it was consummated, the question of commissions was raised between Seelye and Badger, and Badger finally paid him $750 for his commission. Badger did not claim that Eddy was under obligation to pay commissions.

The question in the case is whether the payment of that $750 commissions by Badger to Seelye is to be regarded as interest accepted or received by the lender, thereby rendering the contract usurious. I am unable, from the testimony, to come to any other conclusion than that Badger was bound to Seelye for the commissions. But whether he was bound or not, it was no part of the contract or understanding between the lender and borrower that Seelye was to receive commissions for securing the loan; consequently the lender is not affected by the arrangement between Seelye and Badger, whereby the latter paid commissions to the former. All the cases referred to by counsel for the defendant are consistent with this view. I have been referred to no case which certainly establishes a contrary doctrine. The inquiry in all the adjudged cases is, whether the particular arrangement, alleged to be tainted by usury, was a device to evade the usury laws.

In each case cited by defendant, some fact or circumstance is found which justifies the conclusion that the agreement between the parties was a mere device to evade the usury laws. There is absolutely nothing in this case to show that the payment of the commissions to Seelye by Badger was either a part of the contract or was imposed by the lender as a condition of the loan, except the bare fact that the person through whom the loan was secured, received these commissions from the borrower. I am not able upon those facts to come to the conclusion that there was a device to evade the usury laws. I know of no reason why a man, desiring to borrow money, may not himself say to an individual, "Get me a loan for the amount I want, and I will pay you a commission." If that be the transaction, and the whole transaction, the fact that the borrower pays to that person a commission for his services—not by virtue of any understanding or arrangement with the lender—is insufficient to sustain the charge of usury.

The case which learned counsel for defendant cited, decided by Judge Dillon, reported in the Central Law Journal, of May 26, 1876 (Moon v. Union Mutual Life Ins. Co. [Case No. 9,777]), is not at all in conflict with this view. On the contrary, I do not hesitate to say that the decision of Judge Dillon was exactly right. In the report of that case it appears that McMechan, a merchant in Nebraska City, being financially embarrassed, applied to the Union Mutual Life Insurance Company of Maine, through J. F. Kinney, for a loan of twelve thousand dollars. Pending the negotiations therefor, it was learned that that sum would not be sufficient to accomplish the desired object, and it was therefore proposed to increase the loan to twenty thousand dollars. The conditions upon which this loan was made, were, that McMechan should take and pay for $36,000 of life insurance on the $12,000 portion of the loan, and for $40,000 insurance upon the $8,000 portion of the loan—the usual proportion, $5 of insurance for $1 of money loaned, being reduced in consideration of the large amount. There was, says the report of the case, a further condition imposed by the lender, that the borrower should pay to Kinney, the general agent of the insurance company for Nebraska, three per cent. commissions upon the amount of loan for obtaining the loan, and the additional sum of $500 for services rendered in the case. From the sum to be advanced, there was deducted $1,456 for life insurance, premiums, etc.

Now, Judge Dillon held that that contract was usurious. "I find," says he, "these three mortgages are usurious. This result I reach upon the special circumstances of this case—placing it largely upon the ground that the requiring of such a large and extraordinary amount of life insurance, not only upon the life of the borrower, but upon that of others, as a condition of making the loan, is a direct loss to the borrower and in violation of the purpose and policy of the usury laws."

It is stated, in the report of the case, that in the accounts between the parties, the three per cent. commission was disallowed by the court. I am not sure that I would not have gone a little further in that case than Judge Dillon did. If there was any proof in this

case, if it could be fairly inferred from all the evidence that it was one of the conditions of the loan imposed, directly or indirectly, by the lender, that the borrower should pay commissions, the contract would then be usurious. It should then be fairly regarded as a mere device to evade the statutes upon usury.

But as already stated, there is no evidence to that effect. It is the naked case of a lending of $30,000, without any obligation, understanding or contract, on the part of the lender, that the borrower was to pay commissions to Seelye. The payment of commissions to him was the act of the borrower alone, uninfluenced by any suggestion from the lender. My conclusion, therefore, is, that the master's report should be sustained, and a decree rendered for the complainant.

EDDY (BYAM v.). See Case No. 2,263.

EDDY (DENNIS v.). See Cases Nos. 3,793–3,795.

EDDY (RUGGLES v.). See Cases Nos. 12,116–12,118.

EDDY (STEBBINS v.). See Case No. 13,342.

EDDY (UNITED STATES v.). See Case No. 15,024.

Case No. 4,277.

EDDY STREET IRON FOUNDRY v. HAMPDEN STOCK & MUT. FIRE INS. CO.

[1 Cliff. 300.] [1]

Circuit Court, D. Rhode Island. June Term, 1859.

FIRE INSURANCE—APPLICATION PART OF POLICY—WARRANTIES — ANSWERS OF APPLICANT — DESCRIPTION OF PROPERTY INSURED.

1. When a policy of insurance contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and all the material statements in the answers of the applicant are thereby changed from representations into warranties.

2. A warranty is a stipulation forming a part of the contract, and is construed as a condition. Warranties, unless strictly complied with, will invalidate the insurance, whether they are or not material to the risk.

[Cited in Hearn v. Equitable Safety Ins. Co., Case No. 6,300.]

3. Where property described as contained in a certain building was insured, that description being made a part of the contract, is material, and the insured cannot recover for the loss by fire of such property while in a building other than the one thus described.

At law. This was an action of assumpsit upon a policy of insurance. The suit was originally commenced in the state court, but on motion of the corporation defendants was removed to this court, under the twelfth section of the judiciary act. From the pleadings and evidence, it appeared that insurance was effected by Arnold C. Hawes, A. B. Hawes, and Ira N. Stanley, doing business under the firm name of Hawes and Stanley, and that the policy was issued to them in their firm name.

The persons comprising the firm were interested in certain tools, stock, flasks, cupola, fixtures, and patterns, contained in the rear of No. 82 Eddy street, in Providence, to the value of eight thousand dollars, and were so interested until they were incorporated under the name of the Eddy Street Iron Foundry, and then under the corporate name were so interested until the said property was destroyed by fire. The first policy to the firm was taken out on the 30th of December, 1853, and was for fifteen hundred dollars for one year. At the expiration of the year it was renewed for another, that is, till December 30, 1855, at which time the plaintiffs had become incorporated. The property was destroyed by fire on the 5th of January, 1856. After the incorporation the policy was renewed in the name of the treasurer of the company, for a year from December, 1855.

In the application of the policy, which was in writing, the patterns, cupola, and furnace were stated to be in a building in the rear of No. 82 Eddy street, used by the applicants as a furnace house.

By the terms of the policy the application was made a part of that instrument. When destroyed by fire in January, 1856, the property was not in the furnace-house, but in a store-house, which could not properly be described as standing in the rear of 82 Eddy street, but in the rear of 82 and 84 on that street. At the November term, 1857, the parties went to trial upon the general issue, and under the instructions of the court the jury returned a verdict for the defendants, whereupon the plaintiffs moved that the verdict be set aside, and a new trial granted, for the following reasons:

1. Because, in the construction of the several instruments which contained the evidence of the contract of insurance in said cause, the court were requested to rule that "warranties are only to be found in answer to special interrogatories"; which ruling the court refused to give.

2. Because the court were requested to rule upon the instruments aforesaid, that all else which might be found in them, except in answer to special interrogatories, and responsive to such interrogatories, concerning the property to be insured and its situation, are representations merely, and that it is a question of fact for the jury to say whether or not such representations were concerning matters material to the risk aforesaid by the defendants; which ruling and instruction to the jury the court refused to give.

3. Because the court were requested to rule and to instruct the jury, that the omission to state the description of the building containing the property burnt, and in which the property described as the subject of in-

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

surance was stored, while not in use, in the furnace building, if such an omission was found to exist, was an omission to state a fact which might or might not be material to the risk, and that the question of such materiality was one of fact to be left to, and ascertained by, the jury; and that although the description in the representation may differ very considerably from the actual state of the property insured, if such variation were not fraudulently intended, and did not in fact affect the rate of insurance, or change the actual risk, it can scarcely be deemed material; which ruling and instruction the court refused to give.

4. Because the court were requested to rule and to instruct the jury, that in special risks upon personal property which are the matters of special contract, the question of materiality is always a fact for the jury; and it is for them to say whether the omission to describe the building, if such omission existed, was a misrepresentation or concealment which affected the risk, and thereby avoided the policy; which ruling and instruction the court refused to give.

T. A. Jenckes, for plaintiffs.
C. S. Bradley, for defendants.

CLIFFORD, Circuit Justice. None of the instructions given by the court are the subject of complaint, nor are they reported on the motion for a new trial. Under the circumstances, it must be assumed that they were correct. Had the instructions given been reported, there would be much less difficulty in determining whether the requests offered by the plaintiffs were properly refused. Without the means of comparing the one with the other, some reference to the facts of the case becomes indispensable, in order that the precise nature of the questions presented may be clearly understood. No change was made in the terms and conditions of the policy, or in the description of the property insured, from the time the policy was made and issued, to the time of the loss. When the period for which it was first given had expired, it was extended without any alteration of its terms, and upon the express condition that the application upon which the policy was originally predicated should continue valid and in force. These remarks apply to the second extension as well as the first, so that the rights of the parties in this controversy depend upon the true construction of the policy when taken in connection with the original application. Some discrepancy exists as to the articles of property insured, and as to the distribution of the amount of the insurance between the policy and the application on which it is founded; but that discrepancy does not affect any question now presented for decision. Insurance was in fact made to the amount of fifteen hundred dollars, as follows: one hundred and fifty dollars, on stock manufactured and in process; seven hundred and fifty dollars, on tools and flasks; six hundred dollars, on fixtures, cupola, and patterns, situated in rear of 82 Eddy street, Providence. At the argument it was agreed that the loss, consisting chiefly of patterns, was confined to property contained in a storehouse situated on the premises of the plaintiffs, and that the property was not contained in the furnace building, situated in rear of No. 82 Eddy street. On both sides, it was conceded that the furnace building, specified in the application, is situated directly in the rear of No. 82; and it appeared at the time, that the storehouse which contained the property lost was separate from the furnace building, and would be well described as situated in rear of Nos. 82 and 84, on the same street, and would not be properly described as situated in rear of No. 82. Nothing can be more certain than the proposition that the policy, under the circumstances of this case, must be read in connection with the application which forms a part of it, and when so read, it is equally clear that, by its true construction, it describes the property insured as all contained in the furnace building. That conclusion rests upon the express statements of the answers to the second and third interrogatories in the application, and upon the admitted fact that the true description of the furnace building corresponds to the one circumstantially given in the answer to the third interrogatory. From the course of the argument, it was also conceded that the situation of the furnace building is correctly described in the policy as in rear of No. 82, and it was not controverted that the description of No. 82, as given in the answer to the second interrogatory of the application, is correct. By the terms of the policy, the insurance was predicated upon the application, which is expressly declared therein to be a part of the policy. Twelve interrogatories were propounded to the applicants, all of which were duly answered. Of these, three only of the questions and answers need be given: Interrogatory One. State the character and kind of property to be insured. To which the applicants answered as follows: Cupola, furnace, stocks, tools, fixtures, flasks, engines, and patterns. Interrogatory Two. Where is it situated? Answer. In the rear of new stone and brick building on Eddy street, Providence. Interrogatory Three. Of what materials is the building constructed; age, size, height, and condition, and for what purpose occupied, and by whom? Answer. Brick; attic, wood; slate roof; new, one story high, no floor; furnace by applicants. Those questions and answers, when taken in connection with the terms of the policy, make it clear, we think, that the property insured was understood by the parties to be contained in the furnace building. When parties have deliberately put their engagement into writing, in such

terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, says Mr. Greenleaf, that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and parol evidence is not admissible to vary, enlarge, or contradict the terms of such an instrument. Construction can go no further, even in cases of doubt, than to ascertain the real intention of the parties; and that intention must be collected from the language employed as applied to the subject-matter and the surrounding circumstances. Every writing undoubtedly where the language is doubtful may be read by the light of the surrounding circumstances, in order more perfectly to understand the true intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. 1 Greenl. Ev. §§ 275–277. Every written instrument, as a general rule, must be construed by the court, and not by the jury. That rule is so firmly established, that it would be quite out of place to cite authorities in its support. It has certain exceptions and qualifications, but none of them have any application to the present case.

Having ascertained the facts of the case, so far as necessary in this investigation, we will now proceed more immediately to the inquiry, whether the instructions requested were properly refused.

Certain principles in the law of fire insurance have become too well settled to be any longer the subject of dispute. Parties to a policy of insurance may agree as to the materiality of the statements of the applicant, and such agreements, if made a part of the contract, will be respected by courts of justice. Accordingly, when the policy contains a clause declaring that the application forms a part of the policy, it thereby becomes a part of the contract, and all the material statements in the answers of the applicant are thereby changed from representations into warranties. In such a case the application is to be taken as a part of the contract of insurance in the same manner as it would be if incorporated into the policy itself. Battles v. York Co. Mut. Fire Ins. Co., 41 Me. 208; Burritt v. Saratoga Co. Mut. Fire Ins. Co., 5 Hill, 188; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio, 82; Smith v. Bowditch Mut. F. Ins. Co., 6 Cush. 449; Sillem v. Thornton, 26 Eng. Law. & Eq. 238; Hayward v. New England Mut. F. Ins. Co., 10 Cush. 444; Wilbur v. Bowditch Mut. F. Ins. Co., Id. 488; Wellcome v. People's Equitable Mut. F. Ins. Co., 2 Gray, 480.

Representations are collateral statements of facts incidental to the contract; but a warranty is a stipulation forming a part of the contract, and is construed as a condition. All statements contained in the policy itself are prima facie warranties, while extraneous statements are in general regarded merely as representations, even when made formally in writing, and in answer to written or printed questions propounded by the insurers. Such statements, when not introduced into the policy, are ordinarily regarded as collateral to the contract, but they may undoubtedly, according to all the authorities, be incorporated with it by agreement, and then they cease to be mere representations, and become warranties. Mere reference to a representation, in a policy of insurance, will not necessarily make it a part of the contract, or render it absolutely binding on the insured; for the intention may, and sometimes will, be presumed to be, to put its existence as a representation beyond question, and not to give it another and more unfavorable character. Gates v. Madison Co. Mut. Ins. Co., 3 Barb. 73, 2 Comst. [2 N. Y.] 43, and 1 Seld. [5 N. Y.] 469. But when the representations of the insured are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties, and invalidate the insurance, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer. Williams v. New England Mut. Fire Ins. Co., 31 Me. 219; Jennings v. Chenango Co. Mut. Ins. Co., 2 Denio, 75; Murdock v. Chenango Co. Mut. Ins. Co., 2 Comst. [2 N. Y.] 210; Lee v. Howard Ins. Co., 3 Gray, 592. Even when the reference to the statements of the insured is not such as to render them warranties, as when they are expressly referred to as representations, it will still be prima facie, if not conclusive, evidence of their materiality to the risk, and render any misrepresentation or concealment in making them fatal to the right of recovery against the insurer. Houghton v. Manufacturers' Ins. Co., 8 Metc. [Mass.] 114; Burritt v. Saratoga Co. Mut. Ins. Co., 5 Hill, 82; Vose v. Eagle Ins. Co., 6 Cush. 42; Davenport v. New England Ins. Co., Id. 340; Glendale Woollen Co. v. Protection Ins. Co., 21 Conn. 19.

Evidence to show a misrepresentation or a concealment must be submitted to the jury, and in general the question whether the misrepresentation or concealment was material or not is an inquiry of fact, and not of law. Livingston v. Delafield, 1 Johns. 522; Walden v. New York Firemen's Ins. Co., 12 Johns. 138.

None of these principles, however, precisely touch the questions involved in the motion. What we have to determine in this case is, the construction of the contract, which in point of fact has nothing to do with any question of misrepresentation or concealment. By the terms of the policy, when read in connection with the application which forms a part of the policy, it appears that certain property therein described as contained in a given building, was insured. That building was situated on the premises

of the plaintiffs, and not only contained property of the description mentioned in the policy, but was owned and occupied by the plaintiffs for the purposes described in the application. Place and situation, therefore, as given in the application, constituted an essential element in the description of the property insured; and as that description is a part of the contract, it was necessarily material, for it was the property so described, and no other, that was included in the risk. No one, we presume, will contend that all the property of that class owned by the plaintiffs, without regard to place or situation, was included in the policy. Such a construction of the contract would be both unjust and unreasonable, and therefore cannot be adopted. If it be admitted that the terms of the contract are not broad enough to include all such property of the plaintiffs, then there is no other sensible construction which can be adopted consistently with the language employed, except the one which restricts its meaning to the property contained in the furnace building as described in the application. To suppose that the policy covered all such property of the description mentioned as was situated on the premises of the plaintiffs, would be to make a new contract for the parties, instead of expounding the one they have made for themselves, as there is not a word either in the policy or application which authorizes any such construction. Having come to this conclusion as to the construction of the contract, it necessarily follows that the several prayers for instruction were properly refused.

Motion overruled.

EDELIN (PATTY v.). See Case No. 10,840.

Case No. 4,278.

The EDGAR BAXTER.

[8 Ben. 162.][1]

District Court, S. D. New York. June, 1875.

COLLISION AT A PIER—TOWBOAT AND TOW—PILOT.

The steam propeller E. B., having a vessel alongside, while bringing her to a pier, ran her against a steam-tug which was lying at the pier, and did damage. The motions of the E. B. were directed by a pilot in the employ of, and on board and in charge of, the vessel in tow. *Held*, that the E. B. was not liable for the damages.

This was a libel in admiralty by the owners of the steam-tug G. H. Notter, to recover damages for a collision. The libel alleged that the Notter was lying at a pier in the East river, when the Edgar Baxter came there with a schooner in tow alongside, to put her in at the pier; and that the Baxter negligently ran the schooner against the Notter. The answer of the Baxter alleged that the Notter was herself in fault in the matter, and, moreover, that all the movements of the Baxter were directed by a pilot on board of, and in the employ of and in charge of, the vessel which she had in tow.

Beebe, Donohue & Cooke, for libellants.

Butler, Stillman & Hubbard, for respondents.

BLATCHFORD, District Judge. The evidence shows that the movements of the propeller were under the direction of a pilot who was on board of, and belonged to, and was in the employ of, the schooner. The tug furnished only the motive power, while the guidance of the two vessels, considered as one in their relations to other vessels, the schooner being lashed alongside of the tug, was under the direction of the schooner, through such pilot. Under those circumstances, the tug is not liable for the damage complained of in this case, and the libel must be dismissed, with costs.

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

Case No. 4,279.

EDGARTON v. BRECK et al.

[5 Ban. & A. 42.][1]

Circuit Court, D. Massachusetts. Dec., 1879.

PATENTS — NECESSARY PARTIES TO SUITS FOR INFRINGEMENT—REMEDY FOR MISJOINDER OF PARTIES.

1. All parties having title to a patent are necessary parties to a suit for its infringement. If the title is undisputed, they may all be joined as complainants, but, if disputed, those whose title is questioned should be made defendants.

2. If parties who have no title to the patent are joined as complainants, the remedy is not a dismissal of the bill, but merely of their names as parties to it.

3. The fourth and fifth claims of reissued letters patent, number 2,994, dated June 16th, 1868, granted to George Whitcomb for an improvement in horse-rakes *held* to be infringed by the defendants.

[Cited in Edgarton v. Frust & Bradley Manuf'g Co., 9 Fed. 452; Green v. City of Lynn, 55 Fed. 519.]

Bill in equity [by Charles A. Edgarton, administrator, and others, against Charles H. B. Breck and others] for infringement of the reissued patent No. 2,994, dated June 16th, 1868, granted to George Whitcomb for an improvement in horse-rakes. The original patent was dated October 5th, 1858 [No. 21,712], and was extended for seven years in 1872, to October 5th, 1879. It expired after this suit was brought.

On May 31st, 1858, Whitcomb, reciting that he had invented a new and improved horse-rake for which he was about to apply for a patent, and that Elbert White had agreed to purchase "one undivided half of all the

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

right, title and interest which I have or may have in consequence of the grant of letters patent therefor," granted to said White the full and exclusive right to one-half of all the improvements, as described in the specification already prepared for the patent office, to be held and enjoyed "to the full end of the term for which said letters patent may be granted as fully as the same would have been held and enjoyed by me, if this assignment and sale had not been made." In February, 1864, Whitcomb and White jointly granted to L. G. Kniffen all their "right, title and interest in and to said invention, with full power to make, construct, use and vend to others to be used the said improved horse hay-rake for, to and in the state of Massachusetts," and some other states, to hold during the continuance of said patent. Kniffen afterwards conveyed all his interest to Alzirus Brown, one of the plaintiffs.

The patentee assumed that the grants before mentioned were for the term of the original patent only, and he granted to said Alzirus Brown one-third of his interest in the extended term, and one-third to said Elbert White; and these three, Whitcomb, Brown and White, united in conveying one-fourth interest to Thomas H. Dodge. The three persons last named and Whitcomb's administrator were the complainants in this suit. The answer set up that the assignments by Whitcomb to White, and by these two to Kniffen, and by Kniffen to Brown, conveyed the exclusive interest for Massachusetts and the other territory mentioned therein for the extended, as well as the original term of the patent, and that for this reason the complainant Brown was the only plaintiff who had any interest in the suit. The defendants gave a very full history of the art, as shown by the patents which had been granted before 1858, and upon the facts thus proved, denied the validity of the Whitcomb patent, and that the defendants infringed it.

Thos. H. Dodge, for complainants.

W. B. H. Dowse and Alexander Selkirk, for defendants.

LOWELL, District Judge. I do not conceive it to be my duty to decide whether the assignments of Whitcomb to White, and of Whitcomb and White through Kniffen to Brown, conveyed, in advance, an interest in the extended term of the patent, or not. The parties interested treated them as conveying only the original term, and when the extension was dealt with, the plaintiff Brown, who is now said by the defendants to be the sole owner for a large part of New England, accepted a deed of one-third of the whole interest from the original patentee, White accepted another third, and the three conveyed one-fourth part of the whole patent to Dodge. Under these circumstances, the complainant Brown cannot set up that he is the sole owner of the patent for Massachusetts, nor has he asserted such a pretension. The defendants need not be solicitous for Brown's interests. They are safe in any event, since Brown is a plaintiff, and whatever his title may be, his whole damages will be forever disposed of by the decree. Dodge is a proper party plaintiff under any construction of the deeds, because he claims title under Brown. If the other complainants, Whitcomb and White, had no scintilla of interest, the remedy would not be a dismissal of the bill, but merely of their names as parties to it. But, since these persons insist that they have a title, and the records of the patent office show it, they are necessary parties, either as plaintiffs or defendants; and if they had not been joined, the present defendants might well have objected; and, since Brown and Dodge admit their title, they are proper plaintiffs; if there had been a dispute between them on this point, they should have been made defendants. The bill, then, is not objectionable in respect to the parties plaintiff.

In Brown v. Whittemore [Case No. 2,033], the second and fourth claims of this reissued patent were sustained by this court. In the present case, a large number of patents have been referred to, some of which were not before us at the former trial. The most important of these, that granted to Nathan Martz, was set up in the answer in Brown v. Whittemore, but how much it was relied upon in argument I do not recollect. My impression is that Whitcomb was proved to have preceded Martz as an inventor in all respects, and the only real question was whether plaintiff had not used or sold his invention for a longer time than the law permits. Whitcomb has died, and there is no proof in this case that his invention was earlier than his application; so that we must compare the two patents, assuming Martz to be the first inventor of what he describes. The record makes it evident that there were many inventors in this class of machines, and that the various parts of a horse-rake, such as the wheels, thills, rakehead and teeth, with levers to raise and lower the teeth, had been combined in many ways. The plaintiffs' rake appeared to us in the former case, and still appears to me, to be a decided improvement upon the older forms. It had greater capacity and a more useful operation, depending upon the mode in which the rakehead was hinged, and that in which it was raised and lowered, and the relative position of teeth to the line of the wheels. Martz's drawings undoubtedly show a rake resembling Whitcomb's; but its organization is such that it was not capable of doing such a variety of work, if indeed it would work at all. Its mode of holding the teeth down to the work was by coiled springs, which must have interfered seriously with the full oscillation of the rakehead, and which could not possibly be adapted, in the

same rake, to do work upon different qualities of hay and grain; if the springs were strong enough for one sort of work, they would be too strong or too weak for other sorts. It is plain, therefore, that Martz does not anticipate all the claims of the reissued patent. It is admitted by the plaintiffs that the first and third claims, which are for the combination and arrangement of the rakehead and axle, and of rakehead, shafts, hinges and axle, must be narrowly construed in order to be valid, and are not infringed.

The second claim is for "the combination and relative arrangement of the hinged rakehead with the supporting axle and carrying wheels, substantially as shown and described, whereby the head is supported above the rear upper edge of the axle, as shown, and the lower ends of the teeth, when gathering the hay, occupy positions in rear of the head of the wheels, and forward of a vertical plane on a line with the rear edge of the wheels, substantially as shown in the accompanying drawings." The defendants attach the upper ends of their tines or teeth to a rod, stretched parallel with and behind the axle; the rod turns in sockets and carries the teeth upward when the load is dumped; the teeth are attached firmly to the rod only at their ends, and have a little vertical play which enables them to avoid slight inequalities in the ground or other obstructions; at some distance behind and a little above this rod, and firmly attached to it in two or three places, is a bar with staples on its under side, through which the teeth are passed, and which are large enough not to interfere with the play of the teeth above mentioned. One of the disputed questions is whether this rod and bar together make a rakehead. The defendants show that constructions like this were known before Whitcomb's patent was issued, one of which is found in the Randall Pratt patent; and there is evidence that the parts are called in the trade a thimble rod and a staple bar respectively; and that a bar with the teeth firmly attached or coiled round it, so that they must move in all directions with it, is called a rakehead. Whether such a discrimination was made at the date of Whitcomb's patent, I do not know; nor is it important, because he was describing a certain thing which is plainly shown in his description and drawings, and the name he gives it is of no consequence. It seems to me that the rod and bar of the defendants' rake together perform the functions of the plaintiffs' rakehead. Martz's device, which the defendants admit to be a rakehead, was divided into two bars attached to each other, and working together to hold, raise and lower the teeth. It is an old form of rakehead which the defendants have substituted for that of the claim. If better in some respects, still it was a known substitute.

The difficulty with the second claim of the reissue, as applied to this case, is that the patentee has seen fit, for some reason, to describe his rakehead as "supported above the upper edge of the axle," and the defendants' rakehead is on a line with the axle. It may be that this limitation was unnecessary; but it is found in the second claim, and I do not feel at liberty to disregard it. The defendants' machine, therefore, is not within this claim.

The fourth and fifth claims appear to me to be infringed. The defendants use the hand and foot levers and their connections for holding the teeth down and for raising them, though in a somewhat different form. They have added an ingenious piece of mechanism, by which the levers are connected with the whiffle-tree, and by this means the horse in walking draws up the teeth when the load is to be discharged; but I understand the witnesses on both sides to say that this additional mechanism cannot be relied on to do all that is necessary at all times, but must often, if not usually, be helped out at some point by the action of the foot or hand, or both. It does not enable the defendants to dispense, wholly, with any part of the plaintiffs' combinations; and I understand from the record that they do, in fact, use them to a certain extent.

Decree for an account.

[NOTE. For another case involving this patent, see note to Brown v. Whittemore, Case No. 2,033.]

EDGELL, In re. See Case No. 6,285.

Case No. 4,280.

EDGERTON et al. v. GILPIN.

[3 Woods, 277.][1]

Circuit Court, E. D. Texas. May Term, 1878.

REMOVAL OF CAUSES — CITIZENSHIP OF FORMAL AND UNNECESSARY PARTIES — LONG ACQUIESCENCE IN REMOVAL—IRREGULARITIES.

1. The fact that some of the defendants in a cause pending in a state court are citizens of the same state with the plaintiff, is not an obstacle to the removal of the cause to the federal court, if such defendants are merely formal and not necessary parties.

2. Where a cause had been removed from a state court to a federal court and had been pending and proceeding there, the removal acquiesced in for a number of years, and all objection to the jurisdiction of the federal court had been obviated by amendment: *Held*, that the cause would not be remanded to the state court on account of any irregularities in its removal.

[Cited in M'Henry v. New York, P. & O. R. Co., 25 Fed. 68.]

Heard upon motion to remand cause to the state court from which it had been removed.

T. N. Waul, for the motion.

E. J. Davis, contra.

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

BRADLEY, Circuit Justice. This case was commenced in the state district court of Nueces county, in December, 1867, the complainants being three business firms of New York, and the defendants being a business firm in Nueces county, Texas. The suit was an equity suit, brought to procure the sale of certain real estate in Nueces county, and certain claims against different parties, which had been assigned by the defendants to one Charles Russell, as trustee, to secure to the plaintiffs, and to one other business firm of New York, certain debts due to them by the defendants. The plaintiffs prayed for a sale of the property to satisfy these debts. The three plaintiff firms were L. Edgerton & Doane, Gardner, Green & Co., and Reid, Sprague & Co.; the other firm interested with them in the same trust was Lane, Banks & Co. The defendant firm was F. Belden & Co., to whom was added as defendants, Russell the trustee, and the firm of Lane, Banks & Co., who did not join in the suit. The latter firm was added merely because they had an interest in the property sought to be sold. They were not served with process except by publishing a citation, and they never appeared in the cause. Russell did not appear, having, as alleged, emigrated to Mexico, and has since deceased. The real defendants, having any interest in the cause opposed to the plaintiffs, were the firm of F. Belden & Co., consisting of F. Belden, then deceased, and H. A. Gilpin, who was surviving partner of Belden, and administrator of his estate, appointed thereto by the county court of Nueces county. Gilpin was duly served with process, and defended the suit. Mauricia A. Belden, widow of F. Belden, was subsequently made a party.

After various proceedings in the case, the plaintiffs, in October, 1869, applied to remove the cause into the circuit court of the United States for the eastern district of Texas, on the ground that from prejudice and local influence they would not be able to obtain justice in the state district court. This application was made under the act of March 2, 1867 [14 Stat. 558], amendatory of the act of July 27, 1866 [14 Stat. 306], relating to removal of causes. The application for removal was first made by motion, supported by an affidavit, on the 16th of October, 1869. The motion, as filed, alleged that the plaintiffs were citizens and residents of the state of New York. The affidavit stated that they were of the city and state of New York, and that they had reason to believe that from prejudice and local influence they would not be able to obtain justice in the state court.

The motion was opposed by the defendants by exceptions filed on the 19th of October, 1869, on the ground, first, that Lane, Banks & Co., of New York, were defendants; secondly, that the acts of March 2d, 1867, and of July 27th, 1866, had not been complied with; thirdly, that the plaintiffs had not filed a petition, as required by the act, etc. The next day, the 20th of October, 1869, the plaintiffs filed a regular petition for the removal of the cause, alleging that they were citizens of the United States, and of the state of New York, and that the defendants were citizens of the state of Texas; that the matter in controversy exceeded five hundred dollars, and they referred to their previous affidavit, motion and bond already filed, and prayed for a removal of the cause. This petition was not verified by affidavit, but was only signed by the attorneys of the plaintiffs. But its statements as to the citizenship of the parties have never been denied. This petition was not acted on by the court for more than a year, during which time further proceedings were had in the cause, namely, the appointment of a receiver to take charge of a portion of the property, who, however, was subsequently discharged. The application for removing the cause was again presented to the court on the 25th of November, 1870, and was then heard, and an order of removal was made by the court, and the cause was transferred to this court, and has ever since progressed here.

After the removal of the cause, the plaintiffs, to avoid the objection to the jurisdiction of this court, arising from making the firm of Lane, Banks & Co. defendants, dismissed their bill as to them. Subsequently, in September, 1877, in order that the pleadings and proceedings might be in conformity to the forms of pleading and proceeding in equity in this court, the plaintiffs filed an amended and supplementary bill, making only the said Gilpin, surviving partner and administrator of F. Belden, and Mauricia, his widow, defendants; and therein alleging the citizenship of themselves and of the defendants, the one of New York, the other of Texas. To this bill the defendants appeared, and filed answers, and the cause has been going on since in this form. Now, after the cause has proceeded for seven or eight years in this court, the defendants move to remand it to the state court for the irregularities before referred to. We have made this statement, as furnishing a better argument than any other that could be made, to show that it would be unjust and oppressive to grant this motion. The parties have acquiesced in the removal for years, and have been proceeding with the litigation of the cause in this court without objection. Every ground of objection to the jurisdiction of this court has been removed. We think the parties are entirely estopped from moving to remand at this stage.

The only point that would have required special consideration at any time is, whether the fact that Lane, Banks & Co. were made defendants in the cause, they being citizens of New York, the same state of which the plaintiffs are citizens, would have precluded

its removal. But they were made defendants nominally, because they did not choose to join the plaintiffs in bringing the suit, not being willing, probably, to incur any costs on the subject. They were not necessary parties. They could have been cited to prove their claim before the master without being made parties. I do not think that the making of them formal parties changed the character of the suit, as a suit between citizens of New York on one side, and citizens of Texas on the other. They were the only real litigants in the cause. It was really and truly and only a litigation between them, and we should have been inclined to think that the cause was properly removed, at the time it was removed, notwithstanding this objection. But, in view of the course which the cause has taken, we think that, if the objection could have been properly urged, it has ceased to be a ground of objection to the jurisdiction of this court. The motion is overruled.

EDGERTON (WINNEBRENNER v.). See Case No. 17,877.

Case No. 4,281.

The EDITH.

[5 Ben. 144;[1] 3 Chi. Leg. News, 370.]

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

MORTGAGE ON VESSEL PAYABLE IN GOLD—VALIDITY.

1. The owner of two vessels gave a mortgage upon each, to secure the payment of a promissory note for one thousand pounds sterling, lawful money of Great Britain. The vessels being sold in admiralty, the mortgagees applied, on petitions, for the payment of the amounts secured by the mortgages, out of the surplus and remnants of the ships: *Held*, that it was the intention of the parties to the notes and mortgages that the sums secured thereby should be solvable only in gold coin, and that the contracts were adequately expressed to that end in the instruments.

2. Such contracts are as lawful when made since the passage of the legal tender acts by congress, as before.

3. The recovery, therefore, must be for so many dollars in gold and silver coin, as are equivalent, at the rate agreed upon, to the number of pounds sterling expressed in the notes and mortgages, with the agreed interest added.

4. If the surplus and remnants in court consist of money less in value than gold and silver coin, so much of such money must be applied to the satisfaction of the recovery as will purchase the amount of gold and silver coin of the United States, for which the recovery was had.

In admiralty. The ship Edith and the ship Polar Star were sold under decrees in admiralty. Thereupon mortgagees filed petitions against the surplus and remnants in each case, to obtain payment of the amounts secured by the mortgages.

F. F. Marbury, for petitioners.
John Sedgwick, for mortgagor.

BLATCHFORD, District Judge. The claim of the mortgagees in each of these cases is evidenced by a mortgage of the vessel to secure the payment of a promissory note, dated New York, June 18th, 1869, whereby Charles Carow, the mortgagor, promises, twelve months after date, to pay to his own order "one thousand pounds sterling, lawful money of Great Britain, at the Merchants' National Bank in the city of New York, with interest at seven per cent., payable semi-annually." It is agreed by the parties, that the sum of £1,000 sterling, lawful money of Great Britain, is now worth, in New York, $4,850 in the gold coin of the United States, being at the rate of $4 85, in the gold coin of the United States, to the pound sterling, of such lawful money of Great Britain. I have no doubt that it was the intention of the parties to the notes and mortgages, that the sums of money thereby agreed and secured to be paid, should be solvable only in gold coin; that such were their contracts; and that such contracts are adequately expressed to that end, in such instruments executed at the time. Such contracts are as lawful, when made since the passage of the legal tender acts by congress, as they were when made before, and must be carried out according to their purport and intent. As a decree by a court of the United States for the payment of money can be made only for the payment of so many dollars of some species of money that is made lawful money by a statute of the United States, it follows that the recovery in these matters must be for so many dollars in gold and silver coin, lawful money of the United States, as are equivalent to the number of pounds sterling, lawful money of Great Britain, expressed in the notes and mortgages, with the agreed interest added, at the rate of conversion before stated. If the surplus and remnants in court consist of money that is less in value than gold and silver coin of the United States of an equal denomination, so much of such money must be applied to the satisfaction of the recovery, as will purchase the amount of gold and silver coin of the United States for which the recovery is had. These conclusions necessarily follow from the decisions in the cases of Bronson v. Rodes, 7 Wall. [74 U. S.] 229; Butler v. Horwitz, Id. 258, and Forbes v. Murray, in this court [Case No. 4,928].

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

Case No. 4,282.

The EDITH.

[5 Ben. 432;[1] 11 Amer. Law Reg. (N. S.) 214; 6 N. B. R. 449; 15 Int. Rev. Rec. 24.]

District Court, S. D. New York. Jan., 1872.[2]

MARSHALLING ASSETS—DOMESTIC VESSEL—MATERIAL MAN'S LIEN — MORTGAGE ON DIFFERENT SHARES.

1. Surplus and remnants of a ship being in the registry, petitions for payment out of the same were filed by four parties. B. & Co. had furnished repairs to her, to collect which they had taken proceedings under the lien law of the state of New York (Sess. Laws 1862, c. 482), under which the ship, she being a domestic vessel, had been attached, and, a bond having been given to discharge the attachment, they had brought suit on the bond in a state court, which suit was pending. They petitioned for payment of the amount of their claim. C. T. B. & Co. filed a petition for the payment of a mortgage, executed by C., the owner of the ship, on June 18th, 1869, upon one-half of the ship. T. filed a petition as holder of another mortgage, executed by C. on January 11th, 1870, on three-fourths of the ship, for an amount exceeding the whole amount of the surplus and remnants. S. filed a petition, as assignee in bankruptcy of C., the owner. *Held*, that B. & Co. had no lien on the ship herself, and could not be held to have a lien on her proceeds, as against the mortgagees, or the assignee of the owner.

2. One-half of the ship being covered by the mortgage to C. T. B. & Co. the lien of that mortgage must be held to attach to one-half of the proceeds, which one-half must be regarded as made up of two equal funds, one of them being subject to the lien of that mortgage alone, and the other first to the lien of that mortgage, and then to the lien of the mortgage to T.; and that the mortgage to C. T. B. & Co. must be paid out of the first fund, and the rest of that fund must be paid to the assignee, while the second fund and the other half of the surplus must be paid to T. upon his mortgage.

3. A maritime lien does not arise on a contract for materials and supplies furnished to a vessel in her home port, even though such contract be a maritime contract.

4. In respect to such contracts, a state may lawfully create such liens as it deems proper, not amounting to a regulation of commerce, and may enact reasonable regulations for enforcing such liens.

5. All state legislation providing for the enforcement of maritime contracts, in any other manner than by a common-law remedy, infringes on the exclusive jurisdiction of the federal courts, and is unconstitutional.

6. The proceedings taken by B. & Co. under the state lien law were void; and that law gave them no lien on the vessel.

[In admiralty. The facts were these: The ship Edith was sold by order of the court of admiralty for seamen's wages and towing, and the money arising from her sale paid into court, and, after paying the seamen and the owner of the tug their claims, there remained a large surplus in the registry of the court. Several petitions were filed, praying that the surplus and remnants should be duly marshalled and distributed among the petitioners according to their respective maritime liens on the same. The court referred the whole matter to a commissioner to take proof of the matters in the petitions, and to report thereon. This brought before the commissioner the precise question, "which of the claims presented a maritime lien on the fund in court?" The first petitioner, Bucknam & Co., claims a lien for labor, materials and repairs made on the ship Edith in this port. The testimony before the commissioner shows, that at the time that Bucknam & Co. made the repairs the ship Edith was a domestic vessel in her home port; and the commissioners held that their claim was not a maritime lien. To this decision Bucknam & Co. excepted.][3]

Charles Donohue, for Bucknam & Co.

Everett P. Wheeler, for Tyler.

John Sedgwick, assignee in bankruptcy, in pro. per.

BLATCHFORD, District Judge. There is, in the registry of this court, the sum of $31,176 82, the net proceeds of the sale of the ship Edith, on a sale made of her on the 8th of May, 1871, under process issued on a decree of this court, in a suit in rem against her, in admiralty. There are four claimants to portions of this fund.

D. Freeman Poole, A. Judson Bucknam and John E. Leech, composing the firm of Bucknam & Co., claim to be paid out of such proceeds the sum of $3,597 70, with interest. Their petition alleges, that, in July, 1870, they, being shipwrights, repaired the vessel in the port of New York, she being at the time a domestic vessel, belonging in said port; that, in making such repairs, they furnished labor and materials to said amount; and that such amount, with interest, is still due, and is a lien on the vessel, and was so, by the laws of the state of New York, at the time the materials and labor were furnished. The evidence shows, that the repairs were made by the order of the master and owners of the vessel, and were made while the vessel was on the water; that the vessel has always been engaged in foreign trade; that the lien was "filed" on the 27th of July, 1870; that, thereafter, under the state law, a warrant of seizure for the amount of the claim was issued out of the supreme court of New York, against the vessel, under which she was seized by the sheriff; that, under the same law, a bond was given and the vessel was discharged from custody and from the warrant; and that a suit on such bond is now pending undetermined in the supreme court of New York.

One Charles Carow, being the owner of the vessel, made and delivered to C. T. Bowring & Co., on the 18th of June, 1869, a mortgage upon the one-half of her, as security for the payment of a promissory note

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

[2] [Affirmed by the circuit court in Case No. 4,283. Decree of the circuit court affirmed by the supreme court in 94 U. S. 518.]

[3] [From 6 N. B. R. 449.]

for £1,000 sterling and interest, of the same date, made by Carow to the order of C. T. Bowring & Co. Such mortgage was recorded in the New York custom-house on the 23d of June, 1869.

On the 11th of January, 1870, Carow, being the owner of the vessel, made and delivered to Daniel Tyler, to secure an existing indebtedness from Carow to Tyler, a mortgage upon three-fourths of the said vessel. On such mortgage there is due the sum of $55,424 46, with interest from the 1st of July, 1870. This mortgage was recorded in the New York custom-house on the 11th of January, 1870, and a copy of it was afterwards duly filed in the office of the register of the city and county of New York. The mortgage contains a clause whereby the mortgagor "doth promise, covenant and agree, for his heirs, executors and administrators," to and with the mortgagee, "his heirs, executors, administrators and assigns, to warrant and defend the said three-fourths part of said ship Edith, and all the other before mentioned appurtenances, against all and every person and persons whomsoever;" and a clause, that a sale under the mortgage "shall forever be a perpetual bar, both in law and equity, against" the mortgagor, "his executors, administrators and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them, or either of them."

Carow was, on the 28th of January, 1871, adjudged a bankrupt by this court, on a petition for adjudication filed January 13th, 1871. John Sedgwick was afterwards appointed his assignee.[4]

No objection is made by any of the parties to the payment of the amount due to C. T. Bowring & Co. on the mortgage to them, amounting to $5,776 24.

The claim on the part of Tyler is, that the $31,176 82 should be divided into four equal parts; that the mortgage to C. T. Bowring & Co. should be charged as paid out of one of said four equal parts; and that Tyler should be declared to be entitled to three of said four equal parts. This would distribute the $31,176 82 as follows: to C. T. Bowring & Co., $5,776 24; to the assignee in bankruptcy, $2,017 96; to Tyler, $23,382 62.

The claim on the part of the assignee in bankruptcy is, that, from the $31,176 82 should be paid the Bowring claim, amounting to $5,776 24, and that the balance then left, $25,400 58, should be distributed as follows: one-fourth of it, or $6,350 15, to the assignee in bankruptcy, and the remaining three-fourths, or $19,050 43, to Tyler.

The claims of the various parties were referred to a commissioner to ascertain and report who are entitled to the said surplus and remnants. He has reported that the $31,176 82 should be divided into two equal parts, of $15,588 41 each; that, taking one of those two parts, namely, $15,588 41, the Bowring mortgage, $5,776 24, should be paid out of it; that the balance thereof, $9,812 17, should be divided into two equal parts, of which one, $4,906 09, should be paid to the assignee in bankruptcy, and the other, $4,906 08, should be paid to Tyler; and that the other half of the $31,176 82, namely, $15,588 41, should also be paid to Tyler. This division distributes the $31,176 82 as follows: to C. T. Bowring & Co., $5,776 24; to the assignee in bankruptcy, $4,906 09; and to Tyler, $20,494 49.

The commissioner has also reported that Bucknam & Co. have no lien upon said surplus and remnants, and no legal right to be paid out of the same, in these proceedings, any portion of their said claim.

To this report Bucknam & Co. except, on the grounds, 1. That the report should have been that Bucknam & Co. are entitled to be paid out of the proceeds of the vessel in court; 2. That the report should have been that Bucknam & Co. have a lien on the fund in court for the amount of their claim; 3. That Bucknam & Co. should be paid out of the fund.

The assignee in bankruptcy excepts to the report on the grounds: 1. That the report allows to him out of the surplus, $4,906 09, whereas it should have allowed to him $6,350 15; 2. That it allows to Tyler $20,494 49, whereas it should have allowed to him only $19,050 43.

Tyler excepts to the report on the grounds: 1. That it reports that the surplus should be divided into two equal parts, and that the Bowring mortgage should be paid out of one of such parts; 2. That it reports that the balance of such one of such two equal parts should be equally divided between Tyler and the assignee in bankruptcy; 3. That it does not report that said surplus should be divided into four equal parts, that the Bowring mortgage should be charged as paid out of one of such parts, and that Tyler should be declared to be entitled to three of such parts.

1. As to the claim of Bucknam & Co. It is contended, for them, that their claim was a maritime lien on the vessel, without regard to the state law; that, under the state law, they have a lien on the vessel and her proceeds, which this court can and ought to recognize, by paying the claim out of the proceeds of the sale of the vessel; and that, whether they had a lien or not on the vessel, their claim should be paid out of such proceeds.

It is the recognized law of the courts of the United States, that a maritime lien does not arise on a contract for materials and supplies furnished to a vessel in her home port, even though such contract may be a maritime contract. The Belfast, 7 Wall. [74 U. S.] 624, 645; Leon v. Galceran,

[4] [See In re Carow, Case No. 2,426, for proceedings in the bankruptcy court for the purpose of having the ship Edith insured for the benefit of those interested therein.]

11 Wall. [78 U. S.] 185, 192. It is also a principle recognized by those courts, that, in respect to a maritime contract for materials and supplies furnished to a vessel in her home port, a state may lawfully create such liens as it deems proper, not amounting to a regulation of commerce, and may enact, for enforcing such liens, reasonable regulations. The Belfast [supra]; Leon v. Galceran [supra].

In the present case the materials were supplied and the repairs were made to the vessel in her home port, and no maritime lien arose therefor, although the vessel was engaged in foreign trade.

The statute of New York under which a lien is claimed, is the act of April 24, 1862 (Sess. Laws of 1862, c. 482). By the 1st section of that act, this debt, having been contracted by the master and owners of the vessel, within this state, for work done and materials furnished for repairing the vessel, is made a lien on the vessel, to be preferred to all other liens thereon, except mariners' wages. The act provides for filing specifications of the lien, and for the issuing of a warrant to enforce the lien, which is to be a warrant to the sheriff to attach and seize the vessel, to satisfy the claim, if established to be a lien on the vessel. The warrant being executed, the vessel is to be kept by the sheriff. The warrant may be discharged on the giving of a prescribed bond to the prosecuting creditor, conditioned to pay the amount of all claims which shall be established to be due to the person in whose behalf the warrant was issued, and to have been a subsisting lien on the vessel, pursuant to the provisions of the act, at the time of exhibiting the same. If the warrant is thus discharged, no further proceedings against the vessel seized can be had under the act, founded upon any demand secured by such bond. The bond must be prosecuted within three months after its delivery. If, in an action on the bond, it is found that any sum is due to the plaintiff, which was a subsisting lien on the vessel at the time of exhibiting the same, as provided in the act, judgment is to be rendered, that the plaintiff recover the same; but if in such action it is found that no subsisting lien existed in favor of the plaintiff, at the time of exhibiting his claim, judgment is to be rendered against him. If, within a time limited by the act, the creditor who has exhibited his claim has not been satisfied, and the vessel has not been discharged, a warrant is to issue to the sheriff to sell the vessel, to raise a specified amount necessary to satisfy all unsatisfied liens which have been exhibited against the vessel. The proceeds of the sale are, until their distribution, to stand in place of the vessel, and, until such distribution, any person, entitled under the act to enforce a lien against the vessel, may enforce the same against such proceeds, in the same manner as is provided in the act for enforcing a lien against the vessel herself, and with like effect. On the distribution of such proceeds, the various claims exhibited, which are found to be subsisting liens on the vessel or her proceeds, according to the provisions of the act, are to be paid out of such proceeds, in the order of the delivery of the respective warrants to the sheriff. At any time before final distribution, any claim exhibited may be contested in a manner prescribed. When the amount of all the claims which have been exhibited, and which are found to have been subsisting liens on the vessel, at the time of exhibiting the same, have been finally determined, the proceeds are to be distributed by the court. Uncontested claims, entitled to be paid prior to contested claims, may be paid in the order of their respective priorities, notwithstanding such contest; and uncontested claims may be paid after paying all prior uncontested claims, and reserving enough to pay all prior contested claims. Provision is made for discharging the lien on bond, after specifications of the lien have been filed, although no warrant to enforce the lien has been issued.

In the case of In re Josephine, 39 N. Y. 19, this statute of New York came under consideration, in the court of appeals of New York. In that case, a specification of lien was filed by the creditors against the steamboat, under the act of 1862, for supplies furnished by them at New York to the steamboat. During the period covered by the furnishing of the supplies, the steamboat was enrolled at the custom-house in New York, and was engaged in running between the port of New York and the state of New Jersey. The court of appeals held, that, under the decisions of the supreme court of the United States, in The Moses Taylor, 4 Wall. [71 U. S.] 411, and The Hine v. Trevor, Id. 555, the act of 1862, to the extent in which it authorized proceedings in rem against vessels, for causes of action cognizable in the admiralty, invested the courts of New York with admiralty jurisdiction, and was void, on the ground, that, under the constitution of the United States, congress had in fact, and rightfully, given to the district courts of the United States exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; and that a proceeding in rem, as used in the admiralty courts, is not a common-law remedy. There can be no doubt, that all state legislation providing for the enforcement of a maritime claim or contract in any other manner than by a common-law remedy, infringes on the exclusive jurisdiction of the federal courts, and violates the constitution of the United States. The contract in the present case, being one for labor and materials furnished by shipwrights in making repairs to a vessel on the water, was a

maritime contract. Whether the contract was or not one which the admiralty court would enforce by a proceeding in rem against the vessel is of no consequence. Brookman v. Hamill, 43 N. Y. 554. So far, therefore, as any proceedings in rem against the Edith were authorized by the act of 1862, or were taken under that act, they were wholly void.

As the seizure of the vessel under the warrant was void, the bond given to obtain the release of the vessel from custody was, also, void. Vose v. Cockcroft, 44 N. Y. 415, 420. It is insisted, however, that the provision of the 1st section of the act of 1862, declaring that every debt of the character therein specified shall be a lien on the vessel, is valid, although the provisions for enforcing the lien against the vessel are void. Even if this be assumed, still, the 2d section of the act provides that the debt shall cease to be a lien at the expiration of six months after the debt was contracted, unless, at the time when the six months shall expire, the vessel shall be absent from the port at which the debt was contracted, in which case the lien shall continue until the expiration of ten days after the vessel shall next return to said port. Such six months, in the present case, expired in January, 1871, and the debt ceased at that time, at farthest, to be a lien, unless the vessel was at that time absent from the port of New York. The fact of such absence of the vessel is one to be shown affirmatively by the creditor, and no such fact is shown in this case.

Bucknam & Co. must, therefore, be regarded merely as general creditors; and the question arises, whether, as such, they can be paid the amount of their claim out of these proceeds, as against the mortgagees and the assignee in bankruptcy. In the case of The Neptune, 3 Knapp, 94, in the privy council, in 1835, on appeal from the high court of admiralty, the vessel had been sold under a decree in a suit for wages. A surplus remained in the registry. A material man claimed to be paid out of it for supplies, and a mortgagee claimed the whole of the surplus. The court of admiralty awarded to the material man, the amount of his claim. On appeal, the privy council reversed the decree. The vessel was a British vessel, and the supplies were furnished in England. Two questions were considered by the court: 1. Whether the material man was entitled to any lien on the proceeds; 2. If not, whether the mortgagee was entitled to such proceeds. It was conceded, that a material man without possession, had no lien on the vessel itself for supplies furnished in England, and could not prosecute his suit in the court of admiralty against the vessel in specie. But a distinction was relied on between proceedings instituted by material men against the ship in specie, and proceedings against surplus proceeds remaining in the registry. The principle upon which the court of admiralty had proceeded was, that, when a vessel had been sold under process from that court, the balance of the proceeds, after satisfying the immediate object of the sale, was held in usum jus habentium; that, by the civil and maritime law, material men have a lien on the vessel and proceeds; that, although the municipal courts of England had restrained proceedings in the court of admiralty, at the suit of material men, against the vessel itself, for supplies furnished in England, no prohibition had ever issued with respect to suits against the proceeds after lawful sale; that the reasons on which the right of material men to arrest the ship in such cases had been repudiated, were not applicable to the arrest of the proceeds after a lawful sale; and that, as the vessel was not bonded, and the proceeds had been allowed to come into the registry, they had become subject to the lien of the material man, from which the vessel in specie would have been exempt. The decision of the privy council was, that material men have no better claim against the proceeds of a vessel in the registry of the court of admiralty, than they have against the vessel. The court confirms this observation of Sir Christopher Robinson in The Maitland, 2 Hagg. Adm. 253, 255. "There does not seem to be any solid distinction between original suits and suits against proceeds, in cases that are opposed; whereas, in cases unopposed, the exercise of a judicial discretion by the court, in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion, and capable of being justified to that extent, notwithstanding the general prohibition." The considerations urged in favor of paying the material man were all of them overruled on the ground that he had no lien on the proceeds.

In the case of The New Eagle, 2 W. Rob. Adm. 441, in 1846, there was a contest over proceeds in the registry, between mortgagees of the vessel, and a creditor who claimed to be paid for money advanced for the service of the vessel, in paying seamen's wages. Dr. Lushington rejected the claim of the creditor, and awarded the proceeds to the mortgagees, on the ground, that, after the decision of the privy council in the case of The Neptune, it was impossible to make a distinction between the proceeds and the vessel itself.

In the United States, it is undoubtedly true, that, where proceeds are rightfully in the possession of a court of admiralty, it is an inherent incident to the jurisdiction of the court, to entertain supplemental suits by the parties in interest, to ascertain to whom such proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof. Andrews v. Wall. 3 How. [44 U. S.] 568, 573. But it by no means follows, that a general creditor, who has no lien on the thing out of which the proceeds arise, can rightfully claim such proceeds. And, although some decisions in

the United States express an opinion to that effect, yet no one can be found which maintains the view, that a material man having no lien is to be paid out of the proceeds of a vessel, in preference to a mortgagee, or to the assignee in bankruptcy of the person who was the owner of the vessel when the debt was contracted. And that is the present case. There is not enough money to pay the Tyler mortgage in full. As against the assignee in bankruptcy, representing other general creditors of Carow, besides Bucknam & Co., it would be inequitable to permit Bucknam & Co. to obtain a preference in this way over such other general creditors. The proceeds cannot be impounded as belonging to Carow, because the title to them has passed to the assignee in bankruptcy, subject only to specific liens on them.

It is by no means clear, that the proposition, that the lien given by the act of 1862 is valid, although the provisions of that act for enforcing it are void, is a correct one. The proper view would seem to be, that such lien as is given by the act is, in analogy to the meaning and efficacy of a maritime lien, only a privilege to arrest the vessel for the demand, which privilege constitutes, of itself, no incumbrance on the vessel, and becomes such only by virtue of an actual attachment of the vessel. The Globe [Case No. 5,483]. On this view, as any attachment of the vessel under the act is void, and the privilege of arrest amounts to nothing, it would follow, that the lien given by the 1st section of the act can never constitute any incumbrance on the vessel or on her proceeds.

I must, therefore, pronounce against the payment of the claim of Bucknam & Co. out of these proceeds, and disallow their exceptions.

2. As to the proper mode of distributing the $31,176 82 among the mortgagees and the assignee in bankruptcy.

The principle governing the rule of distribution adopted by the commissioner is not stated in his report, but it would seem to be this: Bowring & Co. have a first mortgage, and it is on one-half of the vessel; Tyler has a second mortgage, and it is on three-quarters of the vessel. The Tyler mortgage must be regarded as a first lien on the one-half of the vessel that is not covered by the Bowring mortgage, and, after the Bowring mortgage is paid out of the one-half that is covered by it, the remainder of such one-half must be divided equally between Tyler and the assignee in bankruptcy, on the idea, that the parties to the Tyler mortgage intended, by mortgaging generally three-quarters of the vessel, after one-half of it had already been mortgaged generally, to cover, by the Tyler mortgage, in addition to the one-half not covered by the Bowring mortgage, one-half of what should be left of the one-half covered by the Bowring mortgage, after the satisfaction of the Bowring mortgage; and that, as, if Carow had himself paid the Bowring mortgage, Tyler would have covered, by his mortgage, the one-half not mortgaged to Bowring, and one-half of the one-half mortgaged to Bowring, so, if the Bowring mortgage is paid out of one-half of the proceeds, Tyler must still cover the one-half not mortgaged to Bowring, and one-half of what is left of the one-half of the proceeds out of which the Bowring mortgage is paid.

Both Tyler and the assignee in bankruptcy contest the principle adopted by the commissioner, and each of them claims a different rule of distribution from that adopted by the commissioner, and neither of them assents to the rule proposed by the other of them. The view of the assignee in bankruptcy is, that he has the vessel; that, out of less than one-quarter of her proceeds, he discharges the Bowring mortgage; that then the entire remainder of the proceeds represents the vessel in the state in which the Tyler mortgage attaches to three-quarters thereof; and that, consequently, three-quarters of such remainder must be given to Tyler, and one-quarter to the assignee in bankruptcy. The view of Tyler is, that Bowring & Co. have a first mortgage on two quarters of the vessel; that, on one of the two quarters covered by the Bowring mortgage, that mortgage is the sole mortgage; that, on the other one of the two quarters covered by the Bowring mortgage Tyler has a second mortgage; that Tyler has a first and the sole mortgage on the two quarters not covered by the Bowring mortgage; and that it is the right of Tyler to have the Bowring mortgage satisfied out of that one of the four quarters, if sufficient, which is not covered by the Tyler mortgage, so as, if possible, to give to Tyler three-quarters of the entire proceeds.

The considerations urged on the part of Tyler are, that the assignee in bankruptcy can claim only what Carow could have claimed; that, as the one-quarter not covered by the Tyler mortgage is sufficient to pay the Bowring mortgage, no part of the three-quarters which are covered by the Tyler mortgage can be taken away from Tyler and given to the assignee; that such three-quarters are three-quarters of the entire $31,176 82, and not three-quarters merely of the $25,400 58 left after paying the Bowring mortgage out of the $31,176 82; that Carow, by his mortgage to Tyler, expressly agrees to warrant and defend three-fourths of the vessel, that is, three-quarters of the $31,176 82, against all persons, and, therefore, cannot, by himself or his assignee, claim any part of such three-quarters; that, as to him and his assignee, the case must be treated as if no mortgage to Bowring & Co. had ever existed; and that, consequently, as to them, the Bowring mortgage must be wholly paid, if possible, out of the only one-quarter which they can claim to hold as against the mortgage to Tyler, namely, out of the one-quarter of the entire $31,-

176 82. To these considerations it is replied, on the part of the assignee in bankruptcy, that the Tyler mortgage is a mortgage of three-quarters of the vessel, as it stood at the time that mortgage was given, that is, subject to the then existing incumbrance of the Bowring mortgage; that the Tyler mortgage is a mortgage of three undivided quarter parts of the vessel, and the Bowring mortgage one of two undivided quarter parts of the vessel, each mortgage affecting every part of the vessel equally with every other part of her; that the surplus of the two undivided quarters covered by the Bowring mortgage, remaining after satisfying that mortgage, represents, with the other two undivided quarters, the whole vessel, to three-quarters of which aggregate the Tyler mortgage attaches; and that, as the Tyler mortgage was a mortgage on three undivided quarters of the whole, subject to a prior mortgage on two undivided quarters of the whole, the prior mortgage must be first paid out of two quarters of the whole, and the remainder of such two quarters must added to the other two quarters, to represent the whole, to three quarters of which whole the Tyler mortgage attaches.

It seems to me, that a proper application of the equitable principles on which a court of admiralty should proceed, in distributing these proceeds among these two mortgagees and the assignee in bankruptcy, demands, that I should regard the Bowring mortgage as first attaching to two quarters of the proceeds, and the Tyler mortgage as attaching first to the two quarters not covered by the Bowring mortgage, and then as being a second mortgage on one of the two quarters covered by the Bowring mortgage. On this view, as the amount due on the Tyler mortgage is greater than three quarters of the whole proceeds, I think the Bowring mortgage should be regarded as first attaching to two quarters, or $15,588 41 out of the $31,176 82; that such $15,588 41 should be regarded as made up of two equal funds, one of them, $7,794 21, subject to the lien of Bowring & Co.'s mortgage alone, and the other of them, $7,794 21, subject to the lien first of Bowring & Co.'s mortgage, and afterwards of Tyler's mortgage; and that the claim of Bowring & Co., $5,776 24, should be paid out of the $7,794 21 which is not subject to the lien of Tyler's mortgage, leaving the residue, $2,017 96, of that $7,794 21 to be paid to the assignee in bankruptcy, and the full three-quarters, $23,382 62, of the $31,176 82 to be paid to Tyler. This applies to the distribution the familiar principle, that, where there are two funds, and one of them is subject to the lien of one suitor, and the lien of another suitor covers both, the latter suitor will be paid, if possible, out of the fund that is subject only to his own lien. Macl. Merch. Shipp. 601; The Sailor Prince [Case No. 12,219].

Independently of this view, which would properly control the distribution in a case where all the fund was to go to mortgagees, I think that neither Carow nor his assignee can, in view of the warranty of the mortgage to Tyler, properly claim any portion of three-quarters of the $31,176 82.

A decree will be entered distributing the money in accordance with these views, and disposing of the exceptions of Tyler and of the assignee accordingly.

[NOTE. Affirmed by circuit court in The Edith, Case No. 4,283, following, and by the supreme court, 94 U. S. 518.]

Case No. 4,283.

The EDITH.

[11 Blatchf. 451.][1]

Circuit Court, S. D. New York. Feb. 19, 1874.[2]

SHIPPING — LIENS FOR REPAIRS BY STATE LAW—HOME PORT—STRICT COMPLIANCE WITH STATUTE —ADMIRALTY JURISDICTION.

1. The statute of the state of New York (Acts 1862, c. 482, p. 956) purporting to give liens on vessels in certain cases, is unconstitutional and void, so far as it attempts to give a remedy for the enforcement of maritime contracts which is not according to the course of the common law. The remedy in rem which it gives is not a common law remedy.

[Cited in The Sylvan Stream, 35 Fed. 315.]

2. Not only is the remedy which such statute gives void, but the lien which it purports to give is not valid.

3. If the state statute could be held valid, the discharge of the vessel from arrest on giving a satisfactory bond, as therein provided, terminates the lien.

4. The lapse of six months after the debt is contracted also terminates the lien which the statute attempts to give.

[See note at end of case.]

5. A contract for repairs done, or for supplies furnished, to a vessel is a maritime contract, of which courts of admiralty have jurisdiction, whether such vessel be foreign or domestic.

6. But, according to the uniform course of decision in the supreme court, no lien exists, by the maritime law, on a domestic vessel, for repairs done or supplies furnished to her in her home port.

7. Local or state laws cannot confer jurisdiction upon the courts of admiralty; but, where the subject-matter is a maritime contract, whereof the court of admiralty has jurisdiction, it seems that rights may exist, under or by force of state laws, which, in dealing with the rem, the court of admiralty would recognize in favor of parties intervening for their interest in the vessel.

8. Where the court of admiralty had, by the maritime law, jurisdiction of the contract, the court of admiralty, under rules of practice formerly in force, recognized the validity of liens, not maritime, annexed to such contract by the local law, and gave effect thereto. But, that no maritime lien existed for supplies or repairs to a domestic vessel, in her home port, has been uniformly declared, and constantly maintained, by the supreme court.

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

[2] [Affirming Case No. 4,282. Decree of circuit court affirmed by supreme court in 94 U. S. 518.]

9. The cases on this subject reviewed.

10. The rules prescribed by the supreme court, as to process in admiralty, in favor of those furnishing supplies and materials, and the changes in such rules, and the reasons for such changes, discussed and commented upon.

11. The new 12th rule in admiralty, of 1872, considered. Whether that rule, in so far as it relates to supplies and repairs to a domestic vessel in her home port, imports any thing more than that the material man may, by process in rem, acquire a lien or right to hold the vessel, as upon mesne process, as security for the debt which he may establish, quere.

[Followed in The Circassian, Case No. 2,726. Applied in Whittaker v. The J. A. Travis, Id. 17,599. Cited in The John Farron, Id. 7,341. Distinguished in The Unadilla, Id. 14,332.]

12. That rule does not necessarily require a decision that a contract for supplies and materials to such a vessel in her home port creates a maritime lien.

13. Until some more explicit declaration, by the supreme court, of an intention to reverse their former numerous decisions on this subject, those decisions must be deemed binding upon the inferior courts.

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

Charles Donohue, for Poole and others.
Everett P. Wheeler, for Tyler.

WOODRUFF, Circuit Judge. The ship Edith was heretofore sold under and by virtue of a decree of the district court in admiralty, and, after satisfying from the proceeds certain claims of the libellants and their costs, &c., there remained in the registry of the court the sum of $31,176 82, subject to distribution among claimants. The appellants, D. Freeman Poole and others, thereupon presented their petition, alleging that they, as shipwrights, had made repairs upon said ship and furnished materials; and, claiming that they had a lien upon the ship therefor, they asked that their said claim be paid out of such proceeds. Their petition and claim were resisted by Daniel Tyler, a mortgagee of three fourth parts of the ship, to whom was due a sum which, after the payment of another mortgage on one-half of the vessel, exceeded the residue of such surplus proceeds, and by John Sedgwick, the assignee in bankruptcy of Charles Carow, the owner of the ship. There was some controversy between Tyler and the said assignee, as to their relative rights; but the decision of the court thereupon is not appealed from by either of them, and need not be further noticed. The court held and decided—The Edith [Case No. 4,282]—that the petitioners, Poole and others, had no lien upon the ship, nor, as between them and the mortgagee and the assignee in bankruptcy, any title to such surplus; and it was therefore decreed, that such surplus, after paying such mortgage on one-half, be divided between the said mortgagee Tyler and such assignee in proportions deemed to be according to their respective rights as between themselves. The petitioners, Poole and others, being thus excluded from any share in said surplus, have appealed to this court.

The ship Edith was a domestic vessel. Her owner resided in the city of New York. The repairs in question were done by the petitioners, and the materials therefor were furnished to the ship, while she was lying in navigable waters in the port of New York, by order of her master and her owner, in the month of July, 1870. The petitioners, in their petition, set up no other ground of claim; but, in the proofs that were taken, it appeared that the petitioners, after the repairs were made, attempted to claim and enforce a lien therefor under a statute of the state of New York, in pursuance of which they caused an attachment to be issued to the sheriff of the city and county of New York, who, by virtue thereof, seized the ship. Thereupon a "satisfactory" bond was given by or on behalf of her owner, as permitted by that statute, and the ship was discharged from custody and from the said attachment. An action was then brought upon the said bond, which is now pending and undetermined in the state court.

I. Independent of the technical objection, that the petitioners did not come to the court alleging in their petition any lien upon the ship acquired under the statute of the state of New York, their proceedings to enforce a lien under the state law will not avail anything in this case against the claim of the mortgagee.

1st. The cases of In re Josephine, 39 N. Y. 19, and Brookman v. Hamill, 43 N. Y. 554, under the authority of The Moses Taylor, 4 Wall. [71 U. S.] 411, and The Hine v. Trevor, Id. 555, must be regarded as settling, for the present, at least, that the statute of New York in question (Acts Leg. N. Y. 1862, c. 482, p. 956), so far as it attempts to give a remedy for the enforcement of maritime contracts, which is not according to the course of the common law, is unconstitutional and void, and that the remedy given by that statute is not a common law remedy.

2d. It is claimed that those decisions should be confined to the mere proposition, that the manner of enforcing the lien therein attempted to be given is unconstitutional and void, but that the lien given by the statute is, nevertheless, a valid lien. Neither the language of the cases nor other reasons warrant any such distinction. The grounds of those decisions forbid it. The lien which is to be created under the New York statute and the manner of enforcing it cannot be thus separated. The statute was an attempt (so far as maritime contracts were embraced therein) to take jurisdiction from the courts of admiralty, and prescribe a new incident to such contracts, and enforce the right conferred by a proceeding strictly in rem. If, by the rules and principles of maritime law, as administered in courts of admiralty, and governing

its jurisdiction and the exercise thereof, a lien already existed in virtue of the contract, then, separate and distinct from the provisions of the statute for enforcing it, which are thus conceded to be void; the supposed lien obtains no force or validity from the statute. In that respect, the statute is an idle and useless declaration. If, by the rules and principles governing courts of admiralty, no such lien exists, then the attempt to control the courts of admiralty, and so interfere with their administration, by attempting to create new maritime liens not known or recognized in those courts, and which affect the rights of parties there who rely upon the law maritime in their dealings, may be deemed liable to all the objections which induced the decisions to which I have referred. If the lien exists as the creature of the state law, how is it to be executed? Strike out the mode of proceeding for its enforcement prescribed by the statute, and there is no common law mode provided by which the state courts can give it any efficacy. And the moment it is sought to enforce it as a lien in the court of admiralty, it proceeds upon the idea that the states can give to those courts jurisdiction not known or pertaining to them under the constitution and laws of the United States, or, at least, can introduce into those courts new rules of decision, and establish priorities not known to the maritime law—priorities which, as against persons who may have other and recognized maritime liens, would be in direct conflict with the maritime law.

In its bearing upon this point, the dissenting opinion of Chief Justice Taney, in Taylor v. Carryl, 20 How. [61 U. S.] 600, concurred in by Justices Wayne, Grier and Clifford, is very significant. Though not deemed by the majority of the court to meet the grounds on which their opinion was placed in that particular case, it is an able and convincing maintenance of the courts of admiralty and the admiralty law, against any modification of their authority or rules of decision by the states.

The consideration of this case will, therefore, raise the question, whether the petitioners had a lien upon the ship by the maritime law; and the conclusion on that subject is that they had not, as will be herein more fully stated. But, it is equally clear, that the contract for repairs and materials is a maritime contract, of which courts of admiralty have jurisdiction. The question whether the states can, by statute, annex to a maritime contract any lien on the vessel not known to the maritime law, and whether the court of admiralty ought to recognize and enforce it, has been very much discussed, as will hereafter be seen. The language used by Mr. Justice Clifford in The Belfast, 7 Wall. [74 U. S.] 645, and repeated in Leon v. Galceran, 11 Wall. [78 U. S.] 185, 192, imports that, although the contract be maritime, yet, if there be no lien incident thereto by the maritime law, the states may, by statute, give a lien, if their legislation do not amount to a regulation of commerce, and they may provide for enforcing such lien. The case last named may be deemed to illustrate this. There the claim was for wages of mariners. It was founded on not only a maritime contract; but, by the law maritime, a contract out of which arose a lien on the vessel. The supreme court nevertheless sustained a suit in personam, in the state court, under the laws of Louisiana, in which writs called "writs of sequestration" were issued and levied on the vessel, as a security to respond to the judgment which the plaintiff might recover against the owner of the vessel, as defendant in the suit. The court say, that the mariners had a right to proceed in personam, in the state court, against the owner, and that such a writ, when duly issued and served in such a case, has substantially the same effect, in the practice of the courts of that state, as an attachment on mesne process, in jurisdictions where a creditor is authorized to employ such a process to create a lien upon the property of his debtor, as a security to respond to his judgment; and the right to obtain a lien by foreign attachment under the state law, not as a maritime proceeding in rem, but as a means of obtaining security for the debt and enforcing its payment, seems to lie at the foundation of the opinion of the majority of the court in Taylor v. Carryl [supra], above adverted to. This furnishes no warrant for sustaining the lien alleged to have been given by the law of the state of New York, the only mode of enforcing which, and the only right given by the statute to enforce it at all, is a proceeding strictly in rem and not in personam; and that is void, under the decisions in the cases of The Moses Taylor and The Hine v. Trevor, above cited. See, on this point, the cases of In re Josephine, 39 N. Y. 19, and Brookman v. Hamill, 43 N. Y. 554. That, in a suit in personam, property of the debtor may be attached under state laws, and held to satisfy the judgment which may be recovered, whether the property be a ship, or property in any other form, may not be doubtful,—Taylor v. Carryl [supra]; Leon v. Galceran [supra]; and, that courts of admiralty, where the rules regulating process allow it, may authorize process in rem for the same purpose, will be suggested in considering the meaning and effect of the recent rule of the supreme court, hereinafter mentioned.

But, it may well be doubted, that the supreme court or Mr. Justice Clifford meant to be understood to hold that a state may annex to a maritime contract, or even to any contract relating to a ship, a lien which shall operate to withdraw her in any degree from the operation and effect of the law maritime, by which courts of admiralty are governed, and which, by the constitution, they are authorized and are bound to administer, or which shall hinder or prevent courts of admiralty from dealing with the ship in all

respects according to the principles of the admiralty law. Can the states, by their statutes, create liens which shall interfere with or disturb the priorities given by the law maritime? If they can, then power to maintain and administer the jurisdiction and laws of the admiralty has not been conferred upon the government of the United States and its courts. For illustration, suppose a case of collision, and a suit against the ship to recover therefor, in the admiralty. Can the states create liens, upon which any party may intervene by cross libel or otherwise, and assert a priority over the maritime lien, and take, as the case may be, the whole value of the vessel? Such state liens may, perhaps, be good as against the owner, who was bound by the contract; and liens may arise, in suits in personam, by attachment or like process, but they must be held subject to the maritime law; and seizures on such attachments may operate on the vessel in the condition in which she is found, and hold her, subject to all prior liens, as security for the judgment which may be recovered.

3d. But, independent of the suggestions already made, the statute itself under which the petitioners attempted to obtain a lien, is fatal to any maintenance of that lien as the creation of that statute. The attachment which the statute authorized having been issued, and the vessel seized, a "satisfactory bond was given, under the state law. The vessel thereupon was discharged from the custody of the sheriff and from the attachment." This is the language of the proof. The bond, here referred to, and prescribed by the statute, is conditioned for the payment "of any and all claims and demands which shall be established to be due to the person or persons in whose behalf such warrant was issued, and to have been a subsisting lien upon such vessel pursuant to the provisions of this act," &c., &c.; and the 12th section declares, that, upon the giving of such bond, the officer issuing the attachment shall discharge the same, and that thereafter "no further proceedings against the said vessel so seized shall be had under the provisions of this title, founded upon any demand secured by such bond;" and, by sections 28 and 29, it is provided, that, where the creditor has taken the preliminary steps to acquire a lien, the owner need not wait until the vessel has been seized. He may apply to the officer, and give such bond, and the officer shall direct that the said lien be marked by the clerk as discharged, "and the same shall cease to be a lien upon such vessel." The statute itself, therefore, makes the giving of bond for the payment of the claim terminate the lien. The bond becomes the substitute for the vessel. This, in my opinion, ends the question of lien under or by virtue of the state law. The petitioners, setting up and claiming under this statute, must accept its provisions, with all their necessary consequences; and, when the owners of the Edith gave the statute bond for the discharge of the ship, there was an end to their lien under the state law. It does not affect this result, that the bond would be held void, as part of the remedy, under the decisions above cited. The only lien the petitioners obtained, by virtue of the statute, was subject to be defeated by the giving of the bond, and it was thereby defeated. The most that can be said of the decisions declaring the bond void is, that the whole statute, viz.: the attempted creation of the lien, the attachment for its enforcement, the giving of the bond, and the remedy thereon, are all so connected, under the statute, that they all fall together under the one condemnation.

4th. This result is still more apparent when the limitations inserted in the New York statute are adverted to. They make it plain that it was not the intent of that statute to create a lien upon the vessel independent of the prescribed mode of its enforcement. The statute did not declare a lien, to be a continuing lien, and to be availed of in any mode known to the common law. The precise steps to make the declared lien available, and the only mode of making it effective, are pointed out; and it is expressly declared that the debt shall cease to be a lien at the expiration of six months after the debt was contracted, unless at that time the ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until the expiration of ten days after such ship or vessel shall return to said port. The proceeding is in all respects summary. Within the period thus limited, a warrant must be issued for the seizure of the vessel; advertisement must be made for other claims; after thirty days, if the owner do not obtain a discharge of the vessel by giving bond, the vessel must be sold, and the proceeds distributed among those who have presented claims. This shows the nature of the right called a lien. It is inextricably connected with the means provided for its enforcement; and, they being void, it has no longer anything of value or force. And it is especially clear, that, after the lapse of six months, or of the further term of ten days, what is called the lien ceases. As a lien, it has operated to hold the vessel for that period, subject to be taken under the warrant. Then it has performed its whole office, and, by the very words of the statute, it ceases. After that, the vessel, if it be held at all, is held, not by virtue of a continuing lien, but by virtue of process and seizure whereby it becomes a security for the payment of claims which may be presented. The process and seizure and authority to sell being adjudged void, nothing remains to the creditor, either of lien or security. No one would, I think, claim that, where no warrant was issued for the seizure and sale of the vessel, the lien continued beyond the pe-

riod expressly limited. If not, then a void proceeding provided for by statute is no better than taking no proceeding, and the lien of the creditor is equally at an end. He stands a general creditor of the owner, and that is all. In the case now under consideration, this limitation is fatal to the petitioners' endeavor to maintain a lien under the law of the state of New York.

II. The next, and, in view of the pendency of other cases relating to the subject, the most important question, is, whether the petitioner had a lien independent of the statute of the state of New York; or, in another form, has one who makes repairs and furnishes materials to a domestic vessel in her home port, and in the port of the residence of her owner, a maritime lien upon the vessel?

In view of the course of decision in the supreme court of the United States upon that question, I do not feel at liberty, in this court, to inquire whether, in such case, a lien was given by the civil law. If the supreme court should feel at liberty to recall the decisions heretofore made therein upon the question, and treat the subject as open to inquiry and determination, according to the rules of the civil law, they will do so. This court is bound by the decisions of the supreme court as they now stand. It will, therefore, be sufficient for the purposes of this case, and it is all that I feel at liberty to do, to state the course of decision in that tribunal. It may, however, tend to a better and more clear understanding of their result, if I suggest that they recognize a distinction between the requisites to maritime or admiralty jurisdiction, and the requisites to a maritime lien. That is to say, that the courts of admiralty have jurisdiction of all maritime contracts and maritime torts, but that it does not follow that, in all cases of jurisdiction of the contract or subject-matter, founded on its nature, as maritime, there is also a lien upon the ship or vessel. The recognition of such a distinction by the supreme court is important in considering the meaning and inference to be assigned to the decisions and opinions which hold the contract for supplies and materials to a vessel, though in her home port, a maritime contract, of which the courts of admiralty have jurisdiction. The inquiry, therefore, is, in each case—does the contract and its performance create a maritime lien, according to the course of decision in the supreme court?

The supreme court, in 1819, in The General Smith, 4 Wheat. [17 U. S.] 438, recognizes the distinction above adverted to; and, while it is, in the opinion of the court, given by Mr. Justice Story, distinctly stated, that no doubt is entertained of the jurisdiction of the admiralty in cases of material men, it is with unqualified distinctness held, in respect to repairs and necessaries in the port or state to which the ship belongs, that the law maritime gives or implies no lien.

In The St. Jago de Cuba (in 1824) 9 Wheat. [22 U. S.] 409, the court sustained the claim of those who had furnished materials and supplies, to a lien on the vessel. But the doctrine of The General Smith is affirmed, and additional reasons given therefor. The decision is expressly placed on the ground that the owners, by their conduct, were estopped to allege that she was a domestic vessel, being "thus precluded, by their own act, from denying her foreign character."

In 1833, the court, in Peyroux v. Howard, 7 Pet. [32 U. S.] 324, reassert the doctrine of The General Smith in the very terms of the opinion in that case. On the subject of the jurisdiction of the admiralty over our navigable rivers, subsequent cases correct the observations made in the opinion which assume that it is limited to the ebb and flow of the tide; but that has no bearing on the subject now under consideration.

In 1848, Judge Nelson, giving the opinion in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, reasserts the doctrine, that there is no maritime lien in favor of material men in the home port, as held in The General Smith; and it may be worthy of notice that the question chiefly discussed, and on which the supreme court were divided, was, whether the jurisdiction of the admiralty was even as comprehensive as was assumed in that case.

In 1857, in People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, in giving the opinion of the court, that the ship-builder had no maritime lien, Mr. Justice Catron strongly reaffirms, of repairs and materials, that, "where the owner is present, no lien is acquired by the material man, nor is any where the vessel is supplied or repaired in the home port."

It is, perhaps, necessary to the full history of the subject to state, that, while the existence of a maritime lien for materials and supplies in the home port had been thus frequently denied, the right of the material man to proceed in the admiralty in rem, where the state law gave him a lien therefor, had been distinctly allowed by the 12th rule in admiralty, adopted in 1844. In the cases above mentioned, the power to employ the process of the admiralty to enforce such liens was admitted. In the inferior courts, the right had been recognized, and the lien created by the state law sustained. The distinction between cases in which the cause of action was itself within the admiralty jurisdiction, and the cases in which the admiralty had, independent of the local law, no jurisdiction, may not always have been attended to. But where, as in case of repairs and supplies to a vessel even in the home port, the contract was itself deemed maritime in its nature, and so within the admiralty jurisdiction, notwithstanding the absence of a maritime lien, it was not deemed beyond the power of the admiralty, having acquired jurisdiction by the nature of the contract, to recognize one of the incidents

of the contract, although created by the local law, and, in administering upon the subject-matter, to give effect to the lien so created.

Thus, in The General Smith, Judge Story says, that no lien is implied unless it is recognized by the municipal law of the state.

Mr. Justice Thompson, in Peyroux v. Howard, of the particular contract relied on in that case, says: "It is a maritime contract; and, if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law, * * * it will bring the case within the jurisdiction of the court."

In The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, Mr. Justice Story limits the apparent meaning of the observation last cited, stating that the local laws could not confer jurisdiction upon the admiralty, and that they could only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States. Hence, in the case then before the court, the cause of action not being of maritime jurisdiction, the existence of a lien by the state law would not avail the libellants.

So also, Mr. Justice Nelson, in New Jersey Steam Nav. Co. v. Merchants' Bank [6 How. (47 U. S.) 344], at page 390, apparently overlooking, or, at least, not noticing, the distinction stated by Judge Story, states that jurisdiction has always been exercised by the admiralty courts in this country, in suits by ship carpenters and material men, for repairs and necessaries made and furnished to ships, whether foreign, or in the home port, if the municipal laws of the state give a lien for the work and materials; and he cites numerous cases from the district and circuit and supreme courts.

Mr. Justice Catron, however, in giving the opinion in People's Ferry Co. v. Beers [supra], noticing the fact that district courts have recognized the existence of admiralty jurisdiction in rem against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law,—e. g., Read v. Hull of a New Brig [Case No. 11,609]; Davis v. New Brig [Id. 3,643]; Harper v. New Brig [Id. 6,090]; Ludington v. The Nucleus [Id. 8,598],—adds: "Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court." This, it will be observed, was said of a case of the building of a vessel, which the court held was not a case within the jurisdiction of the admiralty, that the jurisdiction depended upon the nature of the contract, and that a contract for the building of a vessel is not maritime.

After this decision, and, as explained in the opinion of the court in Maguire v. Card, 21 How. [62 U. S.] 251, "so as to take from the district courts the right of proceeding in rem against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by state laws, it being conceded that no such lien existed according to the admiralty law," the supreme court, by the amended 12th rule, to take effect May 1st, 1859, provided for proceedings in rem or in personam, in suits by material men for repairs or supplies to a foreign vessel; and for proceedings in personam but not in rem, in cases of domestic ships, for supplies, repairs, or other necessaries."

By the course of decision down to that time, above referred to, the supreme court affirmed, that the contract for repairs and supplies to a vessel is a maritime contract, and within the jurisdiction of the district courts, as courts of admiralty; that the contract for supplies and repairs to a foreign vessel is attended by a maritime lien in favor of the material man or repairer, as an incident to the contract which would be enforced in the admiralty; that the contract for supplies and repairs to a domestic vessel in her home port is attended by no such incident; that no maritime lien is implied therein or created thereby; and that, although the admiralty had jurisdiction of the contract, and would sustain suits thereon in personam, there is no lien by maritime law upon the vessel itself, to be enforced as such; and, finally, the rule last referred to affirms, that such last named contract is a maritime contract of which the admiralty has jurisdiction, but that it creates no maritime lien upon the vessel, and the courts are forbidden to proceed in rem to enforce liens claimed in such case under state laws.

The case of Maguire v. Card [supra], decided in 1858, at the same term at which the rule was adopted, was distinctly in point. The supplies for which a libel in rem was filed were furnished to a domestic vessel engaged in navigating the Sacramento river, and lying in the port of Sacramento. The court, in that case, wholly denied the jurisdiction of the admiralty of the subject-matter, in any form or under any process, because the vessel was engaged in the purely internal commerce of the state. This ground of the decision has since then been overruled. The Belfast, 7 Wall. [74 U. S.] 624. But the court explain the rule then recently adopted, and declare a determination to leave liens asserted under state laws to be enforced by the state courts. The language of the opinion is very broad; and yet, as it was used in a case in which the court disclaimed any jurisdiction of the contract, it may be doubted that the court intended to hold that, where, upon other grounds, the admiralty has jurisdiction to arrest and sell a vessel in a proceeding in rem, it will not recognize the existence of a lien created by state laws, in the adjustment of the rights of parties intervening for their interest.

That the local laws could not confer jurisdiction upon our courts of admiralty was

again affirmed in Roach v. Chapman (in 1859) 22 How. [63 U. S.] 129.

In 1861, in the case of The St. Lawrence, 1 Black [66 U. S.] 522, the subject was fully reviewed by Chief Justice Taney. He gives the reason for the former rule of 1844, and for its abrogation in 1859, and recognizes the distinction between the cases in which the admiralty has no jurisdiction of the subject-matter, and can acquire none by virtue of the local or state laws, and those in which, having jurisdiction of the contract, as maritime, it has recognized the lien upon the vessel which the state laws created. He places the authority to make and change the rules referred to, not upon the principles of admiralty law, conclusively determining by what process its jurisdiction should be exercised in any particular case, but on the authority conferred by statute on the supreme court, in its discretion, to prescribe the process and modes of proceeding, where jurisdiction does exist. Thereupon, holding that the rule of 1859 was prospective only in its operation, the court hold the libellant entitled to the benefit of the proceeding he had taken before that rule was adopted; and, the contract for supplies being maritime and within the jurisdiction of the court, hold, also, that a decree condemning the vessel should be affirmed.

The cases of The Moses Taylor, 4 Wall. [71 U. S.] 411, and The Hine v. Trevor, Id. 555, decided in 1866, are important to the question whether and to what extent state laws purporting to create liens, in cases embraced in the jurisdiction of the admiralty, and to provide a proceeding in rem for their enforcement, have any validity whatever. But, on the single question, whether there exists a maritime lien for repairs and supplies to a domestic vessel in her home port, they make no change in the course of decision already recited.

In 1868, in the case of The Belfast [supra], in which the court overrule prior decisions restricting the jurisdiction of the admiralty to tide waters, the court reaffirm the decisions last above mentioned; and, in the opinion, Mr. Justice Clifford says: "State legislatures have no authority to create a maritime lien; nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem, as practiced in the admiralty courts." It will be seen, that, as above stated, the court had already held that the states could confer no jurisdiction of any kind upon the United States courts. Again, he says: "Such" (a maritime) "lien does not arise in a contract for materials and supplies furnished to a vessel in her home port;" and again: "Contracts for ship-building are held not to be maritime contracts," and, "in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding in rem is exclusively in the district courts of the United States." He expresses the opinion, however, that, in reference both to contracts not maritime and to contracts out of which, although maritime, no lien arises, it is competent for the states, under the decisions of the supreme court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.

In 1869, in the case of The Kalorama, 10 Wall. [77 U. S.] at page 211, Mr. Justice Clifford, again adverting to the proposition that no maritime lien arises for supplies furnished in the home port, declares that the supreme court have put the doubt once existing on that subject at rest.

In 1870, in the case of Leon v. Galceran [supra], the meaning and effect of the decisions in The Moses Taylor and The Hine v. Trevor, above referred to, are considered; and the opinion delivered in The Belfast is affirmed and applied, where the action was brought in personam, in a state court, by mariners having a maritime lien for wages, and having, also, by the state law, a right, in the nature of a lien, to have the vessel seized by writ of sequestration, to be held as security for the judgments which they might recover in such action. The legality of such a proceeding was affirmed; but the opinion reiterates, as in The Belfast, that a maritime lien does not arise in a contract for materials and supplies furnished to a vessel in her home port.

In the face of this continuous declaration of the supreme court, that no maritime lien exists in a case like the one under consideration, in effect, that the libellants had no lien upon the ship Edith for repairs and materials done and furnished in her home port, I am asked to declare that such maritime lien does exist, and to decree to the libellants a portion of the proceeds of her sale, to the exclusion of mortgagees and the assignee in bankruptcy of her owner. Having arrived at the conclusion that the libellants are not so entitled by virtue of the provisions of the state statute, their claim must rest solely upon their alleged maritime lien. On the questions, what was the rule of the civil law, and what should be the influence of authorities cited thereon, or of the early authorities, cited by counsel, showing the recognition of the rule of the civil law in this country, I am not called upon to express an opinion. If I deemed the course of decision which I have collated to have originated in misapprehension, and to be erroneous, it would neither be decorous nor proper for me so to hold. I am aware that many and very important limitations of the jurisdiction of our courts of admiralty, declared in former decisions of the supreme court, have, within a few years past, been held by the same court erroneous, and the cases containing them overruled. Both as to waters over which jurisdiction is to be asserted, and as to contracts and torts once

deemed not to be of admiralty cognizance, the court now asserts and exercises jurisdiction. Possibly, the court is now ready to affirm the existence of a maritime lien in the case under consideration. But it is for the supreme court itself, and not for the circuit court, to assume to disregard the decisions of the former tribunal heretofore made on the subject.

III. It is suggested, that the supreme court has acted in this matter, and, by a more recent rule, has practically overruled all the denials that material men have a maritime lien on the vessel, which are found in the previous decisions.

On the 6th of May, 1872, the court ordered that the twelfth rule in admiralty, above adverted to, be amended so as to read as follows: "In all suits by material men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam." I am furnished with some decisions in the district courts which are claimed to hold that, by force of this rule, they are bound to hold that the decisions of the supreme court in the past are now overruled, and that contracts for supplies do now create a maritime lien. The rule has no such necessary interpretation, and I think it becomes this court, before acting upon it as authority for so holding, to await some more decisive declaration from the supreme court.

1. In The St. Lawrence, ubi supra, the supreme court state the foundation of their authority to make the rule of 1859 (now amended), and they define its scope and meaning. Their rules are not made for the purpose of changing the law. The jurisdiction and powers of courts of admiralty in this country are declared in the constitution, and vested in the courts which possess and exercise them, by the acts of congress. The supreme court does not assume to change the law. Their rules are rules of practice. They are made and altered, as the court in its discretion sees fit, under acts of congress empowering that court, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used in the district and circuit courts of the United States, and the forms and modes of framing and filing libels and other proceedings in admiralty, and making the forms and modes of proceeding according to the principles, rules and usages of courts of admiralty, subject to such alterations and additions as the courts deem expedient, or to such regulations as the supreme court shall think proper, by rule, to prescribe. The supreme court does not assume to vest new rights not before recognized by the maritime law. It does regulate the practice by which rights vested by law may be prosecuted and maintained, and by which wrongs may be redressed. It acts in reference to the remedy, the means of enforcing rights, or of obtaining redress for their violation. This is, in substance, the exposition given by the supreme court itself, as a vindication of the former rule, in the case last referred to. The court, therefore, does not, by force of its rule, create a maritime lien, where, by the law maritime, none exists. It may assume to furnish a means of obtaining a lien, as a security for the judgment which may be rendered by the court. That is in analogy to all seizures and attachments wherein a lien or right to hold the subject seized, to secure the judgment which the court may pronounce, is gained by service of the process upon property. Neither the right to such a process, nor the use of such a process, does, per se, import the existence of a prior lien.

2. In The St. Lawrence, the court declared the rule of 1859 prospective only in its operation. Regarding the new rule simply as the allowance of a form of remedy, this view of the prospective operation of the rule is fatal to the libellants in this case, for, before the libel was filed upon which the ship Edith was sold, her owner was adjudged a bankrupt, and an assignee appointed; and, before the rule in question was adopted, the sale had taken place, and the rights of the parties had become fixed. The petition now before us was filed, the order appealed from was made, and the present appeal was taken, before the new rule was adopted. The petitioners, in short, have taken no proceeding, either in form or substance, under the rule, and derive no benefit therefrom, if it be regarded only as a means of collecting the money due to them.

3. It may be suggested, that the supreme court, by the new rule, though it did not intend to overrule the former decisions and assert the existence of a maritime lien for supplies furnished in the home port, did intend to return to the practice which had obtained in the district courts under the rule of 1844, with the sanction of the supreme court, before the rule of 1859 was adopted; that is, that it intended to recognize the contract, as had been done before, as a maritime contract, and to enforce the lien on the vessel, if, and whenever, a lien was given for such supplies by the state law; and that so the court is made to recognize the state lien, as a right in the property, which the court of admiralty is bound to recognize in its dealing with the ship, or the proceeds of her sale.

Having concluded that the present petitioners have now no lien under the state law, this construction of the rule will avail nothing to them. But the claim to such a construction is liable to this criticism: The rule is general. It gives process in rem in all cases, without any reference to state laws, as a condition therefor. It is not to be supposed that the court intended to give the process in rem in all cases, but to make the utility of the proceeding in that form, and its efficiency as a security, to depend upon

the state law. That would again involve the subject in all the embarrassments suggested as reasons for the rule of 1859, and call upon the United States court to deal, in the very use of its process, with the construction and effect of state laws creating liens, or claimed to do so, and with the various questions of priority which may arise under those statutes—questions with which state courts are more competent to deal.

So far as the new rule of the supreme court operates upon the subject, there seems but one alternative—1st. That rule is to be held a repudiation of the prior decisions, and an affirmative recognition of the existence of a maritime lien eo instanti supplies and repairs are furnished; or, 2d. The rule is a mere rule of practice—a rule prescribing process by which the ship can be attached or seized, and held as a security, and for the collection of the demand. In this latter view, the lien or right of detention does not arise until the process is issued, and the seizure under the process, like the levy of process of the admiralty, in the nature of a foreign attachment, where the debtor has absconded, operates upon the thing seized in the condition in which it is found, and without displacing just liens of third parties, prior in their nature. As suggested in a former part of this opinion, the court could not have intended, that, although no maritime lien exists in favor of the material man, he may nevertheless, by process in rem, obtain a priority to which he was not, as against third parties, entitled; or that, even if the state law has given him a lien, he can thereby displace liens which exist by force of the maritime law, and which, by the principles of that law, the court is bound to sustain.

It is quite true that this latter construction of the rule raises many interesting questions touching the rights of third persons, and, as the case may be, the inquiry whether, when the vessel has passed into the hands of third persons, bona fide purchasers, before such process issues, it will affect their titles. But, as already suggested, I do not deem it fitting that the circuit court should act in disregard of the repeated and consistent declarations of the supreme court, and contrary to its express decisions on the precise point, without some utterance from that court more clearly expressing an intent to overrule those decisions, than is found in this rule of court.

4. Another alternative view of the construction and effect of the new rule is suggested, namely, that, without discriminating between supplies furnished to a foreign, and supplies furnished to a domestic vessel, the rule permits the creditor to elect his form of remedy, and maintain his proceeding if he can. If, by reason of the foreign character of the vessel, or facts constituting an estoppel, or other circumstances which create or imply it, a maritime lien is established, the process in rem will be successful. But, unless a maritime lien is established, the libel in rem must be dismissed. Otherwise, the court would be deemed to create a lien by judicial legislation, when the power to do so is not conferred upon the court, either by act of congress or the constitution. To hold that the court can create such a lien, save by process which operates when the seizure is made, and not until then, as security for the debt, would be to contradict the clear declaration of Chief Justice Taney, in The St. Lawrence, 1 Black [66 U. S.], at page 529: "The process in rem, or priority, given for repairs or supplies to a domestic vessel, by the courts of admiralty, in those countries where the principles of the civil law have been adopted, form no part of the general maritime code, and no part of the admiralty and maritime jurisdiction conferred on the government of the United States." Without considering this alternative further, or the force of this constitutional objection, it confirms me in the belief that I ought not to consider a proposition open to assertion in this court, which in the supreme court has been declared at rest for nearly sixty years, and which that court has "constantly maintained." The Kalorama [supra].

It is a relief to me that the amount in controversy in this, and in some other cases involving the same questions, is sufficient to warrant a review of the decision I feel constrained to make, and it is to be hoped that we may soon have the declaration of the supreme court on the precise question, before any final injustice is done to the parties.

The fund in this case must be distributed in conformity with the decree made in the district court. As no other party appeals except the claimants for repairs and materials, no question is made here except the one which has been considered.

Let a decree be entered accordingly, with costs to the appellees.

[NOTE. On the appeal of D. Freeman Poole and others the decree of the circuit court was affirmed by the supreme court in The Edith, 94 U. S. 518. Mr. Justice Strong, in speaking for the court, held that as the repairs in this case were completed by the 22d of July, 1870, the lien therefor expired in January, 1871, by the terms of the statute of New York of April 22, 1862 (4 Gen. St. 632), under which it was claimed, and which provides that such liens shall cease at the expiration of six months after the contraction of the debt, unless at that time the vessel or ship shall be absent from the port, in which event the lien shall continue until the expiration of 10 days after the ship or vessel shall next return to said port. It was further held that, assuming the appellants had a lien upon the ship for repairs by virtue of this act, the burden of proof was upon them to show that the vessel was absent from the port at the expiration of the six months, and that she had not returned to the port more than 10 days before she was sold; but as the vessel was libeled in admiralty on the 1st of April, 1871, was duly seized, and a decree made against her, under which she was sold in May of that year, the presumption is that the 10 days next after the return of the ship had elapsed when the appellants first filed their petition for the application of the proceeds of the sale to the payment of their alleged lien.]

EDMISTON (DOUGHERTY v.). See Case No. 4,025.

EDMONDS (PITTS v.). See Case No. 11,191.

Case No. 4,284.

EDMONDSON v. BARRELL.

[2 Cranch, C. C. 228.] [1]

Circuit Court, District of Columbia. April Term, 1821.

DEPOSITION — ASSUMPSIT — SERVICE ON ONE OF SEVERAL JOINT DEFENDANTS—ABATEMENT—EVIDENCE —WAIVER OF OBJECTION TO DEPOSITION — EFFECT OF ADMISSION OF NEW PARTNER ON EXISTING PARTNERSHIP DEBTS.

1. A deposition, taken under the act of congress [1 Stat. 73] must be reduced to writing by the magistrate, or by the deponent in the presence of the magistrate.

2. If the declaration be against three jointly, upon a joint assumpsit, and one of them only be taken, who pleads non assumpsit for himself alone, and a verdict be rendered for the plaintiff, the judgment will be arrested, unless the other joint defendants shall have appeared, or process shall have been issued and continued against them up to the time of the trial.

3. The court will not quash the writ, because it is against one only of three joint defendants, against whom the plaintiff has declared.

4. The court will not receive a plea in abatement that there are other defendants not taken, unless it be first put in upon oath.

5. A partnership debt may be given in evidence to support a several assumpsit by one of the partners.

6. If, at the trial, all objections are waived to a deposition, and a new trial be granted, the court will not suffer objections to be made to the same deposition upon the new trial.

7. If a magistrate who takes a deposition under the act of congress, certifies that the deponent was "carefully examined and cautioned and sworn to speak the whole truth," it is to be inferred that he was so examined, and cautioned and sworn by the magistrate who took the deposition.

8. If goods be consigned by the plaintiff to K. & G. for sale, and be sold by them, and the proceeds of sale received by them; and afterwards B. becomes a partner with K. & G. under the name and firm of K. G. & Co., the new firm is not liable to the plaintiff for the proceeds of the sales of those goods, unless they came to the use of the new firm, who in consideration thereof promised to pay the same to the plaintiff.

At law. This was an action of asumpsit for goods sold and delivered, money had and received, &c. The writ was against "George G. Barrell, late of the county aforesaid, merchant, lately carrying on trade and commerce, as a merchant, under the firm of Kirkpatrick, Grivegneè & Co." The declaration stated, that "William Kirkpatrick, Henry Grivegneè, Jr. and George G. Barrell, lately trading under the firm of Kirkpatrick, Grivegneè & Co., were attached to answer to Charles Edmondston;" who, by E. J. Lee, his attorney, complained, "That whereas the said defendants on the 30th of April, 1816, at Malaga, to wit, at the county aforesaid, were indebted to the plaintiff in the sum of $2,556.55, for sundry matters and articles properly chargeable in an account, as by a particular account thereof herewith into court exhibited, appears," &c., and being so indebted, the said defendants, in consideration thereof, promised to pay, &c. There were also the common money counts, all averring a joint liability, and a joint promise to pay. The defendant, George G. Barrell, only having appeared, pleaded non assumpsit for himself alone, upon which issue was joined, and the cause came to trial at June term, 1819.

E. J. Lee, for plaintiff, offered to read in evidence, to prove the handwriting of the defendant Barrell, in a letter to the plaintiff, the deposition of John Marshall, of Charleston, South Carolina, taken before the Hon. John Drayton, District Judge of the United States, who certified as follows: "District of South Carolina, ss. On this, 28th day of May, 1818, personally appeareth the undernamed deponent, John Marshall, of Charleston, merchant, before me, the subscriber, John Drayton, district judge of the district aforesaid, and being by me carefully examined, cautioned, and sworn in due form of law, to testify the whole truth and nothing but the truth, relating to a certain civil cause wherein Charles Edmondston is plaintiff, and Kirkpatrick, Grivegneè, & Co. are defendants, now depending," &c., "he maketh oath to the deposition above written, and subscribes the same in my presence, the said deposition being first reduced to writing by the deponent."

Mr. Lear, for defendant, objected that the judge had not certified that it was so reduced to writing in his presence, as required by the 30th section of the Judiciary Act of 1789.

E. J. Lee contended that it must be presumed to have been so written, as the law required it.

But THE COURT (nem. con.) supported the objection, and rejected the deposition.

The handwriting of the defendant, Barrell, was proved by another witness, and the jury found a verdict for the plaintiff.

Mr. Lear, for defendant, Barrell, moved, in arrest of judgment, that the declaration is against three persons, upon a joint assumpsit, and the verdict finds the issue only as to one of them, the others not having appeared, nor having been outlawed, and no process having been issued against them. The practice of outlawry, in Maryland, in civil cases, has become obsolete, but, as a substitute for it, process must be issued against all the defendants, and continued against those not taken, to the time of trial, when, if not taken, that fact may be stated in an amendment to the declaration, and the plaintiff may obtain judgment against such of the defendants as have appeared and pleaded.

Mr. Lee and Mr. Jones, for plaintiff, con-

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

tended that the objection came too late. That a variance between the writ and the declaration can only be taken advantage of by plea. That the writ is no part of the record without being made so by oyer, which the defendant has not demanded. Hole v. Finch, 2 Wils. 394, 395; 1 Saund. 317, note 3; Ford v. Burnham, Barnes, Notes Cas. 340; Spalding v. Mure, 6 Term R. 363; Watson v. Shaw, 2 Term R. 654; Oakley v. Giles, 3 East, 167; Clarke v. Holmes, 3 Johns. 148, Stables v. Ashley, 1 Bos. & P. 49; Stephens v. White, 2 Wash. [Va.] 212; Boswell v. Jones, 1 Wash. [Va.] 323; Barton v. Petit, 7 Cranch [11 U. S.] 194; Moss v. Moss, 4 Hen. & M. 293; 1 Tidd, Pr. 160, 162, 652; Tomlinson v. Blacksmith, 7 Term R. 132; Blackamore's Case, 8 Coke, 161; Tomkin v. Crocker, 1 Ld. Raym. 564, 1 Salk. 49; Barnes, Notes Cas. 10, 16, 22; 1 Tidd, Pr. 162; Judiciary Act 1789, § 32 (1 Stat. 73).

Mr. Lear, contra, cited Barton v. Petit, 7 Cranch [11 U. S.] 194; Rice v. Shute, 5 Burr. 2613; 1 Chit. Pl. 438, 439; Scott v. Godwin, 1 Bos. & P. 72; 1 Chit. Pl. 29; 1 Har. Ent. 201, where there is the form of a declaration against one defendant, when the others are returned non sunt.

THE COURT arrested the judgment, and ordered a venire de novo, and permitted the plaintiff to amend his declaration upon payment of the costs of the term.

At April term, 1820, Mr. Lear, for defendant, moved the court to quash the writ, because it had been issued against the defendant Barrell, alone, upon a joint cause of action.

But THE COURT overruled the motion.

The plaintiff, under the leave to amend, filed a new declaration stating—"That George G. Barrell, late of the county aforesaid, merchant, and lately carrying on trade and commerce as a merchant, under the name, style, firm, and description of Kirkpatrick, Grivegneè, & Co., was attached to answer unto Charles Edmonston, in a plea of trespass on the case, &c., and whereupon the said Charles, by E. J. Lee, his attorney, complains, that whereas the said George, on the 8th day of May, 1816, at the city of Malaga, in the Kingdom of Spain, to wit, at the county aforesaid, together with one William Kirkpatrick, and Henry Grivegneè the younger, was indebted to the said plaintiff in the sum of 2556 dollars and 55 cents, lawful money of the United States, for divers goods, wares, and merchandises by the said plaintiff, before that time sold and delivered to the said George, and to the said William Kirkpatrick and Henry Grivegneè the younger, at their special instance and request; they, the said George, William, and Henry, to whom the said goods, wares, and merchandises were sold and delivered as aforesaid, being, at the time of the said goods, wares, and merchandises, and of contracting the said debt as aforesaid, to wit, on the same day and year aforesaid, and for a long time before and after, at Malaga aforesaid, joint merchants and traders, carrying on trade and commerce in copartnery, under the name, style, firm, and description of Kirkpatrick, Grivegneè, & Co.—which said William and Henry, as well at the time of the sale and delivery of the said goods, wares, and merchandises, and of contracting the said debt as aforesaid, as at the time of commencing the plaintiff's action aforesaid, and always before, and ever since, continually dwelt and resided in foreign parts, without the District of Columbia aforesaid, and without the limits and jurisdiction of the United States of America, to wit, at Malaga aforesaid, and were not, nor was either of them, at the time of commencing the plaintiff's action as aforesaid, nor at any time before or since, any where within the jurisdiction of this court; and being so indebted, the said George, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook," &c., "and to the plaintiff faithfully promised to pay him the said sum of money when he, the said George, should thereunto be afterwards requested." There was also a count for money had and received, with similar averments. And the declaration concluded with an averment that neither the said George, nor the said William and Henry have paid the said sums of money, or either of them, or any part thereof; and that the said defendant and the said William and the said Henry have altogether refused to pay the same, &c.[2]

Mr. Lear, for defendant, offered a plea in abatement, that the other joint promisors had not appeared, and were not made parties to the suit.

But THE COURT (nem. con.) refused to receive it unless upon oath.

The defendant then pleaded the general issue, and the jury was sworn.

The plaintiff offered, in evidence, the letters of Kirkpatrick, Grivegneè, & Co., in the handwriting of the defendant Barrell, dated Malaga, 17th April, and 8th May, 1816, inclosing an account of sales of the plaintiff's rice to the amount of $3,880.10, and promising, when in cash, to remit the amount in undoubted bill, on London, to Davidson & Simpson, according to the plaintiff's orders; which was the whole evidence in the cause. Whereupon the defendant's counsel moved the court to instruct the jury that the said evidence was not sufficient, in law, to enable the plaintiff to sustain his action; and

THE COURT (nem. con.) so instructed them; being of opinion, that to enable the plaintiff to sustain this action against the defendant alone, upon his sole assumpsit, it was necessary for the plaintiff to prove an express sole promise by this defendant, upon the joint consideration; and that the sale and delivery of goods to the three, would

[2] This declaration was drawn by Walter Jones, Esq.

not, in law, raise an implied assumpsit of one alone. The plaintiff took a bill of exceptions. The jury found a verdict for the defendant.

Mr. Lee, for plaintiff, moved for a new trial, on the ground of the misdirection of the jury, by the court, in the point of law, and cited Rice v. Shute, 5 Burrows, 2611; Abbot v. Smith, 2 W. Bl. 947; Whelpdale's Case, 5 Coke, 119; Stead v. Moon, Cro. Jac. 152. See, also, Shirreff v. Wilks, 1 East, 48; Nowlan v. Geddes, Id. 634; Tom v. Goodrich, 2 Johns. 220; Brown v. Belches, 1 Wash. [Va.] 9; Shields v. Oney, 5 Munf. 550; Wats. Partn. 241.

Mr. Jones, on the same side. Mercantile partners are jointly and severally bound, but not other joint contractors. A joint contractor, if sued alone, may rely on the joint contract, and may object to the evidence; for the plaintiff's allegata and probata must agree. It is only in mercantile partnerships that the plaintiff can recover in a suit against one alone, upon a partnership debt, if the defendant do not plead in abatement. In this cause the declaration presents the same case as if the writ had issued against all the partners, and all but one had been returned non est.

THE COURT (THRUSTON, Circuit Judge, contra,) granted a new trial, being of opinion that a partnership debt may be given in evidence to support the assumpsit laid in the declaration.

At April term, 1821, the cause came on again for trial, upon the issue of non assumpsit.

Mr. Lear, for defendant, objected to the deposition of J. Marshall, for want of formality; but

THE COURT overruled the objection, because he had, at the former trial, waived all objections to it.

Mr. Lear, for defendant, also objected to the deposition of John Haslett, because the judge who took the same had not expressly certified that the deponent was examined, cautioned, and sworn by him, the said judge; he having certified that "the said witness, being of full age, and being carefully examined, and cautioned, and sworn to speak the whole truth, says in manner and form following," &c.

But THE COURT overruled that objection also, and suffered the said deposition to be read in evidence, because it was plainly to be understood that the deponent was by him (the judge) examined and cautioned, &c.

Mr. Lear then prayed the court to instruct the jury, that if they should be satisfied by the evidence, that the goods of the plaintiff, for the value of which this suit is brought, came to the hands of the said Kirkpatrick and Grivegneè, and were sold by them before the admission of the defendant into the partnership, then the contract was made with the plaintiff by Kirkpatrick and Grivegneè only, and the defendant is not chargeable in this action; and that if the defendant was not a partner of the firm at the time of the contract, no subsequent assumpsit by him, in the name of the firm can charge him, in this action, unless an agreement be proved that he should be chargeable with the debts or contracts of the old firm;

Which instruction THE COURT refused to give, as prayed, but instructed the jury, that if they believed from the evidence that the goods of the plaintiff in the declaration mentioned, came to the hands of Kirkpatrick and Grivegneè, and were sold by them before the defendant, Barrell, was admitted into the partnership, then the contract was made by the plaintiff with Kirkpatrick and Grivegneè only, and the defendant is not chargeable in this action, unless the jury should be satisfied by the evidence that the stock of the old firm was carried into the new, and that it was agreed by the new firm with the plaintiff to pay the said debt to him; or that the money for which the said goods were sold, came to the hands of the new firm of Kirkpatrick, Grivegneè & Co., and that in consideration thereof, they promised to pay the amount thereof to the plaintiff.

Verdict for the plaintiff, $2,556.55, with interest from the 16th of June, 1816.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

Case No. 4,285.

EDMONDSON v. HYDE.

[2 Sawy. 205;[1] 7 N. B. R. 1; 5 Am. Law T. Rep. U. S. Cts. 380.]

Circuit Court, D. California. June 17, 1872.

REMEDIAL STATUTES — MORTGAGES — VOID AS TO ASSIGNEE IN BANKRUPTCY — EXEMPTION AS TO MORTGAGEE IN VOID MORTGAGE—JUDGMENT FOR COIN.

1. Remedial statutes should be liberally construed to advance the remedy, rather than strictly to the destruction of a right.

2. Under the bankrupt act, mortgages and bills of sale of personal property, which are void as to creditors under the statute of frauds of the state where the transactions occur, are void as to the assignee in bankruptcy.

[Followed in Re Morrill, Case No. 9,821. Cited in Lloyd v. Hoo Lue, Id. 8,432.]

3. Where the bankrupt makes no claim to have set apart a portion of his property, to which he is entitled under a statute exempting property from seizure and sale under execution, a mortgagee in a mortgage embracing the property executed by the bankrupt, void as to creditors under the statute of frauds, is not in a position which entitles him to have such property set aside as belonging to him by virtue of his mortgage.

[4. Cited in Re Morrill, Case No. 9,821, to the point that the delivery of possession must be immediate, and that a mortgage, void at its inception for want of such delivery, is not made valid by a subsequent taking of possession before a creditor acquires his lien.]

5. Where the district court found the value of property recovered by the assignee in bank-

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

ruptcy in "gold coin," and accordingly rendered judgment for coin, the circuit court refused to reverse the judgment on that ground.

Error to the district court [of the United States for the district of California] in proceedings by the assignee in bankruptcy, to recover the value of the assets of the bankrupt.

The district court found the facts to be as follows:

On January 10, 1869, F. B. Clark, one of the bankrupts, executed and delivered to Edmondson a bill of sale of certain personal property, embracing a part of that in dispute, the object being to secure the payment of moneys to be advanced by said Edmondson to Clark. Subsequently, May 1, 1869, said Clark executed and delivered to said Edmondson a second bill of sale, of certain personal property, embracing a part of that now in controversy, to secure the payment of moneys advanced by the latter to the former. Afterward, on February 1, 1870, said Clark executed and delivered to said Edmondson a chattel mortgage of all the personal property of said Clark, being a part of the property now in controversy, and consisting of horses, harness, wagons, cows, swine, farming utensils, household furniture, etc., but none of it being articles of the description given in the statute of California entitled "An act in relation to personal mortgages in certain cases," approved May 11, 1853 (St. 1853, p. 153), and the acts supplementary to, and amendatory thereof.

Said chattel mortgage was given to secure advances of money by Edmondson to Clark. No delivery of possession of the property described in said bills of sale and mortgage, or either of them, accompanied the execution of the same, or either of them, nor was there any possession taken thereunder till May 10, 1870; on which day, Edmondson took possession of all the personalty of both the bankrupts, except their household furniture —the property so taken into possession being all the property of which they were possessed—and removed the same from the premises of the bankrupts, and applied it to the payment of his claims against them.

Three days subsequent to so taking possession, that is to say, May 13, 1870, said chattel mortgage was recorded in the office of the recorder of Alameda county. Said bankrupts, F. B. and T. J. Clark, were copartners in the business of farming in Livermore valley, Alameda county, state of California. On said May 10, 1870, said bankrupts were insolvent, and were in contemplation of bankruptcy; and at the time of taking possession of said property, as aforesaid, the said Edmondson was well aware of the insolvent condition of said bankrupts. The cash value of the property taken by him was four thousand three hundred and ten dollars and seventy-five cents ($4,310.75) in gold coin of the United States.

June 10, 1871, proceedings in bankruptcy were commenced against said F. B. and F. J. Clark by filing a petition by their creditors, and June 21, they were adjudged bankrupts on said petition.

In due course of proceedings, Hyde, the defendant in error, was appointed and qualified as assignee of said bankrupts, and afterward, as such assignee, he instituted this proceeding against Edmondson, plaintiff in error, to recover the value of said property now in controversy. On the foregoing state of facts, the district court held:

1. That the said bills of sale not being accompanied by an immediate change of possession, were void under the statute of frauds of the state of California, as against all persons but the parties thereto.

2. That, for the same reason, and because the property attempted to be mortgaged, is not of the kind which, by the statute of California, can be mortgaged by a recorded chattel mortgage, without a change of possession, is also void as against all persons other than the parties thereto.

3. That the taking possession by the mortgagee subsequently, and with notice of the insolvency of the bankrupt, conferred no rights upon him as against the assignee.

4. That the assignee, as the representative of the creditors of the bankrupts, is entitled to recover the property so attempted to be sold, or mortgaged, or the value thereof, the property having been disposed of.

Judgment was thereupon rendered for the said value in gold coin. [Case not reported.]

The cause having been taken to the circuit court on writ of error by Edmondson, the correctness of these conclusions was presented for review.

Wm. H. Patterson, for plaintiff in error.
H. C. Hyde, in pro. per.

SAWYER, Circuit Judge. The statute of frauds of the state of California, contains the following provisions, viz.:

"Sec. 15. Every sale made by a vendee of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendee, or the creditors of the person making such assignment, or subsequent purchasers in good faith."

"Sec. 17. No mortgage of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee."

Under these provisions, it is well settled by numerous decisions of the supreme court of the state, that without an immediate and continued change of possession, sales and

mortgages of personal property are absolutely void as against creditors. The statute of this state is much more stringent than the statutes of 13th and 27th Elizabeth, and the various statutes of New York, and several other states, and cuts off many questions which arose under those acts. Woods v. Bugbey, 29 Cal. 475, 479.

It was settled by the supreme court of California so long ago as 1856, that, under the statute of frauds of that state, the change of possession must be immediate, and a sale or mortgage, being void at its inception, for want of such change of possession, that a subsequent delivery before a creditor acquires his lien, does not render it valid as to such creditors—that being void originally, it does not become valid from the date of a possession subsequently taken. Chenery v. Palmer, 6 Cal. 121. See, also, Hackett v. Manlove, 14 Cal. 89; Woods v. Bugbey, 29 Cal. 471.

The case of Chenery v. Palmer, so far as I am aware, has never since been overruled, or questioned by the court. This construction of the statutes of California must govern this court, and it must therefore be assumed that, under the statute of frauds of California, the bills of sale and mortgage in question are void as to the creditors of Clark, and confer no rights upon Edmondson as against them. The record subsequently made availed nothing. The property could not, under the statute, in any event, be validly mortgaged by a recorded mortgage, without a change of possession. This being so, we come to the important question in the case, what relation does the assignee in bankruptcy hold to the property, and what relation does he sustain to the creditors and the bankrupt? On the one hand it is contended that the assignee represents the bankrupt, and stands exactly in his shoes; that his position is no better and no worse; that he can set up no right against the vendee, or mortgagee, that the bankrupt could not set up; and as the transactions were valid, as between Clark and Edmondson, they are valid as to him.

On the other hand, it is insisted that the assignee represents the creditors, and as these conveyances are void as to them, they are void as to the assignee, and he is entitled to the property. On this point the decisions in the district and circuit courts appear to be conflicting, as will be seen by reference to 6 Am. Law Rev. 50, where they are collected and reviewed. To my mind, the conclusion that the assignee under the present bankrupt act, whatever the rule may have been under former bankrupt acts, English or American, takes the property as against the vendee or mortgagee in a bill of sale or mortgage, void as against creditors under the statute of frauds, is clearly correct. Undoubtedly, in some respects, the assignee is a representative of the bankrupt, but as to the property of the bankrupt, its administration and distribution he primarily represents the creditors. The whole object of taking possession of the property of the insolvent is, to distribute it equally and equitably among his creditors according to their several rights. It is to give to the creditors, so far as the property will go, that which under the law they are entitled to obtain in some form. The creditors themselves, not the bankrupt, choose the assignee, or, upon their failure to choose, the judge or register selects him. Upon what principle, unless he represents their interests in this particular? The constituent or principal usually appoints his own representative, why not in this case? Section 14. The property, in fact, at once goes into the custody of the law, primarily for the benefit of the creditors, and the assignee himself is but an officer of the court, to administer and distribute the property under its direction to the creditors according to their rights, as recognized by the law at the time of the institution of the proceedings, except so far as preferences are designated. Section 14 provides what the effect of the assignment shall be, and among other things, "That no mortgage of any vessel, or any goods or chattels made as security for any debt, or debts in good faith, and for present considerations, and otherwise valid and duly recorded, pursuant to any statute of the United States, or of any state, shall be invalidated or affected hereby; and all the property conveyed by the bankrupt in fraud of his creditors * * * shall, in virtue of the adjudication in bankruptcy, and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover said estate, debts, and effects, etc."

Now what mortgages are here carefully protected against the general creditors? The act plainly specifies them. They are such, only as are "otherwise valid and duly recorded pursuant to any statute of the United States, or of any state." But the sales and mortgages in question were not "otherwise valid," or duly recorded, but on the contrary, were expressly made void as to creditors by the statute of California. They are not enumerated as protected in favor of the vendee and mortgagee, but on the contrary carefully excluded. The attention of congress was specially called to chattel mortgages, and the language of the act is carefully framed, so as to recognize and protect such liens as were already valid by the laws of the land—the statutes of the United States, or of the state, where the transactions occurred. I do not see why the maxim "expressio unius est exclusio alterius" is not peculiarly applicable in this case. Besides, the act goes on to provide in express terms, that "all property conveyed by the bankrupt in fraud of his creditors * * * shall, in virtue of the adjudication of bankruptcy, and the appointment of his assignee, be at once vested in such assignee, etc."

What does this phrase, "in fraud of his creditors," mean? Can it be limited to property conveyed with a specific intent to de-

fraud creditors, or is it to be extended to conveyances in fraud of creditors in the technical and legal sense of the term? If the latter there is an end of the controversy, for, in that sense, the statute in express terms says, the property shall go to the assignee. Upon what principle can the construction be limited to the former class? The conveyances in question are in fraud of his, Clark's creditors, under the statute of frauds of the state, for the language of the statute is, that a want of an immediate and continued change of possession, "shall be conclusive evidence of fraud as against creditors." They are, therefore, both within the letter and spirit of the bankrupt act.

All conveyances made void as against creditors by the statute of frauds, in legal contemplation are made in fraud of such creditors, whether they are fraudulent, in fact, by specific intent, or only fraudulent in law. Generally such conveyances are, almost necessarily, fraudulent in fact, as well as in legal contemplation. A party who mortgages a stock of goods for example, and yet retains possession, controls and sells them, and surrounds them with all the indicia of ownership in himself, lulls existing creditors into a false security, and induces others to credit him on the supposition of his ownership, thus working actual fraud, whether so specifically intended or not. This result having been found in practice to be so common, the dictates of good policy suggested that the law should, in all cases, declare that to be fraudulent in contemplation of law, regardless of any specific intent, which was ordinarily found to be so in fact. The term, "in fraud of his creditors," is used in a statute relating to a subject matter, in which frauds of the character provided for in the statute of frauds have always abounded; and it must be presumed, that congress intended to use the term in its broadest technical, or legal sense. The occasion demanded such a use, and congress would, naturally, so provide, for its object was remedial as to creditors—to furnish a remedy in place of other remedies taken away by the bankrupt act. A liberal construction must be given to advance the remedy, rather than a strict one to destroy the right. There is nothing in the act to indicate that it was intended to be limited to conveyances made with a specific intent, at the time, to defraud creditors. I find nothing in the statute as a whole, which manifests an intent to infringe the rights of creditors, or to take away all remedy for an existing right, which would be equivalent to destroying the right itself; but on the contrary, the statute read as a whole shows, that the assignee is intended to be an officer of the court, acting under its direction, to take, administer and distribute the property of the bankrupt primarily for the benefit of all the creditors, without impairing their rights in any particular except as specifically provided. Any other construction would absolutely abrogate the statutes of frauds of the several states, and practically validate, as to creditors, these transactions, which such statutes say shall be void, and take from the creditors that property, which the state statute says they shall have, and give it to the fraudulent vendee, or mortgagee, when the state law says he shall not have it.

Let us see how such a construction would operate in California, for example. In this state, any creditor upon a contract for the direct payment of money, made or payable within the state, upon default of payment, may attach the goods of his debtor at once, not for the purpose of obtaining jurisdiction of the party, but as a levy upon the goods in advance of the judgment to secure the payment of his demand. A merchant secretly mortgages or conveys his entire stock in trade to a third party, but retains possession, and goes on with his business in the usual way, obtaining further credit on the faith of appearances, but is finally unable to meet his obligations. His creditors—all perhaps relying on appearances, have become so since the said mortgage or sale—attach his goods. The statute of California says that the sale or mortgage is void as to the creditors, and gives the property to them through the legal proceedings taken, or that may be taken. But as soon as an attachment has been levied, the debtor himself, or some creditor, files a petition in bankruptcy; an adjudication of bankruptcy follows; an assignee is appointed, and thereby the attachments are all dissolved, and the creditors forbidden to proceed in the state courts to enforce their claims to the property. The assignee steps into the bankrupt's shoes, and as he represents the bankrupt only, the conveyance or mortgage, although void as to creditors, under the statute of frauds, is valid as between him and the fraudulent vendee or mortgagee, and the property is taken from the creditors who have already fastened upon it; or if they have not done so, might do so under the laws of the state, and given to such fraudulent vendee, or mortgagee, in direct contravention of the statutes of the state, and the rights of creditors under them. Such, evidently, must be the result, unless an actual intended fraud can be proved. And if this view is adopted, experience shows that we shall have an abundance of such cases. In that view, the bankrupt act kindly steps in, and does for the debtor and his fraudulent grantee that which they originally set out to do, but which the statute of the state declares shall not be done. The fraud upon creditors which the state statutes seeks to prevent, the bankrupt act aids the parties to fully accomplish. These consequences cannot be avoided, unjust, unreasonable, or absurd as they may seem, if such is clearly the proper construction of the bankrupt act. But when the construction is wholly deduced as a matter of reasoning, from the position of the assignee as a supposed, rather than an

expressly declared personal representative of the bankrupt—for there is no express provision in the act pointing directly or inferentially, to the relation as so claimed to exist—I think it legitimate to look to such unjust, unreasonable or absurd results with a view of ascertaining, whether it is at all probable that they could have been contemplated by congress in passing the act. In my own judgment, such could not have been the intention of the legislator. Besides, the whole tenor of the act indicates to my mind, that it was intended to protect the rights of the creditors as against the debtor and his fraudulent grantee, as they existed under the laws in force where the transaction occurs, and that, in this particular, the assignee primarily represents the creditors, rather than the debtor. I am satisfied from the clause before quoted, read in connection with the other provisions of the act, that the assignee under the present act, whatever may be true of former acts, was designed to succeed to the rights of property in those cases of secret conveyance, which were not "otherwise valid and duly recorded pursuant to any statute * * * of any state," and to all property conveyed by the bankrupt in fraud of his creditors, whether the conveyance was merely fraudulent in law, or was fraudulent in fact. My conclusion is, that the assignee is entitled to the property in question. In this view I am supported by Chief Justice Chase on the circuit. In re Wynne [Case No. 18,117]. As quoted in the American Law Review, he says: "It may be, and we think it is true, that if the deed remained unrecorded when the petition in bankruptcy was filed, the title of the assignee would have prevailed against any claim under the deed; for the assignee represents the creditors, and the statute of Virginia expressly declares 'any deed of trust void as to creditors' until and except from the time it is duly admitted to record. It is not an unreasonable construction of the bankrupt act, as we think, which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt, discharged of liens or trust which, at the time of the petition, are valid only inter partes, under the statute of the state in which they are claimed to exist." 6 Am. Law Rev. 53.

So, also, in Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 394, the reasoning of the court is very pointedly to the same effect. This was, also, a suit by the assignee in bankruptcy to recover personal property of the bankrupt from the mortgagee in a mortgage not recorded as required by the statute to give it validity. The assignee recovered. The judgment was affirmed by the supreme court. One of the grounds upon which the decision is put is, that the supposed agreement, if established, was void as against other creditors of the bankrupt under the statute of frauds of Kansas. Id. 394, 395. Thus the principle is expressly recognized, that as between the mortgagee in a mortgage, void as against creditors under the statute of frauds, for want of a proper registry, and the assignee in bankruptcy, the assignee is entitled to the property. The district court in this district has so ruled repeatedly, and so clear did the proposition seem to me, that I have on more than one occasion affirmed its rulings on writ of error, without any extended discussion of the question. I should do so now, but for the fact that counsel have called my attention to a very recent decision of the supreme court, in Gibson v. Warden [14 Wall. (81 U. S.) 244], which, they earnestly insist, settles the question the other way.

This makes it necessary to re-examine the question in the light of that decision. It must be confessed that an observation made in stating the grounds of the decision affords some support to the position taken by counsel of the plaintiff in error; and upon a hasty reading, I was inclined to think that principles were stated that would lead to the result claimed; but the precise question was not involved, and upon a more attentive perusal, I am satisfied that the point was not decided, or intended to be decided, or covered by the principles laid down. The question was not in the case. There is this broad difference between that case and the one now under consideration. In Gibson v. Warden [supra], under the statute of frauds of the state of Ohio, as construed by the supreme court of that state, the mortgage in question was valid from the date of delivery, and the delivery took place in time to render it valid as to the creditors. In that case, then, the mortgage in question was a valid mortgage as to the creditors, as well as inter-parties. So far as the statute of frauds of Ohio was concerned, there was, therefore, no question between an assignee in bankruptcy and a mortgagee, in a mortgage void under the statute of frauds. In the case now in hand, the sales and mortgage are void under the statute of frauds of California, as the construction is settled by the supreme court of the state, and the question is between the assignee and vendee and mortgagee in sales and mortgages so void under the statute of frauds. The mortgage in Gibson v. Warden being valid as to the creditors under the statutes of Ohio, the only question left was whether it was valid under the thirty-fifth section of the bankrupt act. The thirty-fifth section does not declare that mortgages shall be void for want of delivery of possession, or want of registry. It only provides that certain conveyances made to evade the bankrupt act, within certain times, four and six months, before the filing of the petition, shall under certain prescribed circumstances be void. The mortgage in question being held valid as to creditors under the statute of frauds of Ohio, the question remained whether it was void under said thirty-fifth section of the bankrupt act,

on the ground of its having been made for the purposes therein prohibited, within four or six months before filing the petition. The mortgage had been actually made more than six months before the filing of the petition, but possession had not been taken till three days within six months of said filing. But want of possession is not stated as one of the elements of invalidity by the provisions of that section.

Although not stated in this precise form, the result seems to be that the possession having been taken in time to render the mortgage valid as to creditors under the statute of Ohio, no further question arose under that act; and as the bankrupt act did not make a mortgage void for want of a delivery, or record, that the conveyance must be deemed to have been made for the purpose of the thirty-fifth section at the time it was actually made, and not at the time when possession was taken under it. At all events, it was held:

1. That the mortgage was valid as to creditors under the statutes of Ohio.

2. That with reference to the thirty-fifth section of the bankrupt act, it was made more than six months before the filing of the petition, and was, therefore, not void under that act. These were the points decided. It being valid under both, it was a valid mortgage, and the right of the mortgagee was superior to those of the assignee. I do not think the court intended to hold, or to lay down principles necessarily leading to the result, that, had the mortgage in question been void as to creditors under the statute of Ohio, the mortgagee would still have been preferred to the assignee on the ground that the assignee strictly represented the bankrupt only, and succeeded to his status with respect to the mortgagee, without in any sense representing the rights or succeeding to the status of the creditors. The decision seems to have been concurred in by the entire court, and I cannot think the court would have squarely overruled the views so recently and pointedly expressed in Bank of Leavenworth v. Hunt [supra], and by the chief justice, in Re Wynne [supra], upon a point of so vital importance, and so wide spread in its application, and consequences, without in some way alluding to those cases, or at least more fully discussing the precise question. If I could satisfy myself that such was the intention and decision of the court, I should unhesitatingly follow it, without presuming to question the correctness of the determination. As I do not understand that the court has intended to overrule the views expressed in those cases, or to lay down principles which would necessarily lead to that result, and as my own convictions are very decided upon the points now in issue, I shall adhere to my former ruling until the supreme court has an opportunity to examine and determine the precise question. The question now presented frequently arises in the district court, and, I am informed, is already pending in other cases. Should the doctrine contended for by the plaintiff in error be finally established, the statute of frauds of this state, so far as relates to this question, would hereafter be nugatory, and might as well be stricken from the statute book, and I apprehend in many cases hereafter arising but little property will be found uncovered by such sales and mortgages to be distributed among general creditors. At all events, the establishment of such a principle would hold out large inducements for the commission of frauds in this convenient form.

Two other points have been made, though not much argued. It does not appear whether the questions presented by them were raised in the court below or not. One is, that certain portions of the property in question were exempt from execution, under the laws of California, and that, as to these at least the title did not pass to the assignee; but is in Edmondson by virtue of his bills of sale and mortgage. No authority has been cited on the point. The exemption from execution, and, I think, also in the bankrupt act, is a right or privilege given to the debtor and bankrupt. He may waive it by not claiming the exemption. The bankrupt did not treat this property as though it was, or would be, claimed under the exemption law, when he included it with other like property in his said bills of sale and mortgage, all of which were given for the purpose of security only. He has made no claim himself to have it set apart under the act. If the bankrupt does not choose to assert any claim to have it exempted, I am of the opinion, that the mortgagee is in no position to claim it as against the assignee.

The only remaining point is, that judgment is rendered payable in "gold coin," without finding any such state of facts as would justify that kind of a judgment. The court, however, found the value of the property in "gold coin" and not in legal tender currency. This appears in the record. The supreme court has, in repeated instances, as have various statutes of the United States, recognized the fact universally, publicly known, and acted upon in the business transactions of the country, with which everybody must be supposed to be familiar, that there is a difference in value between gold coin and currency issued under the legal tender acts. In other states, doubtless, the value of the property would have been found in legal tender currency. But as all business transactions in California are based on coin values, the district court has found the value of the property in coin. It would have been the regular mode, in the absence of a stipulation by the parties, to have found the value in currency. But this would only have involved the necessity of ascertaining the difference in value between coin and currency, and adding it to the coin value. The result would,

practically, have been the same, for the amount of currency would have been increased, so as to equal the value, as actually found in coin. The party would have been required to pay exactly the same value as now, although the number of dollars in currency would have been greater. He is, therefore, in no way injured by the judgment for coin. Doubtless, if he had called the attention of the court to the matter at the trial, and desired it, the court would have found the value in legal tender currency. I do not think I should be justified in reversing the judgment on this ground under the circumstances, as no injury resulted from the error, if error there is.

The judgment of the district court must be affirmed, and it is so ordered.

Case No. 4,286.

EDMONDSON v. LOVELL.

[1 Cranch, C. C. 103.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

DEED — NECESSITY FOR PROOF OF EXECUTION — TRESPASS QUARE CLAUSUM FREGIT BASED ON POSSESSION ALONE.

1. The execution of a deed of land need not be proved by the witnesses if it be acknowledged and recorded.

2. Possession alone will maintain trespass quare clausum fregit against one who has no title.

[Action of trespass quare clausum fregit by Ninian Edmondson against Lovell.]

THE COURT decided that the execution of a deed of bargain and sale of land need not be proved, by subscribing witnesses if the deed has been duly acknowledged and recorded. And that possession alone was sufficient to maintain the action against one who has no title.

EDMONSTON (BALLARD v.). See Case No. 817.

Case No. 4,287.

The EDMUND LEVY.

[6 Ben. 371.] [2]

Circuit Court, S. D. New York. Feb., 1873.

COLLISION IN EAST RIVER—STEAMERS MEETING AT NIGHT.

The tug W. D. R., going up the East river, made the green and red lights of the tug E. L. about ahead. The E. L. was coming down the river, and, on seeing the lights of the W. D. R., ported her helm. The W. D. R., wanting to run in to a pier on the New York side, blew two whistles, and, without waiting for any reply, starboarded her helm. The two vessels came together, the stem of the W. D. R. striking the port bow of the E. L., and receiving such injuries that the W. D. R. sank: *Held*, that the W. D. R. was in fault, in starboarding, and was solely responsible for the collision.

In admiralty.

W. R. Beebe, for libellants.

R. D. Benedict, for claimant.

BLATCHFORD, District Judge. The steamtug W. D. Reed was going up the East river, after dark, on the 8th of December, 1871, and, when off about pier 5, made the green and red side lights of the steamtug Edmund Levy, some 300 yards off, at about pier 9, about right ahead. The Edmund Levy was going down the river. The vessels were therefore, meeting end on, and it was the duty of each to port. Instead of porting, the W. D. Reed, because she wanted to run in to a pier on the New York side, blew two blasts of her steam whistle, and, without waiting for any response thereto from the Edmund Levy, starboarded her wheel, and ran on, with undiminished speed, the Edmund Levy having, at the same time, ported, across the course of the Edmund Levy, so that the two vessels collided, the stem of the W. D. Reed striking the port bow of the Edmund Levy, and the W. D. Reed being damaged by the blow so that she sank. In view of the statutory regulation requiring both of these vessels to port, under the circumstances, the W. D. Reed was solely in fault, and the libel must be dismissed, with costs.

Case No. 4,288.

The EDMUND LEVY.

[8 Ben. 144.] [1]

District Court, S. D. New York. June, 1875.

COLLISION IN EAST RIVER—TOWBOAT AND TOW—COMING OUT FROM PIER—SIGNAL.

1. The tug S. was going up the East river against the tide, not far from the Brooklyn piers, towing a barge on her port side. Her pilot saw the tug L. lying at the end of a pier on the Brooklyn side. The S. kept on until the L., without giving any signal, started out, whereupon the S. slowed her engine to allow the L. to pass ahead of her. It then appeared that the L. was towing, on a line astern, a canal boat. On seeing this the engine of the S. was stopped. As the L. went out farther into the river, it appeared that she was towing a second canal boat, the G., stern foremost, on a line from the stern of the first. On seeing this the engine of the S. was backed. But the tide swept the L. and the canal boats down upon her, and a collision ensued between the barge towed by the S. and the G. The owners of the G. filed a libel against both tugs to recover the damages. Each tug answered that it was free from fault and threw the blame upon the other, and each alleged that the G. was in fault, in being towed stern foremost so that she could not be steered: *Held*, that it did not appear, from the evidence, that the collision would

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

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

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have been avoided if the G. had been towed bows foremost; but, if the manner in which she was towed was a fault, it was one for which the L. was responsible, and not the G.

2. It could not be held to be a fault in the L., that she towed the two boats out astern of each other, and the G. stern foremost; but such a mode of towing imposed on her the duty of using great care.

3. She should have given an alarm before moving out, and continued it till the G. was clear of the piers.

4. The S. was not in fault for being too close to the piers, although, undoubtedly, if she had been so far out as to be beyond the L., there would have been no collision, because there would have been none, also, if she had been yet closer to the piers.

5. The navigation of the S. was free from fault, and that the L. was in fault for not giving due warning, and must be held solely liable.

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.
John A. Foley, for the Levy.
Goodrich & Wheeler, for the Sumner.

BLATCHFORD, District Judge. This libel is filed by the owners of the canal boat Katie T. Gardner, to recover against the steamtug Edmund Levy and the steamtug W. A. Sumner, for the damages sustained by such owners, through a collision which took place in the East river, off Brooklyn, on the 30th of December, 1873, in the day time, between the canal boat and a barge in tow of the Sumner, while the canal boat was in tow of the Levy. The tide was ebb. The Sumner was going up along the Brooklyn shore, against the tide, with the barge on her port side, the stem of the barge projecting some distance ahead of the stem of the Sumner. The Levy was towing astern of herself, from Brooklyn to New York, by a hawser, two canal boats. One of them, the Lappan, was towed stem foremost, a hawser running from her bow to the stern of the Levy. The Gardner (the libellants' boat) was towed stern foremost, astern of the Lappan, a line running from the stern of the Gardner to the stern of the Lappan. The Levy, in addition, had a canal boat lashed to her side, which she was towing. The bow of the barge alongside of the Sumner came into collision with the starboard side of the Gardner, and damaged her.

The Gardner was lying at the lower side of a pier at Brooklyn, with her stern towards the river. The Lappan was lying between the Gardner and the river, alongside of the same pier, with her stem towards the river. Both boats were to be towed by the Levy to the same pier in New York, across the East river. The Levy came to the end of the pier at which the two boats were lying, and got a hawser from her own stern to the bow of the Lappan. Then, by direction of those in charge of the Levy, a line was made fast between the stern of the Lappan and the stern of the Gardner, by which to tow the latter boat. Then the master of the Levy gave directions that the canal boats should be cast loose from the pier, and that was done, and the Levy proceeded to tow out the boats.

The libel alleges that the Sumner, upon perceiving the Levy towing out the Lappan, slowed until the Lappan's stern had reached the end of the pier, and then, without waiting for the Gardner to get out, went ahead again, and, as the Levy and her boats felt the influence of the wind and tide, the Gardner was carried down, by such influence, towards the Sumner and upon her course, and the onward course of the Sumner and the swinging of the Gardner brought the stem of the Sumner's barge in contact with the starboard side of the Gardner, a little abaft amidships; that the Gardner was without fault; that the collision occurred by the combined fault of the Levy and the Sumner; that the Levy was in fault in attempting to tow out from the pier two canal boats, one behind the other, across a strong tide and wind, when it was apparent she could not control them; and that the Sumner was in fault in coming up so close along the docks, in not stopping in time to avoid the collision, and, having the Levy upon her starboard hand, in not taking measures in time to avoid her.

The answer of the Levy avers that the Sumner was not more than 100 feet from the pier; that there was plenty of room in the river, and no obstruction in the river; that, at the time of the collision, the Levy was over 200 feet from the pier; that no whistle was blown, nor any signal given, from the Sumner, to announce her approach; and that the collision was not caused by any fault on the part of the Levy, but was caused by the negligent manner in which those in charge of the Gardner attached her tow line to the Lappan, and by the negligence of those in charge of the Sumner, in that she came up so close along the docks, and did not stop in time to avoid the collision, and did not give any signal, or blow any whistle, to give warning of her approach.

The answer of the Sumner sets forth, that the Sumner was proceeding up the river at a distance of about 400 yards from the Brooklyn shore; that, when she was abreast of the second pier below the pier at which the Levy was, her pilot saw the Levy coming out with a tow, and, almost immediately, saw that there was more than one boat in tow, and at once stopped and backed; that the Levy and her tow were swept down by the tide, and ran across the bows of the Sumner, and carried the Lappan safely across, but the stern of the Gardner was, by reason of her being light and towed by the stern, unable to be steered or controlled, and her stern sheered to the right, barely clearing the bow of the Sumner's barge, and then her starboard side was swept by the force of the tide upon the bow of the Sumner's barge, but the Levy kept on her course

and took the Gardner across the river; that the Sumner was without fault; that she was well out in the river; that the Levy was discovered at a distance of at least 300 yards; that the Sumner was at once stopped and backed, and was going astern when the collision happened; that the Gardner was in fault in being towed by the stern and in being attached by a hawser, thus depriving herself of a helm, and by a hawser passed out from a cleet and not over the centre of the stern; and that the Levy was in fault in not giving notice of her intended movement and in towing the Gardner by the stern.

(1.) As to the negligence alleged against the Gardner, it is said that her tow line was attached by herself to the Lappan in a negligent manner, and that it passed out from a cleet on her side to the Lappan, and not over the centre of her stern, so that she was not towed in a straight direction after the Levy and the Lappan, but was caused to sheer towards the Sumner. I am not satisfied, on the evidence, that the manner in which the line ran from the Lappan to the Gardner and pulled on the latter, had any part in contributing to the collision.

Again, it is contended that the Gardner was in fault in allowing herself to be towed astern, on a hawser, and not alongside of the Levy, and, also, in allowing herself to be towed stern foremost, so that she could have no use of her helm. I am not satisfied, on the evidence, that, if the Gardner had been towed bow foremost, in the same relative position, the use of her helm would have prevented the collision. But, at all events, if her being towed stern foremost, and her not being towed alongside of the Levy, contributed to the collision, and can be regarded as faults, they are faults for which the Levy is responsible, and not the Gardner. Of course, as between the Gardner and the Levy, the Levy alone is responsible for those faults, if they were faults. As between the Gardner and the Sumner, the Levy had, for the time being, assumed control of the position which should be occupied by the Gardner, and the Levy alone can be held to respond to the Sumner for such position of the Gardner. If the Sumner were suing for injuries to herself by this collision, her cause of action, if any, would be against the Levy alone, and she would have none against the Gardner, arising out of such position of the Gardner.

(2.) As to fault in the Levy, it cannot be held to be a fault in itself that she towed out the two boats astern of her, and that she towed the Gardner stern foremost. Such a mode of towing, however, imposed upon her the necessity and obligation of using great caution. She was starting from a pier. She had a boat alongside of her. To those observing her from a distance not very great, even after she began to move out, it would not appear, in the absence of a previous warning by her, that she was towing a boat astern of her, much less that she was towing a second boat astern of the first boat. Other boats would adopt precautions, in the first place, only to avoid the Levy and the boat alongside of her, and, when it was seen that she had one boat in tow astern of her, it would hardly be thought that she would have another astern of that one. But, if before starting out at all, she had, in view of what she was to tow astern of her, given signals of alarm by her whistle, she would have indicated to other boats that there was something in her proposed movement that required attention from them. She ought to have done this, and she ought to have continued such signals until the Gardner was clear of the pier. It is quite apparent, on the evidence, that the Sumner could and would have stopped and backed sooner than she did, and enough sooner to have avoided the collision, if she had had any previous warning from the Levy that the Gardner was coming out. She slowed and stopped and backed in season to avoid the Levy and the Lappan. But the Levy pulled out the Gardner unexpectedly and without warning to the Sumner, when the Sumner had taken what proved to be effectual measures to avoid the Levy and the Lappan.

The tide swept down the Levy and her tows as soon as they felt its influence. This arose largely from the fact that the two boats were towed astern, one after the other. They were not as much under the control of the Levy as they would have been if they had been alongside of her. This added to the obligation upon the Levy to give warning, especially in view of the approach of a vessel from the direction toward which the tide would carry her and her tow. That was the direction from which the Sumner was approaching. The captain of the Levy testifies that he did not see the Sumner before he started; that he first saw her when the Gardner was outside of the pier; and that the Sumner was then 150 or 200 feet from him. The Levy was going out and was pulling two canal boats lengthwise after her, without giving any signal or warning. On the other hand, the Sumner saw the Levy lying at the end of the pier, and proceeded up the river, without any intimation as to what the Levy was going to do. Then the Levy started out, and the Sumner slowed for her to pass, as being a tug without a tow. Then the Sumner perceived that the Levy had one boat in tow behind her. Thereupon the Sumner stopped her engine. Then the Sumner perceived the Gardner being pulled out behind the Lappan. Thereupon the engine of the Sumner was backed. But the sweep down of the Gardner was such that the collision ensued. On these facts, the Levy was clearly in fault, for not giving warning to the Sumner.

(3.) I perceive no fault in the Sumner. In the absence of a proper warning from the Levy, the Sumner's navigation was not im-

proper. It is alleged that she was coming up too close to the docks. Undoubtedly, if she had been so far out in the river as to be beyond the reach of the Levy and her tows, there would have been no collision. As it was, if she had been even closer to the docks, she would have passed inside of the Gardner, and the barge would not have hit the Gardner.

The libel must be dismissed, as to the Sumner, with costs; and there must be a decree in favor of the libellants, against the Levy, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

EDRINGTON (AIKEN v.). See Case No. 111.

EDSALL (NONES v.). See Case No. 10,290.

EDSELL (WELDDES v.). See Case No. 17,375.

EDUCATION, BOARD OF, OF HARRISONVILLE (BONHAM v.). See Case No. 1,629.

Case No. 4,289.

The EDWARD.

[1 Blatchf. & H. 286.][1]

District Court, S. D. New York. Feb. 12, 1832.

SEAMAN'S WAGES—WHEN LIBEL MAY BE FILED—PLEADING—ANSWER TO THE MERITS — WAIVER OF EXCEPTION TO REGULARITY OF PROCEEDINGS OF LIBELLANT.

1. Where a vessel has fully discharged her cargo in her port of delivery, and leaves that port, on other voyages, without payment of wages, the seamen, although accompanying her, are entitled to an action for such wages immediately.

2. So, if she return to the same port of delivery, a seaman may institute an action at once for wages earned on the previous voyage, though the vessel be not discharged of her second cargo.

3. Where, in a suit in rem for wages, an answer is filed to the merits, and issue is joined, and the case is brought to a hearing, and proofs are taken on both sides, that is a waiver by the claimant of any right of exception to the regularity of the proceedings of the libellant as to the time of instituting his suit, under the 6th section of the act of July 20, 1790 (1 Stat. 131, 133).

[Cited in Granon v. Hartshorne, Case No. 5,689; The Heroe, 21 Fed. 528. Applied in The Grace Darling, Case No. 5,651.]

In admiralty. This was a libel in rem by a cook to recover his wages, and the value of a chest of clothes, and damages for his being deserted by the vessel and left at Callao. A claim and answer to the merits was filed, and issue joined. The cause came on regularly to be heard, and proofs were taken on both sides. It appeared that the libellant had shipped in Providence, Rhode Island, and had accompanied the vessel upon several voyages, in the course of which she had once before discharged at the port of New-York. She afterwards went from New-York to Callao, thence along the coast of Mexico, and back to Callao, where the libellant was left. The vessel then went to Canton, and from Canton to New-York. This suit was brought for wages due previously to the first discharge at the port of New-York, and was instituted before the vessel was fully discharged the second time at the same port. A motion was now made, on the part of the claimant, to dismiss the libel, on the ground that the action was prematurely brought, under the provisions of the 6th section of the act of July 20, 1790, which provides that, "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due, according to his contract;" "but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages."

John B. Staples, for libellant.
George F. Talman, for claimant.

BETTS, District Judge. The motion to dismiss the libel, in this case, rests on the ground that the action was prematurely brought, the vessel not being fully discharged at the time. The action is not for wages upon the voyage now ending, but for those earned on a previous voyage, fully terminated long since. The vessel left the port of delivery, where the voyage now in question ended, without payment of the wages earned during that voyage. Accordingly, the case is directly within the words of reservation in the statute. The restriction on the right of action applies only when the vessel, on the termination of the voyage, remains at her port of unlading, and is intended for the benefit of the shipowner, that he may be enabled to ascertain that his cargo is delivered without embezzlement, and to collect his freight before being obliged to make disbursements for wages. The seaman is bound to delay his action, that the owner may secure those advantages. It is plain that the act has relation only to the specific voyage and services for which the suit is brought; and, when the vessel has accomplished one voyage with full unlivery of her cargo, it matters not that she has made other voyages, and, when proceeded against, happens to be again in the same port at which the voyage sued for terminated and the wages claimed were payable. Those wages have no connection with the after employment of the vessel, or the after service of the libellant. The vessel will, in respect to such service, be considered as having left the port of delivery on an after voyage, equally as if she were

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

found and sued in a different port. The "last port of delivery," designated in the act of congress, necessarily means the port of final delivery of the specific cargo upon which the wages accrued, and in respect of which the suit is brought. There is, accordingly, nothing in this branch of the defence.

I think, also, that the claimant, by appearing and contesting the claim upon the merits, must be deemed to have waived all right of exception to the regularity of the proceedings. Proofs have been taken by both parties under the issue joined, and, after that, the claimant cannot be permitted to allege that the libellant instituted his action without observing the requisite formalities. The claimant can take no higher advantages by this motion than he could under a plea in abatement, or under a declinatory exception of that character; and such objection to a prior irregularity is not regarded by the courts after full contestation of the action upon the merits. 2 Browne, Civ. & Adm. Law (Ed. 1799) 30, 89, 104, et seq.; Pothier, Analyse des Pand. 360, 361.

Motion denied, with costs.

EDWARD, The (STURGIS v.). See Case No. 13,575.

Case No. 4,290.

The EDWARD ALBRO.

[10 Ben. 668.][1]

District Court, S. D. New York. Dec., 1879.

BOTTOMRY—FORM OF BOND—ITEMS PROPERLY INCLUDED IN A BOTTOMRY BOND GIVEN BY THE MASTER OF A VESSEL TO HER AGENT—COMMUNICATION WITH OWNER—COSTS—PLEADING.

1. A bark belonging in Nova Scotia arrived in Cape Town with a cargo of deals. Her owner had sent a power of attorney to a merchant there, but he refused to act. Her master becoming acquainted with one G., a ship chandler, and having told him that he was to have several hundred pounds in hand from the inward freight, procured supplies of him for the vessel and advised with him about procuring a cargo to New York. G. procured some freight for the vessel and also arranged for the purchase of some old iron to be taken as freight. But when the inward freight was settled up, it appeared that there was but £37 coming to the captain and that he would not have money enough to pay her bills for supplies and for some repairs which were necessary. The seller of the old iron arrested the captain to recover the price, whereupon G. paid the bill and obtained his release. The next day the captain suddenly died. G. then advertised for a master and one R. offered his services and was accepted and took command of the vessel. G. had been credibly informed that the mate was not a proper man to take the command. Advertisements were then issued for a loan of money on bottomry, but none were offered, and G., who had himself a large bill for supplies, paid the other bills of the vessel and took an instrument signed by R. as master, as a bottomry bond, and also bills of exchange for £687 16s 11d, on B. of New York (who was the equitable owner of her), payable at seven days' sight. The vessel having arrived in New York and the bills of exchange not being paid, G. libelled her to recover the amount of the bond. The registered owner appeared as claimant and contested the bond: *Held*, that it is essential to a bottomry bond that payment of the sum secured be conditioned on the safe arrival of the vessel.

2. While the question, whether this characteristic is to be found in the instrument, must be determined by the terms of the instrument without regard to extrinsic evidence, it is sufficient if on the whole instrument the intention of the lender to take the risk appears.

3. This instrument was a bottomry bond, because, although there was a provision in it that in case the bills of exchange were not accepted and paid, the bond should become due, yet there was also in it a condition that G. should assume the risk of the voyage, and the two conditions must be taken together.

4. Although the libel did not allege that the master had made efforts without success to procure advances on the credit of the vessel, yet as it averred that he, having no other means of procuring the money, borrowed the money on bottomry after duly and publicly advertising therefor, and the libel had not been excepted to, the objection to the libel for not containing that allegation had been waived.

5. It is more proper pleading, if the claimant of a vessel object because the master of his vessel failed to communicate with him before taking up money on bottomry, that he should aver by way of defence that the circumstances were such as to require such communication.

6. Under the circumstances of this case the bond was not made void by the failure to communicate with the owner.

7. Although the libellant had acted incautiously in advancing his money to pay some charges, which were not proper to be inserted in a bottomry bond, there was no ground for charging him with bad faith.

8. A party who has supplied a vessel, or advanced money on the personal credit of the owner, cannot afterwards turn it into a maritime lien on the vessel by taking a bottomry bond for it, but advances made and supplies furnished on the credit of the vessel may be turned into a subsequent bottomry.

9. Though no agreement was made with G. at the time he began to supply the ship, as to how he was to be paid, he undoubtedly supposed from the master's statement which was untrue, that the master would have funds to pay him, and the owner could not now take advantage of such mis-statement, and the supplies furnished by G., while the effect of that statement continued, were properly included in the bond.

10. The following items were not proper to have been included in the bond, viz.: (1) The amount paid for the old iron and the costs of the suit. (2) Money furnished to the master but not proved to have been used for the ship or loaned for the ship's use. (3) Items for personal expenses of the master, for cab hire and for liquors. (4) Commissions on the libellant's own bill of supplies. (5) Cash for a set of scales, weights and measures, not shown to be necessary for the ship. (6) Items of luxuries in the libellant's bill of supplies.

11. The following items were properly included: (1) Commissions for procuring freight. (2) Stevedore's bill for taking cargo on board. (3) Funeral expenses of the former master. (4) Advertising for a master, for bottomry and for bills against the ship. (5) For drawing the bottomry bond and stamps on it. (6) For a butcher's bill, the items of which were not given but which were shown to be correct. (7) Expenses of survey and cost of repairs.

12. Owing to the libellant's having included in the bond unauthorized charges, and insisted

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

on its payment in full, and filed his libel without affording the owner of the vessel a reasonable time to examine into the question of the amount really due, the court would not award him costs.

[Cited in The City of New York, 23 Fed. 620.]

In admiralty.

W. W. Goodrich, for libellant.

F. A. Wilcox, for claimant.

CHOATE, District Judge. This is a suit by Joseph Grady, upon a bottomry bond executed at Cape Town, South Africa, by the master of the British bark Edward Albro, on the 10th day of July, 1877, for £687 16s 11d. The bond is upon the vessel and her freight for the voyage from Cape Town to New York. Soon after her arrival in this port and on the 14th of September, 1877, this libel was filed. The bark belongs to Pictou, Nova Scotia, but her equitable or real owner is a resident of New York. The vessel being attached on process, the registered owner appeared as claimant and has answered. Besides some defences on the merits, the claimant makes by exception and answer certain objections to the libel and to the bond, which will be first disposed of.

It is objected that the instrument sued on is not a bottomry bond but a mortgage. Undoubtedly, this court has no jurisdiction to enforce a mortgage, and if such is the real nature of this instrument the libel must be dismissed. Bogert v. The John Jay, 17 How. [58 U. S.] 402; Maitland v. Atlantic [Case No. 8,980]; The Emancipation, 1 W. Rob. Adm. 124. The distinguishing characteristic of a bottomry bond is that the payment of the sum secured thereby is conditioned upon the safe arrival of the vessel, the lender taking all the risk of her loss upon the voyage, and this is the consideration that justifies the extraordinary or maritime interest reserved on such contracts. Same cases; also, The Atlas, 2 Hagg. Adm. 57. And whether or not an instrument is a mortgage or a bottomry bond must be determined, as in case of all other written instruments, by the terms of the agreement itself, without regard to extrinsic proof of the intention of the parties. Cases last cited. It is enough, however, that upon the entire instrument the intention of the parties appears that the lender shall take the risk of the safe arrival of the vessel. There is no prescribed form of a bottomry bond and the courts of admiralty, recognizing the fact that the forms of these instruments used in different countries differ, have given to them a liberal construction to effect the intention of the parties. The Nelson, 1 Hagg. Adm. 176. See, also, Simonds v. Hodgson, 3 Barn. & Adol. 50; The Tartar, 1 Hagg. Adm. 14. So, too, it is no objection to a bottomry bond that a draft or bill of exchange is also given for the amount. It is in some countries usual for the master to draw for the amount, and the drawing of such a bill as collateral security does not vitiate the bond. The Nelson, ut supra; The Jane, 1 Dod. 466; The Emancipation, ut supra.

Applying these well-settled rules to the present case, the instrument here sued on is undoubtedly a bottomry bond. It commences as follows: "Know all men by these presents, that I, William Reimer, master of the barque or vessel called the Edward Albro, of the burden of 394 tons or thereabouts, now lying in Table Bay, am held and firmly bound unto and on behalf of Joseph Grady, of Cape Town, merchant, etc., carrying on business under the style of Jos. Grady & Company, in the penal sum of nine hundred pounds sterling of lawful money, to be paid to the said Joseph Grady & Company, their certain attorney, order or endorser of this bond, for which payment to be well and truly made I, the said William Reimer, do hereby specially bind, mortgage, pledge and hypothecate the said ship, Edward Albro, her tackle, apparel, furniture and appurtenances, together with the freight to become due and payable in respect of the cargo laden on board during the voyage of the said vessel from this port bound to New York, firmly by these presents. Sealed with my seal, dated at Cape Town," etc. The bond then recites that the vessel, on her voyage from Geffle to Cape Town, met with very severe and boisterous weather and sustained considerable damage, and was compelled in consequence to expend a considerable sum of money in repairs and necessary supplies to enable her to leave Cape Town and continue her voyage to New York, the port of her owners; that the master, not having sufficient funds for defraying the expenses of repairs, stores and supplies and other necessary expenses at that port, advertised for tenders for the sum required "on bottomry of the said vessel, cargo and freight;" that Joseph Grady & Co. agreed to advance the sum required on more satisfactory terms than any tender put in; that the master had received from them the full amount of £687 16s 11d, to defray the expenses of the ship, and enabled her to proceed to sea, "on bottomry of the said ship, her tackle, apparel, furniture and appurtenances, together with the freight to become due and payable, during the hereinafter mentioned voyage in respect thereof." The bond then contains the following clause: "In consideration whereof, the usual risks of the seas, enemies, pirates, utter loss from fire and all other casualties of navigation, are to be for and on account and risk of the said Joseph Grady and Company." The bond then further recites that the master has signed and delivered a set of bills of exchange for the sum of £687 16s 11d, dated at Cape Town the 9th day of July, 1877, drawn and signed by him upon A. Speirs Brown, of New York (the equitable owner of the vessel), payable at seven days after sight to the order of Jos. Grady & Co.

It then concludes as follows: "Now the condition of this bond is such, that if the said bills of exchange or any one of them shall be well and truly accepted upon presentation and paid within seven days thereafter, then this obligation shall be null and void and of no force or effect, but otherwise shall be and remain in full force and virtue, I, the said William Reimer, for and on behalf of myself and the owners, hereby contracting, agreeing and engaging that the said ship, her tackle, apparel and furniture and appurtenances, and the freight as aforesaid, shall, in the event of such non-payment, at all times be liable and chargeable for the payment of this bond, together with maritime interest at the rate of twenty-five pounds per centum per annum, and all costs and charges which may attend the recovery thereof, and that the taking of such bills of exchange (if not paid) shall not in any way vitiate or prejudice this bond. In witness whereof," etc., etc. The bill of exchange referred to in the bond was in the following form: "At seven days after sight of this first bill of exchange, etc., pay to the order of Joseph Grady & Co. the sum of £687 16s 11d, value received, in advances to defray expenses of the barque Edward Albro, secured by bottomry bond, to be surrendered on due payment of this draft, on or within seven days after presentation, and which charge, with or without advice, to account of Wm. Reimer, master." Little need be said, it seems to me, about the form of the bond. As the use of the word "bottomry" in an instrument will not make it a bottomry bond, if the evident intention is to make the agreement to pay absolute and not dependent on the safe arrival of the vessel, so the use of the word "mortgage," as in this instrument, cannot have the effect to make it a mortgage instead of a bottomry, if upon view of all its provisions the contrary intent is apparent. Reading the formal condition alone, it might seem that the only case in which the bond was to fail was the non-acceptance or non-payment of the draft; but if effect is given to all its provisions, it is obvious that this is not so. The express provision that Joseph Grady & Co. are to assume all the usual risks of the seas, etc., was evidently inserted for the very purpose of attaching to the contract the condition of the safe arrival of the ship, and this provision cannot be ignored. This clause and the condition can, without difficulty, be construed together. If the draft is paid, the bond is discharged; if not, the bond is to be enforced. But what bond? Why, of course, not the absolute promise to pay, but the bond as it is, with all its conditions and qualifications, one of which is that the obligee takes all the usual risks of the seas, and of the loss of the ship upon the voyage by fire or other casualty. The exceptions to the libel, therefore, so far as they are based on the theory that this was not a bottomry bond, are disallowed.

A further exception is taken that the rate of interest reserved was usurious. This objection necessarily falls with the other. An exception is also taken that it does not appear on the libel that the master made any efforts to procure advances on the credit of the owner, or that he communicated with the owner that such advances were needed and that he had made efforts without success to procure the same on the credit of the vessel before the execution of the bond. The libel does allege the need of funds and that the master "having no other means of procuring the same, after duly and publicly advertising therefor, borrowed the aforesaid sum of the libellant on bottomry," etc. Correct pleading requires that the material facts should be stated, not by way of recital merely, but positively, and if this exception had been brought on before the trial of the cause, it would be proper to have sustained it, in order to compel the libellant to state the fact that there were no other means within the control of the master positively; but by going to trial on the merits, it seems to me that the claimant has waived this merely technical objection, and if he has not, that the libel should now be allowed to be amended to conform the pleadings to the facts, without imposing any terms. I think a distinct and positive averment that the master had no other means of procuring the money except by bottomry, is a sufficient averment of the necessity for giving the bond, and that the libellant need not allege that the master communicated with the owner. Whether the master is bound to communicate with the owners, or not, before executing a bottomry bond, depends upon circumstances, and it seems more proper, if the claimant insists that the circumstances require it, that this should be set up by way of defence. The Olivier, Lush. 484. In the first instance, it is enough for the libellant to allege the necessity for repairs and supplies, and that the master was without means of procuring them. The Eureka [Case No. 4,547]. The exceptions to the libel are therefore overruled.

Upon the merits, several defences are attempted which may be reduced to these: (1) that the bond is void because of fraud on the part of the libellant; (2) that it is void for want of a communication with the owner; (3) that the master had other means to meet all the proper expenses of the ship; (4) that, as to some part of the expenses included in the bond, they were not incurred on the credit of the vessel, and as to some that they are exorbitant.

As to the defence of fraud, there is, I think, no sufficient evidence to impeach the good faith of the libellant. He has indeed acted very incautiously in advancing his money to pay some charges which are clearly improper to be included in a bottomry bond, but his acts show a want of prudence and of

knowledge of the business he undertook to transact, rather than bad faith. And the fact that a part of the expenses, for which a bottomry bond is given, are improper is not in itself a fraud. The Augusta, 1 Dods. 287.

In respect to the defence of want of communication with the owner, it is necessary to consider the circumstances under which the bond was given. The master, as agent of the owner of the ship, is bound to act with a prudent regard to the owner's interests, and before hypothecating the ship, where other means of raising the necessary funds fail, he is bound to communicate with the owner, if such communication is practicable under the circumstances, without unduly delaying the ship, before he can execute a bottomry bond. The Oriental, 7 Moore, P. C. 398. See, also, The Bonaparte, 8 Moore, P. C. 459; The Onward, L. R. 4 Adm. & Ecc. 57; The Julia Blake [Case No. 7,578]. It has been suggested that this objection goes only to invalidating the stipulation of the bond for payment of maritime interest on the ground that the failure to communicate has only subjected the owner to this extraordinary expense. The Eureka [Id. 4,547]. But, as I understand the cases, it has been held that the communication with the owner, where practicable and prudent under the circumstances, is one of the modes of obtaining funds to which the master must resort and which he is bound to exhaust before that necessity can be said to exist which clothes him with authority as agent of the owner of the ship to make an express hypothecation of the ship by a bottomry bond. This being so, the objection, if well taken in the particular case, must make the contract as a bond invalid for want of authority to execute it. The same principle has been held to apply to a bond hypothecating the cargo, and in respect to the cargo upon a ground which does not apply to the case of the ship, namely, that the owner of the cargo may have the opportunity to exercise his option to take the cargo at the intermediate port upon payment of full freight and indemnifying the ship against expense and loss arising from his retaking it. The Julia Blake, ut supra; The Onward, ut supra; The Lizzie, L. R. 2 Adm. & Ecc. 254. But it is entirely clear as to the cargo and a fortiori as to the ship, that the master is not bound to wait to communicate with the owner, if it is impracticable under the circumstances, or will seriously delay the vessel, having regard to all the circumstances. Perhaps no better test can be applied than this, that in the matter of communicating the master must do what a prudent owner, if personally present, would do under the same circumstances. The Lizzie, ut supra. The failure of the bond for want of communication would not, however, necessarily lead to the dismissal of the libel, since the court may, if it appears that through a mistake and without fraud, an attempt to convert a tacit hypothecation under the general maritime law into an express hypothecation by the bond has failed, allow an amendment of the pleadings and enforce the maritime lien. And such practice would especially be proper where the parties, without fault, have, as in this case, been delayed two years in the trial of their case, and have really tried the questions that arise in respect to the maritime lien. The William and Emmeline [Case No. 17,687]; The Eureka, ut supra; Carrington v. Pratt, 18 How. [59 U. S.] 66. Of course this would be impossible if the prior claim did not constitute a maritime lien, as in the case of The Circassian [Case No. 2,724], or in case of an attempted hypothecation of the cargo, where no prior lien exists.

The barque arrived at Cape Town on the 15th of April, in command of Capt. Cummings, who had sailed in her from New York. She had sailed from New York with a cargo of petroleum for Stettin. From Stettin she proceeded to Geffle and from Geffle took a cargo of deals for Cape Town. She put into Madeira in distress and was there repaired, and incurred expense, for which a bottomry bond was executed. She was consigned at Cape Town to one Ardeme. The owner had, before her arrival, sent a power of attorney to a merchant at Cape Town, to attend to the business of the vessel, but for some reason he did not act. Soon after his arrival Capt. Cummings got acquainted with this libellant, Joseph Grady, who was doing business under the name of Joseph Grady & Co., as a ship chandler, and Grady solicited of the captain the business of the ship so far as related to the supplying of ship-chandler's stores. The captain informed Grady that he would have coming from his consignees three or four hundred pounds to spare, which he wished to put into old iron to bring to New York, and asked him to assist in procuring other freight. The vessel seems to have had no business at Cape Town except to deliver her inward cargo and to get such homeward cargo as she could obtain. Soon after his arrival, the master consulted with the libellant in respect to getting a homeward cargo, and by his advice, the ship was advertised in the newspapers for New York, for any freight that might offer. The libellant was then doing business with an American man-of-war, and secured for the barque the carriage of her guns to New York, the freight agreed upon being £100. Cargo did not offer in any large quantity, but some wool and other produce was secured. The libellant arranged with one Wainwright to sell to the master about two or three hundred tons of old iron and about twenty tons were actually delivered and shipped on the barque. This was soon after the delivery of her inward cargo, which took about ten days. But afterwards, upon

settlement of the master's accounts with Ardeme & Co., it was discovered that instead of there being three or four hundred pounds to spare of his freight moneys to invest in cargo, as the master had represented, there was but £37 payable to him. The precise time when this discovery was made does not appear. It was, however, before the 29th of May, when the master died. Up to that time most of the cargo that was obtained at all had been shipped and there was little prospect of any more. From the time that the discovery was made that the master had but £37 at his command, it became evident that he would be in want of funds to disburse the ship in order to prosecute his voyage, unless the freight on the cargo shipped and to be shipped should be sufficient and available therefor. The owner had no agent acting for him and no funds in Cape Town at the master's command. The vessel, on her arrival, needed some slight repairs and supplies and stores for her stay in port and her return voyage, which was ordinarily a voyage of about two months. The apparent necessities of the ship were much short of the amount afterwards secured by the bottomry, £687, for, as will be shown hereafter, many expenses were included therein which were not really necessities of the ship, and after the death of the captain there was a further unexpected delay of the vessel in port, and repairs which had not been anticipated, but which were rendered necessary in consequence of the refusal of the crew to go to sea in the vessel as she was, and the consequent order by a survey of some additional repairs. All this tended to make the ship's disbursements, in fact, larger than seemed probable before the death of Captain Cummings, and before the bills of the vessel were called in by advertisement, which was some time, but how long does not appear, before his death. When the bills were called in it was evident that the master could not obtain the means at Cape Town of disbursing the ship. It is suggested that the freight, in all amounting to about £300, was a fund that he could have used. Upon the evidence, however, I am bound to find that it would not have been possible, at Cape Town, without some collateral security or an indorser, to raise money on the freight. Before Captain Cummings' death he had been arrested at the suit of Wainwright for the price of the old iron delivered to the ship. The libellant paid the bill and costs, amounting, in all, to about £49, and the captain was released, went on board ship and almost immediately died. He seems to have been an intemperate man and had lived on shore while in port and run up considerable bills for his board, for liquor and other unnecessary expenses. Upon the death of the master the libellant advertised for a master, and on the 14th of June Captain Reimer offered his services, and he was accepted and assumed the command of the barque on the 16th of June. It is objected that his appointment was irregular for want of authority on the part of the libellant, and, also, because the vessel had a mate who was competent to act as master and who should have succeeded to the command. It is, indeed, suggested that the libellant designed a fraud on the owner, and for that reason set aside the claims of the mate and procured and installed a master in his own interest who would make no objection to executing the bottomry bond and would aid the libellant's fraudulent designs. As above indicated, the evidence does not sustain this charge. The mate seems to have been set aside because he was, or the libellant was credibly informed that he was, not a suitable man to become captain. In this the libellant may have been mistaken, but it cannot be concluded from such mistake that Captain Reimer, who became, in fact, the master, and who has since been recognized as such by the owner, had not all the customary authority of master from the time he took command of the vessel. Tenders for bottomry on ship and freight were advertised for, but no tenders appeared, and finally the libellant, who had already a large bill for supplies due him, paid the bills of the ship and took the bottomry bond. The vessel sailed from Cape Town on the 12th of July. No communication was had with the owner, except that on the 30th of May the libellant wrote the owner a letter, which was received in New York on the 7th of July, informing him of the death of the master, referring to the claims against the vessel and promising further information by the next mail, which would leave on the 5th of June. This letter is clearly insufficient as a communication, if communication was necessary, because it was not sufficiently distinct as to the necessities of the ship, and by promising further advices, led the owner to await such further intelligence before acting on it, which further intelligence did not come. Captain Reimer also wrote a letter advising the owner of his appointment. The letter of the libellant also referred to the possibility of the freights being sufficient to provide for disbursing the ship without resorting to a bottomry. At that time the bills had not all been presented. The shortest line of communication between Cape Town and New York, at that time, was by mail to Madeira, which left Cape Town once a week by steamer, and from Madeira by telegraphic cable by way of Lisbon and London. By this means of communication messages have been received in New York from Cape Town in fourteen days. The shortest period, therefore, for a despatch from Cape Town and the receipt of a reply, would have been twenty-eight days, but with the chances of having to wait for the mail at Cape Town and Madeira for something less than a week at each

place, the time to be allowed for a communication cannot probably be put at less than thirty-five days. Was it, under all the circumstances, necessary to wait this length of time to get an answer or funds from New York before hypothecating the ship and freight? What would a prudent owner have himself advised, if he had been placed in the same situation in which the libellant and the master were? In considering this question, I think the nature and amount of the necessities of the ship are a very important element. If the repairs required are extensive and the detention of the ship will be necessarily considerable, there are much stronger reasons for consulting the owners, than where the repairs required are trifling and the supplies needed are those ordinarily required for all vessels wherever they may be. The latter is the present case. There was no apparent reason, before Captain Cummings died, why the ship should be detained in port twenty days. His death made some delay, but even then a delay of thirty days was not to be anticipated. The question is not to be judged by the length of time that she actually remained in port. That is conceded to have been unexpectedly prolonged, and it is insisted by the claimant that it was unnecessarily protracted. The expenses, which it was really necessary and proper to include in a bottomry bond, were mostly such as were already secured by a tacit hypothecation of the vessel under the general maritime law, and were not very large in amount with reference to the value of the vessel. Quick despatch of the ship is at all times one of the leading duties of the master and greatly for the interest of the owner. Delay itself, whatever be the object, is attended by great expense. On the whole, I think it would have been for the true interest of the owner and what any prudent owner would, if present, have advised, that the master should, on discovering the necessity therefor, have hypothecated the ship and freight by bottomry on the very easy terms of twenty-five per cent. per annum offered by the libellant, and despatched the ship without waiting for intelligence from New York for thirty-five days or more. The terms offered were easy because the probable maritime interest for the expected voyage of two months would only be about four per cent. That the owner himself was annoyed by the long detention of the vessel at Cape Town is apparent from his letters to the libellant.

The objection as to the bond, so far as it covers expenses which are properly necessaries supplied to the ship, that they were not furnished on the credit of the ship nor in the expectation that a bottomry bond would be given for them, is not tenable. The principle is well established that a party who has supplied a vessel or advanced money upon the personal credit of the owner cannot afterwards turn it into a maritime lien against the vessel by taking a bottomry bond for it, but advances made and supplies furnished on the credit of the vessel may be turned into a subsequent bottomry. The Augusta, 1 Dods. 283; The Hebe, 2 W. Rob. Adm. 412; The Yuba [Case No. 18,193]. As to all the bills paid by the libellant for such necessaries, there is no evidence to control the presumption which arises from the fact that they were furnished to the vessel in a foreign port with no apparent means on the master's part to pay them except the vessel and her freight. Nor is there any evidence that any of these parties relied on any thing except the credit of the vessel, which, by the general maritime law, they were entitled to rely upon. As to the libellant, it is true, that during the first part of the time of his supplying the vessel, he may be held to have placed some confidence in the master's statement to him that he had about £300 to £400 to invest in cargo. This plainly implied that he was in funds to disburse the ship, according to appearances at that time. When the libellant began to supply the ship, no agreement was made as to how he was to be paid. He testifies that he supplied her as he did any other vessel. It is uncertain at what time he discovered that the master was really without funds, but it may be assumed that, till this was discovered, he supposed that the master would pay him out of these funds which he represented were coming to him from the consignee of the inward cargo. This statement of the master was either a mistake or an intentional falsehood. Which it was, does not appear. It seems to me, however, that the owner cannot take advantage of this misstatement of the master made to the libellant on his behalf and as his agent, and that as to the supplies furnished while the effect of this misstatement continued, they are properly included in the bond. To hold otherwise would be to encourage fraud.

The question then is one of what items included in the bond should be allowed. The item of £48 2s 6d paid to Wainwright for the price of the iron and costs of suit, is not an expense for which the master could pledge the ship without express authority. It was for purchase of cargo. The master had no apparent authority to buy it, as Wainwright and the libellant must be held to have known. It is suggested that this iron served as ballast. But there is no proof that it was needed as ballast, nor what suitable ballast, if needed, would have cost. The items of cash furnished at various times to the master, £105 12s, must be disallowed. It appears that this money was largely for the master's private use, and it is not proved to have been used for the ship or loaned for the ship's use. The item of £6 9s 6d for cash advanced by Makin, and £6 by Nolan, must be disallowed for the same reasons. The items of "cab hire," "barouche" and

"phaeton," are for personal expenses of the master, and not necessary for the ship, and are disallowed, amounting to £11 6d. This is true of the amounts paid or charged for liquors, £20 12s 6d. Most of it was shown to be for the captain's personal use. None of it is proved to have been necessary for the vessel.

Commissions of an agent properly employed by the master may be included in a bottomry as a necessary part of the expense incurred for the benefit of the ship. I think there was occasion for the master to employ the libellant to get in, settle and pay the bills of the vessel. The Yuba, ut supra. Therefore the libellant's commissions may be allowed on bills properly included other than his own. But it must be held that in supplying stores and provisions at prices charged he charged all that he was entitled to therefor and I see no propriety in his having a commission on his own bill. The item of £4 10s for a set of scales, weights and measures, is not shown to be necessary for the ship and should be disallowed. So the item "rent on guns," £2 15s. of which no explanation is given. Various items for luxuries in libellant's bill, "potted" meats and fruit, also "postages," "knife," "currants," "empty bags," "2 bales oakum," "tobacco," "Shipley's account, £6 6s," "petty charges, £7 10s," are not proved to have been necessary and must be excluded. The stevedore's bill for taking cargo on board is properly included. The test of what may be secured in a bottomry bond is not whether the expense is one for which the creditor will have a maritime lien without any express agreement, but whether it was properly and necessarily incurred by the master in pursuance of his authority as agent of the owner for the prosecution of the voyage. The Yuba, ut supra. The funeral expenses of the master should, I think, be allowed. Where a master of a ship dies in a foreign port without means to defray his funeral expenses and the agent of the ship pays these expenses, humanity and the interests of commerce and the relation of the parties to the vessel justify the treating of the expense as a necessity of the vessel. The George [Case No. 5,329]; Winthrop v. Carleton, 12 Mass. 4. Advertising for a master, for tenders upon bottomry and for the bills against the ship, may be regarded as proper charges, but the expense incurred on this account was excessive. They advertised in all the newspapers in Cape Town. This was wholly unnecessary, and all these bills, except for one paper, must be disallowed. The expense of drawing the bottomry bond and stamps on the same is proper. The objection to the butcher's bill from June 1st to July 10th, £14, that the items are not given, is not well taken. Ordinarily, proper vouchers and bills of items must be furnished. Failure to do so is a suspicious circumstance. But, in this case, the proof is that this party supplied the ship during the period in question; that there was a pass-book in which all items were entered, which the captain held. The detailed account from April 15th to June 1st is produced and the amount of the gross charge from June 1st to July 10th is not out of proportion to the amount for the earlier period. The expenses of the survey which ordered repairs, and the cost of those repairs, are proper charges. The mate has testified that the repairs were unnecessary, but I think the proof is to the contrary. Capt. Cummings's board bills on shore must, of course, be disallowed. The doctor's bills are not proved to have been necessary for the ship. It does not appear that they were for attendance upon the master in his last sickness. It does appear that he died suddenly of heart disease.

If the parties are unable to adjust the account in conformity with these views, the matter may be referred, or particular items may again be brought to the attention of the court, if questions of items have been overlooked. I think that the claimant's point that the prices charged by the libellant are exorbitant is not sustained by the proof.

While I acquit the libellant of all bad faith, yet his careless allowance, as on ship's account, of all sorts of bills, proper and improper, was inconsistent with the exact discharge of the duty he assumed towards the owner in accepting the position of agent of the vessel. The death of Capt. Cummings made it especially incumbent on him to see that the accounts of the ship were properly kept. Every such lender on bottomry, who is also the agent of the ship, must be prepared to justify the loan as to its several parts by proper vouchers and accounts. The Aurora, 1 Wheat. [14 U. S.] 107. In this case not only was the libellant thus negligent of his duty to the ship at Cape Town, but on the arrival of the ship here he demanded full payment of the bond and instantly sued, before the owner fairly had a reasonable opportunity to determine by examination what part of the bond was good and what part was bad. Such conduct, while not constituting bad faith, cannot but receive the disapprobation of a court of admiralty. It is injurious to the interests of trade, and in this case it has rendered litigation necessary to effect what it was the duty of the libellant himself to have done. Therefore, in the exercise of that discretion which is given to the court, the costs must be denied to the libellant.

Decree for libellant for amount to be adjusted under this opinion.

Case No. 4,291.

The EDWARD BARNARD.

[Blatchf. Pr. Cas. 122.] [1]

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

PRIZE—CONDEMNATION—BLOCKADE — SPOLIATION OF PAPERS—CAPTURED PROPERTY.

1. Cargo condemned as enemy property, and for a violation of the blockade. There was also a spoliation of papers, and the cargo was sent to sea in an enemy vessel.

2. It is the usage of prize courts, to exercise jurisdiction over property captured on board a vessel without having the vessel itself brought within their cognizance.

BETTS, District Judge. The schooner Edward Barnard, sailing in the name of a neutral and British subject, and laden with 600 barrels of turpentine, ran the blockade of the port of Mobile on the 10th of October last, and was captured on the 15th of the same month, in the Gulf of Mexico, by the United States vessel-of-war South Carolina as a prize. She was anchored by order of the captors off the outlet of the harbor, and her cargo, by order of the United States flag-officer, because of the insufficiency of the schooner and the heaviness of the weather, was transferred on board the United States storeship Nightingale and brought in her to this port, and here libelled for condemnation. Whilst the schooner so lay at anchor, after her capture, a storm arose, and she became stranded and lost, and proceedings in court were only carried on against the cargo so seized and transmitted.

It is fully within the usage of prize courts to entertain and perfect their jurisdiction over property captured on board a vessel without having the vessel itself brought within their cognizance. Proceeds of Prizes of War [Case No. 11,440]; 10 Am. & Eng. Enc. Law, p. 357, art. "Prize," by Story, J.; Jecker v. Montgomery, 18 How. [59 U. S.] 110, and 13 How. [54 U. S.] 498. In many instances this mode of procedure is indispensable, as in the case of capture of enemy property in neutral vessels, and when the enemy vessel is destroyed in capture.

The evidence in preparatorio clearly proves that the cargo belonged to residents of Mobile, and thus became enemy property and good prize of war. The neutral owner of the vessel was also a mercantile resident of the latter place, carrying on trade there, which fact would render his vessel, so employed in aid and to the advantage of the enemy, subject to forfeiture. Jecker v. Montgomery, 18 How. [59 U. S.] 110. But the present proceedings only affect the cargo. Although the arrangements purported to convey title in the vessel to her master, yet it was all palpably factitious and colorable, as the ownership of the vessel was to return to the enemy vendor on his restoring to the supposed vendee the purchase engagement, no actual payment being made on the sale.

These facts transpired on the preparatory examination of the nominal purchaser. It was also proved by the preparatory depositions that a spoliation of papers relating to her cargo, and on board the vessel at the time of her capture, was made by her master and others. It was known at Mobile, by the master and all on board the vessel, when the vessel sailed, that the port was under blockade. The vessel watched her chance and got out covertly.

The proofs are abundantly satisfactory to show that the cargo was enemy property, and was sent to sea in an enemy vessel, the owner well knowing that the port of Mobile was at the time in a state of blockade.

Judgment is, accordingly, given, ordering the condemnation and forfeiture of the property arrested.

EDWARD HOWARD, The (HESSIAN v.). See Case No. 6,436.

Case No. 4,292.

The EDWARD LEE.

[3 Ben. 114.] [1]

District Court, E. D. New York. Dec., 1868.

SALVAGE—ASSIGNMENT OF SALVOR'S CLAIM — RELEASE — ORDER TO REPAY SALVAGE INTO COURT —DISTRIBUTION.

1. Where a bark picked up, at sea, a derelict schooner, and, putting a crew on board of her, sent her to New York, where she was libelled for salvage, in the name of the master and owners of the bark, for the benefit of all concerned, and the amount of salvage decreed was, in pursuance of an order of court, paid over to the libellant's proctor, and by him to the owners, no order of distribution of the salvage having been entered, and, subsequently, one of the crew petitioned the court that the owners repay into court his share of the salvage, and the owners set up an assignment of the seaman's claim to them, which, it appeared, was executed in a foreign port, at the request of the master, and in ignorance of the facts as to the salvage suit; and also set up a release of the claim, executed by the seaman, after the return of the bark to New York, which was also executed in ignorance of the facts: *Held*, that the payment of the money out of court, without an order of distribution, was an oversight, as well on the part of the court, as of the proctor.

2. The assignment and the release could not avail to deprive the sailor of his share in the salvage, and that a sufficient amount to pay him that share must be repaid by the owners into court.

In admiralty. This case came before the court, upon the petition of Nicholas Thompson, one of the crew of the bark "Ada Carter," praying that the agents of that vessel, who were also part owners, might be compelled to repay into the registry of the court, for the benefit of the petitioner, a proper portion of a certain salvage award, which was made by this court, in favor of the master, owners, and crew of the "Ada Car-

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

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

ter," but in which said part owners refused to allow the petitioner to participate.

The petition was opposed, upon the ground that the petitioner had parted with all his interest in the salvage award.

It appeared, by the evidence, that the bark "Ada Carter," while at sea, picked up a derelict, put on board thereof a mate and two seamen, and sent her to the port of New York, where she arrived in safety, and was libelled in this court for salvage, the libel being filed in behalf of the owners and master, for themselves and all others interested.

Pending this proceeding, the owners wrote to the master, at Cuba, announcing the safe arrival of the derelict in New York, and that they had demanded $8,000 salvage, and hoped to realize $4,000, and suggesting the procurement, from the seamen, of an assignment of their interest. A written assignment of all the interests of master, mate, and crew, to one of the owners, for $25 each, was thereupon prepared, and signed by the master, mate, and then by the crew, no money being then paid, but the master going through the form of handing $25 to each seaman, and taking it back at the same moment, with the promise to give it to him in clothes, or at the end of the voyage.

The bark and crew arrived back in New York, in May, and about the 20th of May, the crew, including the petitioner, were paid off by the master, in the stream, each receiving his balance of his wages, and $25 besides.

The petitioner then signed a receipt, in full for all demands arising out of services, salvage claims, assaults, batteries, &c., &c., objecting, however, at the time, that he was entitled to more for the salvage. At the time of this payment, although the sailors did not know the fact, the wreck had been condemned in the salvage suit, and the amount of salvage to be paid had been agreed on, between the libellants and claimants in that suit, in pursuance of which agreement, within four or five days, the sum of $4,150, in addition to the costs, was drawn out of the registry, by the proctor for the salvors, and the same sum, less expenses, paid over by him to the agents of the vessel.

The petitioner, subsequently learning of the salvage award, demanded of them a proportionate share, and being refused, applied to the court for relief, upon petition, and proved the foregoing facts.

O. B. Wilcox, for petitioner.
E. C. Benedict, for owners.

BENEDICT, District Judge. Although there may, perhaps, be cases where an assignment, obtained from a seaman, by the master, for the benefit of an owner, of the seaman's share of a salvage claim, can be upheld, this is no such case.

This owner, when he sought to procure the assignment from the petitioner, for $25, expected, as his letter shows, that the salvage award would be $4,000, and he had made a claim for $8,000, but neither he nor the master gave to the seaman any hint that the claim would amount to any such sum, when they procured the assignment, in Cuba. The execution of the assignment was induced by the master himself, and also the mate, falsely pretending to assign their rights also, for the same sum, and the transaction, as conducted, was a sham, intended so to be treated by all, except the seamen. The master treated it as a sham, for he has since received $400 for his share of the salvage. The mate treated it as a sham, for he has since received $200 for his share of the salvage. The owners treated it as a sham, for they divided the rest of the money among them. Houghton, the assignee, has treated it as a sham, for he does not pretend, and has never pretended, to be entitled to the interest which the assignment purports to convey to him. This petitioner may also treat it as a sham.

It was made in ignorance of facts, which, if made known, would have prevented its execution, and these facts were then within the knowledge of the parties engaging in its procurement, and it was a contrivance far from creditable, either to the owner, who suggested it, or the master, who consented to carry it into execution. Such a transaction will never, in this court, be permitted to stand for a moment between a seaman and a sum awarded to him for meritorious salvage services. It is for the interest of commerce that seamen, of all others, reap the benefit of that provision of the maritime law, which gives salvage rewards to encourage efforts in behalf of vessels in distress, and any assignment which has the effect to deposit the reward in the pockets of the owners, in order to be sustained in a court of admiralty, of which all sailors are the wards, must bear unmistakable marks of good faith and fair dealing.

Nor is the case helped by the fact that, after the arrival of the bark in New York, the petitioner was paid the $25 by the master, while in the stream, and then signed a receipt in full of all demands, including any demand for salvage. At this time, the money had not been paid over to the owners, although they undoubtedly knew how much it was, by agreement, to be. The petitioner, then, had no claim against them to release. His claim was in suit against the derelict, and the libellant's proctor was his proctor, as the owners knew. The receipt neither released the owners from any thing, nor did it purport to authorize them to receive from the proctor the petitioner's share of the award, when it should be made.

The receipt, and the payment, can have no effect to work a transfer of the interest to the owners, for the sailor was not then in-

formed of the fact that the derelict had been sold, and the award agreed on at $4,150, nor was his proctor consulted.

The right of the petitioner to participate in this award, as one of the original salvors, then remains unimpaired, and as the owners, who received the money from his proctor with full knowledge of all the facts, refused to allow him to participate, they must be compelled to repay into the registry of the court, within 48 hours from the service of the order of this court, the sum of $350, for the benefit of the petitioner.

It should be added, that it was an oversight, on part of the proctor for the salvors to draw the whole award from the registry, without having previously, for his own protection, applied for, and obtained, an order of distribution, fixing the portion payable to each salvor; and it was also an oversight, on the part of the court, to permit the money to be drawn, before such distribution had been made.

Case No. 4,293.

In re EDWARDS.

[2 N. B. R. 349 (Quarto, 109).][1]

District Court, D. Virginia. 1868.

BANKRUPTCY—SETTING APART REAL ESTATE AS A PORTION OF BANKRUPT'S EXEMPTION.

Real estate may be set apart as a portion of the bankrupt's exemption where it will not injure the sale of other real estate, or work adversely to the interest of the creditors.

The bankrupt [Leroy T. Edwards] filed his petition in bankruptcy on the 25th day of March, 1868, and on the 26th day of March he was adjudicated a bankrupt. E. R. Turnbull was appointed assignee of the bankrupt's estate on the 12th day of June, 1868, and on the 5th day of September the assignee made a report to the register of the property designated and set apart to the bankrupt, which report included the bankrupt's interest in two hundred and forty-five acres of land. On the 13th of November the assignee filed a written request of the register, asking that the real estate included in his report, designating the property set apart as exempt to the bankrupt, be disallowed, upon the ground that the assignee was not authorized by law to set it aside as exempted property.

UNDERWOOD, District Judge. The opinion of the court is in accordance with its previous decisions, that real estate may, in some cases, be set apart as a portion of the bankrupt's exemption, but only in cases where it will not injure the sale of other real estate, or work adversely to the interest of the creditors.

EDWARDS (ADAMS v.). See Case No. 53.

[1] [Reprinted by permission.]

Case No. 4,294.

EDWARDS v. BOND.

[5 McLean, 300.][1]

Circuit Court, D. Illinois. July Term, 1851.

WITNESS' FEES—JUROR SERVING AS WITNESS.

When a person is summoned as a juror, and, at the same term, is subpoenaed by the United States as a witness, and attends in obedience to each process, and, according to the practice of the court, makes affidavit of such attendance, he is entitled to compensation for each service. And upon the facts being shown by petition, and admitted by the marshal, a rule absolute was entered directing the marshal to pay the amount

[Applied in Re Addis, 28 Fed. 795. Cited in Archer v. Hartford Fire Ins. Co., 31 Fed. 662. Criticised in Ex parte Turner, 32 Fed. 373.]

Mr. Edwards, for plaintiff.

A. Williams, Dist. Atty., for defendant.

DRUMMOND, District Judge. In this case the plaintiff has presented a petition setting forth that at a former term of this court he was summoned as a juror, and at the same term was subpoenaed as a witness on behalf of the United States in a certain cause pending in this court. The petition alleges that he attended both as a juror and witness, and that according to the practice of the court he filed an affidavit of such attendance with the clerk, showing the number of days he was present in court, and the distance in miles of his place of abode from Springfield, where the court was held. The petition also states that he claimed of the marshal his compensation for each service, but that the marshal has paid him for one service only, and absolutely refuses to pay him for the other. He asks for a rule on the marshal requiring him to pay the amount he claims. The marshal has filed an answer in which he admits the facts stated in the affidavit to be true. He also admits that he has sufficient funds of the United States in his hands to pay the plaintiff, but gives as a reason for refusing payment that such claims have not been allowed by the accounting officers of the treasury department at Washington. There is no controversy between the parties as to the amount claimed. It is conceded that the sole question is, whether having rendered the service as juror and as witness at the same time, he is entitled to compensation in both capacities.

The sixth section of the act of Feb. 28, 1799 (1 Stat. 626) provides for the compensation of jurors and witnesses in the courts of the United States, and after prescribing the per diem and mileage of each grand and petit juror, declares that the same allowance shall be made witnesses as to jurors. The counsel of the government admits that he

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

has not been able to find any decision of a court which would defeat the claim of the plaintiff; and no act of congress exists which provides for the contingency. I am called on to decide whether the claim of the plaintiff is in conformity with law.

The ordinary mode of bringing an individual into court to serve as a juror is by summoning him on the venire. That being done, he is subject to the court, and if disobedience follow, he can be punished for it. In this instance the plaintiff was summoned on the venire. In obedience to it he served as a juror. He was called into court to discharge a particular duty. The usual method of requiring the attendance of a witness is by the service of a subpoena. If the witness disobey it, he is in contempt, and subject to an attachment. Now, it is apparent, if the venire and subpoena concur in identity of person, of court and of time, there is not the less a distinction as the duty to be fulfilled. Indeed, the only identity of time was, that each duty began on the first day of the term. Here the plaintiff was directed to be present as a juror and as a witness on the same day, but neither process specified how long he might be needed in the one or other capacity. That depended upon future contingencies. When he had finished his duty as juror, he had not necessarily performed his duty as a witness, and so of the converse of this. And yet, if he had performed one duty, why might he not leave the court and return home, leaving the other unperformed? Simply because the process of the court operated on him, and called on him to discharge the other duty. If a person attends court as this party did he assumes a two-fold character, and for each is entitled to his compensation. Suppose after a person is summoned as a juror, it is ascertained that he is an important witness for the government, shall the district attorney decline to have him subpoenaed because he has been summoned at the same term as a juror? Certainly not. If he did not attend, it would be no sufficient reason for continuing the cause, that it was supposed he would be present as a juror. The process to him as juror does not demand his attendance as a witness, and there is, in general, no method by which a person, if absent, can be compelled to attend as a witness, but by the service of a subpoena. Besides, it is no part of the duty of the district attorney to know who is on the panel, and, in fact, he is usually ignorant of it till the meeting of the court. On the other hand, if he does attend, and his duty as juror is finished, is the officer of the government to watch the moment that it happens, and then serve a subpoena on him to compel his attendance as a witness? If his service in one capacity is performed, it will not be pretended but that he may be compelled to remain under the process of the court, and if he do remain, then clearly is he entitled to compensation for so doing. It is plain that the only safe course is to have the appropriate process for witnesses duly served. Again, if a juror summoned by the government has already been paid by another party for attendance as a witness at the same term, why may not the United States refuse to pay him? It would still be double pay. It is said one party does not pay double. True, it is another party, but the case put shows that the fact of double pay does not determine the right. It must, then, rest upon the circumstance of the party being the same. But it may be reasonably asked, for which service shall he be paid, as a juror or witness? It is true that the per diem and mileage of each is the same,—it is generally so, but not necessarily,—and if it were by law different, which should he have?

The argument which is drawn from the liability to abuse which exists in these cases is no sufficient reason for giving a construction to the statute which its language will not justify. If a flagrant case of abuse were made to appear, the court might interfere, or, if this were a questionable power, it is always within the province of the legislature to interfere and correct it. I think, therefore, upon principle, the plaintiff is entitled to compensation in each case.

The point seems not less clear upon authority. And the example of the government is not wanting to sanction the view taken by the court. When the courts of the United States were first created, the circuit and district courts were held by different judges, and at different times, though by the act of 1789 [1 Stat. 73] the judge of the district court was one of the judges of the circuit court. Of late years, however, as the district judge performs a large part of the duties of the circuit court, the circuit and district courts in most of the states are now required to be held at the same time and place. And yet prior to 1842, though both courts were held at the same time, it is understood it was the practice for the officers of the court to claim, and for the government to allow compensation in each court. But the act of May 18, 1842 (5 Stat. 484), expressly provided that in such case no greater per diem or other allowance should be made to certain officers named, than for attendance on one court. This being the practice acquiesced in by the government, to prevent which an act of congress was necessary, it is not unfair to presume that prior to the passage of that act, the compensation charged and allowed in each court was a legal one. So here, I hold, for a much stronger reason, that the charge of the plaintiff is a proper one. Even the act of 1842 requires that both courts must be held at the same time, to exclude the officers from compensation, and it is probable, if both courts should meet on the same day, and after sitting from day to day, one of

the courts should adjourn over for one or more days,—the other court sitting on,—the officers in attendance on this last court would have a right to their compensation, and thus it might happen that they would receive pay for two courts at the same term. However this may be, it is enough to say that the law of 1799 gives the compensation as well to the witness as the juror, and the law of 1842 has made no change in this respect. That both characters united in the plaintiff, in this instance, was his fortune.

Recently the circuit court of the United States for the eastern district of Pennsylvania, where a case had been postponed for several days, some of the jurors residing at a distance held that they were entitled to compensation for attendance, though, in fact, they were absent from court. Parker v. Kempton [Case No. 10,741]. And see Hathaway v. Roach [Id. 6,213]. The laws of the states provide, in general terms, not unlike the act of congress of 1799, for the compensation of witnesses and jurors A similar law exists in Illinois, and when the same person is a juror or witness at the same time, his right to compensation in each character, so far as I have understood, has never been questioned. Indeed, when a person attends, at the same time, in the same case, but subpoenaed by both parties, it has been usual to have the costs taxed for both services,—that is, as the witness of the plaintiff and of the defendant. On this last point, however, the practice is not uniform in the states. Peace v. Person, 1 Murph. 188; Renfro v. Kelly, 10 Ala. 338. In Whipple v. Cumberland Cotton Co. [Case No. 17,515], the court allowed the costs of a witness who had travelled a distance of more than a hundred miles from the place where the court was held, to be taxed in the cause, though he had come from another state. And this was followed in a very recent case. Hathaway v. Roach [supra]. In the case of Willink v. Reckle, 19 Wend. 82, the court decided that witnesses subpoenaed by the same party in three cases at the same term, were entitled to their fees in such case for going and returning, and for attendance. This is a much stronger case than that, for, if witnesses subpoenaed by the same party could receive pay in each cause, much more would a person summoned as a witness and a juror by the same party, be warranted in receiving pay in each character. These authorities, not to multiply others, conclusively show that the courts have uniformly given a liberal construction to the law, and I think, they justify the plaintiff's claim. Let the rule, therefore, be made absolute.

EDWARDS (FOOT v.). See Case No. 4,908.

EDWARDS (FRENCH v.). See Case No. 5,097.

EDWARDS (HOWE MACH. CO. v.). See Case No. 6,784.

Case No. 4,295.

EDWARDS v. The MANHASSET.[1]

[5 Hughes, 104.]

District Court, E. D. Virginia. Nov. 12, 1879.[2]

COLLISION IN HARBOR—STEAM AND SAIL.

[A steam ferryboat, approaching her slip in a crowded harbor, must be held in fault, in the absence of vis major, for running upon a sloop, which was visible at a distance of at least 130 yards, and which fulfilled its duty of holding its course.]

[This was a libel by William Edwards against the steam ferryboat Manhassett to recover damages for a collision and for personal injuries sustained therein.]

BY THE COURT. On the 3d day of June last the steamer George Leary was lying at Campbell's wharf with her bow projecting about twenty feet beyond the eastern corner of the wharf, to a line with the spiles of the west side of the slip used by the Norfolk and Berkely ferryboats. Just east of this slip and alongside of it lies the slip of the Norfolk and Portsmouth ferryboats. About twelve o'clock on that day a small sloop, the Elizabeth Kate, which had discharged a cargo of potatoes belonging to the libellant at the wharf, was pushed out by hand, with sail half up from inside the Leary, past her bow, for the purpose of going over past the two ferry slips to Bell's wharf, beyond. The wind was very light, and the sloop could and did make but very slow headway. It is the custom for the ferryboat for Berkely to leave her Norfolk slip just when the Portsmouth ferryboat leaves Portsmouth for Norfolk. On this occasion, the Elizabeth Kate pushed out past the Leary, just after the Berkely ferryboat left her Norfolk slip. She had on board her master. Colonna; and Edwards, the libellant, whose goods had just been discharged at Campbell's wharf. The Elizabeth Kate failed to clear the slip of the Norfolk and Portsmouth ferryboat in time to be out of the way of the Manhasset, which was the ferryboat then coming across from Portsmouth. Some ten yards out from the end of that slip, the Manhasset ran upon the sloop, carried her before her into the slip, to within six or eight feet of the float, inflicting damage upon her to the extent of $60. At the time of collision, Edwards, the libellant, was caught by the prow of the Manhasset against the sloop's mast, and his leg just above the ankle was quite severely bruised and injured. He was first taken to a station house and treated there by a physician, and was afterwards taken to St. Vincent's Asylum, where he was confined with great suffering for several weeks, until sufficiently recovered to return to his home in Hampton. His ankle joint

[1] [The opinion in this case is published from a copy certified by the clerk of the court from the records in his office.]

[2] [Affirmed by circuit court (case not reported).]

was painfully, and was at one time thought to be dangerously, affected; and is now the source of much pain, and is stiff, enlarged and the cause of more or less lameness.

The law of navigation applicable to this case is, that "when two vessels, one of which is a sail-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel." Another law is, that "every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse." These are not merely prudential rules which steamers may apply as well as they can in an emergency, but they are laws, statute laws of navigation, admitting of no modification or variation; they must be implicitly obeyed, and, as has been over and over again decided, effectively obeyed. It was not, therefore, the duty of the sloop to do anything whatever, on this occasion; on the contrary, it was her duty to keep on, and abstain from doing anything. There is no proof in the case that the sloop made any manoeuvre, or did any wanton or mistaken act tending to embarrass the steamer or to foil any manoeuvre the steamer might have made in compliance with the laws of navigation which have been quoted. And this case, therefore, turns upon what the steamer did, in obedience to the law requiring her "to keep out of the way of the sail-vessel." She did not keep out of the way of, but collided with, the sloop; and carried her after the collision some twenty yards or more into the slip. The only defense which she can urge in the case, (a defense however, which is not set out in the answer to the libel) is, that of "inevitable accident." But the weather was calm and clear; the hour was midday; the tide was in ebb; her machinery was in good working order; there was nothing the matter with her rudder or rudder-chain, or with her engine. There is no evidence of the existence of vis major in any shape. The case turns solely therefore upon the question, was there anything in the circumstances of the collision to excuse her for not having "kept out of the way of the sail-vessel?" This, the law imperatively commanded her to do; commanded her not merely to try to do, but to do effectively and successfully; for the rule is too important to the interests of commerce and navigation to admit of any other compliance with it, than effectual, successful compliance. "How not to do it" as to executing a law of navigation so important and so imperative as this, is an idea which cannot for a moment be tolerated when it concerns the movements of powerful steamers in a crowded harbor like that of Norfolk.

In considering this collision, I shall chiefly rely upon the evidence of the master of the Manhasset, Capt. Gregory. There was a great deal of evidence submitted at the trial, which was as violently conflicting as evidence in collision cases usually is. I shall take only his, as the best given for the defense. Capt. Gregory stated, that when he got to point 150 yards from the slip on the Norfolk side, he slowed down as he usually did at that point; that on doing so, he saw the sloop just come out from behind the bow of the Leary, making over towards Berkely; that he then gave the signal to back his wheels; and at once did everything he could to stop his boat, and prevent her from running down the sloop. Now, if he had gone as far as ten yards beyond where he first slowed down which was at a point 150 yards from the slip; and if, according to all the testimony he collided with the sloop at a point ten yards from the slip, then he ran 130 yards between the point at which he first saw the sloop to the point of collision.

And the defense in this case, taken in connection with this testimony, is, that a collision by the Manhasset is inevitable when, in the absence of any form of vis major, she sees a vessel ahead of her, after she slows down, at a distance of 130 yards. The consequences of accepting a defense based on this proposition, to the safety of shipping in this harbor would be so serious, that I dare not admit its validity. The usual speed of the Manhasset is at the rate of about eight miles an hour; and if it is true that her machinery has not the power to check her up, and stop her in a distance of 130 yards, or more than twice her length, then either she can not lawfully be employed in the harbor, or else her machinery should be changed. And if it is true, as the testimony of all those who were on board of her on the day of this collision establishes, that the crew knew she could not be stopped in that distance, then they were running the boat at an unlawful speed. For it is unlawful for any steamer to run in the harbor at such a speed, that on seeing a sail-vessel 130 yards forward in her path, she must needs run into her by "inevitable accident." The law of navigation must be obeyed and the speed given up. It is to be observed however that he contradicts his own theory by testifying positively that he really could check up his boat in the space of 75 yards. But even conceding that to be a fact (which I cannot believe is a fact) that the Manhasset cannot be stopped in the distance of 130 yards, and that her master knew that she could not, then her duty was to "keep out of the way," by going to one side or the other of the sloop; and the evidence shows that the course of the steamer was not in the least changed, nor any effort made to change it. If the Manhasset was so unmanageable that she could not be stopped in 130 yards, then her rudder ought to have been brought into active requisition and her course changed so as to "keep out of the way" of the sloop. I hold that the steamer was at fault and is responsible for the damages caused by the collision. Those sustained by the sloop are accurately ascertained, and a decree may be taken for $100 in favor of her owner.

Those sustained by the libellant, Edwards, depend upon estimation by the court. The bills of the hospital and physician in attendance, must be allowed, and amount to $90. Then, according to precedents, I am to fix the amount of damages due—1st. For pain and suffering. 2nd. For loss of time and earnings while actually disabled; and 3rd. for the loss likely to accrue as the permanent consequences of the injury, on the principles stated in my decision in Dunstan v. The R. R. Kirkland [Case No. 4,181]. I estimate the amount due for pain and suffering, which were very severe, at $500. I also, on like considerations to those then stated, estimate the actual loss in wages and earnings during the season during which Edwards was laid up, at $500. And I estimate the loss likely to be the consequence in the future of the diseased condition of his ankle at $500. I will give a decree for an aggregate of $1,590.

[NOTE. Affirmed by the circuit court on appeal (case not reported).]

Case No. 4,296.

EDWARDS v. NICHOLS.

[Brunner, Col. Cas. 43;[1] 3 Day, 16.]

Circuit Court, D. Connecticut. 1808.

BOOK ACCOUNT—ASSUMPSIT FOR—PARTIES AS WITNESSES IN—CITIZENSHIP—HOW ALLEGED.

1. Assumpsit will lie for articles or services commonly charged on book. The declaration may be for labor and services performed generally. In such action the parties cannot be permitted to testify.

2. If a party is described as a citizen of the district of New York, he is sufficiently described as a citizen of the state of New York.

This was an action of indebitatus assumpsit [by Pierpont Edwards against John Nichols]. In the writ the plaintiff was described as "of the city, county, and district of New York, a citizen of said district," and the defendant as "of Waterbury, in the county of New Haven, and district of Connecticut, a citizen of said district." The first count of the declaration alleged "that on the 30th day of June last past, at New Haven, in said district of Connecticut, he the defendant was indebted to the plaintiff in the sum of seven hundred dollars, for divers labors and services before that time done and performed by the plaintiff for the defendant at his, the defendant's, special instance and request; and the defendant, at said New Haven, immediately afterwards, viz., on the 30th day of June last past, in consideration of being indebted to the plaintiff as aforesaid, assumed upon himself, and to the plaintiff faithfully promised to pay to him the aforesaid sum of seven hundred dollars, in a reasonable time thereafter, when thereto requested by the plaintiff." The second count stated a quantum meruit for seven hundred dollars, for labors done and service performed. The third count claimed five hundred dollars for so much money laid out, disbursed, and expended by the plaintiff for the use of the defendant, and at the defendant's special instance and request. The fourth count was as follows: "Also for that at New Haven aforesaid, on the 30th day of June last past, in consideration that the plaintiff had before that time, at the special instance and request of the defendant, done and performed divers labors and services for one Samuel C. Alcox of Wolcott, in the county of New Haven, he, the defendant, at said New Haven, on or about said 30th day of June, 1805, assumed upon himself and to the plaintiff faithfully promised to pay him therefor, as much as said services rendered and performed as aforesaid were reasonably worth; and the plaintiff further avers that said services so rendered and performed were reasonably worth the sum of sixty dollars." The fifth count alleged that the defendant was indebted to the plaintiff in the sum of fifty dollars, for services before that time rendered to Alcox by the plaintiff, at the special instance and request of the defendant, and that being so indebted he promised, etc. The sixth count was for fifty dollars in money, laid out by the plaintiff for the use of Alcox, at the special instance and request of the defendant. The common averments were inserted at the close. Plea, non assumpsit.

When this case came on for trial the counsel for the defendant moved for a continuance of the case until the next term of the court, on account of the sickness of the defendant, who was then in the state of New York, and unable, as was stated, to attend the trial.

LIVINGSTON, Circuit Justice. You must be sensible that the sickness of a party, or his inability to attend the trial, is no legal cause for a continuance.

Ingersoll and Staples, for defendant, stated that Nichols was a competent witness in this case; that they wanted his testimony, and on that ground moved for a continuance. They insisted that though this action is assumpsit in form, it still comes within the meaning of our statute, which permits the party to testify in book-debt actions. The words of the statute are "that in all actions on book debts that shall be tried by a jury, the jury shall well weigh and consider the credit of the parties or any other persons interested," etc. 1 St. Conn. tit. 25, c. 1, § 2. This action is brought for charges made on book, and ordinarily sued for in the form of action described in our statutes as book-debt actions; but whether sued for in this form or not, the same rule of evidence must be adhered to in order to satisfy the meaning of the statute.

They also urged that the statute of limitations of book debts had been construed to extend to actions of assumpsit. But the words of this statute, "that all such book

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

debts as are now outstanding," etc., can with no more propriety be extended to such actions than the words of the other statute.

Daggett and Bristol, for plaintiff.

The privilege allowed by our statute that the parties should be permitted to testify in their own case is mutual; and it is confined to the action denominated book debt. The practice adopted in our state courts has never extended the privilege to any other form of action. It was a fundamental principle of common law that no man should testify in his own case; and the statute which gives the privilege in question, being in derogation of the common law, is not to be extended by construction. This is true in all cases, but ought to be inviolably adhered to when the principle of common law invaded by a statute is a rule of evidence so important as the one under consideration.

It has been said that the statute of limitations regarding book debts is applicable to actions of assumpsit, and has been so applied. This is true where the action of assumpsit is brought to recover the value of articles or services commonly charged on book. But this depends on the phraseology of the statute of limitations which declares, with certain exceptions, "that all book debts shall not be recoverable after six years." 1 St. Conn. tit. 25, c. 2. The limitation, therefore, applies to the subject-matter of this action, and the statute substantially declares that whatever may be the remedy or the form of action adopted for the purpose, still no book debt shall be recovered after six years. But the statute authorizing courts to receive the testimony of the party himself, gives the privilege only in the particular form of action which we call book debt.

LIVINGSTON, Circuit Justice. If Nichols were present, he could not testify in this case under your statute; there is no reason, therefore, for the continuance of the case.

The next day the case came on for trial. As it was conceded by the counsel for the plaintiff that the demand in question was for services performed as an attorney and counsellor at law, and for disbursements in several cases in which he had been thus employed, Ingersoll and Staples urged an objection to the admission of any testimony to support the declaration, for the following reasons:

1. An action of assumpsit will not lie to recover the value of such articles delivered or such services performed as are the proper subject of charge on book. The remedy in such cases is by action of book debt, and by that only. This remedy has grown up with the state of Connecticut, and has had an important influence upon our modes and habits of business. All persons taking it for an established position that they can support their charges by their own testimony, have become negligent of procuring and preserving other evidence. It must be very pernicious to this community, therefore, that this ancient privilege and one so much relied upon should be taken away at the choice of one party, who must be supposed to know his advantages, and that the other party should be obliged to defend himself, deprived of the accustomed mode of substantiating his charges and payments. It is, in short, no less than taking from parties that testimony to which, from long and perhaps universal usage, they think themselves entitled.

Besides, in our action of book debt the defendant has the opportunity of setting off all his charges against those of the plaintiff, and if they exceed the plaintiff's, of recovering his balance and costs. 1 St. Conn. tit. 25, c. 1, § 3. This is certainly a very beneficial provision, both as it prevents litigation and expense, and as it is a security that one party shall not gain an undue advantage over the other. Such a provision ought not to be defeated, nor are the forms of action by which it is secured to be rashly invaded.

2. The declaration is too general. It ought to have stated, particularly, the labor done and services performed in order that the defendant may come prepared to repel the claim. Here it is not even hinted in what capacity or character the plaintiff acted while performing these services, nor is the nature of the services at all mentioned. Our courts have decided that indebitatus assumpsit shall not be supported by a general promise to pay the plaintiff all the defendant owed him. The promise must have a particular reference to the very debt sued for, and must not be capable of an application to other debts. The plaintiff does not offer to prove any promise to pay the particular items, but only a general acknowledgment of the debt. Indeed, if he did offer particular testimony, it could not be gone into on the general counts.

3. The counts which declare upon the services performed for Alcox, and the moneys paid to him, are within the statute of frauds and perjuries, as the promise of the defendant is an engagement to pay the debt of another. It is admitted that in one of these counts the allegations are made with sufficient particularity.

Daggett and Bristol, for plaintiff.

1. On the same principles that the oath of the party has not been allowed in this case, the action of book debt itself, being an anomaly in our law, ought not to be extended by construction; much less ought it to be so construed as to defeat the remedies afforded by the common law. The statute respecting book debts has not prohibited a resort to the common law remedy in all proper cases, and consequently all other modes of redress remain the same as they were before that statute. A statute giving a new remedy does not take away a remedy furnished by the common law, unless it be expressly taken away; but in all such cases the statute and common law remedies are concurrent. Thus,

it was never imagined that the statute giving threefold damages for cutting trees on another's land (1 St. Conn. tit. 165, c. 1, § 1) had abolished the remedy by trespass at the common law. But the statute regulating book debts does not profess to give the form of action; it merely regulates the action by allowing the parties to testify, and enabling the defendant to recover if the balance is in his favor. It is probable the form of book debt had been adopted in practice long before the statute was made.

Nor are we to forget that this action is in derogation of the common law, and a direct invasion of the established rules of evidence.

As to the objection that the defendant is deprived of his oath, it may be answered that the plaintiff is deprived of the same advantage, and it is as likely to be an inconvenience to him as to the other party; and as he pursues a common law remedy, he must establish his claim by common law proof.

This objection, in a more specious form, was originally made to all actions of assumpsit where debt on simple contract might be brought at the common law. The reason then assigned was that this action took away the defendant's wager of law, and thus bereaved him of the benefit which the law gave him. 4 Coke, 92. Yet the court held in Slade's Case that assumpsit was a proper remedy though it deprived the defendant of his wager of law.

2. It was unnecessary to state with more particularity the services performed. If the plaintiff is able to show that any services which could come under these allegations have been performed by him for the defendant, he, on the other hand, must come prepared to show that these services have been paid for or discharged, or that some good and legal reason exists why they should not be remunerated. If anything further than this general averment is required, how particular must the plaintiff be? Must he show the days, hours, and minutes he has been employed, or must he state the number of cases in which he was retained, the several terms which intervened, the consultations had or arguments made? This would swell the record to an insupportable and endless prolixity. Neither precedent nor authority can be cited in support of the doctrine advanced. No cases in this state can be cited where great particularity has been held to be necessary. It is the constant course of practice here to make general averments as in the present case. In England, and by the supreme court of errors in this state, actions precisely like this have been held maintainable.

It may be well to observe here, since the action of book debt is so zealously advocated by the counsel for the defendant, that no form of action used in our courts of justice is more general than that of book debt; nor is it possible to conceive of any form more general. It simply demands that the defendant render to the plaintiff such a sum, which he owes by book.

But lest any inconvenience should result to the defendant, or he should be taken by surprise, the court may order the plaintiff to furnish him seasonably with oyer of his account, which must be a more accurate specification of his demand than any declaration can be supposed to afford. This has been voluntarily done in the present case for more than eighteen months.

3. The counts applicable to the services rendered, and the money paid to Alcox, allege that they were performed at the special instance and request of the defendant, and we offer to prove that request, and the services performed in consequence of it. The undertaking of Nichols, then, is an original undertaking to pay for those services, and not collateral to any contract or obligation of Alcox.

The counsel for the defendant, in reply, commented upon the words of the statute, "in all acts on book debts," which seemed to imply that different actions might be brought for articles and services commonly charged on book. Since, however, this action has been decided by the court not to be an "action on book," by the exclusion of the defendant's oath, no evidence ought to be admitted to substantiate a book-debt claim.

To this it was answered by the counsel for the plaintiff that the words "actions on book debts," had been always understood to mean the same as "actions of book debts."

LIVINGSTON, Circuit Justice, after requesting to hear the statute read, observed: From the reading of the statute I am convinced that this action is well brought, and that assumpsit and the book-debt action are concurrent remedies.

As to the legality of permitting parties to testify in the action of assumpsit, on the ground that it is an action on book, I have doubts with respect to the correctness of my decision yesterday. I am far from certain that the party ought to be excluded, and I hope that no inconvenience will result to the defendant in this case from the decision.

I think the objection that the declaration is too general cannot prevail. In the English practice and our own, declarations as indefinite as this may be found, though it is usual to declare for services rendered as an attorney, physician, mechanic, etc. Very little particularity is demanded in assumpsit, except in the count for money had and received, where more exactness and precision is required. This is open for discussion, however, in a future stage of the case.

The evidence was admitted, and the jury found a verdict for the plaintiff for the amount of his account.

Upon a motion in arrest.

Ingersoll and Staples took two exceptions.

1. The declaration is too general. The same arguments were relied on to support

this position that have been stated in the objection to the testimony.

2. It does not appear by the record that the plaintiff is a citizen of the state of New York, or the defendant a citizen of the state of Connecticut. That this should appear is absolutely necessary; and this court has, without motion, ordered a case to be erased from the docket on discovering that the parties did not appear to be citizens of different states.

Daggett and Bristol, contra.

The first exception comes too late after verdict, when every promise alleged in the declaration is taken to be an express promise, or even a promise in writing, if necessary to sustain the verdict.

But an allegation of work and labor generally, without setting out what sort of labor, or in what manner it was performed, is good and agreeable to numerous precedents in the books of forms. Some doubt was formerly entertained on this point, but the question has been long since put at rest. Carth. 276; 1 Vent. 44; Sid. 425. The best pleaders have latterly adopted this mode, as the plaintiff would be restricted in his proof if the declaration were more special.

2. The plaintiff and defendant are well described as citizens of the states of New York and Connecticut. The plaintiff is alleged to be a citizen of the district of New York, and the defendant a citizen of the district of Connecticut. By the act of congress to establish the judicial courts of the United States,—1 Laws U. S. 48 [1 Stat. 73],—the United States are divided into districts; and the states of New York and Connecticut are respectively constituted districts of the same name. The same territorial limits, as well as the same body politic are, therefore, described by the terms district of Connecticut, as if the word "state" had been used. The district and state of Connecticut are synonymous and co-extensive, and the parties are described as citizens of the states of New York and Connecticut, by language perfectly definite and certain.

LIVINGSTON, Circuit Justice, overruled the motion in arrest, and ordered judgment to be entered.

EDWARDS v. The PANAMA. See Case No. 10,702.

Case No. 4,297.

EDWARDS v. The ROBERT F. STOCKTON.

[Crabbe, 580.][1]

District Court, E. D. Pennsylvania. July 17, 1845.

COLLISION—LIEN FOR DAMAGES—BONA FIDE CHANGE IN OWNERSHIP.

A bona fide change of ownership, without notice, does not divest the lien for damages arising from collision, where there is no laches by the injured party.

[Cited in The Avon, Case No. 680.]

This was a libel [in admiralty] for collision. It appeared that the collision had occurred at Delaware City on the 11th March, 1845; that a negotiation was commenced for a settlement of the libellants' claim; that, pending the negotiation, the owners of the Stockton sold her to one Gaw, on the 1st May, 1845, without notice of the claim; that the negotiation was unsuccessful, and that, on the 5th May, this libel was filed. Gaw intervened for his interest, and contended that the lien on the Stockton was discharged by her passage into his hands.

W. G. Smith, for libellants.

W. W. Hubbell and Mr. Ashmead, for respondent.

RANDALL, District Judge. The libel alleges that the sloop Centurion was, on the 11th March last, lying safely and properly moored at the wharf in Delaware City, and within the admiralty and maritime jurisdiction of this court, when the steamer R. F. Stockton approached with great speed, and that, notwithstanding the master of the Centurion held a light upon the outside of his vessel, and hailed the steamer in a loud voice, requesting her to keep off, she ran into the sloop with great force and violence, striking the Centurion on the starboard bow and cutting her down to the water's edge, otherwise injuring her, and reducing the value of her cargo, which was thus prevented from being brought to Philadelphia as soon as it otherwise would have been.

A claim and answer has been filed by Henry L. Gaw, who states that on the 1st May, 1845, and prior to the filing the libel in this cause, he purchased the Stockton without any notice or knowledge of the said alleged collision, and that, being a bona fide purchaser without notice, the steamer is not liable in his possession for any injury she may have done previously to his said purchase. The answer also denies that the collision was occasioned by the fault or negligence of those on board the steamer; alleging that, if any injury was sustained by the Centurion, it was caused solely by the fault and negligence of those on board the sloop in not having proper lights exhibited, and in her being moored in an improper place in the channel or entrance to the Chesapeake and Delaware Canal.

Assuming, for the purposes of this case, that the purchase by Mr. Gaw was bona fide, and without notice of this collision, the question arises whether the steamer remains liable, in his possession, for the damage occasioned by her; supposing her to have been in fault? It is true that the master and owner of an offending vessel may be personally liable for the damages occasioned by the negligence or misconduct of such master, or of those in

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

charge of the vessel; but it does not follow that the vessel is not also responsible. If, then, the Stockton was liable for this damage, was her liability removed by her subsequent sale to Gaw? In the case of The Mary [Case No. 9,186], which was on a libel for seamen's wages, the libellants shipped, at New York, on a voyage to New Orleans, and back; the vessel remained at New Orleans upwards of a year, when, not obtaining a freight, the seamen were discharged and the vessel sold; the men returned to New York, and the vessel, under her new owners, made a voyage to Liverpool and from there to New York, where she was attached by the former crew. It was held that they were entitled to recover, notwithstanding the intermediate sale of the vessel.

But it is argued that a claim for seamen's wages differs from one like the present, inasmuch as they are a favored class, always allowed a preference over every other claim. In a recent publication on this subject it is stated that "whenever one vessel does damage to another, within the admiralty and maritime jurisdiction, the offending vessel becomes hypothecated to the vessel and cargo sustaining the injury to repair the damages occasioned by the collision, and the injured persons have a lien or privilege upon the guilty property, by the general maritime law of nations, to the exent of the injury sustained." 3 N. Y. Leg. Obs. 4. This seems to be the generally received opinion of courts of admiralty, and in a large majority of cases the proceedings to recover damages are in rem against the vessel whenever she can be reached. In the case of Hale v. Washington Ins. Co. [Case No. 5,916], it was held by Judge Story, that where a loss by collision occurs by the negligence of the master and crew, the ship is primarily liable for damages, and the master or owners personally but collectively responsible. And in the case of Peters v. Insurance Co., 14 Pet. [39 U. S.] 99, it was held, by the supreme court of the United States, that in a loss by collision, without fault on either side, the underwriters were liable for damages which the insured vessel was bound to pay to equalise the loss. The case of The Rebecca [Case No. 11,619] is perhaps more analogous to the present. That was a libel for damages occasioned by the careless and improper manner of stowing ten hogsheads of liquor, shipped on board the Rebecca by the libellant, at New York, to be delivered at Boston, the dangers of the sea only excepted. The goods were stowed on deck and thereby lost. The shipment took place on the 20th March, the vessel being at that time owned by one Chase. A claim was put in by a person named Scott, who averred that Chase, on the 5th April, sold the vessel to a third party, from whom the claimant purchased her, on the 20th December; that in the intermediate time the vessel had been repeatedly at New York, where the libellant resided, without molestation, and therefore was discharged from any liability in his hands. The question is so fully and ably examined in the opinion of Judge Ware, who decided that the lien was not defeated, even by a bona fide sale, before an opportunity for enforcing it, that I deem it only necessary to refer to that case for a full and satisfactory answer to this objection.

I grant that there may be such gross negligence on the part of a claimant as to forfeit his remedy against the vessel, in the hands of an innocent and bona fide purchaser, without notice, but in the present case no such negligence appears. The collision took place at Delaware City on the 11th of March, 1845; the vessel was brought to Philadelphia to be repaired, and until the repairs were finished the extent of damage could not be ascertained. A correspondence or negotiation for a compromise appears to have taken place between the parties, after the repairs were completed, which failed, and on the 5th May, the libel was filed; the purchase by the claimant is alleged to have taken place on the 1st May, which was pending the negotiation for a compromise, and if allowed to take away the libellants' rights must not only have the effect of preventing amicable settlements of disputed claims, which should be encouraged, but would enable a dishonest and insolvent owner of a vessel to avoid all responsibility for her illegal and improper acts.

It only remains, therefore, to consider whether the Stockton was, at and immediately after this collision, liable for the consequences of it. Of this I have, on the evidence before me, no doubt, and shall therefore enter a decree for the libellants.

Case No. 4,298.

EDWARDS et al. v. SHERMAN.

[Gilp. 461.][1]

District Court, E. D. Pennsylvania. May 29, 1834.

EMBEZZLEMENT FROM CARGO BY SEAMEN—WAGES—CONTRIBUTION BY INNOCENT SEAMEN.

1. Where articles belonging to the cargo are embezzled by the fraud or negligence of a seaman, he is chargeable for the value, and the amount may be deducted from his wages.

2. Where articles belonging to the cargo are embezzled, an innocent seaman is not chargeable for the loss occasioned by the fraud or negligence of others, nor is he to contribute any portion from his wages to make it good.

[Cited in U. S. v. Stone, 8 Fed. 251.]

The libellants claimed wages as mariners on board the brig Eliza, on a voyage from the port of Philadelphia to Vera Cruz, and thence back to Philadelphia, commencing on the 9th day of January, and ending on the 16th of April of the same year, at nineteen dollars per month. The answer admits that the libellants shipped for the voyage as set forth in their libel, and that they performed

[1] [Reported by Henry D. Gilpin, Esq.]

it, but alleges that the brig was loaded at Vera Cruz on or about the 23d of March, and that, among other things, there were shipped on board of her three bags containing three thousand two hundred hard silver dollars, marked W. L.; one containing one thousand dollars, marked J. C.; and one containing five hundred, marked G. D.; all of which were stowed in the run under the cabin floor. On the arrival of the brig at Philadelphia, a part of the specie was missing from each bag, which the respondent firmly believes and avers was embezzled by some of the crew. The amount embezzled was one hundred and three dollars out of one bag, and sixty-four dollars out of each of the others, which the respondent claims to be deducted from the wages of the officers and crew in due proportions. The libellants reply that they are not informed whether the number of bags, containing the amount of money mentioned, were put on board or not; nor whether any part thereof was missing, on the arrival of the vessel at Philadelphia; but they deny that any part or portion of it was embezzled by them, or by any of the crew, to their knowledge; or that any part thereof was lost through their fault, negligence or misconduct.

The case was argued by—

J. R. Ingersoll, for the respondent:

It is sufficient if the crime is traced to the crew, although not fixed on any individually. Spurr v. Pearson [Case No. 13,268]. This depredation must have been made before the vessel sailed; no access by the crew could have been had afterwards. The mate of the vessel has testified, that he took the money on board at Vera Cruz, between the 18th and 25th of March. There were two bars of bullion, and twenty-four bags of specie, which came on board at different times; twenty-three of these bags were sewed with twine, and one tied with a string, which belonged to one of the passengers. Some of the money the captain brought on board himself; he thinks five or six bags. It was all put in the run. The witness brought some of the bags on board, thought some of them were loosely woven, could see the money through them. The scuttle was put down, a bar was put over the staple, and a lock put through it. The lock was not locked, being broken. The run had not a solid bulk head. Water casks and boards formed the bulk head. The steerage hatch was not secured. Witness brought all the bags on board, except the five or six brought by the captain. The witness had two men with him when he went for stores, and brought one bag every time he went. The bags were made of grass, two or three of them of duck. The money might have been forced through the grass bags. One of the bags burst while he was taking it in, none could have been spilt in the run. There were eleven passengers. The run was opened several times during the passage. There were stores in the run. The sailors could have no access to the run from the steerage. The bags when taken out here, appeared to be in the same condition as when put in. They were delivered here to the clerk of Mr. Stevenson the owner. When the witness went several times to the run, he observed nothing changed, as to the lock. He had not seen the crew with any unusual amount of money; he lent them some at Vera Cruz. The steward had constant access to the run. None of the men were sent there. The steward had a good deal of money in his possession. The clerk of Mr. Stevenson has proved the deficiency of money in the bags as stated. He said there were four bags loosely woven, that he took out several dollars through the bags. There was no appearance of violence about them.

Mr. Randall, for the libellants.

On the facts proved by the respondent there is no ground for charging the crew with the loss of this money. Abb. Shipp. 472; Mariners v. The Kensington [Case No. 9,085]; Spurr v. Pearson [supra]; Lewis v. Davis, 3 Johns. 17; Thompson v. Collins, 1 Bos. & P. (N. R.) 347.

J. R. Ingersoll, for the respondent, in reply.

From the mode of life and associations of sailors, a crime can hardly be done by any one of them, without being known to the others. It is their duty to guard their owners against such losses and to inform them of them. It is apparent from the testimony, that the money was taken before the vessel sailed, and at that time there was nobody on board but the crew.

HOPKINSON, District Judge. The law of this district upon the subject of a loss of a part of the cargo or other articles from the ship, I have thought exceedingly severe, and indeed unjust to the crew. It is, as far as I know, peculiar to this district, and goes far beyond the doctrine of the courts of England, and exceeds that of other districts of the United States. It seems to me to impose a liability on a sailor, not warranted by his contract, which assuredly binds him to a faithful performance of his own duty, but does not make him the surety for all and each of a crew, who are perhaps absolute strangers to him, and who are brought on board the vessel without his act, acquiescence or knowledge. It is converting a ship's company into a novel kind of partnership, in which each one is made answerable, nolens volens, for the acts and crimes of any and all the rest, and this without his having any choice or agency in the selection of his companions. This dangerous responsibility for the honesty of every man on board is imposed upon him, it is said, for

reasons of policy. If it be so, it should be so declared in his contract; it should be made a part of it, and he should distinctly understand that he is not only to be answerable for his own honesty and the full and faithful discharge of his duty, but to make good the losses, which may happen on board the vessel by the fraud or negligence of others; nay that the burden of proof is thrown upon him, to show that the embezzlement was committed by persons not of the crew. If neither he nor any body else knows how the loss happened, nor, if by embezzlement, by whom the fraud was committed, he is to stand answerable for it, to whatever sum his proportion may amount. Such is the law as laid down in the case of The Kensington [supra]. The reason is not that any such undertaking is found in the contract of the seaman, but in the policy of the law. The same policy would apply to a number of persons employed in an extensive manufactory; where there are the same opportunities to pilfer, the same inducements to fraudulent combinations, and the same reason, if there be any, to presume that they are acquainted with each other's doings. If a sailor is thus to be made the insurer for all the property on board against embezzlement; and, more than this, if he takes upon himself to prove how and by whom the loss was occasioned, before he can throw the burden from himself, he ought to have an adequate premium, an addition to his wages for this extraordinary risk. His wages pay him only for his labour and services.

In the case of the Kensington, the amount of wages was not disputed, but the seamen were charged with a sum, for a loss to the ship, in consequence of the embezzlement of part of a box of cambrics and lawns. It appeared, from circumstances, that the embezzlement took place at the time of lading the ship at Liverpool, though it was not discovered until she was unlading at Philadelphia. Several persons, not of the crew, were hired to assist in stowing the vessel at Liverpool; these had the part of the cargo assigned to them to stow, of which the plundered box composed an article; but the mate and some of the crew were always with them, and the box was in a situation to admit the access of the crew, as well those who assisted the labourers, as any others of the seamen. The box was much injured and broken open with a crow bar or some such instrument, probably used at the time of storage. In that case the crew were ordered to make good the loss by a general contribution. The learned judge, in making this decree, says, "If it could be proved, that the labourers committed the embezzlement, without the participation, connivance, or knowledge of the mariners, the latter would not be bound to contribute." And this proof is to be made by the mariners, whose answer and defence denies all such participation, connivance, and knowledge, which, in the ordinary course of legal proceedings, would throw the proof back upon those who would charge them with it. The mariners are to prove that they did not participate; that they did not know or connive at the fraud; and more than this, they must prove who were the offenders; "if it could be proved that the labourers committed the embezzlement;" and further, that it was without their participation. It is true, the judge agrees that if it were proved to have been done by the labourers, he would not consider the mariners liable for them as part of the crew. The judge then distinctly states, "that there is no doubt but that the seamen are answerable for embezzlement, unless they can clearly show, either by positive evidence, or strong circumstances, that it was committed by persons not of the crew. It is," he adds, "impossible for me to say who committed the act in question, in this case; it may have been either a separate or a joint act; it may have been perpetrated by the labourers alone, or in company with some of the crew; but under the uncertainty, I think the law throws the burden of proof on the mariners." To the law, as thus laid down, I cannot assent. It does not, in my opinion, conform to the general principles of jurisprudence; of right and wrong between man and man; nor to the adjudications of other courts on the subject. No case is cited by the learned judge, or by the counsel of the respondent, to support this doctrine. The law of the English courts is thus given, in Judge Story's last edition of Abbott on Shipping (page 472): "If the cargo be embezzled, or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may, by the custom of merchants, deduct the value thereof from the wages of the seamen, by whose misconduct the injury has taken place." Alluding then to the proviso introduced into the agreement made with the seamen, which, he says, is calculated to enforce the rule he has mentioned in the case of embezzlement, either of the cargo or the ship's stores, he adds, "this proviso, however, is to be construed individually, as affecting only the particular persons guilty of the embezzlement, and not the whole crew. Nor, as it seems, is any innocent person liable to contribute a portion of his wages, to make good the loss occasioned by the misconduct of others." This appears to me to be the real justice of the case, administered to seamen, as it is administered to others. In the first place, before the master and owner can throw upon the mariners the responsibility which the law throws upon them, the embezzlement or loss must be by the fraud or negligence of the seamen; and, of course, is a fact to be proved either by direct or satisfactory circumstantial evidence. This being done, the deduction is to be made "from the wages of the seamen by whose misconduct

the injury has taken place," which is another fact to be proved by the master or owner; "but no innocent person is to make good the loss occasioned by the misconduct of others."

The learned editor of the American edition of this work, in a note appended to the paragraph quoted, says: "This may be justly stated as the generally received law in the courts of America. Some cases have been decided, in which all the seamen have been held liable to contribution for embezzlement, where there is no reason to impute to them any participation in the act of plunder." He then refers to the case of Crammer v. The Fair American [Case No. 3,347], in which Judge Peters ruled, that "no one is to be excused from the general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder." "The innocence of an individual is not the question, it turns on the joint obligation of all to make retribution." He also refers to the case of the ship Kensington, already noticed; to a manuscript case in the Massachusetts district, which I have not seen; and to the case of Sullivan v. Ingraham [Id. 13,595]. In this last case Judge Bee does not adopt the principle of Judge Peters, although he goes beyond the English rule. He says, "The general doctrine is, that all are answerable," but that "the court will always endeavour to distinguish between the innocent and the guilty." And he acquitted two of the crew from liability upon presumptive proof that, although on board the vessel, they were not concerned in the embezzlement. The learned annotator further says, that the doctrine in the text was held to be the correct doctrine in the case of Lewis v. Davis, 3 Johns. 17. In that case a bale of goods was shipped at Bayonne; the vessel arrived at New York, direct from that place, on the 17th of October. On the 18th she came to the wharf, and on the 19th the goods were missing. The crew went on shore on the 18th; and returned on board on the 19th. On the night between the 18th and 19th, the fore scuttle was broken open. It was not pretended that any of the crew were concerned in the robbery. Kent, C. J., delivered the opinion of the court: "Admitting the rule of the maritime law to be, that mariners are to contribute out of their wages to the damages arising from embezzlement by each other, during the voyage, yet if negligence be not imputable to them, and the circumstances of the case do not fix the presumption of embezzlement upon any of the crew, they ought not to contribute." We see here that the preliminary step is to show that the embezzlement was done by the crew or some of them; negligence must be imputable to them; the circumstances of the case must fix the presumption upon the crew or some of them. This is entirely different from the rule of Judge Peters, who fixes the presumption on the crew, primâ facie, and throws it upon them to disprove it. Chief Justice Kent proceeds, "The loss ought, in justice, to attach upon the person, to whom the care of the vessel was committed for the night." "Molloy does not state the rule on this subject, with much precision, nor is he of much authority; but he rather seems to place it upon the ground of fault or negligence in the mariners. And even to the limited extent, to which he carries it, in this instance, has been recently questioned or denied by the court of common pleas in the case of Thompson v. Collins, 1 Bos. & P. (N. R.) 347, who were inclined to think that each person ought to answer for his own default. On the other hand, the mutual responsibility of seamen has been carried to a greater extent in the decrees of the district court of Pennsylvania; and further, I apprehend, than in any of the marine ordinances annexed to the reports of those respectable decisions. Assuming, however, the rule to the extent, in which it is laid down in Molloy, it is sufficient that the facts, in this case, did not lead to the conclusion that the plaintiff below was chargeable with fault or negligence, or that the embezzlement was to be imputed to any of the crew."

The case of Thompson v. Collins [supra], referred to Chief Justice Kent, was a suit for wages as a sailor. The facts were, that the ship sailed from Jamaica with several pipes of wine on board, stowed in the fore part of the ship. In the course of the voyage the partition was broken down, by some of the crew, but by whom could not be ascertained. Six of the casks were plugged by some of the crew, but it was not proved that the plaintiff was concerned in the transaction. A deficiency was found in the contents of the casks, of one hundred and sixty-two gallons. The defendant, the owner, paid all the other men their wages, deducting their proportional value of the wine lost. The question was, whether the plaintiff was entitled to recover. The defendant relied upon the words of the act of parliament, "that each seaman and mariner, who shall well and truly perform the above mentioned voyage, (provided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores,) shall be entitled, &c." The court held that these words must be construed respectively to every sailor, who shall plunder, embezzle, or commit an unlawful act. It is proper to say that this was a decision upon the construction of the act of parliament, and a clause in the shipping articles in conformity with it, which forfeited the wages in the cases mentioned, and our shipping articles contain the same clause, but not upon the maritime law authorising a deduction from the wages of every seaman in case of embezzlement. That question is not, it is true, decided by the court, but Chief Justice Mansfield, after declaring that there is no foundation for a forfeiture

of the whole wages, adds, "And I suspect that there is as little for a proportionable deduction; for notwithstanding what is said in Molloy, if such be the rule of law, it is scarcely possible but that it must have been often mentioned in the books, and as well known as any rule of maritime law, since frequent occasions must have arisen for the application of it." The annotator (Judge Story) also says that the English doctrine was adopted and followed in the case of Spurr v. Pearson [Case No. 13,268], which, being his own decision, he cannot be mistaken as to its intention. The learned judge goes into a thorough examination of the subject with his usual ability. His argument is so condensed, that an analysis cannot be made of it without injury to the whole. I shall therefore content myself with giving the result in his own words: "Upon the whole, my opinion is, that the rule of contribution, as contended for at the argument, and as asserted by Valin, cannot be sustained as a general rule of maritime law; that it has not that general sanction or universal use which entitles it to such a consideration; and that it has not such intrinsic equity or justice, as that, in the absence of direct authority, it ought to be adopted as a limit upon judicial discretion. On the contrary, it seems to me, that the true principles, which are to govern in these cases, are those of the general contract of hire; and that the most, that the maritime law has done, is to enforce these principles, by allowing the owner and master to make an immediate deduction from the wages of the offending parties, instead of driving them to the circuity of an action for damages. The result of this opinion is, that where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it, in proportion to their wages; but when the embezzlement is fixed on an individual, he is solely responsible; that where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute; but that where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master; that in no case is the innocent part of the crew to contribute for the misdemeanours of the guilty; and further that in case of uncertainty, the burthen of the proof of innocence does not rest on the crew; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded."

While I think that the learned judge presses sufficiently hard upon the sailor, and scarcely places his contract upon the principles of "the general contract of hire," I cannot deny that there is in his opinion a combination of good sense, natural justice, and sound law, with as much of commercial policy as justice will bear, which I am willing to abide by. If then we test the case before us by these principles, to what result will they bring us? It is uncertain, in the first place, what amount of dollars was in the bags, more especially in the large ones. I do not mean to intimate any fraud or improper design in this respect; but mistake is not improbable. There was evidently great carelessness in putting it up; it was probably done in haste. The bags were so loose and open, that the money might have been picked out of them, before they were taken to the vessel, or left the store for that purpose. They were carried about a quarter of a mile, and the missing money may have dropped out. In short, it is impossible to say where or how these dollars were lost. When the bags came on board the vessel, they were put in the run; to which there was no fastening. The steward, a stranger, not one of the crew, had constant access to it. No one of the crew was seen to go to the run, and they could not after the vessel sailed. There is, in truth, no one circumstance of suspicion or presumption against the crew; except that the money is lost, and no one knows what has become of it; no one pretends to know who took it, if the supposed amount was really put into the bags. Without a recurrence to the principles adopted in the case of Spurr v. Pearson, just recapitulated, it is most manifest, that they would not afford the least warrant for charging the libellants with this loss.

Decree. That the libellants recover and have paid to them their wages, without any contribution or deduction on account of the loss alleged by the respondent.

EDWARDS (SNOW v.). See Case No. 13,145.

Case No. 4,299.

EDWARDS v. The SUSAN.

[1 Pet. Adm. 165.] [1]

District Court, D. Pennsylvania. 1795.

SEAMEN'S WAGES—WHEN DUE—WHEN SUIT MAY BE COMMENCED.

1. At what period a mariner, at the last port of delivery, may sue for his wages.

2. End of the voyage the period, when wages are due.

[Cited in Thorne v. White, Case No. 13,989; The Mary, Id. 9,191.]

3. Wages are payable in ten days from the end of the voyage; but in some cases, fifteen are allowed for the discharge of the cargo, and payment of wages.

[Cited in Granon v. Hartshorne, Case No. 5,689; The Martha, Id. 9,144; The Mary, Id. 9,191; The William Jarvis, Id. 17,697.

[1] [Reported by Richard Peters, Jr., Esq.]

Applied in Knagg v. Goldsmith, Id. 7,872.]

In admiralty. The question in this case was, "When a mariner, at the last port of delivery, is entitled to receive, or sue for his wages?"

COURT. It has been a frequent subject of dispute, in this court, sometimes originating in animosity and desire to delay, possibly provoked by some improper conduct of the mariners, but most commonly as it affected costs. at what time a suit can legally be commenced, for wages due at the expiration of the voyage. The controversy always turned upon the construction of the 6th section of the "Act for the government and regulation of seamen." 1 Laws U. S. p. 137 [1 Stat. 133]. I confess, that it has appeared to me unwarrantable, to contend that the ten days should run from the time of the discharge of the cargo. All laws should receive a construction according to justice, and the principles on which they are predicated. "Qui haeret in littera, haeret in cortice." The end of the voyage is clearly, in my opinion, the period when the wages, according to the contract, are due. The discharge of the cargo or ballast, is coupled with the end of the voyage in the law, not as part of the contract, or to fix the time, from whence the ten days are to be computed, but because it is a necessary step to enable the merchant to demand his freight; and the wages ought not to be paid, until this is recoverable. it being the fund, out of which the wages are payable. There cannot be two periods, from which one term of ten days must run. This would be absurd and impossible. It cannot be from the end of the voyage, "and" the discharge of the cargo, which must, of course, be after the end of the voyage. An obscurity in terms is therefore involved, which fully justifies a discretionary interpretation. A reasonable time for the collection of freight should be given. The merchant should also have the opportunity afforded of examining the whole cargo, to see whether embezzlement, or damage chargeable on wages, has occurred. In most cases, ten days after the end of the voyage are sufficient to unlade and collect freight. But it sometimes happens, that where the cargo consists of a great variety of packages, or articles, belonging to a great number of owners, the custom house officers cannot grant permits, within that time. When a number of dry-good ships, added to others, cause a press of business at the custom house, I have perceived the impracticability of delivering the permits, in the time in which, on common occasions, they are issued. Under the latitude given in the words of the section, I have considered myself authorized to enquire into, and decide according to circumstances peculiar to the case. To allow an unreasonable time for discharge, would be as unjust, as it respects the mariner, as it would be to compel the merchant, prematurely to pay. Coals, salt, &c. are frequently retained on board, for a long time; and "ballast" is not always discharged. On the contrary, it sometimes remains on board for more than one voyage. Exercising therefore a discretion, according to circumstances, I have given more or less time, as the evidence justified me. To fix on the time of discharge would be difficult, uncertain, and often unjust. It depends on the industry, the inclination, or the interest of the owner. whether the discharge be accelerated, or unreasonably retarded. I have allowed, at the least, ten days from the end of the voyage; and at the most, fifteen working days to unlade. The latter period is given, in the collection law, for this purpose; after the time in which the master is bound to report. Although it has been contended that ten days even after this period, should be allowed, I have not thought it just to extend the interpretation, to a length appearing so unreasonable. It is too great a hardship on seamen, and very injurious to commerce, to delay the payment of wages, and thereby reduce the mariner to distress, as well as prevent his employment in other service. Or, if he is forced by necessity to enter into other employment, it may be at the price of abandoning, or selling for a trifle, the earnings of a precedent voyage. The law was enacted to do justice, and not to impose unnecessary hardships by granting unreasonable indulgences. Although all the freight may not be collected within the ten or fifteen days, it can scarcely ever happen that a sufficient sum is not received, in that time, to discharge the demands of the crew.

In the case before me, I allow fifteen working days, from the end of the voyage: that is, from the day on which the vessel was made fast to the wharf, and ready to discharge.

Case No. 4,299a.

EDWARDS et al. v. THIRTY-FIVE BOXES OF GOLD DUST, SAVED FROM WRECK OF THE UNION.

[19 Betts, D. C. MS. 79.]

District Court, S. D. New York. Sept. 22, 1851.

SALVAGE—COSTS—AMOUNT OF STIPULATION—AVERAGE.

[1. Libelants seeking salvage compensation who have filed a single libel, treating the salved property belonging to numerous persons as an entirety, and have given a stipulation in the sum of $250, to secure costs, conformably to standing rule 44, will not be required to furnish increased security under rule 55, where it does not appear that the sum stipulated is insufficient to cover the costs of contesting libelants' demand in the manner in which the suit is instituted.]

[2. It is only incumbent on libelants to establish that the subject matter, consisting of boxes and bags of gold dust, is subject to their claim, and a sale of so much as may be necessary to

raise the amount will be ordered, and not an average on the different parcels.]

[3. Libelants are not responsible for the expense incurred in effecting an average between the respective owners.]

[4. Nor are they answerable to the claimants for sums deposited on bonding the attached property, as rule 68 changes the former practice by securing the return of costs to successful claimants.]

In admiralty. The libelants [Lawrence R. Edwards and 37 others] have caused the above [35] boxes of gold dust to be attached on a libel filed demanding a salvage compensation for services rendered in rescuing it from a wrecked ship and preserving it on land until re-shipped to the consignees in the United States. On filing their libel they gave stipulation in the sum of $250 conformably to standing rule 44 of this court, to secure the costs created by their suit. The Union Mutual Insurance Company, the Sun Mutual Insurance Company, the Mercantile Mutual Insurance Company and various individuals in their private right, have intervened and bonded about one half in number of the boxes arrested, and on such bonding paid into court to meet the fees of the marshal and clerk, $3000, pursuant to rule 68.

The libel alleges that the libellants and others about 250 persons in all, were passengers on board the steam ship Union, which sailed on the first of July 1851 from San Francisco for Panama, having on board as part of the cargo 36 boxes and 3 leather bags of gold dust. That on the voyage, on the morning of the 5th of July, the steamer ran ashore on the coast of Lower California, striking with great violence on an outer bank or bar about 200 yards from the shore, and was then and there wrecked amongst the breakers, and was abandoned by the master and crew, who were placed in great peril and were with great difficulty enabled to escape from the wreck and save their lives, leaving on board a great portion of their baggage and clothing and the ship's stores, which were totally lost.

The other particulars alleged by the libel, need not be stated further than that the libellants aver, they by their exertions and at great personal risk and danger, after making their escape from the vessel went back to her and succeeded in saving and bringing on shore the boxes &c. of gold dust now proceeded against, and for which service and others concomitant to them, they claim a salvage compensation. No answers have yet been put in by any of the claimants. But a motion is made in their behalf on an affidavit, that the suit will involve heavy expenses, and that $3000 costs have already been claimed against them, and other costs must necessarily accrue, for which the stipulation of $250 affords no adequate indemnity, that the libellants be required to file such additional security as may be sufficient to cover the costs to be created by the litigation.

Geo. F. Betts, for motion, on behalf of claimants.

W. A. Butler and Mr. Marbury, for libellants, opposed.

BETTS, District Judge. It is provided by rule 55, of this court, that in all cases of stipulations in civil and admiralty cases, any party having an interest in the subject matter may move the court on special cause shown, for greater or better security, and the only question is whether there is a case made here, which calls for the exercise of the discretion of the court to require the libellants to give security which may be equal to the costs to be created by the litigation. For I assume that the demand of the libellants is to be contested by the claimants, although no answer or plea has been yet filed.

I think the motion ought not to prevail. The libellants bring a single action, treating the property saved as an entirety, and they cannot be subject to the expense of litigating between the various owners the distributive proportion each of them shall contribute towards the salvage compensation. All that it is incumbent on the libellants to establish is, that the cargo arrested by them is subject to a salvage claim, and their recompense will be secured them by sale of so much as may be necessary to raise the amount, and will not be by any average on the different parcels of the cargo. That average must be claimed and decreed between the respective owners, and the libellants cannot justly be responsible for the expenses incurred in effecting it.

There is no evidence before the court showing that the stipulation of $250 is not sufficient to cover the costs of contesting the demand in the manner in which the suit is instituted. It is a mistake to suppose the libellants are answerable over to the claimants for the sums deposited by them in court on bonding the property attached. Under the old practice in admiralty, the claimant paid the costs of the officers of court on taking his property under bond or stipulation from their custody, and in case of his success on the final hearing had to rely upon the responsibility of the actors for repayment of such advance. The 68th rule of this court was intended to correct that mischief, and instead of drawing the costs from claimants absolutely on surrender of the arrested property to them, to place it so that the costs will be secured to the libellant and officers if the claimants are subjected to payment of them, and if exonerated from such payment so that the claimant may be secured their return without the hazard of recourse to the libellant. All the claimant can lose will be possibly the interest on the

advance whilst the cause is in litigation. But he is no way entitled to put the libellant under a stipulation to refund or secure such costs, because if the decision casts costs on the libellant, he must satisfy the officers of court and the claimant withdraws his deposit, and is made liable to no charge therefor, and in no contingency are they paid over to the libellant.

The case made by the libel, and contradicted before the court, shows at least a prima facie and colorable right in the libellant to a salvage compensation. An investigation on full hearing may show many of the statements to be exaggerated and inflated and the result may be that very small, or even no compensation is awarded them. Still unless the claimants have tendered a reasonable reward for services actually rendered, or the proceedings by the libelants are extortionate or oppressive, it is not the habit of admiralty courts to withhold costs when services beneficial to the claimant have been performed, or attempted to be performed, although no salvage compensation is awarded, and it is not unusual to grant costs in such instances. They are never imposed upon the salvors unless they have been guilty of gross misconduct. 2 W. Rob. Adm. 270; The Shannon (before Dr. Lushington, Dec., 1847) 6 N. Y. Leg. Obs. 143; Clarke v. The Dodge Healy [Case No. 2,849]; 2 Dods. 115; 2 W. Rob. Adm. 306; Pritch. Dig. 472; Drysdale v. The Ranger [Case No. 4,097]; One Hundred and Ninety-Four Shawls [Case No. 10,521].

The motion to increase stipulation for costs is accordingly denied.

EDWARDS (TURNER v.). See Case No. 14,254.

EDWARDS (UNITED STATES v.). See Cases Nos. 15,025 and 15,026.

EDWARDS (WOODWORTH v.). See Case No. 18,014.

Case No. 4,300.

The EDWIN.

[1 Spr. 477;[1] 22 Law Rep. 198.]

District Court, D. Massachusetts. May, 1859.[2]

CARRIER'S LIABILITY FOR DAMAGED CARGO — EFFECT OF SIGNING BILL OF LADING AFTER DAMAGE—ESTOPPEL — GOODS TRANSFERRED TO SHIP BY STEAM LIGHTER — BURSTING OF THE BOILER —PERIL OF THE SEAS.

1. The signing of a bill of lading, after damage to the cargo, will not increase the liability of the carrier.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

2. The rights of the parties are fixed by the disaster.

3. Where the owner successfully repudiates a bill of lading, he cannot, at the same time, set it up, as merging a prior contract.

4. Where, pursuant to a contract of affreightment, the master of a ship had taken part of the cargo into his custody at Mobile, and conveyed it a distance of several miles in a steam lighter, to his ship, but it was destroyed by the bursting of a boiler, while alongside, and before it was taken on board, it was *held*, that the owner of the goods was entitled to recover for the damage sustained, and had a lien therefor upon the ship. This doctrine is not inconsistent with the decisions in The Schooner Freeman, 18 How. [59 U. S.] 188, and The Yankee Blade, 19 How. [60 U. S.] 90.

[Cited in The R. G. Winslow, Case No. 11,736; The Williams, Id. 17,710.]

5. The court will not, in such case, inquire whether the steamer was seaworthy, as that would not exonerate the carrier.

6. The bursting of the boiler was not a peril of the sea, or of navigation.

[Cited in Barrell v. The Mohawk, 8 Wall. (75 U. S.) 162.]

This was a libel in rem, promoted by the Naumkeag Steam Cotton Company.

The facts were agreed in writing, as follows: "In December last, the vessel was at Mobile; the master, through a shipbroker, agreed to take, for the libellant, seven hundred and seven bales of cotton to Boston, for the freight stipulated in the bills of lading. Vessels drawing over a certain depth of water cannot pass the bar below Mobile, and vessels which can, in ballast, take on board at Mobile enough to load them, so that they can pass the bar, are then towed down below it. The residue of the cargo is then brought to them in steam lighters. Vessels drawing too much water to pass the bar, are wholly loaded in this manner. In either case, when the vessel is ready to receive cargo, the master gives notice to his consignee, or the broker through whom his freight is engaged, that he is ready, and engages for the ship a steam lighter for the purpose, and pays therefor on account of the ship. The lighterman applies to the consignee of the ship, or broker, and receives an order for the amount of bales to be delivered to him from the cotton-press. He receives it there, to carry to the vessel, and gives his own receipt for it. On delivering the same on board of the vessel, he takes a receipt from the mate, or some other officer in charge. The bills of lading are subsequently signed and delivered. The Edwin received the principal part of her cargo at the city, and was then towed down below the bar, to receive the residue. The master employed the steamer F. M. Streck for this purpose, and on the 20th of December, one hundred bales were laden on board of her, at the press, to be taken down, for which the master of the steamer gave a receipt. After she had arrived at the side of the Edwin, but before any part of the hundred bales was tak-

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

[2] [Affirmed by circuit court in Case No. 4,301. Decree of the circuit court affirmed by supreme court in 24 How. (65 U. S.) 386.]

en out, or receipted for, her boiler exploded, by which all the cotton was thrown into the water, and the boat sunk. Fourteen bales were picked up by the crew of the Edwin, and brought to Boston with the balance of six hundred and seven bales mentioned in the bills of lading. Eighty were picked up by other parties, wet and damaged, and were surveyed and sold; four remain in the hands of the ship-broker, at Mobile, for account of whom it may concern; and two were lost. December 28th, the master signed bills of lading, including said hundred bales, being advised that he was bound to do so, and that if he refused, his vessel would be arrested and detained. On arrival in Boston, the master delivered six hundred and seven bales, and tendered fourteen, which the consignees refused to accept, on account of their being damaged. It is customary in insurance on goods at and from Mobile, for the insurers to assume the risk of lighterage. If the court should deem it material, whether the steamer employed was or was not fit and suitable for that purpose, either party may introduce evidence relating to it."

Milton Andros, for libellants.
F. C. Loring, for claimant.

SPRAGUE, District Judge. It is contended by the counsel for the claimant: first, that the bill of lading has no validity, as it was signed after the disaster; second, that the libellants cannot sue upon the original contract, because that was merged in the bill of lading; third, that no lien ever existed upon the vessel; and fourth, that there was no liability, if the steamer was fit and suitable.

The first position is sustained. The master could not, after the loss had occurred, create a liability by signing the bill of lading. The rights of the parties had been previously fixed, and the bill of lading was wholly inoperative.

The second objection cannot be sustained. The claimant himself having repudiated the bill of lading, and successfully denied that it has any validity, cannot at the same time set it up, as an instrument of sufficient efficacy to merge or supersede the prior contract.

The third objection is that which has been most relied upon, and requires the greatest consideration.

The master, acting within the scope of his authority, made a contract of affreightment for the transportation of a cargo of cotton from Mobile to Boston. By the usage which was imported into this contract, and made a part of it, the master was to receive the cotton at the mill, which, it is verbally agreed, was on a wharf, and so situated that the cotton could be taken therefrom on board of a lighter. Pursuant to this contract, the master procured such lighter or boat as he saw fit, and received the hundred bales of cotton on board thereof, and, by his agent, gave a receipt therefor to the libellants, and it was conveyed, under the master's direction and authority, a distance of some miles, to the ship; but while alongside, and before the cotton had been taken on board, the boiler exploded, and the damage occurred. Now, it is insisted in behalf of the claimant, that inasmuch as the cotton was never actually on board of the ship, no lien upon her ever existed, and the opinions of the supreme court in The Freeman, 18 How. [59 U. S.] 188, and The Yankee Blade [Vanderwater v. Mills] 19 How. [60 U. S.] 90, are cited in support of this position. And it must be admitted that it is covered by the language used arguendo, in the opinions of the court in those cases. In the first, it is said: "Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment: but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it." And in the second, it is said: "If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board; consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship, for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases."

These, however, are only dicta, not decisions, the cases not calling for them. The first was where the master had been induced by fraud to sign a bill of lading for goods never shipped, and never intended to be put on board. And it was held that the master had no authority to sign the bill of lading, and that neither the vessel nor the general owner was bound thereby. The case of The Yankee Blade was only a contract in the nature of a partnership, as the court viewed it, by which an owner of one steamer agreed with the owner of another steamer, that each should put his boat on a certain line of travel, to make connecting links for the transportation of passengers. The remarks of the court, therefore, which have been cited, although entitled to great deference, are not of binding authority.

The language of the court is general. The cases did not require any careful consideration of limitations or conditions, or of explanations of what should be deemed the lading of goods on board, or equivalent thereto, and looking at the whole scope of their observations, it is not to be inferred that they would have applied the language which has been quoted, to a case like the present. In these opinions, stress is laid upon the necessity of reciprocity between the

merchandize and the ship. In [Vanderwater v. Mills] 19 How. [60 U. S.] 90, it is said: "The obligation is mutual and reciprocal. The merchandize is bound or hypothecated to the vessel for freight and charges, (unless released by the covenants of the charter party,) and the vessel to the cargo."

I cannot but think that the language of the court was intended to apply to contracts purely executory, and not to those which had been executed in part. Here the merchandize had been delivered to the master, and by him conveyed by water the distance of several miles, in execution of his contract. And he certainly could have held it, even as against the owner, until paid what he had a right to demand; in other words, he had a lien thereon.

The merchandize, then, was holden to the owner of the ship, which is all that is meant by saying that it is bound to the ship; and why then, was the ship not bound to the owners of the goods? The latter being held, reciprocity requires that the former also should be bound. Such a taking on board and transportation by the lighter is, in legal contemplation, equivalent to taking on board of the ship. The contract of affreightment was for the employment of the ship; and the use of the boat was merely subsidiary, and in execution of that contract. Suppose a master taking his cargo at the wharf or shore, uses the ship's boats to transport it to her, while lying in the roads, would not the possession of the goods in the boats be the same, in effect, as taking them on board of the ship? and can it make any difference, whether the boats so used have been purchased, or only hired for a term of time, as for a year, or a voyage, or for the occasion? It is the substitute for the ship. Whether a vessel may be subject to a tacit hypothecation for a breach of a contract of affreightment, where the merchandize has not been delivered to the carrier, is a question which deserves careful consideration, before it is answered in the negative.

In The Flash [Case No. 4,857], Judge Betts held, that such a lien might exist; but subsequently, in July, 1857, according to a newspaper report, he made a contrary decision, not because he had changed his own views, but in submission to the opinions in 18 How. [59 U. S.] and 19 How. [60 U. S.]. These cases, however, as we have already seen, decide no such question. The cases of Morewood v. Pollok, 1 El. & Bl. 743, and Salmon Falls Manuf'g Co. v. The Tangier [Case No. 12,265], have been cited to show that goods in a lighter, or on a wharf, although in the custody of the carrier, are not deemed to be on board of the ship. The question there decided arose under the statute of 26 Geo. III. c. 86, and the act of congress of March 3, 1851 (9 Stat. 635), exempting the carrier from liability for goods taken on board of his vessel, if burnt by fire occurring in, or on board of, the vessel; and the decisions were, that the court would not extend the exemption beyond the language of the statutes. It was merely the construction of a positive enactment, and cannot aid us in determining what should be the rule of liability deduced from the principles of maritime law. The exemption created by these statutes may well be said to be stricti juris, and such was, in effect, the decision of the court in refusing to extend it beyond the import of the words used by the legislature. I am aware that it has of late been repeatedly said by high authority (see [Vanderwater v. Mills] 19 How. [60 U. S.] 89) that liens created by the common maritime law are stricti juris; but I have seen very little explanation of the meaning of that phrase. Where a right is created by statute, it is not to be extended beyond a fair construction of the language of the positive enactment. But where it is given by the common law, it is coextensive with the reason and principle upon which it rests, and is not to be restricted to the precise facts of the cases in which it happens to have been heretofore presented, nor even to the phraseology which the court may have used in upholding the right in particular cases. A court does not create the right, and their attention is drawn only to the facts of the case in which they assert it, and to these their language should properly be referred. A statute right of exemption may be said to be stricti juris, and not to be extended by analogy to other cases, although we might suppose that it would have been reasonable for the legislature to have embraced them. But to apply the rule by which we construe a statute to judicial decisions of a common law right which rests upon reason and justice, or even to the language of the court in giving their opinion upon special circumstances, would be to deprive the common law, whether of the land or sea, of the glory of being a code of principles capable of such expansion and adaptation as to comprehend and govern the infinite variety of novel facts and circumstances growing out of the advance of civilization, and new branches and complications of business.

Pardessus, 3 Droit Com. 597, is the authority cited for the proposition, that maritime liens are of strict right. 19 How. [60 U. S.] 89. But he is there reasoning upon the Code de Commerce. Having stated, that by article 191, a lien is given on ships for the premium of insurance on ships, he raises the question, whether it is to be inferred by analogy, that there is a lien on goods for the premium of insurance on goods. And after saying that, from the silence of the legislature as to the latter, it may be inferred that it did not intend to embrace them, he goes on argumentatively to give other reasons, why such privilege does not extend to goods, and says that liens are stricti juris, that they are exceptions from the general rule of equality of

right in creditors, and are not to be extended, by analogy, from one case to another. All this is fairly to be taken to have reference to the liens upon which he has been commenting, which were created by positive enactment. The reasoning of Pardessus seems to have no application to privileges given by the common maritime law. His language shows that he is speaking of the written, and not of the unwritten law. He says: "An exception ought to be expressly stated, and to be confined to its terms; it does not extend, by logical consequence, from one case to another." But he is here only stating the argument against the lien for premium of insurance on goods. He subsequently states the argument on the other side, to which, in conclusion, he seems to give the preference.

The first time, as far as I recollect, that this citation from Pardessus is to be found in our reports, is in The Kearsarge [Case No. 7,633]. But there the subject-matter was a lien created by a statute of the state of Maine. It rested wholly upon positive enactments.

The case of The Tangier is a direct authority for the proposition, that a vessel may be subject to a lien for damage to goods, when not on board of her. There the merchandize had been transported to the port of destination, unlivered, and placed upon the wharf. But being still in the custody of the carrier, the vessel was held responsible for its loss. This is somewhat stronger than if the goods had been destroyed in being transported in the lighter from the ship to the shore; and, if in such case the vessel is subject to the hypothecation, why not, where the goods were destroyed in being transported in a lighter to the ship? In both, they are in the custody of the carrier, who is responsible for, and actually conveying them, in performance of his contract. Why should the same circumstances carry with them a liability, when occurring at one end of the voyage, and not when arising at the other?

The fourth ground of defence is that, if the steamboat was suitable for the purpose of conveying this cotton, there is no liability on the part of the carrier. This cannot be sustained. The carrier is not exempted from liability, merely because the boat or ship which he employs is seaworthy; that is, fit and suitable for the voyage. It is not contended that the explosion, in this case, was a peril of the sea, or of navigation, within the meaning of those terms, as used in bills of lading and other maritime contracts.

Decree for the libellants for $7,000 and costs.

This decision was affirmed by the circuit court, upon appeal, in [Case No. 4,301]. An appeal was then taken to the supreme court of the United States, before which the case has since been argued. [Bulkley v. Naumkeag Steam Cotton Co., 24 How. (65 U. S.) 386.] See Richardson v. Goddard, 23 How. [64 U. S.] 28.

Case No. 4,301.

The EDWIN v. NAUMKEAG STEAM COTTON CO.

[1 Cliff. 322;[1] 23 Law Rep. 277.]

Circuit Court, D. Massachusetts. Oct. Term, 1859.[2]

CARRIERS — DELIVERY OF GOODS BY SHIPPER — COMMENCEMENT OF TRANSPORTATION SERVICE — LIABILITY FOR DAMAGE.

1. When goods were placed on board a lighter in the employment of the master of a vessel, to be transported to the vessel, the delivery to the master was complete, and the liability of the vessel to which the goods were to be transported commenced.

[See note at end of case.]

2. Unaccompanied by any delivery of the goods, the contract of the master for their transportation creates no lien upon the vessel, and the contract cannot be enforced in the admiralty by a proceeding in rem against the vessel.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

3. Pursuant to a contract of affreightment, part of a cargo of cotton was received at a wharf in Mobile, by the master of a ship lying below the bar, and was transported, in a lighter hired by him, several miles, to his vessel. While the lighter was alongside, her boiler burst, and the cotton, being still on board of the lighter, was destroyed. On this state of facts the court *held*, that the owner of the goods was entitled to recover for the damage sustained, and had a lien therefor on the ship. This decision is not inconsistent with The Freeman v. Buckingham, 18 How. [59 U. S.] 188; or Vandewater v. Mills, 19 How. [60 U. S.] 90.

[Cited in Barrell v. The Mohawk, 8 Wall. (75 U. S.) 162.]

[See note at end of case.]

This was an appeal in admiralty [by Henry F. Buckley, claimant] from a decree of the district court [of the United States for the district of Massachusetts] in a suit in rem brought by the appellees against the bark Edwin, on a contract of affreightment. At the hearing in the district court, the case was submitted upon the following agreed statement of facts, in which the important question in the case is embodied: "In December, 1858, the vessel was at Mobile; the master, through a ship-broker, agreed to transport for the libellant 707 bales of cotton to Boston [in good order and condition, the dangers of the sea only excepted, and that the master of the bark on that day received the cotton in good order and condition][3] for the freight stipulated in the bills of lading. Vessels drawing over a certain depth of water cannot pass the bar below Mobile, and vessels which can in ballast take on board at Mobile enough to load them so that they can pass the bar are then towed down below it. The residue of their cargo is then brought to them in steam lighters. Vessels drawing too much water to pass the

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

[2] [Affirming Case No. 4,300. Decree of the circuit court affirmed in 24 How. (65 U. S.) 386.]

[3] [From 23 Law Rep. 277.]

bar are wholly loaded in this manner. In either case, when the vessel is ready to receive cargo, the master gives notice to his consignee, or the broker through whom his freight is engaged, that he is ready, and engages for the ship a steam lighter for the purpose, and pays therefor on account of the ship. The lighterman applies to the consignee of the ship, or broker, and receives an order for the amount of bales to be delivered to him from the cotton press. He receives it there to carry to the vessel, and gives his own receipt for it. On delivering the same on board of the vessel, he takes a receipt from the mate or some other officer in charge. The bills of lading are subsequently signed and delivered. The Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer F. M. Streck for this purpose, and on the 20th of December 100 bales were laden on board of her at the cotton press to be taken down, for which the master of the steamer gave a receipt. After she had arrived at the side of the Edwin, and before any part of the 100 bales was taken out, and receipted for, her boiler exploded, by which all the cotton was thrown into the water, and the boat sank. Fourteen bales were picked up by the crew of the Edwin, and brought to Boston with the balance of 607 bales mentioned in the bills of lading. Eighty were picked up by other parties, wet and damaged, and were surveyed and sold; four remain in the hands of the ship-broker at Mobile for account of whom it may concern, and two were lost. December 28th, the master signed bills of lading, including said 100 bales, being advised that he was bound to do so, and that if he refused his vessel would be arrested and detained. On arrival in Boston, the master delivered 607 bales, and tendered fourteen, which the consignees refused to accept on account of their being damaged. It is customary in insurance on goods at and from Mobile, for the insurers to assume the risk of lighterage. If the court should deem it material whether the steamer employed was or was not fit and suitable for that purpose, either party may introduce evidence relating to it." In the district court a decree was entered for the libellants. [Case No. 4,300.]

F. C. Loring, for claimant and appellant.
Milton Andros, for libellants.

CLIFFORD, Circuit Justice. It is insisted by the libellant that the liability of the vessel is commensurate with that of the owners, and that the extent of it in regard to both must be ascertained and measured by the terms of the contract made by the master. On the part of the respondent, it is insisted, that the ship is not bound to the merchandise, or the merchandise to the ship, until it is actually placed on board, and that the liability, both of the ship and the owners, notwithstanding the terms of the contract, must be narrowed to the service actually performed by the vessel. It must be admitted that the question is not free of difficulty, and perhaps is involved in some doubt. Much must depend in its solution upon the view taken of the authority of the master, and the real nature and character of the service performed. Something also will depend upon the circumstances attending the making of the contract, and the situation and acts of the parties at the time it was made, and when the loss occurred, as furnishing the key to unlock and unfold its real intent and meaning. Seafaring men are known to be well acquainted with the port of Mobile, and the usual and ordinary course of business in lading vessels in that harbor. Small vessels go up to the wharves to take in cargo; but large vessels cannot approach the wharves at all, on account of the shoalness of the water over the bar, but anchor below and have their cargoes brought down in lighters. Vessels of an intermediate size generally go up to the wharves, and take in what cargo they can safely carry over the bar, and return to the anchorage below, either by their own means of sailing or by means of tugs employed for that purpose, and have the residue of their cargoes brought down, as in the case of large vessels. Large quantities of cotton are annually exported from that port, and the masters and owners of vessels engaged in the trade are as well acquainted with the navigation and the course of business as at the larger commercial ports. Owners send freighting vessels to that port in ballast or otherwise, seeking employment for their vessels, and trust very largely to the discretion of the master to stipulate upon the terms and conditions for transporting the cotton to other domestic ports, or to the foreign market. Northern vessels are largely engaged in that trade, and find their employment to a considerable extent from the agents of the manufacturer of the raw material, or from the northern merchant who has become the purchaser of the same, for the supply of the manufacturing establishments in the northeastern states. Shipments are made through agents or brokers residing in the port of lading, who contract with the master of the vessel for the transportation of the cotton, and deliver the same to him in pursuance of the contract of shipment. When the contract is for the transportation of cotton in vessels requiring the cargo to be lightered, in whole or in part, the master employs the lighter in behalf of the vessel, and pays for such partial conveyance on account of the owners. Transportation coastwise to the northern ports may be safely made in vessels of either of the classes before mentioned, so that the shipper or his agent has no motive or interest to inquire whether the cargo is to be lightered or taken on board at the wharves. He contracts as in this case that the cotton shall be transported for a given freight from the

wharf or the cotton-press, as the case may be, to the place of destination. Different vessels of the same tonnage require a greater or less depth of water, according to their construction, and accordingly vessels of an intermediate size may or may not require the assistance of lighters, as they are well or ill constructed for that peculiar navigation. Whether they can or can not go up to the wharves and take in their whole cargo is well known to the master of the vessel, but may not be known to the shipper or his agent. Shippers are governed, in making such contracts, by the price to be paid for the transportation, and are only indirectly interested in the cost of lighterage, so far as it affects the price of freight. On the other hand, the master, as the agent of the owners, has the means of knowing the state of navigation, the construction of his vessel, and the cost of performing the service, and is bound to determine whether he can afford to accept the proffered terms for the transportation of the goods. Masters are the agents of the owners, and as such have an implied authority to bind them, even without their knowledge, by contracts relative to the usual employment of the ship. "Owners," says a learned commentator, "rarely navigate their own ship, but almost always intrust its conduct and management to the master. They hold him forth to the world as authorized to contract, and by reason of their employment of the ship, and the profit derived by them from that employment, they are bound to the performance of every lawful contract made by him relative to the usual employment of the vessel." Abb. Shipp. (Ed. 1846) 156; 3 Kent, Comm. (9th Ed.) 220; Chit. Carr. (Ed. 1857) 225; The New World, 16 How. [57 U. S.] 473; Smith, Merc. Law, 559; Grant v. Norway, 10 C. B. 688. Possession of the cotton in this case was to be taken by the master at the cotton-press. His contract was to carry a specified number of bales, and to transport the whole parcel from one given place to another. In the strictest sense, therefore, it was by its terms an entire contract for the conveyance of a given quantity of goods. Sayward v. Stevens, 3 Gray, 97. Five sixths of the specified quantity had been taken from the cotton-press by the master, and was already on board the vessel. He employed the lighter in behalf of the vessel to bring down the remainder, and had agreed to pay for the service on account of the bark. Beyond question, it was a marine service which the lighter had engaged to perform, and she was in the employment of the master for the benefit of the vessel, and, in contemplation of law, was the agent of the owners in the performance of the service. Nothing can be more certain than that the service performed by the lighter was a marine service. She was required by the engagement to transport the cotton over navigable waters within the admiralty and maritime jurisdiction of the United States. Whether the water above the bar is more or less affected by the ebb and flow of the tide, it is nevertheless salt water, and is as much within the admiralty jurisdiction as the gulf itself, or the open sea. Her employment in no sense whatever emanated from the shipper. By the terms of the contract between the master and the shipper, the former as much agreed to transport the cotton over the twenty or thirty miles of navigable water, lying between the wharf and the anchorage of the vessel below the bar, as over any other part of the route from there to the port of destination. Whatever, therefore, the lighter did, in forwarding the cotton on the route, was a part-performance of the contract made by the master with the shipper, for which the owners were to receive compensation in the freight earned by the vessel. Freight could not be earned by the vessel, unless the cotton was first transported over this part of the route embraced in the contract. As the vessel could not perform the service, some other agency was absolutely indispensable to enable the vessel to earn freight, and by the usage of the port it was entirely competent for the master to employ a lighter. Had it been practicable so to do, the master might have sent his own boats, as an appendage of the vessel, to bring down the cotton; or, if that course was impracticable, unsafe, or inconvenient, he might employ other usual and customary agencies, as an accessory to the vessel for the time being to accomplish the same result, so as to enable him to fulfil his contract, and enable the vessel to earn freight. His contract bound him to accept the cotton at the cotton-press, and when it was placed on board the lighter in his employment for the purpose of being transported to the bark, the delivery to him was complete, and the liability of the vessel commenced. When it was placed on board the lighter as a substitute for the bark, the shipper had fully parted with the possession, and, having no longer any control or right of control over it, was in no degree responsible for its safe custody. All the obligations of due transport, safe custody, and right delivery at the port of destination, which constitute the duties of the carrier, had then attached. Whenever those obligations of the carrier begin, they carry with them all the rights and privileges incident and belonging to that relation. After such delivery by the shipper, the ship was bound to the merchandise and the merchandise to the ship, and the merchant could not recall the cargo or resume the possession without the payment of freight, unless by consent of the master. Contracts merely executory, where there has been no delivery of the goods to the master, or change of possession, stand upon a different ground. Unaccompanied by any delivery of the goods, the contract of the master for their transportation creates no lien upon the ship, and the contract cannot be enforced in the admiralty by a proceeding in rem against the vessel. Keeping in view this distinction, there will

be no difficulty in reconciling all the decisions bearing upon this question. Take, for example, the case of The Freeman v. Buckingham, 18 How. [59 U. S.] 188. In that case, the master had been fraudulently induced to sign bills of lading for certain merchandise, when none had been delivered, and when, in point of fact, the merchant had none such to be shipped, but had induced the master to sign them with intent to use them as instruments to obtain money from the libellant. He succeeded in his fraudulent purpose and obtained the advances. Failing to get back his money, the libellant instituted proceedings against the vessel. On that state of the case, the supreme court held that the vessel was not liable, and in enforcing the reasons for the conclusion, remarked that "the law creates no lien on a vessel, as the security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it;" but added in the same connection, that there was no cargo in that case, and no contract made for which the ship could stand as a security. Much reliance was also placed by the respondent upon the case of Vandewater v. Mills, 19 How. [60 U. S.] 90. It is insisted that the doctrine established by that case is, that the vessel and owners are never held liable on a contract for the transportation of goods, unless the goods are actually placed on board the vessel. Justice to the court requires that the facts of the case should be briefly noticed. As stated by the court, the libel set forth a contract between the owners of certain steamboats to convey freight and passengers between certain domestic ports. After the contract was executed, the owners of one of the steamers refused to employ their vessel according to the agreement, and sent her in another direction on a contract with other persons. For this breach of the contract, the libel was filed against the vessel, and the court held that the suit in rem could not be maintained. Among other things, the court remarked, that if the master or owner refused to perform his contract, or for any reason the ship does not receive cargo and depart on her voyage, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages as in other cases. No goods had been delivered in that case or offered for conveyance, and, of course, none had been injured or lost. Every remark in the opinion, as applied to the case then before the court, may well be reconciled with the view here taken of the present question. Damages were not claimed in that case for the failure to transport goods after their delivery to the master, or for their injury, deterioration, or loss in the voyage, but for the refusal of the owners to employ their vessel according to the contract; and in point of fact, the agreement had none of the features of a contract between the merchant and the carrier, for the transportation of merchandise. In this case, the contract is between the merchant and the master, as the agent of the owners. Due delivery of the cotton to the master undoubtedly was made, when the goods were placed on board the lighter which he had employed in behalf of the bark for the purpose of transporting it to the vessel. Mr. Parsons says, the reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, binds the ship to the safe carriage and delivery of the goods. 1 Pars. Mar. Law, 132. Similar views are also expressed by Chancellor Kent. He says the responsibility of the owner begins where that of the wharfinger ends, and when the goods are delivered to some accredited person on board the ship. 3 Kent, Comm. (9th Ed.) 281. It was held by Lord Ellenborough, in Cobban v. Downe, 5 Esp. 41, that where the usage is to deliver the goods on the wharf to the mate of the vessel by which they are to be carried, such a delivery has the effect to terminate the responsibility of the wharfinger, and, in delivering judgment, he proceeded upon the ground that the liability of the ship commenced where the responsibility of the wharfinger ended. Reference is also made by the respondent to the case of Morewood v. Pollok, 18 Eng. Law & Eq. 341, as asserting a different doctrine; but there is nothing in that case inconsistent with the rule, that the goods, when placed in the lighter in the employment of the respondent, and for the purpose of being transported to the vessel, were duly delivered to him pursuant to the contract. All the cases agree that, so soon as a sufficient delivery of the goods is made to an authorized person, for the purpose of transportation, in pursuance of a lawful contract, the vessel is liable. Faulkner v. Wright, 1 Rice, 107; Greenwood v. Cooper, 10 La. Ann. 796; Clarke v. Needles, 25 Pa. St. 338; Snow v. Carruth [Case No. 13,144]; Chit. Carr. (Ed. 1857) p. 228; Moll. de J. Mar. bk. 2, c. 2, § 2; Hosea v. McCrory, 12 Ala. 349; Trowbridge v. Chapin, 23 Conn. 595. That the owners of vessels are bound by the contract of the master when acting within the scope of his authority, is a proposition universally admitted. The Paragon [Case No. 10,708]; The Phoebe [Id. 11,064]; Hewett v. Buck, 17 Me. 147. As a general rule, whenever the owners are liable, the ship is also liable; and to such an extent has the rule been carried in some of the cases, that it is said that the liability of the ship and the responsibility of the owners are convertible terms. The Druid, 1 W. Rob. Adm. 399. Exceptions undoubtedly exist to that rule, but none of them have any application to cases of this description.

After full consideration of the case, I am of the opinion, that the decision of the district court was correct, and the decree there made is accordingly affirmed with costs.

[NOTE. On the appeal of Henry F. Bulkley, claimant of the bark Edwin, this decree was affirmed by the supreme court in 24 How. (65 U. S.) 386. Mr. Justice Nelson, in delivering the opinion of the court, referred to the custom of the port of Mobile, by which the master of a vessel ready to receive cargo below the bar notifies his consignor or broker, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor, takes an order for the cargo to be delivered, receives it, and gives his own receipt for same. On delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge. The usual bills of lading are subsequently signed by the master, and delivered. It was held that the delivery of the 100 bales of cotton in this case to the lighterman was a delivery to the master, and that the transportation by the lighter to the vessel was the commencement of the voyage in execution of the contract, the same in judgment of law as if the 100 bales had been placed on board the vessel at the city, instead of the lighter. Mr. Justice Nelson said: "The lighter was simply a substitute for the bark for this portion of the services. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and, when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties become fixed."]

EDYE, The H. W. See Case No. 6,964.

Case No. 4,302.

In re EELES.

[5 Law Rep. 273; 1 N. Y. Leg. Obs. 84.]

District Court, N. D. New York. Aug., 1842.

BANKRUPTCY — ACT OF 1841 — OCCUPATIONS EMBRACED WITHIN ITS PROVISIONS.

Held, that a distiller, whose business consisted in the purchase and sale of grain, and the conversion of it into alcohol and the sale of alcohol; and in the purchase of domestic animals and the sale of them, or of their flesh after being fattened, was of such an occupation, as subjected him to the operation of the bankrupt act of 1841 [5 Stat. 440], on the petition of a creditor.

[Cited in Re Smith, Case No. 12,981.]

In bankruptcy. In this case the main question was, whether the occupation of the debtor [William Eeles] was such as to subject him to the operation of the bankrupt act on the petition of a creditor. He was a distiller, and his business consisted in the purchase of grain, the conversion of it into alcohol, and the sale of the alcohol; and in the purchase of domestic animals, and the sale of them, or of their flesh after being fattened.

Mr. Myers, for the petitioning creditor.

Bennett & Goodwin, for respondent.

CONKLING, District Judge. The question upon which this case turns is of great importance; because its decision must necessarily embrace many other descriptions of persons besides distillers. I cannot say that I have at any time entertained any serious doubt upon it, but I have nevertheless listened patiently to the argument of the respondent's counsel, and have endeavored to allow to it its just weight. The terms of the act applicable to this question are these: "all persons being merchants, or using the trade of merchandise, all retailers of merchandise," etc. The counsel for the respondent insists that these words are to be construed according to their ordinary popular signification in this country; and that as distillers are never, in common parlance, denominated merchants, they are not within the act. But I am of opinion that such a construction of the act would not be in accordance either with its obvious spirit, or a just interpretation of its language. Those provisions of the act upon which this question depends, look chiefly to the security of the creditor against the fraudulent acts of the debtor, whether directed against all his creditors, or designed to favor one or more of them at the expense of the rest. To this end they confer upon the creditors of a debtor who by certain specified acts evinces a fraudulent purpose, the power of compelling him to give up all his effects for just distribution to their use. This remedy is given by the act against "all persons being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of not less than two thousand dollars." Now if we look for the common feature which distinguishes the occupation of each of these several descriptions of persons from those other classes, who under no reasonable construction of the act can be subjected to it, such as professional men, farmers, artificers, and laborers, we shall find it to be this; that their business is carried on to a greater or less extent by credit gained on an uncertain capital stock. And the enumeration is so comprehensive, as to warrant the conclusion, that this was the controlling circumstance with the legislature in making the selection. But if the narrow construction of the words of the act on which this question depends, which is insisted on by the respondent's counsel, is to prevail, it will follow that several numerous classes of persons besides distillers, whose occupations are equally characterized by the same distinctive feature, such as all those usually denominated manufacturers, brewers, cattle and horse dealers, millers, tanners, bakers, butchers, etc. are excluded. This would be an inconsistency for which it would not be easy to account, and furnishes a reason for giving to the words in question a more comprehensive construction, if they will reasonably admit of it.

It was argued by one of the counsel for the respondent, that the compulsory provisions of the act were in their nature penal, and ought therefore to be construed strictly in favor of the debtor. I think this is a mistake. The act is remedial, and is to be so

construed as to suppress the mischief and advance the remedy. Such was the view of Lord Mansfield in the case of Worseley v. DeMattos, 1 Burrows, 474, where he says the bankrupt laws "are to be construed favorably for creditors, and to suppress fraud." But the true answer to the argument on the part of the respondent is, that the phrases of the act in question were unquestionably intended by congress to be used in the same comprehensive sense which in the English courts has long been ascribed to the correspondent phrases in the English bankrupt acts. The frequent occurrence of the word trader in the English books of reports and elementary works treating of bankruptcy, has naturally led to the impression that this is the term used in the early English acts to designate one of the denominations of persons who may be made bankrupts. But this is an error. The first English bankrupt act was 34 Hen. VIII. c. 4, which embraced "persons craftily obtaining into their hands great substance of other men's goods." The succeeding statutes of 13 Eliz. c. 7; of 1 Jac. I. c. 15; and of 21 Jac. I. c. 19, contain words substantially the same as those of the American act, now in question; and the last embraces also persons that use the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody. The language of these acts is nearly identical. That of the last, on which nearly all the decisions affecting the present question have been founded, is as follows: "every person that uses the trade of merchandise, by way of bargaining, exchange, bartering, chevisance or otherwise, in gross or by retail, or seeking his or her living by buying or selling—shall be liable to be a bankrupt." By 5 Geo. II. c. 30, bankers, brokers and factors were also rendered subject to be made bankrupts. And lastly, by 6 Geo. IV. c. 16, § 2, it is enacted that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody, and persons insuring ships, or their freight, or other matters, against perils of the seas, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided that no farmer, glazier, common laborer or workman for hire, receiver general of the taxes, or member of, or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, shall be deemed as such trader liable by virtue of this act to become bankrupt. I cite this last act chiefly for the purpose of indicating in the most summary manner the denominations of persons who have been adjudged by the English courts to be liable to be made bankrupts under the former act; for with very few exceptions, and, if I am not mistaken, with the single exception of keepers of houses of entertainment, all the classes enumerated in this last act as being liable to become bankrupt, had already, directly or by necessary implication, been adjudged to be so liable under the prior acts. And even inn-keepers, who sold liquor to be drunk out of their houses, had been held to be within the scope of these acts. Patman v. Vaughan, 1 Term R. 572. This act may therefore be regarded as essentially declaratory of the previous law as settled by a long series of decisions founded on the antecedent statutes. It is true, that in addition to the terms used in the American act, these acts contained the phrase "of seeking his or her living by buying or selling." Satisfactorily to determine what precise extent, if any, the decisions of the courts were influenced by these words, would require a more extended and minute examination of adjudged cases than I have at present the time and means to make. But from the attention I have been able to bestow to the subject, I am led to conclude that their influence has been slight. The term "trader" was early adopted by the courts, and has ever since been used, as descriptive of the sorts of persons intended by the legislature to be embraced by all the phrases used in the early acts taken collectively; and this term seems rather to have been suggested by the phrase "using the trade of merchandise," (contained also in the American act), than by the phrase "seeking his or her living by buying and selling," omitted in the American act. Whether by this omission it was the intention of congress to restrict the scope of our act to limits less extended than those which had been assigned to the early English acts; and if so to what extent; are questions which sooner or later it will probably be necessary for the courts to decide, but which I do not consider to be necessarily involved in the present case: because any construction of the act which would exclude this respondent, would render it so defective, so inconsistent with itself, and so unjust to creditors, as in my judgment to be wholly inadmissible. A rule to permit petitioning creditors to examine witnesses for the purpose of substantiating such of the charges contained in their petition as are denied or controverted by the respondent's answer, must therefore be granted.

Case No. 4,303.

In re EGAN.

[5 Blatchf. 319;[1] 13 Pittsb. Leg. J. (O. S.) 514.]

Circuit Court, N. D. New York. June 22, 1866.

MARTIAL LAW — NECESSITY FOR ITS EXERCISE — TRIAL BY MILITARY COMMISSION AFTER SUSPENSION OF HOSTILITIES—HABEAS CORPUS.

1. Martial law, defined.

2. Martial law can be indulged only in case of necessity, and, when the necessity ceases, martial law ceases. The necessity must be shown affirmatively by any person who assumes to exercise martial law.

3. Where a person was tried by a military commission, in South Carolina, in November, 1865, for a murder committed in September, 1865, and was convicted and sentenced to imprisonment for life in the penitentiary at Albany, New York, hostilities having terminated and the rebel army having surrendered to the authorities of the United States some seven months before the trial: *Held*, on a habeas corpus, that the prisoner was entitled to be discharged, on the ground that the conviction was illegal, for want of jurisdiction in the tribunal.

This was a writ of habeas corpus, to obtain the discharge of James Egan, a prisoner confined in the penitentiary at Albany, in the state of New York.

Amasa J. Parker, for the prisoner.

William A. Dart, Dist. Atty., for the United States.

NELSON, Circuit Justice. The prisoner, a citizen, and by occupation a farmer, in the Lexington district of the state of South Carolina, some eighty years of age, and never engaged in the military service, or connected with the army, of the United States, or of the so-called Confederate States, was arrested and tried before a military commission, in pursuance of orders issued at the headquarters of the District of Western South Carolina, Columbia, upon a charge of murder, and was convicted and sentenced for life to the Albany penitentiary. The specification, in the record of the crime, is the killing of a negro boy, by shooting him, on or about the 24th of September, 1865. The trial took place on the 20th of November, and the sentence was pronounced on the 1st of December following. The sentence is approved by the order of Brevet Major-General A. Ames, and also of Major-General D. E. Sickles. The only paper or evidence before me, on the return of the writ of habeas corpus, is the record or order of committal in the hands of [General Pilsbury][2] the superintendent of the penitentiary, which contains the above facts.

It will be observed, that this trial before the military commission took place some seven months after the termination of hostilities and the surrender of the rebel army to the authorities of the United States; and, further, that the offence is one which, according to our constitutional system of government, is cognizable by the judicial authorities of the state, and not by those of the federal government; and, also, that the trial was not had under the rules and articles of war, as established by the United States in congress assembled, for, they are limited to the government of the land and naval forces of the United States, and of the militia when in actual service, in time of war or public danger.

The trial must have been had under what is known as "martial law," and the question in the case is, whether or not this conviction and punishment can be upheld by reason of that authority. All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner. His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may be before a drum-head court martial, or the more formal board of a military commission, or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious.

The law officers of the crown in England, in giving their opinion in the matter of the insurrection in the island of Jamaica, observe, that courts martial, as they are called, by which martial law is administered, are not, properly speaking, courts martial or courts at all. They are mere committees, formed for the purpose of carrying into execution the discretionary power assumed by the government. On the one hand, they are not obliged to proceed in the manner pointed out by the mutiny act and the articles of war; and on the other, if they do so proceed, they are not protected by them, as members of a real court martial might be, except in so far as such proceedings are evidence of good faith. Lord Wellington, in one of his dispatches from Portugal, in 1810, in speaking of martial law, observes, that, as applied to persons, excepting officers and soldiers and followers of the army, for whose government there are particular provisions of law in all well-regulated countries, it is neither more nor less than the will of the general of the army, and that he punishes either with or without trial, for crimes either

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

[2] [From 13 Pittsb. Leg. J. (O. S.) 514.]

declared to be so, or not so declared by any existing law, or by his own orders. Subsequently, in a speech in the house of lords, he expressed the same opinion, and added: "In fact, martial law means no law at all. Therefore, the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations according to which his will is to be carried out."

This being the nature and extraordinary character of martial law, which, as observed by Sir Matthew Hale, is not law, but something indulged rather than allowed as law, all authorities agree that it can be indulged only in case of necessity, and that, when the necessity ceases, martial law ceases. When a government or country is disorganized by war, and the courts of justice are broken up and dispersed, or are disabled, through the prevalence of disorder and anarchy, from exercising their functions, there is an end of all law; and the military power becomes a necessity, which is exercised under the form, and according to the practice and usage, of martial law. As has been said by a distinguished civilian, "when foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community; and, while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; but no longer." This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power over the life, liberty and property of the citizen, whenever it is called in question. The nature of this responsibility was explained by the judge-advocate-general of England, before a committee of the house of commons, in the case of martial law declared in Ceylon, and the explanation has been approved by the law officers of the crown. In answer to a question put by Sir Robert Peel, he observed: "I believe the law of England is, that a governor, like the crown, has vested in him the right, where the necessity arises, of judging of it, and being responsible for his work afterwards, so to deal with the laws as to supersede them all, and to proclaim martial law for the safety of the colony." And, again, in answer to a question by Mr. Gladstone: "I say he is just as responsible as I am responsible for shooting a man on the king's highway who comes to rob me. If I mistake my man, and have not, in the opinion of the judge and jury who try me, an answer to give, I am responsible."

Applying these principles to the case in hand, I think that the record fails to show any power on the part of the military officer over the alleged crime therein stated, or any jurisdiction of the military commission appointed by him to try the accused. No necessity for the exercise of this anomalous power is shown. For aught that appears, the civil local courts of the state of South Carolina were in the full exercise of their judicial functions at the time of this trial, as restored by the suppression of the rebellion some seven months previously, and by the revival of the laws and the reorganization of the state government, in obedience to, and in conformity with, its constitutional duties to the Federal Union. Indeed, long previous to this, a provisional governor had been appointed by the President, who is commander-in-chief of the army and navy of the United States, (and whose will, under martial law, constituted the only rule of action,) for the special purpose of changing the existing state of things and restoring civil government over the people. In pursuance of this appointment, a new constitution had been formed, a governor and a legislature had been elected under it, and the state was in the full enjoyment, or was entitled to the full enjoyment, of all her constitutional rights and privileges. The constitution and laws of the Union were thereby acknowledged and obeyed, and were as authoritative and binding over the people of the state as in any other portion of the country. Indeed, the moment the rebellion was suppressed, and the government growing out of it was subverted, the ancient possession, authority and laws resumed their accustomed sway, subject only to the new reorganization or the appointment of the proper officers to give to them operation and effect. This reorganization and the appointment of the public functionaries, under the superintendence and direction of the President, as commander-in-chief of the army and navy of the country, who, as such, had previously governed the people of the state, from imperative necessity, by force of martial law, had already taken place, and the necessity no longer existed.

I have not deemed it necessary, if it were proper, to look into the merits of the offence charged against the prisoner, although it is insisted that it occurred in self-defence, and in resisting a violent assault upon himself. Let the prisoner be discharged.

Case No. 4,304.

Case of EGAN.

[The case reported under above title in 13 Pittsb. Leg. J. (O. S.) 514, is the same as Case No. 4,303.]

Case No. 4,305.

EGBERT v. BALTIMORE & O. R. CO.

[2 Ben. 223.][1]

District Court, S. D. New York. March, 1868.

DAMAGES IN COLLISION CASES — COMMISSIONER'S REPORT—NET FREIGHT—INTEREST.

1. Where, in a collision case, on contradictory evidence, the commissioner to whom it was referred to ascertain the damages, reported a certain amount as the value of the vessel that was lost: *Held*, that though, if the question were before the court as an original one, the court would be inclined to fix a lower value, yet, as the preponderance of evidence was not palpable, the finding would not be disturbed.

[Cited in The Mayflower, Case No. 9,345.]

2. Net freight only is recoverable in such a case, and not gross freight; nor can the freight allowed exceed that which was claimed in the libel.

3. Interest on the value of the vessel, and on the net freight, from the time of the loss, may be allowed, though it was not claimed as such in the libel.

[Cited in The Aleppo, Case No. 158; The Mary Eveline, Id. 9,212.]

[4. Cited in The Freddie L. Porter, 5 Fed. 825, to the point that, the vessel having been in the act of carrying freight, the freight which she was in the act of earning, and was lost by the collision, is allowed as a just measure of compensation.]

[This was a suit by Wesley Egbert against the Baltimore & Ohio Railroad Company.]

Beebe, Dean & Donohue, for libellant.

F. R. Sherman, for respondents.

BLATCHFORD, District Judge. This is a hearing on exceptions by the respondents to the report of a commissioner as to the damages recoverable by the libellant on a decree in a case of collision.

1. The commissioner reports the value of the libellant's vessel, which was sunk by the collision and totally lost, at $14,000. The respondents contend that the evidence before the commissioner warrants a value not exceeding $10,000. The libel claimed $16,000 as such value. The testimony is very conflicting, and, if the question were before me originally, as a new question, on the written testimony, and I were called on to decide upon it in the first instance, and it did not come up on the finding of a commissioner and an exception to such finding, I should be inclined to hold that the commissioner had allowed too much for the value of the vessel, and that a sum not exceeding $11,000 or $12,000 was the proper amount. But I cannot say that the preponderance of testimony against the $14,000 is such as to warrant me in disturbing the report in this respect. As was said by this court in Holmes v. Dodge [Case No. 6,637]: "It is not usual to reverse the judgment passed upon matters of fact by a tribunal or officer having had opportunity for a personal examination of witnesses in each other's presence. A court reviewing the evidence as reproduced upon paper, possesses but imperfectly the means of determining the relative credit of witnesses who stand in conflict as to facts, and it is always safer, when the preponderance is not palpable. to rely upon the discrimination and conclusions made by those who have seen and heard the witnesses face to face, than to attempt to settle that point by weighing the written report of the testimony." That was the case of exceptions to the report of a commissioner. The same views were applied by the circuit court for this district in The Grafton [Id. 5,655], and in The Narragansett [Id. 10,017]. The first exception is, therefore, disallowed.

2. The commissioner allowed $847.50 as freight, at $3.75 per ton, on 226 tons of coal which the libellant's vessel was carrying on freight at the time. The libel claims $625.50 as freight on 226 tons of coal, being a little over $2.76 per ton. The rate claimed per ton is not stated in the libel. The evidence shows that the $3.75 was the gross freight to be earned as contracted for. The second exception is to the allowance of the $847.50, "as no freight was claimed, and none was earned, or if any was earned, it was only pro rata itineris, and, if freight was earned, the insurance should be collected of the insurance companies." This exception is overruled. What is meant by the expression "no freight was claimed." is perhaps, not perfectly clear. The libel does claim some freight. If the exception means that the libellant did not, after the collision and before suit, claim the freight from the respondents as damages, that is immaterial. He claims it in this suit. The vessel having been in the act of earning freight, the freight which she was in the act of earning, and has lost by the collision, is allowed, as a just measure of compensation. The Gazelle, 2 W. Rob. Adm. 279; Williamson v. Barrett, 13 How. [54 U. S.] 101, 111; The Heroine [Case No. 6,416]. The second exception is disallowed.

3. The third exception is, that, in case the libellant is entitled to any freight, he is entitled to recover only the amount specified in the libel. The libellant is entitled to recover only net freight, and not gross freight. The commissioner has reported gross freight. There must be deducted from the freight the vessel was engaged in earning, the expenses she would have incurred if the voyage had been successfully performed, and which expense would have diminished by so much the gross freight. The Gazelle [supra]. The exception is broad enough to cover this point, as the libellant is entitled to recover only so much for freight as he has claimed therefor in his libel, and the freight, as allowed, being gross freight, and the amount claimed in the libel being less than the gross freight, it may well be that the amount claimed for freight in the libel is the net freight. In no event can the net freight to be allowed exceed the amount

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

claimed for freight in the libel. The third exception is allowed.

4. The commissioner has allowed interest on the value of the vessel and on the freight from the time of the collision to the date of his report. The fourth exception is, that no interest should be allowed on the freight, and that none is claimed in the libel. The fifth exception is, that interest should only be allowed, if allowed at all, from the time of the commencement of the suit, and that no interest is claimed in the libel. The libel claims no interest either on the value of the vessel or on the freight. I do not think it was necessary to claim interest in the libel. The libel claims to recover the damage stated for the loss incurred at the time of the loss, and the libellant is entitled, on the case made by him, to have the damages awarded to him as of the time of the loss, and to be made whole as of that time. This is done approximately by allowing to him interest on the value of his vessel and of his net freight to be earned, as they stood at the time of the collision; that is, interest on them from the time of the collision. The fourth and fifth exceptions are disallowed.

Case No. 4,306.

EGBERT v. LIPPMANN et al.

[15 Blatchf. 295; 14 O. G. 822; 3 Ban. & A. 468.] [1]

District Court, S. D. New York. Sept. 26, 1878.[2]

PATENTS—ABANDONMENT—PRIOR PUBLIC USE.

The effect of the provisions of the 7th section of the act of March 3, 1839 (5 Stat. 354), is, to require that an inventor shall not permit his invention to be used in public at a period earlier than two years prior to his application for a patent, under the penalty of having his patent rendered void by such use. Consent and allowance by the inventor are not necessary to such invalidity.

[Cited in Manning v. Cape Ann Isinglass & Glue Co., Case No. 9,041; Perkins v. Nashua Card & Glazed Paper Co., 2 Fed. 453; Campbell v. Mayor, etc., of New York, 9 Fed. 504; Andrews v. Hovey, 124 U. S. 715, 8 Sup. Ct. 684; Id., 123 U. S. 270, 8 Sup. Ct. Rep. 103; Campbell v. City of New York, 35 Fed. 508; Campbell v. Mayor, etc., of New York, 47 Fed. 520.]

[See note at end of case.]

[This was a bill in equity by Frances L. Egbert, as executrix of Samuel H. Barnes, deceased, against Philipp Lippmann and August Seligmann.]

George Gifford, for plaintiff.

John B. Staples, for defendants.

BLATCHFORD, District Judge. The patent in this case was applied for in March, 1866. The answer sets up, as a defence, that, more than two years before such application, the invention was known and in use in the United States. The bill alleges, that, at the time of the application, the invention had not been, for more than two years, in public use, with the consent or allowance of the patentee. The answer denies that, at the time of the application, the invention had not been, for more than two years, in public use. After the defendants had introduced evidence for the purpose of showing that the invention had been made by others before the patentee made it, the plaintiff introduced evidence showing that the patentee made the invention, a pair of corset steels, in the year 1855. At that time, he made a pair of steels, containing the invention patented, and gave them to a lady, who wore them. They lasted her a long time. He made another pair for her, early in 1858, which she wore a long time. She saw him at work on this pair. She knew, about 1863, of his making, at that time, another pair for another lady. The first two pairs of steels made were worn in several pairs of corsets, being ripped from one pair and put into other pairs. These first two pairs were made for a lady who, in 1863, became the wife of the patentee. After her marriage to him, and in 1863, she was wearing a pair of corsets with these steels, and she ripped them out, on one occasion, in that year and the patentee showed them to one Sturges, and explained to him how they were made.

The 7th section of the act of July 4, 1836 (5 Stat. 119), provided that a patent should be issued if it should not appear to the commissioner of patents that the invention had been in public use or on sale, with the applicant's consent or allowance, prior to his application for the patent. The 15th section of that act provided that, in a suit for infringement, the defendant should have judgment, if it should be proved that the thing patented had been in public use or on sale with the consent and allowance of the patentee, before his application for a patent. By the 7th section of the act of March 3, 1839 (5 Stat. 354), it was enacted, that every person who shall have purchased or constructed any newly invented machine, prior to the application by the inventor for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine so made or purchased, without liability therefor to the inventor, and that "no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent, as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale or prior use has been for more than two years prior to such application for a patent." The patent in question was applied for and issued when the act of 1839 was in force. The effect of that act is, to require that an inventor shall not permit his invention to be used in public at a period earlier than two years prior to his application for a patent, under the penalty of having

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 3 Ban. & A. 468, and here republished by permission.]

[2] [Affirmed in 104 U. S. 333.]

his patent rendered void by such use. Consent and allowance by the inventor are not necessary to such invalidity. But, a fortiori, consent to a use in public, not followed by an application for a patent within two years afterwards, makes the patent, when granted, invalid. The policy introduced by the act of 1839 is continued in the act of July 8, 1870, and in the Revised Statutes. The 24th section of the act of 1870 (16 Stat. 201) provides, that a patent may be obtained for an invention, if it has not been in public use or on sale for more than two years prior to the application for such patent, unless it is proved to have been abandoned. This provision is embodied in section 4886 of the Revised Statutes. The 61st section of the act of 1870 (16 Stat. 208), now section 4920 of the Revised Statutes, provides, that it shall be a defence to a suit for the infringement of a patent, that the thing patented had been in public use or on sale in the United States for more than two years before the application for a patent, or had been abandoned to the public. The policy introduced by the act of 1839, and thus continued, is, that the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent for it, and that, if he does not apply within such time, but applies after the expiration of such time and obtains a patent, and it appears that his invention was in public use at a time more than two years earlier than the date of his application, his patent will be void, even though such public use was without his knowledge, consent or allowance, and even though he was in fact the original and first inventor of the thing patented and so in public use. Such public use for such length of time is made equivalent to absolute abandonment.

The use proved in this case was a sufficient public use or use in public, to invalidate the patent. It was not a use for experiment, or a use in private, or a private use. It was a practical use in public of the completed article. No secrecy was maintained or enjoined as to the article or its structure. The fact that the inventor, from time to time, declared that he intended to obtain a patent for the invention, and that his delay was caused by ill health, cannot operate to destroy the peremptory consequence imposed by the statute because of the lapse of time in connection with the public use. The bill must be dismissed, with costs.

[NOTE. For another case involving this patent, see note to Barnes v. Straus, Case No. 1,022.]

[On the appeal of Frances E. Egbert, executrix of Samuel H. Barnes, the judgment of the circuit court dismissing the bill was affirmed in Egbert v. Lippmann, 104 U. S. 333. In discussing the question of the prior public use for more than two years, necessary to invalidate a patent, Mr. Justice Woods remarked that whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. If the inventor, having made his device, gives or sells it to another, to be used by the donee or vendee without restriction or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute. Further, it was held that it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the public use, but one well-defined case of public use is enough to annul the patent. It was held that the defense of two years' public use, by the consent and allowance of the inventor, before he made application for his patent, was satisfactorily established by the evidence. Mr. Justice Miller dissented on the ground that the use of one set of steel springs by one person, as described in the evidence, is not a public use.]

Case No. 4,307.

EGBERTS v. DIBBLE.

[3 McLean, 86.][1]

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

PLEADING—DEMURRER—LIMITATIONS—LEX FORI.

1. A demurrer extends to the first error in pleading.

2. The statute of limitations of the state where the suit is brought, must be pleaded, and not the statute of any other state. It is the law of the forum.

3. Inducement should consist of such facts as authorize an inference against the right asserted by the other party.

Mr. Ten Eyck, for plaintiff.
Mr. Talbott, for defendant.

OPINION OF THE COURT. This is an action of debt, brought on a judgment of the supreme court of the state of New York. The defendant filed three pleas. 1. Nul tiel record. 2. Statute of limitations. 3. That plaintiffs were not citizens of New York. The plaintiffs took issue on the first and third pleas; and as to the second plea, say, that they ought not to be barred from a recovery, because they say, that at the time the action accrued to them, they were in parts beyond seas, to wit, in the state of New York, and that in May, 1841, they came from said parts beyond the seas into the state and district of Michigan, and which coming was the first time they came to the district of Michigan after the accruing of the said cause of action; and that they commenced this suit within eight years after they came from beyond sea into this state and district, after the accruing of said cause of action, &c. The defendant replied that plaintiffs ought not to maintain their action, because the plaintiffs and defendant were, at the date of the recovery, residents of New York, and did then and there reside, continually, for eight years, next succeeding the day of the date of said recovery. Absque hoc, that the said plaintiffs were in parts beyond seas, &c. traversing the replication of the plaintiffs. The plaintiffs sur-rejoined, denying that they and defend-

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

ant resided continuously in New York for eight years, next succeeding the date of said recovery, without re-affirming what is stated in the replication. To this sur-rejoinder defendant demurred, specially. 1. Because the sur-rejoinder does not tender an issue material out of or upon the traverse, but puts in issue the matter of inducement. 2. That the sur-rejoinder does not re-affirm what the defendant has in his traverse by his rejoinder denied. 3. Because the said sur-rejoinder is a negative pregnant, and that it departs from and abandons the matter set up in the replication, &c.

The plaintiffs insist that the defendant sets up in his rejoinder a substantive distinct fact, and that they were right in taking issue upon that fact, and that if the sur-rejoinder is defective, the plaintiffs are entitled to judgment, because the defendant's rejoinder is bad. A demurrer applies to the first defect in pleading, although as in this case, the demurrer be filed to the sur-rejoinder. The rejoinder of the defendant is bad. In this case, the suit being brought in the state of Michigan, the statute of limitations of New York cannot be pleaded, but the statute of Michigan. The act of limitations is the law of the forum. In Le Roy v. Crowninshield [Case No. 8,269], it is said, "a plea of the statute of limitations of the state where the contract was made, is no bar to a suit brought in a foreign tribunal to enforce that contract; but a statute of limitations of the state where the suit is brought must be pleaded." The statute of Michigan does not apply to persons beyond seas, which has been construed by the state courts, beyond the limits of the state. To avoid the plea of the statute, the plaintiffs state that they resided in the state of New York; that until 1841 they never came into the state of Michigan. To this the defendant rejoins that they both resided in the state of New York eight years, continuously from the time of the recovery, &c. Here the defendant sets up new and substantive matter as inducement to the traverse, which is not alleged by the plaintiffs, and is entirely different matter from that of the traverse. The inducement must be an answer to that of the opposite party's allegation, and must be sufficient to defeat that allegation. The traverse is but an inference from the inducement. Now the facts stated as inducement do not go to deny the plaintiffs' action. They are no answer to it, and can authorise no inference against the plaintiffs' right. The view of the pleader seems to have been to rely upon the statute of limitations of New York, and not the statute of Michigan. The matter of the rejoinder being defective, judgment must be entered for the plaintiffs.

EGE (OGLE v.). See Case No. 10,462.

EGGERS (McCARTHY v.). See Case No. 8,681.

EGGERS v. The MARY BELLE ROBERTS. See Case No. 13,240.

EGGLESTON (UNITED STATES v.). See Case No. 15,027.

Case No. 4,308.

EGLESTON et al. v. The AGNES.

[39 Hunt. Mer. Mag. 75.]

District Court, S. D. New York. 1858.

MARITIME LIENS—MATERIALS USED IN CONSTRUCTION OF VESSEL.

This was a libel [by Thomas Eggleston et al.] brought to recover $948.87 for the value of certain iron alleged by the libelants to have been furnished to the bark. The evidence shows that it was purchased by one Erskine, who was building the bark now owned by the claimant.

HELD BY THE COURT: That the iron procured from the libelants by Erskine, and used in building the bark, became a lien upon her, whether Erskine was owner of the bark, or builder, or agent of the claimant—the vessel not having left the port since she was built before the suit. The libelants are entitled to recover for whatever iron he shall prove to have been used in constructing the vessel, with costs.

[NOTE. In Case No. 9,430, which was a libel by William Menzies against this same vessel, to recover for certain lumber, a decree was also rendered for libelant.]

Case No. 4,309.

The E. H. COFFIN.

[9 Ben. 20.][1]

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

COLLISION IN EAST RIVER — STEAMERS ON CROSSING COURSES—WHISTLES.

1. The tug S. J. C. was going down the East river, on August 21st, 1874, bound for the North river. The tug E. H. C. was coming from the North river into the East river, heading toward Harbeck's stores in Brooklyn. The E. H. C. blew one whistle, and got no answer, but kept on her course. Soon after she blew another single whistle, and gave four bells and backed hard. The S. J. C. blew two whistles as soon as she saw the E. H. C., and then gave four bells to stop and back. The S. J. C. was injured by the collision, and was beached on Governor's Island. *Held*, that the courses of the two tugs were crossing, and it was the duty of the S. J. C. to keep out of the way of the E. H. C., and of the E. H. C. to keep her course.

2. Although the E. H. C. got no response to her first signal of one whistle, she had a right to keep on

[Cited in The Emma Kate Ross, 46 Fed. 874.]

3. The pilot of the S. J. C. did not see the E. H. C. as soon as he should have seen her, or as soon as the E. H. C. saw the S. J. C.

4. The E. H. C. was not in fault.

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

[2] [Affirmed in Case No. 4,310.]

This action was brought by the owners of the tug Samuel J. Christian, to recover damages resulting from a collision with the tug E. H. Coffin, in the East river, on August 21st, 1874. The libel alleged that the Christian was headed down the East river towards the North river, there being a tow outside of her, headed the same way. When opposite pier 5, the Coffin was seen off pier 2, bound on a course which would have carried her inside of the Christian. The Christian blew two whistles, which was answered by one. The Christian stopped and backed, and, when opposite pier 4, the Coffin, having kept on under full headway and continuing to increase her distance from the dock, struck the Christian on the starboard side of her stem.

The answer alleged that the Coffin was proceeding slowly up the East river, heading toward the Harbeck stores, in Brooklyn; that, when about 500 feet off pier 2, the Christian was seen off pier 6, heading down stream, on a course which would have carried her inside of the Coffin. The Coffin blew one whistle, which was not answered. There was a large tow about 50 feet abreast of the Coffin on the starboard side, also bound up the river. The Christian then suddenly sheered to the Brooklyn side, across the Coffin's bows. The Coffin was then stopped and backed, but a collision took place.

Beebe, Wilcox & Hobbs, for libellants.

R. D. Benedict and A. Stewart, for claimants.

BLATCHFORD, District Judge. I think that the weight of the evidence is that the courses of the two tugs were crossing. Therefore, it was the duty of the Christian to keep out of the way of the Coffin, and the duty of the Coffin to keep her course. Although the Coffin got no response to her first signal of one whistle, yet she had a right then to keep on, for she had a right to suppose that she was seen by the Christian, and that the Christian would, in season, take measures to avoid her; and her signal of one whistle was an indication that she was intending to do what the law required her to do, that is, keep her course and not change it. When the Coffin saw that the Christian was not taking proper measures to avoid her, the Coffin blew another single whistle, and gave four bells and backed hard. After blowing the second single whistle the pilot of the Coffin heard a signal of two whistles from the Christian. The pilot of the Christian says that he blew those two whistles as soon as he saw the Coffin; that, after that, he heard one whistle from the Coffin; and that then he gave four bells for the Christian to stop and back. It is quite clear that the pilot of the Christian did not see the Coffin as soon as he should have seen her, or as soon as the Coffin saw the Christian, and that accounts for the Christian's not in time taking proper measures to keep out of the way of the Coffin. I see no fault on the part of the Coffin. The libel must be dismissed, with costs.

Case No. 4,310.

The E. H. COFFIN.

[16 Blatchf. 421;[1] 8 Reporter, 297.]

Circuit Court, S. D. New York. June 23, 1879.[2]

COLLISION—APPROACHING STEAMERS—CHANGE OF COURSE WITHOUT NOTICE.

A steamer, which is bound to keep out of the way of another steamer approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it, if that involves a change of course or speed by the other, until she has obtained the consent of the other to such a movement.

This was an appeal by the libellants, in a suit in rem, in admiralty, from a decree of the district court, dismissing the libel [Case No. 4,309]. The facts found by this court were as follows: "In the afternoon of August 21st, 1874, a collision occurred between the steam-tug Samuel J. Christian, owned by the libellants, and the steam-tug E. H. Coffin, about opposite pier 4, East river, New York, and between four and five hundred feet from the end of the pier. The tide was high water slack, and the weather pleasant. The Christian had been lying at pier 6, East river, with her bow to the pier and her stern out, waiting employment. Noticing a signal for a tug from a vessel in the North river, about in the range of Bedloe's Island, she backed out into the East river, and headed for the vessel. She got straightened on her course about opposite pier 5 and between four and five hundred feet out in the river. A tug, with a canal-boat in tow, bound for pier 3, was just passing on the inside of her, and the tug William Beard, on her way to get the tow of the vessel which had the signal flying, was outside, near by. The Christian had on her full head of steam. The Coffin had come from 35th street, North river, bound for pier 17, East river, and rounded the Battery two or three hundred feet off the ends of the piers. When between piers 2 and 3, she discovered the Christian, and gave one blast of the whistle, to pass to the right. This was not heard on the Christian. The Coffin was, at the time, heading on a course which crossed the bow of the Christian. The Christian did not discover the Coffin until she had herself got straightened on her course. She was then further out in the stream than the Coffin, and, consequently, had the Coffin on her starboard side. She gave two blasts of her whistle, to pass to the left, but did not then stop her engine or change her course. The Coffin was, at the

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

[2] [Affirming Case No. 4,309.]

time, about off pier 3, and the Christian about off pier 5, the Coffin still heading on a course crossing that of the Christian. The Coffin answered the signal with one blast of her whistle, and kept her course and speed. The Christian then stopped and backed her engine, but did not change her course, or get under sternway, before the collision occurred. The Coffin did not change her course, or slacken her speed, until just before the vessels came together, when she ported her wheel and backed her engine, but her course was not materially changed or her speed slackened. When the Christian stopped and backed she could not, by keeping on and porting her wheel, have passed to the right without a collision probably more dangerous than that which actually occurred."

W. R. Beebe and F. A. Wilcox, for libellants.

R. D. Benedict, for claimant.

WAITE, Circuit Justice. From the evidence, it is clear, to my mind, that, when the Coffin was discovered from the Christian, the vessels were headed on courses which crossed the bow of the Christian. The Coffin was, undoubtedly, inside the Christian, and, had she been going directly up stream, no collision would have occurred. The Christian, being intent on securing her tow, and competing with the Beard, evidently bent on the same purpose, was, possibly, less observant of the actual movements of the Coffin than she otherwise would have been. She was anxious to pass by the left, and promptly signified, in reply, her desire to keep her course to the right, and, in doing so, but repeated her former signal, which had not been heard by the Christian. As the Christian had the Coffin on her starboard side, approaching so as to involve a risk of collision, it was the duty of the Christian to keep out of the way, and of the Coffin to hold her course. The obligation of the Coffin to keep her course was as imperative as that of the Christian to keep out of her way. The Christian, in making her calculations, was bound to act on the understanding, that the Coffin need not change her course unless she chose. There can be no doubt, that, if the Christian had promptly ported her wheel, she would have passed to the right in safety. She preferred passing to the left, and kept on, without changing her course of speed, or obtaining the consent of the Coffin to change hers, until the two were so close together that a collision was inevitable. A steamer which is bound to keep out of the way of another approaching so as to involve a risk of collision, has no right to attempt to pass to the left, unless there is an imperative necessity for it, if that involves a change of course or speed by the other, until she has obtained the consent of the other to such a movement. The Christian was guilty of a palpable violation of this rule. There was no difficulty whatever in her passing to the right, or, if she preferred, in stopping until the Coffin had crossed her bow. Instead of that, she kept on until the Coffin declined to permit her to go to the left, and then it was too late. This was the sole cause of the collision, and the judgment of the district court was right. Let a decree be prepared dismissing the libel.

Case No. 4,311.

The E. H. FITTLER.

[1 Lowell, 114.][1]

District Court, D. Massachusetts. Sept., 1866.

SHIPPING—UNLOADING CARGO—USAGE OF PORT—SELECTION OF WHARF.

1. It seems, that the consignee of goods under a bill of lading, if he is the only person having cargo on board the ship, or all the consignees, if unanimous, have the right to direct the master to unlade at any usual and convenient wharf at the port of discharge.

[Cited in O'Rourke v. Tons of Coal, 1 Fed. 620; Teilman v. Plock, 21 Fed. 351; The Mascotte, 2 C. C. A. 400, 51 Fed. 608.]

2. In the case of a general ship having the goods of several shippers, the master may lawfully proceed to any such wharf without consulting the shippers.

3. It seems, that, by the usage of the port of Boston, a majority of the shippers, that is, those who pay the greater portion of the freight, may choose the wharf. If so, the choice must be notified to the master before he has himself come under liabilities to the wharfinger of a wharf chosen by himself.

[Approved in The Boston, Case No. 1,671. Cited in Devato v. 823 Barrels of Plumbago, 20 Fed. 518.]

[4. Cited, with other cases, in The Boskenna Bay, 22 Fed. 665, to the point that on a ship's arrival, it is the master's duty to give reasonable notice of the time and place of discharge.]

Libel in admiralty for damages alleged to have been occasioned by a refusal of the master of the brig to land the libellant's goods at East Boston. The libellant's agents at New Orleans shipped cotton to him at Boston, under the ordinary bill of lading. The brig arrived in the harbor on a Saturday night, and on Sunday her agents at this port sent an order to the master to haul to Union wharf, which he did early on Monday. Soon after he had made fast, and discharged his tug-boat, he received an order from the libellant to haul to Grand Junction wharf, at East Boston, which he refused to do. Some negotiation was had on that day and the next, between the libellant and the agents of the vessel; but the cotton was eventually landed at Union wharf, and was received by the consignee without any waiver of his rights, and he now sues to recover as damages the expense of trucking his goods, which was equal to about one-third the amount of his freight.

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

The libellant owned the greater part in bulk and value of the whole cargo, and was to pay the major part of the whole freight; but there were several other consignments of cotton, tobacco, and hides to several different persons.

J. T. Morse, Jr., for libellants.
J. A. Loring, for claimants.

LOWELL, District Judge. This case has been very carefully presented in evidence and argument. The question is, what are the respective rights and duties of the carrier and the consignees as to the wharf at which goods shall be landed by a general ship? The dicta of Mr. Justice Buller, and the other judges, in Hyde v. Trent & M. Nav. Co., 5 Term R. 389, 397, are cited in all succeeding books as the foundation of the law upon this subject. "A ship, trading from one port to another, has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." When the case came up for adjudication in England, however, it was decided in the common pleas, the exchequer chamber, and the house of lords, that the carrier is bound to deliver to the consignee; and, if he intends to rely on a substituted delivery, he must plead that his delivery was according to the practice and custom usually observed in the port or place of delivery. Gatliffe v. Bourne, 4 Bing. N. C. 314, 3 Man. & G. 643, 7 Man. & G. 850. And so is the weight of modern authority. Abb. Shipp. (8th Eng. Ed.) 378; Humphreys v. Reed, 6 Whart. 435; Ostrander v. Brown, 15 Johns. 39; Hemphill v. Chenie, 6 Watts. & S. 62; Wardell v. Mourillyan, 2 Esp. 693; Ang. Carr. § 298 et seq.

It has been recognized as the usage of this and other ports, for the master of a general ship to go to a suitable wharf, and notify the consignees, who then take their goods from the wharf. The Tangier [Case No. 12,265]; Cope v. Cordova, 1 Rawle, 203. So that the general rule is now settled, and it would not require evidence in each case, that such a delivery is sufficient.

But the precise point in this case, namely, what is the usual wharf, and who is to point it out, was not directly involved in these decisions or any others, that I have seen.

The libellant offers evidence that, by the usage of this port, the consignees have the right to order the master to go to any commodious or suitable wharf, and his witnesses concede that, excepting in some particular trades not now involved, if no such order is given, he may choose for himself. This concession avoids the effect of a considerable part of the claimant's evidence, which showed, as do some of the decisions incidentally, that the master of a general ship, with an assorted cargo for several consignees, does not usually, and cannot conveniently, stop to collect the votes of his consignees before proceeding to haul in.

It appeared in evidence that there are many cases, as where the cargo is heavy or perishable, in which it is of the greatest consequence to the consignees whether their goods are landed at one place or another; and, that, generally speaking, it is a matter of no proper concern to the master. It appears that masters are in the habit of going to the wharf at which the best terms are offered them in "return wharfage," as it is called; but as the cargo pays the wharfage, any commission or percentage on its amount ought to belong to the owners of the cargo; and no court could consider this a valid reason for giving the choice of place to the master. A single consignee of a heavy cargo coming coastwise may find his cartage equal in amount to his whole freight. Take a cargo of iron rails, ordered by a railway company that has its wharf and track at the north end of the town, is it reasonable that the master should, for the sake of a petty percentage on what the company itself pays, land the cargo at South Boston, where ships may be scarce, and return wharfage high, against the known wish of the owners of the goods?

This statement of the interests of the parties of itself exhibits their rights, at least where there is but one consignee, or where the consignees are unanimous; for it may be safely laid down as a proposition of law, that, as between two points within the port equally convenient for the carrier, he must deliver at that most convenient for the consignee, if seasonably asked to do so It would be for the carrier to show a usage to the contrary, and then to establish its reasonableness. In the case of one consignee of the whole cargo, having his place of business at the port, and readily accessible, it might be worthy of serious consideration, if the case were now before me, whether the master must not consult with him at all events.

When there are several consignees, the case is different. The master cannot conveniently consult them, and is not bound to do so. Here the evidence shows the course of trade to be, that the majority, that is, those who together pay more than half the freight, have the right to choose the wharf. This is reasonable, because it is of no special moment to the minority whether the master or the majority choose a suitable wharf; and it is as convenient and just a mode of ascertaining the majority as any other. The merchants appear to be unanimous about it, that is, that the power of the majority is as great as that of the whole. Some shipmasters, and perhaps one or two merchants, know of no custom at all about the matter, though nearly all the witnesses say that, either by courtesy or by right, the choice in fact usually lies with the consignees of the cargo.

It being shown, however, that, in the case of a general ship, this right is often unimportant, and is waived, and is presumed to be

waived unless notice is given; and this whether one person alone, or several together, constitute the majority, the consignees ought to be careful to give their notice in due season.

This vessel had her agent in Boston, who, in good faith, engaged the berth at Union wharf, and the vessel was hauled in, and made fast, and her tug was discharged. I cannot tell what inconvenience and damage might result to a ship in changing her berth after that period. The libellant should have found the agent or the master earlier. It is not reasonable to expect them to change their arrangements after they have gone so far. What is seasonable notice will depend on the facts of each case. Here it was too late.

It is to be understood that the usage was not alleged to apply where any peculiar and important convenience to the ship would be promoted by her going to a particular wharf. No point of that sort was in controversy. Libel dismissed.

NOTE. In the case of Silsbee v. Wales [unreported], decided in this court in 1870, it was admitted by both parties that no such general usage could be proved as affecting the Calcutta trade, and it was held that in the absence of such usage the consignees must be unanimous, or they could not control the choice of a place of discharge.

Case No. 4,312.

EICKEMEYER HAT-BLOCKING MACH. CO. v. PEARCE et al.

[10 Blatchf. 403; 6 Fish. Pat. Cas. 219; 3 O. G. 150.][1]

Circuit Court, S. D. New York. Jan. 31, 1873.

PATENTS — ANTICIPATION — VALIDITY—INFRINGEMENT—CLAIMS FIRST MADE IN REISSUE.

[1. The second and third claims of the reissued letters patent for an "improvement in machines for stretching hat-bodies," granted to the Eickemeyer Hat-Blocking Machine Company, as assignee of Rudolph Eickemeyer, December 1, 1868—to wit: "The combination and arrangement of the crown and tip-supporting ribs with the upper series of stretching devices, substantially as described, operating to stretch the tip and side-crown of the hat-body between them, substantially in the manner hereinbefore set forth," and "the combination and arrangement of the brim-supporting ribs with the lower series of stretching devices, substantially as described, operating to stretch the brim of the hat-body between them, substantially in the manner set forth,"—are valid.] [1]

[2. The defendants' tip and brim-stretchers are separate and distinct machines, yet as each has supporting ribs and a series of stretching devices, substantially the same as those of the patent they infringe, the fact that defendants have added some features of construction and operation not found in complainant's patent, and which are improvements on complainant's invention, can not relieve them from the charge of infringement.] [1]

[3. Complainant's patent is not anticipated by the prior devices used by Hutchinson, as the latter were not combined and arranged in an organized machine.] [1]

[4. Complainant's patent does not cover the devices used by Hutchinson, as these devices were not combinations in an organized machine, as contemplated by the second and third claims of said patent.] [1]

[5. No presumption arises from the fact that claims made in a reissued patent are not found in the original, that such claims were not intended to be made in the original.] [1]

[2] [Final hearing on pleadings and proofs. Suit brought [by the Eickemeyer Hat-Blocking Machine Company against Hosea O. Pearce and others] on letters patent [No. 46,553] for an "improvement in machines for stretching hat-bodies," granted to Rudolph Eickemeyer, February 28, 1865; assigned to the Eickemeyer Hat-Blocking Machine Company, and reissued to them December 1, 1868 [No. 3,217].

[The second and third claims of the reissue, which it was contended the defendants infringed, were as follows:

["2. The combination and arrangement of the crown and tip-supporting ribs with the upper series of stretching devices, substantially as described, operating to stretch the tip and side-crown of the hat-body between them, substantially in the manner hereinbefore set forth.

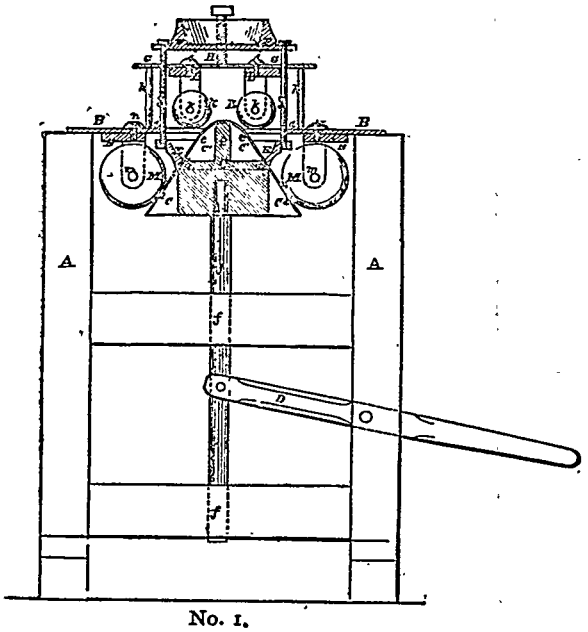
["3. The combination and arrangement of the brim-supporting ribs with the lower series of stretching devices, substantially as described, operating to stretch the brim of the hat-body between them, substantially in the manner set forth."

[In the engravings, Fig. 1 is a vertical central section of the complainant's machine, as shown in the drawings of the reissue; Fig. 2 is a plan of the radially ribbed or skeleton former, and the lower series of stretching rollers; and Fig. 3 is a plan of the arrangement of the upper stretching rollers. A is the frame work of the machine. J is the standard supporting the former, and raised by the lever D. M, M are the lower stretching rollers in the bearings m, m. K, K are the upper stretching rollers in the bearings L. b, b, b are the brim supporting ribs, and e, e, e the tip or crown supporting ribs. E is the metal clamping-ring that holds the hat-body on the former during the operation of stretching. The parts are more fully described in the opinion of the court.

[The defendants insisted that they did not infringe, and that the complainant's patent, so far as the second and third claims were concerned, was void for want of novelty; the devices therein claimed having been publicly used by one John Hutchinson, at Matteawan, New York, several years prior to the invention of Eickemeyer, and that Eickemeyer saw the devices of Hutchinson before taking out his original patent. The devices used by the defendants are shown in Figs. 4 and 5.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus and statement are from 6 Fish. Pat. Cas. 219, and the opinion is from 10 Blatchf. 403.]

[2] [From 6 Fish. Pat. Cas. 219.]



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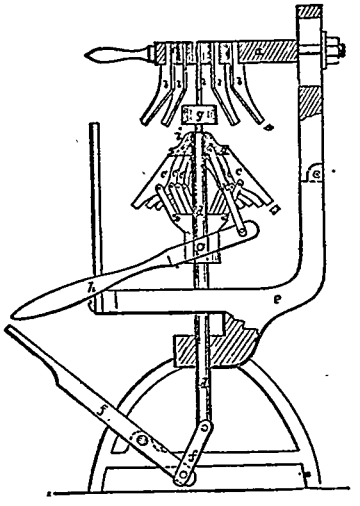

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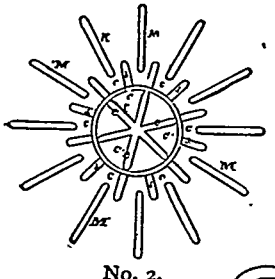

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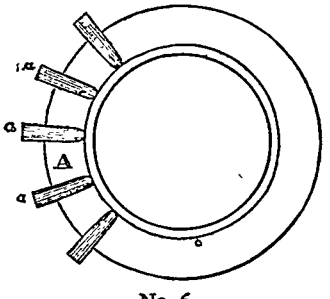

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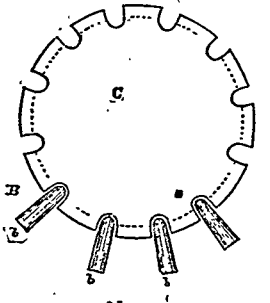

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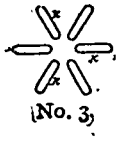

No. 3.

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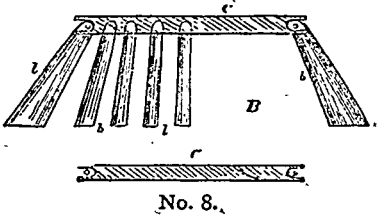
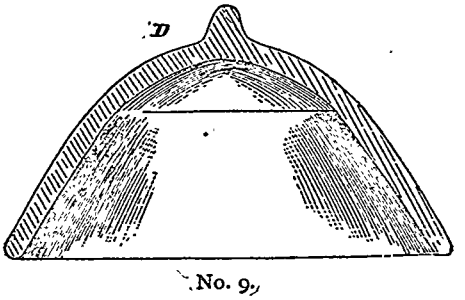


No. 8.



No. 9.

[It will be noticed that, whereas the complainant has a single machine, and stretches both tip and brim at the same operation, the defendants have two machines to do the same work, and the operations of stretching the tip and the brim are separate and distinct. Fig. 4 represents the defendants' tip and crown stretcher. A represents a plan view of the crown-supporting ribs and stretchers, and B is a view of the whole machine, in section and elevation; e is the frame work; d, the standard; c, c, c, the crown-supporting ribs; b, b, b, the stationary stretching devices. Fig. 5 represents the defendants' brim-stretcher, in which a is the stationary frame-work, to which the brim-stretching devices b are attached. d is the standard, at the top of which is the block g, on which the hat-body is placed after the crown has been stretched, as shown in Fig. 4. i is the head secured to the standard d, and having attached to it radially the brim-supporting ribs c, c, c. The lever h is so attached to the head i, by the arm k, that after the hat-body has been pressed up against the stretchers b, b, b, the brim-supporting ribs, c, c, c, may be thereby extended like the arms of an umbrella, thus completing the operation of stretching.

[The devices used by Hutchinson, in 1860, for a brim-stretcher are shown in Figs. 6, 7, 8, and 9. They consisted of a convex former, a concave former, and a dome.

[Fig. 6 is a plan view of his convex former, in which A is the former and a, a, a are ribs rounded upon the edges and extending entirely around the former. A, at appropriate intervals. Fig. 7 is a plan view of his concave former, and Fig. 8 a sectional view of the same. The top, C, was a circular piece of wood, to which were attached the hinged ribs b, b, b, as shown in Fig. 8. Fig. 9 was the dome. In operation, the hat-cone was laid on the convex former; then the ribs of the concave former were spread out radially and placed upon the cone. The dome was then passed down onto the ribs b, b, b (Fig. 8), passing them into the recesses between the ribs a, a, a (Fig. 6). Hutchinson's tip-stretcher consisted of two pieces—a concave-ribbed former and a concave former, having ribs on its interior.] [3]

George Gifford, for complainant.
Charles M. Keller, for defendants.

BLATCHFORD, District Judge. This suit is brought on reissued letters patent granted to the plaintiffs, as assignees of Rudolph Eickemeyer, December 1st, 1868, for an "improvement in machines for stretching hat-bodies," the original letters patent having been granted to said Eickemeyer, February 28th, 1865. The specification, which is signed by Eickemeyer, says: "In the manufacture of felt hats, the bodies, having been formed of a conical shape, and subjected to the process of felting, termed by hatters "sizing," retain their conical form, and require to be stretched in the tip and crown, and also at the brim, to enable the hats to receive and maintain the form subsequently given to them by the operation of blocking. The hat-body being of a conical form, rounded at the tip, is nevertheless made with reference to the hat to be produced, and the different parts of it which are afterwards to be developed into the "tip," "square," "side-crown," "band," and "brim," of the finished hat, are distinguished by imaginary lines or zones around the hat-body, and the same names applied to them, the lower part of the sides being termed the "brim," the upper part of the sides the "side-crown," the line of division between the side-crown and brim the "band," the rounded upper part the "tip," and the dividing line between the tip and side-crown the "square." In stretching hat-bodies for blocking, the band is not generally stretched circumferentially, or but slightly stretched, the stretching being required in the crown and tip, to produce the square or angular corner of the cylindrical or bell-crowned hat, and at the brim, in order that the latter may lie flat, or at right angles, or nearly so, to the side-crown, when blocked; and it is necessary that the body shall be stretched more, in those parts which require stretching, than would be sufficient to conform it to the shape of the hat-block, because, if not over-stretched before blocking, the hat will shrink, when, in wear, it is exposed to moisture, and tend to resume its conical shape, but, if over stretched, and suffered to shrink to the block, will retain its figure afterwards, under ordinary wear and exposure. In stretching a hat-body for square-crowned hats, the upper part of the hat-body is circumferentially stretched, most at the square, or angle of intersection between the side-crown and tip, beginning to stretch gradually from the centre of the tip and from the band, and increasing towards the square. The lower part of the body is stretched circumferentially, most at the edge of the brim, beginning to stretch gradually from the band. This stretching operation has hitherto been commonly performed by hand, notwithstanding the attempts that have been made to use expanding blocks, or expanding devices, inside of the bodies, for stretching the tips or crowns. Hat-bodies are generally made of unequal thickness from tip to brim, but of equal thickness, as near as may be, in the direction of the circumference. and the operation of stretching, sometimes called "wet-blocking," by hand, requires great skill and care to stretch the parts requiring to be stretched, and preserve the requisite circumferential equality of thickness of the body, without over-straining or tearing the hat. The object of my invention is to perform this operation of stretching hat-bodies by machinery, and to

[3] [From 6 Fish. Pat. Cas. 219.]

this end I have invented the new and improved machine hereinafter described, whereby both tip and brim, or either, may be properly stretched by the operation of the machine. My said invention of a new and improved machine for stretching hat-bodies consists generally of a radially ribbed or skeleton former, whereon the hat-body is placed to be stretched, and the ribs of which act as internal supporting and stretching surfaces, and a series of external stretching devices, which act upon the outside portions of the hat-body that are to be stretched, in opposition to the internal action of the ribs of the skeleton former, and between the lines of support of the same, the internal and external supporting and stretching devices being so combined and arranged, with relation to each other, and to the work to be done, that, when they are brought together with force, they operate to stretch the hat-body embraced between them, in the required places to develop the desired shape of the hat; and, for the purpose of holding the hat-body in place upon the former, so that the proper portions will be stretched, a clamping ring is also combined with the machine. I have also made the exterior pressing or stretching devices radially adjustable in position relatively to the axis of the ribbed skeleton former, to accommodate the variations of form required, and, in order to vary the degree of stretching of either the tip or brim at pleasure, I have made the external pressing or stretching devices independent of each other, and independently adjustable. It will be observed, upon inspection of the machine as illustrated in the drawings, that, although the general principle and mode of operation of the parts of the machine which act to stretch the tip are the same as in those parts that act to stretch the brim, the adaptation and arrangement of the parts for the two operations are different. The ribs which support the tip have curved, or otherwise inclined, surfaces, to conform to the rounded tip of the hat-body, and the ribs themselves are arranged so that the recesses between them extend inwards to the axis, or nearly so, in order to give room for the portions of the tip and side-crown that are pressed in by the external stretching devices, and the external stretching devices converge closely together, to act upon the upper surface of the tip to be stretched. The ribs which support the brim have straight surfaces radiating from a circle or cylinder of the diameter of the band, and the recesses do not necessarily extend inside of that circle or cylinder, which may be the hub or support of the ribs of the former. The ribs are more in number than the ribs which support the tip, because of the greater surface of the brim to be stretched by them, and the external stretching or pressing devices are not converged together so closely as those which act upon the tip; and it will also be observed, that the construction and arrangement, respectively, of the parts for stretching the tip and brim of the hat-body, differ so much, that neither will perform the office of the other, although both will perform their offices at the same time upon the same hat-body. For the purpose of securing circumferential equality of action of the stretching devices upon the portions of the hat-body to be stretched, and for convenience and accuracy of adjustment, and facility of operating the stretching devices in a practical machine, I have mounted the internal stretching devices which constitute the skeleton or ribbed former, concentrically, upon the upper end of a vertical sliding spindle, which is moved up and down in guides, in a frame, by a lever, and have attached the exterior stretching devices to the frame, in positions concentric with the axis of the ribbed former, so that the latter may be lowered, to put on and take off the hat-body, and lifted, when the hat-body is put on, to bring the parts together, so as to stretch all the parts operated upon equably in the direction of the circumference of the hat-body. If the exterior and interior devices which act upon the hat-body to stretch it were not guided in this or some equivalent manner, parts of a given zone of the circumference of the body would be apt to stretch more than others, according to their texture, but, by causing the stretching surfaces to act equably, by means of the frame and guides, uniformity in stretching is secured, as far as practicable in such operations." Then follows a description of the construction of the mechanism, with references to three figures of drawings, figure 1 being a vertical central section of the machine; figure 2, a plan of the radially ribbed or skeleton former, and the lower series of stretching rollers; and figure 3, a plan of the arrangement of the upper series of stretching rollers. There is an upright frame, on the top of which is a stationary, horizontal table, having a central circular opening, under and partly within which is situated the skeleton former, made of wood or other suitable material. This former has its vertical profile of conical or other form, corresponding with that of the hat-body before the stretching operation, and a portion of it, at about the middle of its height, is of complete circular form, in its horizontal section, but, above and below this portion, it has a number of vertical recesses, between which is left a corresponding number of equidistant radial ribs, the edges of which ribs form the profile of the former. The former is secured firmly and concentrically upon the upper end of a vertical spindle, which is arranged to slide up and down in guides in the centre of the frame, concentric with the opening in the said horizontal table, and which has applied to it a lever or treadle, by which it can be lifted up, to raise the former. A metal clamping ring, the interior of which is of such size

and form as to fit the circular portion of the former, between the upper and lower ribs, is attached, by vertical rods, to and below a head piece of such weight as to be capable of producing the requisite degree of pressure to hold a hat-body upon the former. These rods work up and down by sliding through guides in a stationary horizontal plate, which is supported by vertical pillars upon the said horizontal table, and the clamping ring is thereby kept concentric with the former. Such ring is supported, when not supported by the former, by means of a vertical screw, which screws through a tapped hole in the head piece, and the lower end of which, bearing upon said horizontal plate, prevents the ring from descending below a given position. A series of thin, round-edged rollers, corresponding in number with the upper recesses and ribs of the former, is arranged above the horizontal line of the circular portion of the former, radial to the axis of the former and clamping ring, and opposite the centres of said recesses. The axles of these rollers are supported in hangers, which are secured, by screws, to the said horizontal plate, said screws passing through radial slots in said plate, to enable the rollers to be adjusted toward and from the axis of the former. The surfaces of such ribs and rollers are the stretching surfaces for the tip and crown of the hat-body. A series of thin, round-edged rollers, corresponding in number with the lower recesses and ribs of the former, is arranged below the horizontal line of the circular portion of the former, radial to the axis of the former and clamping ring, and opposite the centres of said recesses. The axles of these rollers are supported in hangers, which are secured by screws to the said horizontal table, the said screws passing through radial slots in the said horizontal table, to enable the rollers to be adjusted toward and from the axis of the former. The surfaces of such ribs and rollers are the stretching surfaces for the brim of the hat-body. The clamping ring is so adjusted by the screws which support it, and the two series of rollers are so adjusted by setting the hangers in which they are supported, that, when a hat-body upon the former is in contact with said ring while said screw rests upon the said horizontal plate, the edges of the two series of rollers are a short distance outside of the profile of the former. The operation of stretching a hat-body in the machine is as follows: The former is first allowed to descend to such a position as to permit the hat-body to be put on and drawn tightly over it. The hat-body, wet with hot water or steam, is put on, and the former is raised up by depressing the outer end of the treadle or lever, when the hat-body comes in contact with the clamping ring, the weight of the ring and of the attached head piece causes the ring to hold the hat-body with sufficient firmness against the circular portion of the former, to prevent it from slipping between the ring and the former, and the continued upward movement of the former, produced by a suitable pressure upon the outer end of the lever or treadle, brings the hat-body into contact with the two series of rollers, which are thus made to press upon and stretch the portions of the hat-body which are between the rollers and the corresponding ribs of the former, into the recesses. Such portions are thereby stretched over the ribs. By this means, the hat-body is brought to a suitable shape for blocking and shaping the crown and brim of the hat. The specification states, that fixed round-edged surfaces may be substituted for, and would be the equivalents of, the two series of rollers, but that the inventor prefers to use the rollers, as, by preventing friction upon the hat-body, they prevent it from being torn in the stretching operation. The claims are as follows: "1. In a machine for stretching hat-bodies, a skeleton or ribbed and recessed former, substantially such as is herein described. 2. The combination and arrangement of the crown- and tip-supporting ribs with the upper series of stretching devices, substantially as described, operating to stretch the tip and side-crown of the hat-body between them, substantially in the manner hereinbefore set forth. 3. The combination and arrangement of the brim-supporting ribs with the lower series of stretching devices, substantially as described, operating to stretch the brim of the hat-body between them, substantially in the manner set forth. 4. In combination with the supporting ribs of the skeleton former, the stretching devices, operating, as hereinbefore set forth, to stretch the hat-body between them at one operation, as required for blocking, substantially as described. 5. The clamping ring, in combination with the ribs of the skeleton or ribbed former, operating to hold the hat-body thereon during the operation of stretching, substantially as described. 6. The combination, in a machine for stretching hats, of the skeleton or ribbed and recessed former, a clamping ring, and a system of stretching arms or rollers, the whole combined and operating substantially as described. 7. Making the stretching devices for the tip or brim adjustable radially, with relation to each other, so as to vary the degree of stretching of either tip or brim, substantially as described."

The defendants use, for stretching the tip and side-crown of a hat-body, a machine which does not, and cannot, stretch the brim; and, to stretch the brim, they use a separate machine, which does not, and cannot, stretch the tip and side-crown. The defendants' tip and side-crown stretcher has ribs which support the tip and side-crown, and a series of stretching devices, which, instead of being rollers, are fixed round-edged surfaces. The ribs and stretching devices operate to stretch

the tip and side-crown between them. In the plaintiffs' arrangement, however, the operation is such, that the rollers which act upon the exterior of the hat-body, and wrinkle or corrugate it inwardly between the ribs of the former, and thus increase its diameter, act on different points in the hat-body in succession, in lines extending towards the base of it, the parts which have been acted upon being relieved from the pressure of contact with the rollers, as new parts are brought into such contact. In the defendants' tip and side-crown stretcher, the hat-body is placed on a convex-ribbed former, above which is another ribbed former, the ribs of which, when the hat-body reaches the concave part of the latter former, enter between the ribs of the convex former, and the hat-body is wrinkled by the action, so as to be increased in diameter. As the convex former continues to be lifted, the ribs act on the different parts of the hat-body in succession, but, so far from any part already acted upon being relieved at any time, the stretching of every part the stretching of which has once commenced, continues so long as there is any stretching done to any part.

The defendants' brim-stretcher has ribs which support the brim, and a series of stretching devices, which, instead of being rollers, are fixed round-edged surfaces. The ribs and stretching devices operate to stretch the brim between them. But, in the defendants' arrangement, there is a convex-ribbed former, on which the hat-body is placed, which is formed like the ribs and stretchers of an umbrella, the hat-body being placed on the former, when the ribs are in their lowest position. Above this is another ribbed former, and, when the brim on the convex former has reached the concave part of the other former, the wrinkling commences, by the action of the ribs of one former between the ribs of the other former, and then a hand-lever throws out or expands the ribs of the convex former, by an operation like that of opening an umbrella, and the stretching is thereby completed, the ribs of the convex former, during the latter operation, bearing, in their whole length, on the brim, in lines extending from the band to the outside of the brim. The action in the first part of the operation is like that in the defendants' tip-stretcher; but, in the latter part of the operation, there is an action not found in such tip-stretcher nor in the plaintiffs' arrangement.

It is shown, by the evidence, that the defendants' arrangements, in their two stretchers, from the fact that the action is on the whole of a given wrinkle at the same time, are better adapted to the stretching of tender hat-bodies, such as those made of fur, as generally made, than is the plaintiffs' arrangement. But, while the defendants' arrangements may contain improvements on the plaintiffs' arrangement, yet they embody what is claimed in the second and third claims of the plaintiffs' patent. The defendants' tip and side-crown, stretcher has ribs supporting the tip and side-crown, and a series of stretching devices, which ribs are substantially the same as those of the patent, and which stretching devices are substantially the upper series of stretching devices in the patent, when made in the shape of fixed round-edged surfaces, as suggested in the patent, and the ribs and stretching devices are combined and arranged substantially as described in the patent. They operate to stretch the tip and side-crown between them, substantially in the manner set forth in the patent. So, too, the defendants' brim-stretcher has ribs supporting the brim, and a series of stretching devices, which ribs are substantially the same as those of the patent, and which stretching devices are substantially the lower series of stretching devices in the patent, when made in the shape of fixed round-edged surfaces, as suggested in the patent, and the ribs and stretching devices are combined and arranged substantially as described in the patent. They operate to stretch the brim between them, substantially in the manner set forth in the patent. The defendants' lower formers are radially ribbed. The hat-body to be stretched is placed on them. The ribs of those formers act as internal supporting and stretching surfaces. The defendants have external stretching devices, in series, which act on the outside portions of the hat-body that are to be stretched in opposition to the internal action of the ribs of the lower formers, and between such ribs, and in the centres of the recesses between such ribs. The mechanical combination and arrangement of the internal and external supporting and stretching devices, in the defendants' machines, with relation to each other, and to the work to be done, are such, that the two sets of devices are brought together accurately, and automatically, so that their parts interlock properly and stretch the interposed materials in the required places, and equality in the action circumferentially of the stretching devices on the parts to be stretched, and facility of operation, are secured. The combination consists in mounting the set of ribs and the set of stretching devices concentrically, with a coincident axis, and moving one set accurately towards the other, by mechanical guides, the stretching devices being opposite the centres of the recesses between the ribs. All these features the defendants' machines have in common with the plaintiffs'. These features are essential features in the plaintiffs' arrangement, and are the features covered, as respects the tip-stretcher, by the second claim of the patent, and, as respects the brim-stretcher, by the third claim of the patent. That the defendants have added some features of construction and operation, which are not found in the plaintiffs' patent, whereby the machine may be improved, cannot relieve the defendants from the charge of in-

fringing the second and third claims of the patent, in view of their use of the inventions covered by those claims.

The principal ground of defence urged is, that, before Eickemeyer made his invention, one John Hutchinson, at Matteawan, New York, invented and constructed, and successfully used, in a crude way, instruments for stretching the tips and the brims of hat-bodies, which instruments had the same mode of operation as that of instruments found in the defendants' machines. The date of Eickemeyer's invention was the summer of 1864. The identical instruments which Hutchinson used are produced. They were used by Hutchinson in 1860. They are, and always were, detached parts, and never were organized into a machine working automatically. Hutchinson's parts to stretch the brim of the hat-body are three in number—a convex, conical-shaped former, with ribs; a concave, conical-shaped former, with ribs pivoted like the ribs of an umbrella; and a dome-shaped piece. They are manipulated by handling them. The hat-body is placed on the convex former. The concave former is then placed on the top of the hat-body, with its ribs resting on the hat-body. The dome-shaped piece, which is hollow, is then placed over the concave former, and forced down, so as to drive the ribs of the concave former into the recesses between the ribs of the convex former, and carry the brim, in wrinkles, towards the axis of the convex former. In the defendants' brim stretcher, the brim is carried, in wrinkles, away from the axis of the convex former, because the wrinkling is performed by an operation like that of opening an umbrella. In Hutchinson's device, the wrinkling is performed by an operation like that of shutting an umbrella. Hutchinson's parts to stretch the tip of the hat-body consist of a concave-ribbed former and a convex-ribbed former, manipulated by hand, and, like the two formers in the defendants' tip stretcher, in construction, as ribbed formers, and brought together to stretch the tip between them, placed on the convex former, by pressing the ribs of one former between the recesses in the other former. Hutchinson, in using his brim-stretching devices, employed a lever, which had its fulcrum in a post which formed a part of a building, to make pressure on the top of the dome-shaped piece, the fulcrum being at the end of the lever. There was no organized machine. The description given of the use of the devices is, that they were tried, to see whether they would block a hat or not; that they were not operated continuously; that sometimes Hutchinson would make an alteration, and then another trial would be made, to see whether the alteration was any improvement; that but one brim stretcher was made, and that of wood, which was broken several times in operating it; that the tip stretcher was of wood, and was tried on a few tips, and was broken, in use, and never repaired; that Hutchinson had the idea of constructing a machine embodying the principle of such devices, but had no definite plan as to the appliances by which the machine was to work out such principle; that nothing was done towards carrying out such intention; that the devices were tried in 1860, prior to, but not later than, June; that they were then stowed away in a closet, where old books and papers were kept, in a factory where Hutchinson continued to be employed for two years afterwards; and that they remained in that closet, unused, for three years and a half, and were then removed to another place, whence they were taken to be used as evidence in favor of the parties defending this suit. These devices of Hutchinson amounted to nothing, and were practically useless, for the reason that they were not combined in an organized machine. They lacked the combination and arrangement of them which Eickemeyer made, and which secures circumferential equality of action of the stretching devices on the material, and accuracy of operation, by means of the concentric approach to, and recession from, each other, of the ribs and stretching devices. The equable intervention of the ribs between the stretching devices is an essential feature of the patent, due to the mechanical organization. There is no such feature in Hutchinson's devices, because there is no mechanical organization capable of developing such feature. Whether the ribs and stretching devices, in Hutchinson's tools, will move concentrically or not, is a matter of accident, and dependent on the skill of the person handling the tools, and the equability of intervention of the ribs and stretching devices is equally a matter of accident and skill in handling.

There is, therefore, nothing in what Hutchinson did that can interfere with the second and third claims of the patent, which are the only ones involved in this suit. Even if Eickemeyer had seen and known of what Hutchinson did, he would have been entitled to make those two claims. It has been attempted to be shown that Eickemeyer knew of and saw Hutchinson's devices. Whether he did or not, is of no importance. But the evidence wholly fails to show that he did. Hutchinson's devices amounted to nothing. They needed the addition of what is found in the defendants' machines, and which makes of them combinations that were invented by Eickemeyer. It is a mistake to say, that the claims of the plaintiffs' patent cover Hutchinson's instruments. So far as the plaintiffs' patent is concerned, those instruments are free to be used by the defendants in the manner in which Hutchinson used them.

The claims of the original patent granted to Eickemeyer were as follows: "1st. The employment, in the process of stretching hats, of a skeleton or ribbed and recessed

former, substantially such as is herein described. 2d. The pressing ring, E, in combination with the skeleton or ribbed and recessed former, substantially as and for the purpose herein specified. 3d. The employment, substantially as herein described, in combination with the skeleton or ribbed and recessed former, of pressing rollers, K, M, or other equivalent pressing devices, operating as herein set forth. 4th. The combination, in a machine for stretching hats, of a skeleton or ribbed and recessed former, a pressing ring, and a system of rollers, or other equivalent pressing devices, the whole combined and operating substantially as and for the purpose herein specified." Because Eickemeyer did not, in his original patent, make the claims which are made in the second and third claims of the reissued patent, but only made claims which were substantially the same as the first, fourth, fifth and sixth claims of the reissued patent, it is argued that he must have seen the devices of Hutchinson. I draw the very opposite inference. For, if he had seen them, it would have been in his mind, in taking out his patent, that the upper ribs and upper stretching devices might be used separately from the lower ribs and lower stretching devices, as Hutchinson used his tools, and, with such idea, Eickemeyer would have made, in his original patent, claims like the second and third claims of the reissued patent, which are fully warranted by what is found in the specification and drawings of the original patent. It would not detract a particle from the merit or validity of Eickemeyer's invention, if he had seen Hutchinson's tools; but there is no satisfactory evidence, derived from witnesses, or from the history of the case, to warrant the conclusion that he saw or knew of them.

There is no more warrant for saying, in this case, that Eickemeyer did not intend, in taking out his original patent, to make such claims as the second and third claims of the reissued patent, than there is, in every case of a reissue, for saying that claims in the reissue, not found in the original, were not intended to be made, when the original was taken out, because they were not put in, as claims, into the original. On this principle, there never could be a reissue covering claims not substantially found, as claims, in the original.

The argument on the part of the defendants seems to be founded on the idea, that the second and third claims of the reissued patent cover the use of Hutchinson's tools, as Hutchinson used them. This is an error. The use of Hutchinson's tools, as he used them, are not combinations of them, such as the second and third claims of the plaintiffs' patent intend and cover. There are no mechanical combinations of Hutchinson's tools, when they are used as he used them. The second claim of the reissue does not cover broadly the use of the tip former in connection with the upper series of stretchers, detached from the mechanical combination and arrangement of such former and stretchers, found in the plaintiffs' patent, and not found in Hutchinson's tools. So, too, the third claim of the reissue does not cover broadly the use of the brim former in connection with the lower series of stretchers, detached from the mechanical combination and arrangement of such formers and stretchers, found in the plaintiffs' patent and not found in Hutchinson's tools.

There must be a decree for the plaintiffs, for a perpetual injunction, and an account of profits, and an ascertainment of damages, with costs, in respect to the second and third claims of the patent.

Case No. 4,313.

EIDEMILLER v. WYANDOTTE CITY.

[2 Dill. 376;[1] 5 Chi. Leg. News, 423.]

Circuit Court, D. Kansas. 1873.

EMINENT DOMAIN—COMPENSATION—INJUNCTION.

1. Where the constitution of a state requires payment of compensation to the land owner or a deposit for him of the amount in money before private property can be appropriated for public use, such payment or deposit is a condition precedent to the appropriation of the property, and if a corporation, public or private, is proceeding to take possession of private property without making such payment or deposit, the land owner is entitled to an injunction to restrain it, where the injury is irreparable.

[Cited in Northern Pac. R. Co. v. Barnesville & M. R. Co., 4 Fed. 299.]

2. The making of an embanked roadway for public use was *held* to be an irreparable injury within the meaning of the rule.

[Cited in Payne v. Kansas & A. Val. R. Co., 46 Fed. 554.]

3. And in such a case also the land owner may have an injunction pending an appeal taken by him from the assessment of damages, where compensation has not been paid or deposited, and where no different provision is made by law.

4. Constitution of Kansas on the subject of the right of eminent domain, construed and applied.

Application for injunction. The complainants own a tract of land now in the limits of Kansas City, Kansas, containing about four acres, and situate on the Kansas river, opposite the city of Wyandotte. A new bridge has been built across the river between these two places. The west end is on or at the end of a street in Wyandotte; the east end on the land of the complainants, and about twenty feet above its surface. Steps were taken to lay a road through this land by the county authorities; viewers were appointed and damages assessed to the complainants, who, being dissatisfied, appealed to the court, which appeal is still pending. Subsequently, Kansas City, Kansas, was incorporated, within which the above men-

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

tioned lands of the complainants are situated. It does not appear that the county or city authorities of either Wyandotte or Kansas City ever paid, tendered, or deposited for the plaintiffs any money in payment or compensation for the right of way through their land. The city of Wyandotte, it is admitted, is making the approach to the bridge, and for that purpose is hauling earth over the bridge and putting it upon the road bed over and upon the lands of the plaintiffs within the limits of Kansas City. The bill makes the city of Wyandotte, the mayor, and the members of the city council, and certain employes of the said city, defendants, and prays a temporary injunction against further filling in or using the complainants' land, and for general relief. The case came before the circuit judge at his chambers, on the motion of the complainants, for the allowance of an injunction.

Kimball & Cravens, for the motion.
Scroggs & Bartlett, opposed.

DILLON, Circuit Judge. The constitution of Kansas provides that "no right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation." Article 12, § 14.

From the showing made in this case, it appears that steps were taken to condemn a right of way by the county authorities for a public road or highway through the land of the complainants; that they appealed from the assessment of damages; that this appeal is still pending; that subsequently the territory through which the road was laid was incorporated as a city of the third class under the General Laws of Kansas, by the name of Kansas City; that the city council of the latter place, by resolution, has given to the city of Wyandotte the right to improve the said highway and street in the former place, and fill the same so as to connect it with the bridge across the Kansas river, which divides Wyandotte and Kansas City, and that Wyandotte city is now employing a large force of men in making the approach to the bridge by filling up the road or way thus proposed to be laid out through the land of the complainants.

The bridge between the two places appears to have been built at the joint expense of the city of Wyandotte and of the county of Wyandotte, under a contract between the county commissioners and the King Bridge Company, in relation to which there is a dispute between the county and this company. The county has never accepted the bridge, and the present board of county commissioners deny the authority of the former board to make the contract for its erection, and repudiate the bonds issued in payment or part payment for it. The contractors claim a balance due them of over $20,000. The west end of the bridge in question is at the end or on one of the streets of Wyandotte city. The east end of the bridge is in Kansas City, Kansas, at the end of the road or highway before mentioned, and on the land of the complainants. The middle thread of the river is the boundary line between the two cities. It will thus be seen that Wyandotte is engaged in making an approach to the bridge, not only without her own limits, but within the limits of another municipal jurisdiction. This is being done, however, with the assent of the corporate authorities of the latter place. This approach is being made by filling with earth upon the lands of the complainants a road bed, about 80 feet wide and 20 feet deep at the bridge, thus dividing these lands by a high embankment, which, it is alleged, will greatly injure them and destroy them for the uses to which they are devoted by the complainants. It is alleged that no payment for the land thus appropriated has ever been made or tendered or deposited for the complainants. A temporary injunction is prayed to restrain the defendants from further proceeding with their work upon the complainants' lands, or using them, and for gerenal relief.

No compensation having been made, tendered, or deposited for the plaintiffs, as required by the constitution of Kansas to be first done before their property can be appropriated to public use, it follows that they have never been divested either of the title or right of possession of their lands by the proceeding to lay out the county road through them. Damages were awarded them, but being dissatisfied they appealed from the decision of the county commissioners to the district court. The statute gives the right to appeal in such cases "upon the same terms, in the same manner, and with the like effect as in appeals from judgments of justices of the peace." Gen. St. 1868, p. 900, § 7. I have discovered no provision regulating the rights of the parties pending the appeal. To enter upon the lands of another, not for a preliminary and temporary purpose, but for the purpose of making an embankment or roadway upon them for public travel and use is a clear taking or "appropriation" of the land; and this the constitution of the state says shall not be done "until full compensation therefor be first made in money, or secured by deposit in money, to the owner." Here no compensation has been made to the owners, nor secured to them by a deposit of money, and therefore the public authorities have no right thus to use the complainants' lands without their consent, and the use of them in the manner here shown is in violation of their rights guaranteed by constitutional provision. It does not appear that the amount awarded by the county commissioners was ever paid, or tendered, or placed on deposit for the complainants, and therefore we need not now inquire what effect that would have had on their rights had this course been pursued. The statute

gives the land owner an unqualified right to appeal, and pending this appeal (in the absence of statute provisions to the contrary, and in the absence of any payment, tender, or deposit of the money), such owner's rights are not divested or affected by a mere unpaid award or assessment of damages. Whether the constitution does not imply and mean that there shall be a final ascertainment of what the "full compensation" to the owner is, and that when thus ascertained this precise amount must be paid in money, or deposited in money, before the owner can be deprived of the use of his land, I need not now give any opinion; for if it be conceded that the legislature under the constitution could authorize the use by the public, after a deposit of the amount awarded by the commissioners, and pending the appeal, it does not appear that any such provision has been made by the legislature, or any such course pursued by the public authorities.

It is objected by the defendants that the complainants are not entitled to an injunction, because the injury complained of is not irreparable, and because they have a full and adequate remedy at law. These positions are controverted by the complainants, who maintain that such an embankment is an irreparable injury to their land, and that as the acts of the city of Wyandotte with respect to this land are acts done wholly outside of the limits of the city they are ultra vires, and give no action whatever for damages against the city in its corporate capacity.

I deem it unnecessary to follow the counsel in these discussions. The making of a high embankment of great width and length, to be used as a public roadway, falls, I think, within the legal notion of an irreparable injury [but whether it does or not, I have always acted upon the principle that it was sound doctrine that where, without complying with substantial conditions precedent made for the benefit of the owner, a public or private corporation, threatened to take forcible possession of the land of the citizen in violation of his constitutional rights, the citizen is entitled to the speedy and effectual relief which an injunction alone can furnish, particularly when his rights have been so carefully secured as in the constitution of Kansas, as no special and exclusive remedy for the assertion of those rights is prescribed],[2] and gives a clear and recognized right to an injunction.

And it has been held that when an appeal is given by law, and the land owner availed himself of it, he was entitled, in the absence of provisions to the contrary, to the possession of his land during its pendency, and to an injunction, if necessary to protect such possession. Browning v. Railroad Co., 3 Green, Ch. [4 N. J. Eq.] 47; Trustees of Iowa College v. City of Davenport, 7 Iowa, 213.

Compensation and appropriation should be concurrent (2 Kent, Comm. 339, note; Cooley, Const. Lim. 567), and under the constitution of Kansas must be; or rather compensation or deposit of money must precede the appropriation of the land.

It was suggested at the argument that the proper order would be one denying the injunction, if the highest probable amount to which the complainants would be entitled were brought into court for their benefit. But this court has no jurisdiction or control over the proceedings in condemnation, nor over the county authorities by which these proceedings were instituted, nor over Kansas City, it not being made a party to this suit. The payment, tender, or deposit should be made in that proceeding, and not in this.

I think, therefore, that the complainants are entitled to the injunction they ask, but it will be granted only until the compensation to which the complainants are entitled for the right of way has either been paid or deposited as required by the constitution of the state. Ordered accordingly.

NOTE. In England a difference is recognized between the construction of legislative power to condemn lands when conferred upon a railway or other private corporation, and when conferred upon the corporation of a city charged with the duty of making public improvements; in the latter case the house of lords have held that the powers will not be subjected, as in the former case, to a strict and restrictive construction; but the case shows that parliament, to aid in making public improvements, such as opening and widening streets, confers powers (as, for example, to compulsorily take more land than is necessary with a view of selling the surplus for profit), which it is not within the constitutional authority of our state legislature to grant. Galloway v. Mayor, etc., of London (1866) L. R. 1 H. L. 34. In England "it has become," says Lord Chancellor Cranworth, in the case just cited, "a well settled head of equity, that any company authorized by the legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by injunction of the court of chancery from so doing." In this country, see Western Md. R. Co. v. Owings, 15 Md. 199; Browning v. Railroad Co., 3 Green, Ch. [4 N. J. Eq.] 47; Stacy v. Vermont Cent. R. Co., 27 Vt. 39; Cosens v. Bognor Ry. Co., 1 Ch. App. 594; Thompson v. Grand Gulf R. R. & Banking Co., 3 How. (Miss.) 240; Bensley v. Mountain L. W. Co., 13 Cal. 306; 27 Cal. 427; Richards v. Des Moines Valley Railroad Co., 18 Iowa, 259; High, Inj. §§ 391, 304, and cases cited; Pierce, R. R. 164; Cooley, Const. Lim. 562; Gray v. First Div. St. P. & P. R. Co., 13 Minn. 315 (Gil. 289); Railway Co. v. Nesbit, 10 How. [51 U. S.] 395; Dill. Mun. Corp. § 480. Compare Id. § 476, and cases cited; Id. §§ 727–738.

Case No. 4,314.

In re EIDOM.

[3 N. B. R. 106 (Quarto, 27).][1]

District Court, W. D. Texas. 1869.

BANKRUPTCY — SPECIFICATIONS OPPOSING A DISCHARGE—FACTS RELIED UPON.

1. Specifications opposing a discharge must be precise and definite, and must particularize

[2] [From 5 Chi. Leg. News, 423.]

[1] [Reprinted by permission.]

facts, description of the grounds of opposition, setting forth time, place, person, etc. Such specifications referring to facts supposed to be shown on an examination of bankrupt *held* to be faulty.

[Cited in Re Graves, 24 Fed. 552; Re Carrier, 47 Fed. 440.]

2. Facts relied upon in opposing discharge should be set forth alone, without reference to any matter aliunde.

[In the matter of the bankruptcy of J. D. Eidom. Heard on exceptions to the specifications of a creditor in opposition to the discharge of the bankrupt.]

DUVAL, District Judge. Peter McGreal, Esq., a creditor of the bankrupt, having filed specifications, original and amended, in opposition to the discharge of said bankrupt, the same came on to be heard upon exceptions taken by the bankrupt's counsel to the sufficiency thereof.

The first exception is, substantially, that at, or a short time previous to the filing of his petition in bankruptcy, the bankrupt had on hand eleven bales of lint cotton, which he failed to render in his schedule "B," or surrender to the assignee as assets; and here the specification makes reference to the examination of the bankrupt before Mr. Register Whitmore, on the 19th and 20th days of April, 1869, from question 2 to question 17, inclusive. A mere failure on the part of the bankrupt to render in property possessed by him on his schedules, is not made a ground by the act for refusing his discharge. The act does make the concealment of the same a ground for such action, but then it must be averred and proved that it was willful. If an allegation of "failure to render" be sufficient at all, it must be alleged to have been willful. For this reason, as well as because this specification is too vague and general in alleging the time when he had possession of said cotton, etc., I regard it as insufficient. The first amended exception is insufficient, for the reasons stated in regard to this.

The second of both the original and amended specifications are vague, uncertain, and at variance with each other. The former charges that at the time of filing his petition, the bankrupt was the owner of three hundred and twenty-seven and a half acres of land (as shown by his schedule "B,") encumbered by vendor's lien in favor of J. M. Copeland, which lien was subsequently, in pursuance of an agreement between said Copeland and the bankrupt, waived as to two hundred acres, and the remainder only sold in satisfaction of said vendor's lien, thereby willfully defrauding his creditors. And here reference is made to the examination of the bankrupt had before the register. The latter (viz., the second amended specification) alleges that the bankrupt falsely represented that said Copeland had a lien upon the three hundred and twenty-seven and a half acres for two hundred dollars; and that R. E. House, assignee of bankrupt, sold one hundred and twenty-seven acres of said land to Copeland in payment of said lien, which is charged to have no existence, etc. Neither of these specifications, vague and conflicting as they are, seem to me to constitute any ground mentioned in the act for refusing the bankrupt his discharge. They form a charge more against the assignee than the bankrupt.

The third original specification is, that the assignee of bankrupt, by mistake or inadvertence, has set apart to the bankrupt certain property as exempt, which is not exempt by law, and which should be subject to his creditors. This is clearly no ground for opposing the discharge. The propriety of the assignee's action in this respect should have been contested at the proper time and in the proper manner. It cannot furnish a reason for refusing the discharge.

The fourth of the original specifications is that the said bankrupt has been guilty of gross negligence in willfully permitting the twelve hundred pounds of seed cotton mentioned in schedule "B," "and a large amount of cotton in the patch to be destroyed and eaten up by cattle," etc. No time is alleged at which the bankrupt permitted this willful destruction, nor is there any specific charge as to the amount of cotton, excepting the twelve hundred pounds. Neither is it alleged that the bankrupt was in charge of this cotton at the time of its loss, or that he was responsible for it. For aught that appears in the specification, it may have been destroyed after the assignee had been appointed. Specifications in opposition to a discharge in bankruptcy must be precise and definite. They must particularize facts descriptive of the offense as charged, constituting the ground for objecting to the discharge, setting forth, as clearly as may be, the time, place, person, etc. A specification, containing a reference to facts supposed to be shown on an examination of the bankrupt by the register, is, in that respect, I think, faulty. The facts alone, showing a ground under the 29th section for resisting the discharge, should be set forth without reference to any matter aliunde.

The exceptions to the specifications in this case are sustained, and the discharge is ordered to issue.

See, also, In re Rathbone [Case No. 11,580]; In re Beardsley [Id. 1,183]; In re Hill [Id. 6,482]; Mawson [Id. 9,318]; Smith v. Beckford [Id. 12,985]; In re Burk [Id. 2,156]. Where the specifications are vague, they may be disregarded. In re Son [Id. 13,174]; In re Tyrrell [Id. 14,314]; In re Hansen [Id. 6,039]; In re Dreyer [Id. 4,082]; In re Waggoner [Id. 17,037].

[NOTE. For further proceedings in reference to the taxation of the costs, see Case No. 4,315, following.]

Case No. 4,315.

In re EIDOM.

[3 N. B. R. 160 (Quarto, 39).][1]

District Court, W. D. Texas. May 26, 1869.

OPPOSITION TO DISCHARGE IN BANKRUPTCY—TAXATION OF COSTS.

Among the costs taxed against a creditor who was unsuccessful in opposing bankrupt's discharge, were charges of five dollars for recording minutes of testimony of an examination of the bankrupt before the register, before such creditor filed specifications opposing discharge, and ten dollars counsel fee. To both items creditor objected. *Held*, the cost of such an examination must be paid to the register by the party, creditor or assignee, applying for it. Charge disallowed, as improperly taxed in this proceeding. Where a creditor opposes discharge of a bankrupt, a case is created for trial in the court docket, and the counsel fee is allowed as a proper charge.

[Cited in Morgan v. Thornhill, 11 Wall. (78 U. S.) 77.]

DUVAL, District Judge. Peter McGreal, Esq., a creditor of said bankrupt [J. D. Eidom], filed his specifications in opposition to the granting of a discharge to said bankrupt. The case came on to be heard before the court, and a jury impanelled for that purpose, and said specifications having been overruled as insufficient, the case was dismissed and a discharge ordered to issue [Case No. 4,314].

Among the costs taxed against the unsuccessful creditor opposing the discharge, was the sum of five dollars for recording minutes of testimony in the register's office, and ten dollars as an attorney's fee, which said creditor alleges to be illegal, and moves the court to disallow and expunge. If I recollect aright, the testimony referred to was that resulting from an examination had of the bankrupt, under oath, before the register, previous to this creditor filing his objections against the discharge, and which he sought to introduce in evidence to sustain said objections. When a bankrupt is examined at the request of a creditor, the latter should pay the costs of the proceeding; if at the request of the assignee, the costs should come out of the assets of the estate. In either event, it is a matter affecting the register alone, and he should have provided for the payment of whatever compensation was due him for recording the bankrupt's examination. I am unable, with my present understanding of the matter, to see how it can properly be charged against the creditor, as a part of the costs in this proceeding. It is therefore disallowed.

In regard to the charge of ten dollars, attorney's fee. The opposition of a creditor to the application of a bankrupt for discharge creates a case for trial on the docket of the district court, and is accompanied with the usual incidents of such. The opposing creditor becomes plaintiff and the bankrupt defendant, and an attorney's fee becomes a proper charge in the bill of costs. The fee of ten dollars taxed in this case is therefore allowed. In re Jackson [Case No. 7,128].

[1] [Reprinted by permission.]

Case No. 4,316.

EIGHT BARRELS DISTILLED SPIRITS.

[1 Ben. 472;[1] 10 Int. Rev. Rec. 157; 15 Pittsb. Leg. J. 4.]

District Court, S. D. New York. Oct., 1867.

INTERNAL REVENUE—INFORMER'S SHARE—TREASURY REGULATIONS.

Under the one hundred and seventy-ninth section of the act of June 30, 1864 [13 Stat. 305], as amended by the act of July 13th, 1866 [14 Stat. 98], where the marshal sells forfeited property under a venditioni exponas, the informer becomes entitled to his share when the proceeds are paid to the marshal, and his share is to be determined by the regulations then in force.

[Approved in United States v. Twenty-Five Thousand Segars, Case No. 16,565. Cited in Re Jayne, 28 Fed. 422.]

In this case the property [eight barrels of distilled spirits found in Seventh avenue, near Fifty-second street] was forfeited for violation of the internal revenue law, and was sold by the marshal under a decree of the court, on a venditioni exponas. After the proceeds were in the marshal's hands, but before their distribution, the secretary of the treasury made new regulations as to the shares of informers. A motion was now made in behalf of the informer, to have his share paid to him in accordance with the former regulations.

Henry & Clarkson, for the informer.
B. K. Phelps, Asst. U. S. Atty.

BLATCHFORD, District Judge. The proceeds of the forfeiture in this case having been paid into court on the 17th of August last, are not, so far as the share of the informer in them is concerned, subject to the provisions of the supplementary regulations made by the secretary of the treasury on the 2d of September, 1867. Under the one hundred and seventy-ninth section of the act of June 30th, 1864, as amended by the act of July 13th, 1866, the informer, in the case of a sale by the marshal of forfeited property under a venditioni exponas, becomes entitled to his share of the proceeds thereof, when such proceeds are paid to the marshal. The informer's right then becomes vested, and his share is to be determined by the regulations then in force, and cannot be affected by any regulations subsequently made. Motion granted.

EIGHT BARRELS OF WHISKEY (UNITED STATES v.). See Case No. 15,028.

EIGHT CASES OF LAMPS (UNITED STATES v.). See Case No. 15,029.

EIGHT CASKS (UNITED STATES v.). See Case No. 15,030.

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

EIGHT CASKS OF WHISKEY (UNITED STATES v.). See Case No. 15,031.

EIGHTEEN BALES OF BLANKETS (UNITED STATES v.). See Case No. 15,032.

EIGHTEEN BARRELS HIGH WINES (UNITED STATES v.). See Case No. 15,033.

Case No. 4,317.

EIGHTEEN THOUSAND GALLONS OF DISTILLED SPIRITS.

[5 Ben. 4.] [1]

District Court, S. D. New York. Feb., 1871.

PLEADING—INTERNAL REVENUE FORFEITURE.

1. Under rules 22 and 23 of the supreme court in admiralty, and rules 179 and 184 of this court, a libel of information to obtain the forfeiture of property for alleged violations of the internal revenue laws, must state in distinct allegations the matters relied on as grounds of forfeiture. If it does not, the remedy of the claimant is by motion to make the pleading more definite.

2. The government will not be compelled to elect which of the several allegations in a libel of information will be relied on to sustain the forfeiture prayed for.

In this case an information was filed containing twenty-two different causes of forfeiture under different sections of the internal revenue laws. The claimant applied to the court, on motion, praying that the district attorney might be compelled to elect upon which of the allegations of the information he would proceed for a forfeiture; that all other allegations might be stricken out; and that the allegations might be rendered more definite by the insertion of allegations of time, place, quantity, &c.

D. Field, for claimants.

B. K. Phelps, for the United States.

BLATCHFORD, District Judge. By rule 22 of the rules in admiralty prescribed by the supreme court of the United States, it is provided that a libel of information on a seizure for a breach of a law of the United States must propound in distinct articles the matters relied on as grounds or causes of forfeiture. Rule 179 of this court provides that an information on a seizure shall set forth the gravamen of the suit by plain and issuable allegation, and that it is subject to the same general rules, as to its structure and amendment, as an ordinary libel. An ordinary libel must, by rule 23 of the rules in admiralty prescribed by the supreme court, propound the various allegations of fact upon which the libellant relies in support of his suit. Rule 184 of this court provides that if the information is ambiguous or does not supply plain allegations upon which issue can be taken, the defendant or claimant may move the court to have it reformed. Under these rules some of the articles in the information in this case are wanting in the plain allegations of fact which they ought to contain, and some are ambiguous.

The motion, so far as it asks that the grounds of forfeiture may be more fully and distinctly stated in the information, is granted. The rest of the motion is denied.

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

Case No. 4,318.

EIGHT HUNDRED AND FIFTY-EIGHT BALES OF COTTON.

[Blatchf. Pr. Cas. 325.] [1]

District Court, S. D. New York. Jan., 1863.

PRIZE PROPERTY—LIEN FOR FREIGHT—GOVERNMENT OWNERSHIP.

1. Property captured as prize at Newbern, North Carolina, having been shipped to New York by the captor, on board of a merchant vessel, on freight, under a bill of lading, signed at the time, conditioned for its delivery at New York on payment of the freight therein stipulated, the court ordered the freight to be paid by the marshal out of the proceeds of the property in court.

2. On general principles, property captured as prize belongs in law to the government, and is chargeable with the same liabilities as if it had been owned by indivduals, and had been benefited under contracts direct or implied.

3. The United States, in relation to the proprietorship of property, have, in their public capacity, like authority and remedies, and are subject to like liabilities in dealing with it, through legal agencies or otherwise, as natural persons, except, perhaps, in respect to the operation of laws of limitation, or rules resting upon usages under the law merchant.

In admiralty.

The United States and Captors v. Eight Hundred and Fifty-Eight Bales of Cotton, brought on freight from Newbern, North Carolina, to the port of New York, as prize property, on board the schooner Clifton; The Same v. One Hundred and Twenty-One Barrels of Oil, One Thousand Three Hundred and Thirty-One Barrels of Resin, Pitch, and Turpentine, and Two Hundred and Fifty-Seven Casks of Resin, transported as aforesaid on board the schooner Palmer. It being satisfactorily proved in each of the above-entitled causes that the vessels therein named were not, at the time of the lading and affreightment on board them of the merchandise above mentioned, in the employment of or under control of charter-party with the libellants, and bound to receive and transport the said merchandise from Newbern, North Carolina, to the port of New York, or any other port or place for the libellants, except by virtue of the bills of lading and affreightment executed to the

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

shipper of the goods at the time, and set forth in these proceedings, and it appearing to the court that the said ladings were shipped under bills of lading signed at the time, conditioned for their delivery in this port on payment of the freight therein stipulated, it is, therefore, considered that the said cargoes, notwithstanding the same were prize goods remitted to this port for the benefit of the libellants, and for the purpose of adjudication in the prize court of this district, are legally and justly subject to the payment of freight according to the terms of the said bills of lading. Wherefore, it is ordered by the court that a true computation of said freight be made and stated, and that thereupon the marshal pay the same to the claimants out of the proceeds of said goods in court, as part of the expenses and charges to which the same are legally and justly liable and subject.

BETTS, District Judge. The above order is made in the before-named suits, upon facts entirely distinct from the case of The Undertaker's Cargo, decided in the Massachusetts district, November 18, 1862, the vessels which transported the prize cargoes in that case being under demise to the United States, and compensated in sums in gross for the whole period of their service.

On general principles, property captured as prize belongs in law to the government (The Dos Hermanos, 2 Wheat. [15 U. S.] 76; Id., 10 Wheat. [23 U. S.] 306; 3 Phillim. Int. Law, p. 189, § 128; The Elsebe, 5 C. Rob. Adm. 173), and is, accordingly, chargeable with the same liabilities as if it had been owned by individuals, and had been benefited under contracts, direct or implied. Commodore Rowan, of the United States navy, the captor of this prize, was a competent agent of the United States to bind them, as owners of the property, to a fulfilment of this contract for its carriage. The United States, in relation to the proprietorship of real or personal property, have, in their public capacity, like authority and remedies, and are subject to like liabilities in dealing with it, through legal agencies, or otherwise, as natural persons, except, perhaps, in respect to the operation of laws of limitation, or rules resting upon usages under the law merchant. U. S. v. Tingey, 5 Pet. [30 U. S.] 115; Same v. Bradley, 10 Pet. [35 U. S.] 343; Same v. Bank of Metropolis, 15 Pet. [40 U. S.] 377; Dungan v. U. S., 3 Wheat. [16 U. S.] 172; Nielson v. Lagow, 12 How. [53 U. S.] 98; U. S. v. Barker, 12 Wheat. [25 U. S.] 559; Same v. Bank of U. S., 5 How. [46 U. S.] 382. The order to the marshal to pay the applicants the amount of freight due in the above suits will be entered as above indicated.

EIGHT HUNDRED AND FIFTY-FIVE BOXES OF SUGAR (UNITED STATES v.). See Case No. 15,034.

Case No. 4,319.

EIGHT HUNDRED BALES OF COTTON.

[8 Blatchf. 221.] [1]

Circuit Court, S. D. New York. Feb. 11, 1871.[2]

VOLUNTARY STRANDING OF VESSEL — CONTRIBUTION IN GENERAL AVERAGE BY SAVED CARGO.

1. Contribution in general average.

2. A vessel was run on shore by the act of her master, when she was in such peril of the sea, that, if she had not been run on shore when and where she was, she would have foundered, with a total loss of vessel, cargo and crew, or have been driven on shore elsewhere. The vessel went to pieces: *Held*, that, upon the authority of adjudged cases, the case must be deemed one of voluntary stranding, and that the saved cargo must contribute, in general average, to the loss sustained by the owners of the vessel. In estimating such loss, the value of the vessel must be taken as she was, when the stranding was determined upon, without regard to her then peril.

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

William M. Evarts and Clifford A. Hand, for claimants.

Edward H. Owen, for libellants.

WOODRUFF, Circuit Judge. The schoon. George W. Hynson, bound on her voyage from New Orleans to Providence, with 800 bales of cotton and 288 barrels of molasses on board, was run on the beach at Squam, on the coast of New Jersey, in the night of the 21st, or morning of the 22d, of January, 1867. The vessel could not afterwards be got off, but went to pieces. Portions of her tackle were saved and the materials of the vessel were sold, the value of the wreck and other things pertaining to the vessel saved being $2,191.21. The libellants are the owners of the vessel, and prosecuted this cause to recover from the cargo a contribution to their loss on the vessel and freight, by way of general average, and a decree was made in their favor in the district court, from which the claimants have appealed to this court.

In the opinion of the district court—Fitzpatrick v. Eight Hundred Bales of Cotton, [Case No. 4,843]—the facts are detailed with much minuteness; and it seems to me unnecessary to recite them. To the proper understanding of the principal question argued in this court, it will suffice to say, that, in a storm of wind, rain and snow or sleet, of extraordinary severity, from the eastward, the vessel, after reaching a point about fifteen miles southwardly of Fire island, under pressure of the storm and the loss of

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

[2] [Affirming Case No. 4,843.]

her mizzen sail and the bonnet of her jib, was headed off towards the south, and afterwards was put before the wind, on a course to the westward, towards the New Jersey shore, in the hope that the storm might abate, or the wind shift, or that she might be able to pass Barnegat and avoid the pressing danger of foundering, she being wholly unable, in the judgment of her master, mate and crew to bear up against the wind. She was put before the wind, with sail reduced, so far as possible, to diminish her speed, and so continued until after midnight. Instead of abating, the storm had increased, and the waves ran high, breaking, at times, over the vessel, the gale being more violent than the master and mate, who had long experience, had ever known on this coast. At about one o'clock, when off and opposite the New Jersey shore, their peril and the conduct which was determined upon, appears in the testimony of the master and mate to a consultation between them, heard by the crew and dissented from by no one, as follows: Thus, the master says: "As the wind was increasing, and no immediate prospect of a shift, I called the mate to me and consulted him about what was to be done to keep the vessel off the beach. I asked him whether he thought it would be a possible thing for the vessel to come up by the wind. He said, that, in his opinion, if the vessel was attempted to be handled in that way, she would surely knock on her beam, and he thought that the best thing that could be done, for the safety of the vessel and cargo, would be to run her high up on the Jersey beach. My opinion before this, and I had come to the conclusion before consulting the mate, was, that, if the vessel was attempted to be brought to the wind, she must roll over, with the sea we had. It was decided to let the vessel go before the wind, unless something different should take place before striking, and let her go head up on the beach as high as possible. * * * I believe that if the attempt had been made to bring the vessel up to the wind, the crew would most likely all have perished. * * * Her course might have been changed a point or two, but an attempt to bring the vessel up to the wind would have resulted in her rolling over immediately." Again, the mate says: "He thought an attempt to get the vessel by the wind would result in her being thrown on her beam's end immediately. I don't undertake to state the precise language, but I spoke something like this—I said, it's hard lines to run a man's vessel on top of the beach, knowing she was going there. He said he thought it was best for all concerned, that the vessel be run on the beach as high as possible, and even proposed trying to get some more mainsail, to drive her further, so that she could go as high up as she would, saying, that an attempt to do otherwise would almost surely result in loss of life. * * * In my opinion, it would have been both imprudent and useless to have hoisted the sails. It could have been no benefit to us, unless, after hoisting the sails, we had hauled up by the wind. In that case, in my opinion, she would have gone over." The mate says: "Finding that the wind did not die out, but increased, with a higher and sharper sea, and we supposing we were nearing the beach, and there being no prospect of a shift, the captain again asked me, if, in my judgment, there was anything could be done, and if I thought it was a possible thing to get the vessel by the wind. I replied, that I did not, and, that, in my judgment, if the vessel was attempted to be brought to the wind, it would terminate in making an immediate wreck of the vessel and loss of life. He said it was hard to run a man's vessel on the beach, knowing that you were doing so. I told him I knew that, but, of the two evils, it was best to choose the least, and it would be my advice to run her as high on the beach as possible, unless there was a change. He replied, that he didn't see anything else he could do. The vessel was, accordingly, kept directly before the wind and sea. All preparations were made for going on the beach, if we didn't have a shift. We didn't have a shift. The vessel was run high up on Squam beach. * * * I expressed the opinion that it would be impossible to do anything else except go before the wind. * * * I told him, that, if there was no change, it was my opinion that we would have to run the vessel ashore." Other testimony from the master, the mate, and the crew shows that the peril was most imminent, and that the opinions thus expressed were the actual judgment of all, and that the facts thus detailed were true. The case presented was, therefore, this: The vessel and cargo were in imminent peril. In the judgment of her master, mate and crew, they could not be delivered from that peril, and their total loss could not be avoided, by any means in their power except by continuing her course before the wind, as she was then running, and so driving her upon the beach. Any attempt to do otherwise would, in their judgment, produce an immediate foundering of the vessel and the loss of the lives on board. This states the case strongly in favor of the claim made herein by the counsel for the claimants, a little more strongly, perhaps, than is conceded by the libellants, but is the just inference from all the testimony; and I think the evidence warrants the conclusion of fact, that, if the vessel had not been run on shore when and where she was, she would have foundered, with a total loss of vessel, cargo and crew, or have been driven on shore elsewhere, the result of which is entirely uncertain. Hereupon, it is insisted in behalf of the claimants, that there was no voluntary stranding of the vessel; that all that was done was to

submit to an inevitable disaster; that there was no election to do anything; that good seamanship required the master to do as he did, and he did nothing more than good seamanship required; that there was not, in fact, any sacrifice to be made, but the simple inquiry was as to the best mode of meeting the inevitable peril; that the idea of sacrificing the vessel was not in their minds, but only the question, by what skill and judgment, as seamen, the consequences of the peril could be made least disastrous to all who were interested; that a voluntary stranding presupposes some dominion of the master over his vessel, in which he may choose, whether to encounter the risk in which he is involved, and struggle on, accepting the chances of deliverance, or, on the other hand, to make a present sacrifice of the vessel, for the benefit of the other property, or, at least, to subject it to some new peril which he has it in his power to avoid; that her loss was certain, as the vessel must founder, or go on shore where she did, or go on shore at some other and uncertain place on the coast; that, therefore, the stranding here lacks the essential element without which the claim to contribution cannot exist, namely, an actual choice to cast the peril upon a portion of the property involved in the peril, in order that the residue may be saved; that here nothing was in fact done; and that the course of the wind and sea was submitted to, because the chance of saving life and property was greater than could be found in any effort they could make, or in short, because any effort they could make involved the destruction of all.

Doubtless, there is a distinction somewhere between the wreck of a vessel and cargo, in spite of any and every effort of her officers and crew, in the progress of which, at some moment, they give up all effort in despair, and the stranding of a vessel as a choice of evils, one of which is apparently inevitable; and, if the present is a case of voluntary stranding, within the just meaning of the law on that subject, it is not very clear where that line is to be drawn. When stranding is in fact inevitable, its effect on the rights of those interested cannot depend upon the state of mind of the master, or whether he comes to the conclusion sooner or later that it is inevitable and that he will do nothing to prevent it because he cannot do anything with any hope of success. Here, however, although the master and mate acted in the belief that what was done was best for all who were interested, they had an alternative, unpromising to be sure, and, in their judgment, fatal to the interests of all concerned, and, in view of that, they chose a peril to which, in that place and manner, they were not compelled to submit; and they did so in the belief that the interests of all concerned in life and property demanded it. While it seems to me that the case is on the extreme limit to which the definition of a voluntary stranding, within the rule giving contribution in general average, should be carried, I am constrained to say that the decisions of the supreme court of the United States require me to hold that it is within that definition, and to regard the struggle of the claimants here as an effort to open the discussion of those cases.

In Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331, the special verdict upon which the case was heard found, in terms, that, in the situation in which the vessel was before she was run on shore, the captain, "finding no possible means of saving the vessel or cargo and preserving the crew, slipped his cables, and ran her on shore, for the safety of the crew and preservation of the vessel and cargo." The vessel was a total loss, and the owners were held entitled to contribution from the owners of cargo saved, in general average. The case, as stated in the special verdict, cannot easily be distinguished from the one now before the court. But, although this fact, that, but for the running on shore, there was, in the judgment of the captain, no possible means of saving vessel or cargo, was in the verdict and was dwelt upon in the argument, it did not influence the decision adversely to the owners. The point chiefly considered by the court was, whether there could be contribution in general average for a voluntary stranding, when the vessel itself was lost, and the court, with all the facts in the special verdict before them, held such contribution proper.

The point now raised was the chief subject of discussion, and was very distinctly decided, in Barnard v. Adams, 10 How. [51 U. S.] 270, in which the marginal note states very accurately the decision, thus: "It was a proper case for contribution, in general average, for the loss of a vessel, where there was an imminent peril of being driven on a rocky and dangerous part of the coast, when the vessel would have been inevitably wrecked with loss of ship, cargo and crew, and this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured." The arguments earnestly pressed in that case were not unlike those employed here, but they were overruled.

The Star of Hope, 9 Wall. [76 U. S.] 203, is in general affirmance of the same doctrine, although other points were involved.

Whatever I might think of the rule, that there could not be, in any sense whatever, a voluntary stranding bearing any similitude to jettison or voluntary exposure to new or different perils from those then impending, where the present condition of the vessel was absolutely hopeless and no chance of saving the vessel existed, by stranding or otherwise, I am wholly unable to withdraw the present case from the influence of the cases above cited. There has been much conflict of opinion upon the questions involved, and my pow-

er of discrimination is not acute enough to enable me to say that what is settled in those cases does not cover the present case.

On the question, whether the vessel was seaworthy when she left New Orleans, I concur with the district court in the opinion that the preponderance of the evidence is, that she was in suitable condition for the voyage.

It is insisted that the vessel was estimated at too high a valuation, and that, in making an allowance for her value, in the general average, a deduction of one fifth should have been made for presumptive deterioration. The true rule on this subject is, to take the value of the ship as she was when the stranding was determined upon, assuming, of course, for the purpose of the estimate, that she was then safe. In her condition of peril, it might be said she had no real value, but her then peril is not to be taken into view. This rule would make all just allowance for deterioration on the voyage, however caused, and is the whole extent of the actual or theoretical sacrifice or loss by the owners for the common benefit; and, where the proof of value relates to some prior period, as at her port of departure on that or any prior voyage, it would be proper to make just allowance for deterioration. Unfortunately for the point made on this appeal, the only proof laid before the commissioner was the estimate of the master, that she was worth "about twenty thousand dollars," and that "she would have sold for that, easy enough." The time to which this refers is not expressly stated. Its connection would seem to indicate that he was speaking of the time when he decided to run her on the beach, though it is not explicit. If neither party saw fit to offer further or other evidence, and the claimants thought proper to leave that estimate to the commissioner, without cross-examination or explanation, I think the commissioner cannot be said to have erred in adopting that sum as the value to be assumed for the purpose of contribution.

The decree must be for the libellants, in accordance with the decree of the district court, with costs of the appeal.

EIGHT HUNDRED BALES OF COTTON (FITZPATRICK v.). See Case No. 4,843.

EIGHT HUNDRED BARRELS OF SPIRITS (UNITED STATES v.). See Case No. 15,035.

EIGHT HUNDRED CADDIES OF TOBACCO (UNITED STATES v.). See Case No. 15,036.

EIGHTY-FIVE HOGSHEADS OF SUGAR (UNITED STATES v.). See Case No. 15,037.

EIGHTY-NINE BALES OF COCHINEAL (CHACON v.). See Case No. 2,568.

EIGHTY-TWO PACKAGES OF GLASS (UNITED STATES v.). See Case No. 15,038.

Case No. 4,320.

EINSTEIN et al. v. GOURDIN et al.

[4 Woods, 415.][1]

Circuit Court, S. D. Georgia. Nov. Term, 1877.

PARTNERSHIP BY CONTRACT AND BY IMPLICATION OF LAW—COMMUNITY OF PROFITS.

1. A contract between the firm of K. & H., carrying on a banking and brokerage business in Savannah, Georgia, and S., of Quincy, Florida, whereby the latter agreed to open a store in Quincy for the sale, for cash, or its equivalent in salable commodities, of goods belonging to K. & H., and to devote his whole time to the business, and in consideration for his services S. was "to be entitled to have and receive an amount of money equivalent to one-half of the net profit on the sales actually made," does not provide for such a community of profits as would by operation of law constitute a partnership, as to third persons, between K. & H. and S.

2. A charge not applicable to any evidence in the case is properly refused.

3. A partnership, as to third persons, can only arise either by contract between the partners themselves, by implication of law arising from a contract which does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists.

[Error to the district court of the United States for the southern district of Georgia.]

This suit was brought by the defendants in error [R. N. Gourdin and others], as the assignees in bankruptcy of Ketchum & Hartridge, to recover the value, alleged to be $1,133, of certain goods and merchandise which it was charged that Ketchum & Hartridge had, when insolvent and contemplating insolvency, and within four months of their adjudication as bankrupts, transferred and delivered to the plaintiffs in error [Einstein, Eckman & Co.], who were creditors of said firm, with a view to give them a preference, they, the said defendants in error, having, at the time of said transfer, reasonable cause to believe, and in fact well knowing, that Ketchum & Hartridge were insolvent, and that the transfer was made in fraud of the bankrupt act. On the trial of the cause in the district court, the jury returned a verdict for the plaintiffs for the sum of $1,100 and interest from the commencement of the suit, on which the court rendered judgment. To reverse this judgment, this writ of error was brought.

The bill of exceptions showed that on November 27, 1872, the bankrupts, as partners under the firm name of Ketchum & Hartridge, of Chatham county, Georgia, entered into a contract in writing of that date, with one Alexander L. Smith, of Quincy, in the state of Florida, of which the following is a copy: "State of Georgia, County of Chatham: This agreement, made and entered into on this, the 27th day of November, 1872, between Miller Ketchum and Alfred L. Hart-

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

ridge, copartners, using the firm name and style of Ketchum & Hartridge, of said state and county, of one part, and Alexander L. Smith, of Quincy, county of Gadsden, and state of Florida, of the other part, witnesseth, that the said Smith agrees to open a store in said Quincy at once, for the sale of goods belonging to the said parties of the first part, and to devote his whole time and energies to the sale of said goods, for cash, or its equivalent in salable commodities, only as the agent of and for the said parties of the first part. It is agreed that in consideration of the services of the said Smith in selling and disposing of said goods, wares and merchandise, he, the said Smith, is to be entitled to and to receive an amount of money equivalent to one-half of the net profit on the sale of the same actually made, and this agreement to be binding for six months. The said parties of the first part agree that they will keep up the said stock of goods, wares and merchandise in their said store to an amount estimated on the cost value of the same not exceeding $4,000, goods to be forwarded to said store from time to time as the exigencies of the trade in said Quincy may require, up to said limit. The said Smith agrees, as such agent, to render to his said principals, the parties of the first part, monthly statements of stock on hand in said store, weekly returns of sales of said goods, and to remit proceeds of the sales of the same to his said principals at the end of each and every week. The said Smith also agrees, in connection with the above business, to solicit consignments of cotton to said parties of the first part as factors, and for such services is to receive the usual and customary return commission. In witness," etc.

To secure the faithful performance on his part of the said contract, Smith executed and delivered to Ketchum & Hartridge a bond with sureties in the penal sum of $5,000.

Ketchum & Hartridge were a firm carrying on a banking, exchange and brokerage business in Savannah, Georgia. They were not engaged in the dry goods business in any place save in the town of Quincy, Florida, where the said Smith had opened a house for the sale of dry goods under said contract with them. The contract had never been made public, nor had its contents been disclosed to the plaintiffs in error or either of them. Smith had, as agent for Hartridge & Ketchum, bought from the plaintiffs in error dry goods to the amount of $1,134 on March 8, 1873, and on that day, as agent, drew a draft on Ketchum & Hartridge for said amount in payment for goods. The draft was accepted by Ketchum & Hartridge. The following is a copy of the draft: "Savannah, March 8, 1873. Four months after date, pay to the order of Einstein, Eckman & Co., eleven hundred and thirty-four dollars, and charge same to account of A. L. Smith, agent. To Ketchum & Hartridge, Savannah, Ga."

Before this draft fell due, to wit, on April 10, 1873, Ketchum & Hartridge became insolvent, and their insolvency was generally known throughout Savannah, where the plaintiffs in error carried on business. Ketchum & Hartridge were adjudged bankrupts in June following. Soon after the insolvency of Ketchum & Hartridge was known one of the plaintiffs in error called on them about the payment of said draft, and proposed that if the draft could not be paid in money it should be paid by a restoration of the goods bought from the plaintiffs in error. Ketchum & Hartridge thereupon gave the plaintiffs in error an order upon Smith for goods to the value of said draft. The draft was returned to Ketchum & Hartridge, and the plaintiffs in error received from Smith at Quincy, Florida, goods to the value of said draft, some of which had been purchased from them and some had not. At the time of this transaction it was well known to Smith and to the plaintiffs in error that Ketchum & Hartridge were insolvent. When Smith gave his draft on Ketchum & Hartridge, as agent to the plaintiffs in error, they charged the goods on their books to A. L. Smith, agent, but Smith did not directly disclose for whom he was agent. Hartridge, of the firm of Ketchum & Hartridge, and Smith, both testified that the goods at Quincy, Florida, which were in the possession of Smith, were the property of Ketchum & Hartridge, and that the business was carried on by Smith in strict accordance with the terms of the contract, and was not in any respect carried on otherwise, and there was no contradictory testimony on these points.

On this state of facts the district court charged the jury that the compensation provided for Smith in the said contract between him and Ketchum & Hartridge was not such a community of profits as would, by operation of law, constitute a copartnership as to third persons between Smith and Ketchum & Hartridge. The court refused to charge, as requested by plaintiffs in error, "that at common law a simple community of profits will constitute a partnership." The court also refused to charge, as requested by plaintiffs in error, "that if there was a partnership in Florida between Ketchum & Hartridge and Smith, and a partnership in Savannah between Ketchum & Hartridge only, engaged in a different character of business, that the two partnerships were distinct, and that the stock and assets of the Florida partnership would be first subject to the payment of the debts of the Florida firm, before any portion could be subjected to the payment of the debts of the Savannah firm." The charge given, and the refusals to charge as requested were assigned for error.

S. Yates Levy and R. E. Lester, for plaintiffs in error.

Geo. A. Mercer, for defendants in error.

WOODS, Circuit Judge. 1. The charge given by the court, and complained of as erroneous, was correct. The contract between Smith and Ketchum & Hartridge was plainly intended to make Smith the agent, and not the partner, of Ketchum & Hartridge. As between the parties to the instrument, this was undoubtedly its effect. There was no such community of profits as would make the parties to the contract partners. Story, Partn. §§ 23, 32, 33, 35, 36; Code Ga. § 1890; Sankey v. Columbus Iron Works, 44 Ga. 228; Bradley v. White, 10 Metc. (Mass.) 303; Berthold v. Goldsmith, 24 How. [65 U. S.] 536; 3 Kent, Comm. marg. p. 33.

2. The first charge refused was properly refused. The only evidence to show on what terms Smith carried on the business for Ketchum & Hartridge is found in the contract between these parties, and there was no evidence to show that Smith had received any compensation whatever from Ketchum & Hartridge except according to the terms of the contract. The charge requested was therefore not applicable to any evidence in the case. It was purely abstract, and its only tendency could be to mislead the jury, and it was therefore properly refused. Schuylkill & Dauphin Imp. & R. Co. v. Munson, 14 Wall. [81 U. S.] 442.

3. There was no evidence in the cause to which the second charge requested was applicable. There is nothing in the record to show that there was a word of proof tending to establish a partnership between Ketchum & Hartridge and Smith in Florida. The contract which was put in evidence clearly showed that as between the parties themselves, and as to third persons, there was no partnership. Was there any act or declaration of either Ketchum & Hartridge or Smith by which they held themselves out to the plaintiffs in error or the public as partners? There is none such disclosed by the record. If Smith, without disclosing his principals, had gone to the plaintiffs in error and purchased of them a stock of goods, he might have made himself liable as principal, but this would not have made him a partner of his principals. A partnership, as to third persons, can only arise either by contract between the partners themselves, by implication of law arising from a contract which does not make them partners as to each other, but does make them partners as to third persons, or by some act or declaration of the partners by which third persons are reasonably led to suppose that the partnership exists. There was no evidence in the record tending to show by either of these meth ods a partnership between Ketchum & Hartridge and Smith, either in Florida or anywhere else. The second charge requested was therefore not applicable to any testimony in the case, and was properly declined. There is no error in the record. The judgment of the district court is therefore affirmed.

EINSTEIN (JENKINS v.). See Case No. 7,265.

Case No. 4,321.

EISEMAN v. JUDAH et al.

[1 Flip. 627;[1] 4 Cent. Law J. 345.]

Circuit Court, W. D. Tennessee. Feb. 23, 1877.

LIFE INSURANCE—CHANGE OF BENEFICIARIES—ALLOWANCE OF TIME FOR SUCH PURPOSE—WILL—POWER OF APPOINTMENT.

1. If a policy be payable to the wife of the assured at his death, she being then living, but, if not, to her children, and a proviso be inserted "that in case of the decease of the wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy"—such substitution must be made upon the decease of the wife, or within a reasonable time thereafter. After the date fixed for the next ensuing payment of premium it cannot be made.

2. The power thus conferred on the assured of substitution is not executed by a bequest in his last will, made a year after the death of the wife, in which the attempt is made to give and bequeath the policy in question, with three others, none of which were a part of his personal estate.

J. O. Pierce and H. F. Dix, for A. Judah et al.

L. & E. Lehman, for guardians.

TRIGG, District Judge. This is a controversy over a portion of the proceeds of a policy of insurance on the life of one Emanuel Ackerman, issued by the Globe Mutual Life Insurance Company of New York, October 19, 1870, for the sum of $5,000, premiums on which were payable semi-annually on the 12th days of October and April in each year during the life of the insured. The policy was payable at the death of Ackerman to his wife Ellen, if then living, or, if not living, then to her children; with the proviso, "that in case of the decease of the wife during the lifetime of the assured, the said assured may, at his option, substitute any other beneficiary under this policy." Ellen Ackerman died in the year 1872, leaving five children, to-wit: Delia and Carrie, the issue of a previous marriage, and Emma, Rosa and Jacob, the issue of her marriage with the insured. The three latter are minors, and their regular guardians, B. Eiseman and G. H. Judah, are the complainants in the original bill. Delia, now the wife of Abram Judah, and Carrie, now the wife of Leo Judah, are, with their husbands, complainants in the cross-bill. Emanuel Ackerman died Ocober 15, 1873. His last will, executed October 11, 1873, contains this clause: "My life being assured as follows: Globe Mutual Life, of New York, $5,000; Newark, of New Jersey, $5,000; New York Life, $5,000; Northwestern, paid up; * * * the above amount of $15,000 and over, I wish divided among my three children, as follows: $5,000—Emma Ackerman,

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

five thousand; $5,000—Rosa Ackerman, five thousand; $5,000—Jacob Ackerman, five thousand; the remainder I will and bequeath to my brother, Jacob Ackerman, in Germany, the sum of $300—three hundred dollars." No other act of Ackerman, except this provision of the will, is set up as an attempt to execute the reserved power of substitution of a new beneficiary under the Globe policy. The policy in the New York Life Insurance Company was payable "to Ellen, wife of Emanuel Ackerman, and children, share and share alike, or their legal representatives." The policy in the Mutual Benefit Life Insurance Company of Newark was payable to the said Ellen, if living; but, if dead, then to "their children." The policy in the Northwestern Mutual was payable to "Ellen Ackerman, his wife, and his children by her, share and share alike." The defendants, Delia and Carrie Judah, have received their two-fifths share of the New York Life policy, without question made by the guardians of the minors. The first semi-annual premium, which fell due after the death of Ellen Ackerman, to-wit, on April 12, 1873, was paid by Emanuel Ackerman. The next premium, which fell due October 12, 1873, was paid by Abram Judah, on behalf of himself and his wife, Ackerman being then ill, and upon his dying bed. It is contended by the guardians of the minor children, that the clause of the will above referred to operated as a sufficient appointment of a new beneficiary, and a valid execution of the power of appointment; and this is the question now to be considered.

1. Was the supposed execution of the power of appointment, by will, interposed in time to affect the rights of the defendants, if otherwise sufficient? Although the cause has, in the argument of counsel, been treated as a case of an ordinary power of appointment, I am unable to determine this question with reference to any of the authorities cited in behalf of the construction contended for by complainants. In this case, Ackerman had not the slightest personal interest of a pecuniary character in the policy, although it insured his own life. The rights of the children of Ellen Ackerman, as beneficiaries under the policy, vested immediately upon her death. It cannot be considered that there was even a moment of time, after her decease, during which the beneficial interest in the insurance was in want of an object on which to rest. We cannot suppose it floating about in nubibus, waiting for a person or an object upon which it might rest, to be supplied by the act of Emanuel Ackerman, or otherwise. All the authorities upon life insurance agree that the rights of the children of the wife, in such cases, become, upon the death of their mother, vested rights in the fullest sense of the term. This is not, then, a case in which, like most cases of appointment under a power, no reason can be assigned for an immediate execution of the power, so that the whole life-time of the donee of the power is allowed for its execution. Here there are reasons for a prompt execution; for, if the power be executed, the rights under the policy already existing are to be taken away. Within what time, then, will the law allow the act of Ackerman to take away the rights thus already vested, by the death of his wife, in her elder children? This period cannot be indefinite. Justice and equity require that the power thus conferred shall be exercised at some precise time, in order that the fact of its exercise may be duly made known to all persons interested; and no further latitude can be allowed to the donee of the power, than to give him a reasonable time within which he shall act under it, if at all. This reasonable time may well be the period ending with the next ensuing payment of premium. At that date the policy will lapse by its own terms, unless a new premium is paid. Such payment will continue the policy in force, and will thus be, in some sense, the making of a new contract. The beneficiaries may well wish to know whether the policy is to continue in force for their benefit, or whether their interest is to cease. If the divestiture of their rights by the appointment of a new beneficiary could be accomplished a year after those rights accrued, it might equally well be postponed for twenty years, during which time the beneficiaries might pay forty semi-annual premiums, instead of one, as in this case. I am constrained to hold the provision for such an appointment, "in case of the decease of the wife," to mean "upon the decease," indicating that event as the proper time; and to treat the time of the next succeeding payment of premium as the latest hour which can equitably be allowed for a divestiture of rights theretofore existing. The time of the execution of Ackerman's will was too late for the appointment, conceding that the provisions of the will were otherwise sufficient.

2. But I do not construe the will as an execution of the power. The testator treated as his own property four policies of life insurance, all which belonged to the children of his wife. Two of them were in law the property of his own three children, and in the two others the defendants were also beneficiaries. None of these were subject to his bequest, yet he attempted to bequeath them all. No reference is made to the power of appointment reserved in the Globe policy. It is true that policy is referred to by name; and, under some of the authorities, a plain and unambiguous reference to the subject of the power has been held sufficient to treat the devise or bequest of the property as an execution of a power of appointment. But in all cases to which the attention of the court has been called, the intention of the testator has been the objective point of inquiry and construction. It is impossible to impute to this testator an intention to execute this power. His intention, on the contrary, clearly was to bequeath this particular policy,

with others, as a part of his personal estate. This controlling intent is inconsistent with any idea of an execution of the power. Without giving any other construction to any part of the will, the construction contended for by complainants must be refused.

These considerations render unnecessary any reference to the other legal and equitable questions raised by the defendants. It follows that the defendants, Abram, Delia, Leo and Carrie Judah are entitled to two-fifths of the proceeds of the Globe policy, which will be paid to them by the guardians of the minors, who collected the same under decrees made in this cause. The last semi-annual premium paid on the policy by the defendants, and the costs of the cause, will in like manner be equitably apportioned between the parties.

NOTE. The editor of the Central Law Journal, June 30, 1876, is to be credited with the subjoined note, which throws additional light on this intricate subject:

1. This case presents some elements of an estoppel, and possibly the judgment of the court might have been well based on the doctrine of equitable estoppel. Irrespective of the question of the time to be allowed the insured for the execution of the power of substitution, he seems, by the payment of a semi-annual premium after the death of his wife, without attempting to execute the power, to have evinced his election not to execute it. If it was in reliance upon this act of the insured, and in acceptance of the benefits thus continued to them, that the beneficiaries made the payment of the last premium, they might clearly have relied on the doctrine of estoppel, as laid down by Lord Denman in Pickard v. Sears, 6 Adol. & E. 469, and applied in this country in, among other cases, notably, Dezell v. Odell, 3 Hill, 215, and Decherd v. Blanton, 3 Sneed, 373. The principle laid down in Brant v. Virginia Coal & Iron Co. [93 U. S. 326], and the accompanying note, demands constructive fraud, "either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up," as a necessary feature of equitable estoppel. Such constructive fraud will be found in the attempt here made to claim for the children of the testator an interest in the policy greater than that which the defendants were led to believe existed when they paid the last premium.

2. The doctrine of vested rights in the privileges secured by the policy is well settled in favor of the children of an insured wife. Mr. May, at section 392, treats of their rights as vesting immediately on the delivery of the policy, and says: "Where the policy is issued to the wife, payable to her, or, in case of her death before her husband, to her children, the husband cannot, after her death, surrender the policy and take out a new one for his own benefit. All the cases proceed on the ground that when the policy is issued the rights are vested, and cannot be divested without the consent of those to whom they are secured." The rights of children so vested have been protected by the courts in Gould v. Emerson, 99 Mass. 154; Fraternal Ins. Co. v. Applegate, 7 Ohio St. 292; Chapin v. Fellowes, 36 Conn. 132; and Continental Life Ins. Co. v. Palmer (Conn.) 5 Ins. Law J. 307.

3. No case has heretofore been reported where the policy, as in this case, contained an express provision for a divestiture of vested rights by a change of beneficiaries. In respect of this question, the principal case is one of first impression. The insured husband was allowed, after the death of his wife, to change the beneficiary, in Gambs v. Covenant Mut. Life Ins. Co., 50 Mo. 44; but this was where no rights had, by the death of the wife, vested in children or others. So in Roberts v. Roberts, 64 N. C. 695, the court sustained a by-law of the insurer, allowing the insured to appoint an executor to disburse the proceeds to the beneficiaries, a proceeding in aid rather than in avoidance of vested rights. And in England, where under the friendly societies' act it was the custom for the insured member to nominate a beneficiary, and he had power to revoke his nomination and make a new one, this was allowed because of the existing and continuing ownership of the member over his own policy during his life. See Buny. Assur. 151–153. The court, in the principal case, in suggesting that the insured might make such change at the time of paying an annual premium, has doubtless gone as far toward allowing an arbitrary divestiture of rights, once vested under the contract, as any court would feel authorized to go.

4. The court has followed the main current of the authorities in looking to the whole of the will, in order to discover the testator's intention, if any existed, of executing the power. The general rule is well known, that in construction of a will the intention of the testator is to govern, as gathered from all parts of the will. 1 Redf. Wills, 431–434; Allison v. Chaney, 4 Cent. Law J. 239. The same rule is applied when the question is, whether a power has been executed by the will. In Sugd. Powers, 369 et seq., many cases are collected, showing that Lord Alvanley, Sir William Grant, and other chancellors, have laid it down repeatedly and uniformly that "it was always a question of intention whether the party meant to exercise the power or not." Page 372. In 4 Kent, Comm. 335, the rule is announced that, if construction can be given to the will without taking it as an execution of the power, it will not be so taken in doubtful cases; and this is the rule approved by Mr. Perry in his work on Trusts (section 511c, 2d Ed.). The precise question is, can any other intention than that of executing the will-power be imputed to the testator? Bradish v. Gibbs, 3 Johns. Ch. 551; Blagge v. Miles [Case No. 1,479]. So it will be found that in all the leading cases on the subject, the courts have been astute to first discover, and then be guided by, the intention of the testator as to an execution of the power. For example, in Croft v. Slee, 4 Ves. 60, the master of the rolls found, on examination, no intention apparent from the will to execute the power of appointment, and so the power was held not to be executed. A similar conclusion was reached in Pomfret v. Perring, 5 De Gex, M. & G. 775. A late and leading American case is White v. Hicks, 33 N. Y. 383, where the rule is clearly stated, and is illustrated by reference to many cases. There, the court construed the whole will together in the light of extraneous circumstances, which were looked to as evidence, not of what was the testator's intention in the will, but of what influences may have swayed the testator. Applying the rule above cited, the result is reached in this case that an intention existed to execute the power. But it is apparent in all the cases that the court always follows this rule as a polar star, let it lead in whichever direction it may.

5. A singular and important case, in which a slightly different aspect of the question of execution of a power is presented, is Cooper v. Martin, 3 App. Cas. 47. It is worthy of attention in connection with the principal case, inasmuch as, like it, it treats of the time within which a power should be executed, and uses a similar argument ab inconvenienti. A power of appointment was to be exercised within a certain period of time. The donee of the power within that period executed her deed-poll, making an appointment under the power, but reserving a power of revocation, and afterwards, and by her will, executed still within the prescribed period, she made another appointment

in distinct terms. But she died after the time had expired, and it was held that the will, not taking effect till her death, had no power to effect a revocation of the appointment by deed, or to make a new appointment. Lord Cairns, L. J., said: "The power given to the widow was to be exercised by her before the youngest son attained twenty-five. The reason for this appears obvious on the face of the will. The residuary personal estate was to be distributed at that time; and, although the life estate of the widow in Pain's Hill might, as to it, postpone the sale and distribution to a later period, it was clearly in the highest degree desirable that at the period when the residuary estate should become divisible the children of the testator should know definitely what were their vested and transmissible rights in all his property. The time within which an appointment was to be made by the widow was, therefore, in my opinion, not a matter of form, but of the substance and essence of the power." And Sir John Rolt, L. J., said: "The will would not operate as any such execution of the power till the widow's death. It is nothing that the will bears date within the time. It was intended to be ambulatory, and the law must assume that the donee of the power did not intend that it should operate as an execution of the power till her death." This accords with the doctrine of Redf. Wills, 379, that a will takes effect only at the death of the testator, and speaks from thence. But a contrary opinion was advanced by Chancellor Cooper, of Tennessee, in Williams v. Corson, 2 Cent. Law J. 520, where it was held that the will of an insured, disposing of his own life policy, although "not practically operative until after death," yet had the effect, under the statutes of Tennessee, to so dispose of the policy prior to the death as to cut off the rights of his wife, which would otherwise have been called into existence by the force of the statute at the time of his death. This was upon the theory that, "it is the execution in life that gives effect to a will or deed, and the time when the donee goes into possession or reaps the actual benefit, is a mere incident."

Case No. 4,322.

EISEMAN v. MAUL.

[12 Chi. Leg. News, 112.]

Circuit Court, D. Iowa. Nov. 24, 1879.

TROVER — EVIDENCE OF TITLE — POSSESSION — FRAUDULENT SALE—ATTACHMENT—BANKRUPTCY —ASSIGNEE, RIGHTS OF.

1. In an action of trover to recover damages for the conversion of goods, the plaintiff must prove title as against the world when his title is denied.

2. That possession at the time of the seizure is prima facie evidence of ownership, and the burden of proof is upon the defendants to overcome, by proper evidence, the legal effect of such possession.

3. That it was proper for the defendants to show that the title and right of possession was in the assignee in bankruptcy of the plaintiff's vendor.

4. That the assignee in bankruptcy was entitled to the possession of the goods, if the sale to plaintiff was not bona fide, and the defendants being creditors of the plaintiff's vendors, had an interest in the goods, if they were part of the bankrupt's estate. That the evidence tended to show the goods, notwithstanding the sale, belonged legally to the estate of plaintiff's vendors. By the proceedings in bankruptcy the title vested in the assignee.

5. That the title, as against the attachment, by operation of law vested in the assignee before the plaintiff commenced this suit. That the issue before the jury was the validity of the sale under which the plaintiff claimed title not the right of the defendants to interfere with the plaintiff's possession by his attachment proceedings.

This suit is brought to recover damages for the conversion of personal property. The firm of A. Bernard & Co. sold and delivered to the plaintiff their stock in trade, and while the goods were in transit to Council Bluffs, Iowa, they were seized at Omaha, Nebraska, under a writ of attachment issued at the instance of the defendants, who were creditors of the firm. A. Bernard & Co. were adjudicated bankrupts within sixty days after the sale to plaintiff. The defendants were notified by the assignee in bankruptcy that he claimed the goods and made a demand. The defendants dismissed their attachment suit, but the goods were not delivered, for the reason that the sheriff serving the writ had writs of attachment in suits of other creditors. The plaintiff brings this suit for conversion of the goods by defendants. The answer of the defendants puts in issue the title of the plaintiff, and alleges the sale fraudulent in fact, and also void under the bankrupt law [of 1867 (14 Stat. 517)]. The jury found a verdict for defendants. A motion is made for a new trial.

Clinton, Hart & Brewer, for the motion.
C. C. Cole, contra.

NELSON, District Judge. To sustain this action, which is substantially the old common law action of trover, the plaintiff must prove title. The defendants have put this in issue by their pleadings, and the plaintiff is required to show affirmatively that he is the owner. His possession at the time of seizure is prima facie evidence of ownership, and the burden of proof is upon the defendants to overcome by proper evidence the legal effect of such possession. The defendants offer to show that the title and right of possession was in the assignee in bankruptcy of the plaintiff's vendor. This evidence was objected to, but the objection was not sustained, and the defendants then proved, or rather introduced evidence tending to show that the plaintiff acquired possession under a sale declared fraudulent by the bankrupt law. It was left to the jury to say whether the sale to plaintiff was fraudulent. This evidence was properly admitted, and, if true, effectually established title to the goods in the assignee, and defeated the plaintiff's claim. The weight of authority is in favor of the admissibility of such evidence. The plaintiff in this action being required to show title when his ownership is impeached, by proof that the transaction under which he can only claim property in the goods is void, he must fail. The assignee in bankruptcy was entitled to the possession of the goods, if the sale to plain-

tiff was not bona fide, and the defendants being creditors of the plaintiff's vendors had an interest in the goods, if they were a part of the bankrupt's estate. The evidence tended to show that the goods, notwithstanding the sale, belonged legally to the estate of plaintiff's vendors, and by the proceedings in bankruptcy the title vested in the assignee. In a case like this, the jus tertii can always be shown, for the defendants, being creditors of the bankrupts, cannot be regarded as strangers. See Leak v. Loveday, 12 Law J. C. P. 65, E. C. L. 1843, and cases cited. The cited cases recognize fully the admissibility of evidence showing title in some third party, when the pleadings put in issue the ownership. See, also, Add. Torts, tit. "Trover." In Cooley on Torts several cases are cited sustaining this doctrine, but the author thinks the general doctrine is too broadly stated. It is true that exceptional cases can be found where it would be unjust to admit such evidence, but the current authority is in favor of the rule, that the plaintiff must show his title as against the world, when it is put in issue. The issue in this case which went to the jury, was the validity of the sale under which the plaintiff claimed title, not the right of the defendants to interfere with the plaintiff's possession by his attachment proceedings. It is urged the testimony shows that the assignee in bankruptcy never obtained possession of the goods, although he gave notice and made claim to them. This fact is not material, for the reason that the issue is one of title, which the plaintiff must establish before he can recover. The controversy is not between two creditors seeking to hold the property of their debtor against the other for the payment of pre-existing debts. The title, as against the attachment by operation of law, vested in the assignee before the plaintiff commenced this suit. Motion for new trial denied.

EISNER (BROADNAX v.). See Case No. 1,909.

Case No. 4,323.

EISNER v. GUARDIAN MUT. LIFE INS. CO.

[23 Pittsb. Leg. J. 158; 5 Ins. Law J. 613; 22 Int. Rev. Rec. 152; 3 Cent. Law J. 302.]

Circuit Court, E. D. Missouri. March 31, 1876.

LIFE INSURANCE — ANSWERS CONTAINED IN THE APPLICATION—"THROAT DISEASE."

The words "throat disease" in any proposal for life insurance construed to mean something more than a temporary inflammation which, at the time the proposal was made, was completely cured.

Action on a policy of life insurance. The proposal and policy contained the usual stipulations that, in case of false answers to any of the questions in the proposal, the policy should be void. Among the questions, the assured was asked whether he had had any of the following diseases, among them "throat disease," which he answered in the negative. There was evidence tending to show that he had been treated for an ailment of the throat a short time before the application was made.

Upon this point DILLON, Circuit Judge, charged the jury as follows: If you believe that the only previous trouble with the throat of the assured was, that in September, 1871, he consulted Dr. Kohlenheyer, and was advised that his larynx was slightly inflamed; that the doctor prescribed for him about three times at intervals of about a week; that the doctor considered it nervous, temporary, and pronounced it cured; and if the assured had reason to believe when the policy was taken he was in good health, and that his throat trouble had been temporary, was cured, and its effect had passed away, and the insurance was procured, and the answer to question 19 given in good faith, then such a throat trouble, temporary in its nature and cured, and its effect gone at the time of the insurance, would not be such a throat disease as would defeat a recovery on the policy. But if you find that it was more than temporary, of a nature to affect the health, the general health of the assured, or was of such a nature as to be ominous of deeper trouble, or calculated to alarm him, then his answer to the 19th question would defeat a recovery.

Verdict for plaintiff.

Case No. 4,324.

The E. K. DRESSER.

[2 Hask. 349.] [1]

District Court, D. Maine. May, 1879.

LANDING GOODS FROM FOREIGN PORT WITHOUT PERMIT—ACT OF 1799.

The carrying of salt by a fishing vessel to the Bay of Chaleur and bringing the same to the port of departure and there landing the same is not bringing goods from any foreign port or place in violation of section 50, of the act of 1799 [1 Stat. 665], even though the vessel touched at a foreign port near the Bay of Chaleur for wood and water.

Libel in rem by the United States to recover the penalty provided by section 50 of the act of congress of 1799, for bringing goods from some foreign port or place and landing the same without a permit. The owners appeared and made claim and answer that they had not brought goods from any foreign port or place.

George F. Talbot, Dist. Atty., for libellant.
William L. Putnam, for claimants.

FOX, District Judge. I am clearly of opinion that there has not been any penalty

[1] [Reported by Thomas Hawes Haskell, Esq.]

incurred by a violation of section 50 of the act of 1799. This section declares "that no goods, wares or merchandise brought in any ship or vessel, from any foreign port or place, shall be unladen or delivered from such ship or vessel, within the United States, but in open day, &c., nor at any time without a permit from the collector and naval officer, if any, for such unlading or delivery; and if any such goods, &c., shall be unladen or delivered from any such ship or vessel, contrary to the direction aforesaid, the master or person having the charge or command of such ship or vessel, and every other person who shall knowingly be concerned or aiding them in removing, storing or otherwise receiving the said goods, &c., shall forfeit and pay severally, the sum of $400 for each offense, and shall be disabled from holding any office of trust or profit under the United States for a term not exceeding seven years."

To bring the cause within this section, it must appear that the goods were brought from a foreign port or place, and that they were unladen without a permit.

Is a fishing vessel which follows the business of fishing solely on the high seas, sailing from and returning to this port, not having made a harbor throughout the voyage, within the provisions of this section? Can she, legally speaking, be said to come from a foreign port or place as understood in this section, when she returns from such a voyage?

This question, in my opinion, is fully and satisfactorily answered by the opinion of Story, J., in The Eliza [Case No. 4,346]. In that case, the boat left Boston with the object of putting certain goods on board a vessel, which it was understood she would fall in with off Boston harbor; and she was accordingly seized for an alleged violation of section 1, of chapter 129, of the act of 1812 [2 Stat. 778], which provided, that if a vessel, owned in whole or in part by a citizen of the United States, shall depart from any port of the United States, "for any foreign port or place," without giving bonds, &c., the vessel and cargo shall be forfeited.

Judge Story, in his opinion on page 7, says: "It is urged that the being bound to the high seas without the jurisdictional limits of the United States is being bound to 'a foreign place' within the meaning of the statute. I consider this construction entirely untenable on principle and authority. It is clear to my mind, that a foreign port or place in the statute means a port or a place exclusively within the sovereignty of a foreign nation. Such has been the construction of the same words in section 3, c. 8, of the act of 1828, by the supreme court of the United States. Such has been the uniform construction in the district and circuit courts of this circuit, in cases where words of similar import have been drawn into controversy, and I shall therefore content myself with a bare expression of my opinion on this point, without entering into the reasons which cogently press it upon me."

The ocean is the great common highway of all nations, and is foreign to none; no nation has any sole and exclusive jurisdiction over it, and a vessel, pursuing her voyage upon the high seas, cannot be said to have been within or subject to any foreign jurisdiction. The course and terminus of the voyage—the port from which she sails and to which she returns, describes and controls the description and character of the voyage which she has pursued.

Does it in any manner change the legal effect that, in the present case, this vessel in the course of her fishing voyage touched at Port Mulgrave, N. S., for wood and water? Does the fact that for this purpose and for this alone she went within a foreign jurisdiction with this salt in her hold, not as cargo, but as part of her necessary outfit, constitute that port a foreign port or place from which the salt has been brought, so as to incur liability to a penalty if landed without a permit? In my view, her touching at Port Mulgrave, in the manner and for the purpose she did, is entirely immaterial, and cannot affect the question. It was strictly a port of call for the very necessaries of life, wood and water, and not for purposes of trade and commerce. This salt in any legal sense cannot be said to have been brought from Port Mulgrave; it was never owned there; it was not bought there, or there taken on board; and, for the purposes of commerce, was never in reality within the jurisdiction of Nova Scotia. Its connection with the vessel commenced when it was taken on board at Portland, and it accompanied and remained with her until it was actually used for curing the fish on her return. The voyage, so far as this article is in question, began and terminated at Portland; that was the place from whence it was taken, and the only place from which it was taken on the voyage, as I consider.

The fact, that this salt was on board the vessel whilst she was thus casually and from necessity in a provincial port, cannot, as I think, justify a construction that it was, within the meaning of this section, brought from a foreign port, any more than it would, in case the vessel, whilst running through the Straits of Canso, had been by the wind or tide set so near the shore, as for a time to be sailing in the waters of Cape Breton or Nova Scotia. Could it with any reason be urged, in such a case, that a permit was requisite because the vessel, with the salt on board, had thus sailed in provincial waters, or had even been compelled to anchor for a time within a short distance of the shore? No one, I think, would insist that a permit was requisite in such a case, and yet the fact would be that the vessel and salt had been within a foreign jurisdiction.

I suppose that invariably fishing vessels in

the Bay of Chaleur are obliged to touch for wood and water at some place on the shores of the bay, or in that vicinity; yet, I believe that this is the first case in which the government has thought fit to contend before the courts, that thereby such vessel had been to a foreign place, so as to require a permit for landing anything then on board, or her cargo which had been caught on the voyage, because, in my view, if a permit was necessary for landing the salt, for the reason that it was brought from Port Mulgrave, for a like reason, a similar permit was required for the fish which were then and there on board, for the salt and fish were there at the same time in the vessel at Port Mulgrave, arriving at and departing from there together.

In common parlance, this vessel would not be described as having come from Port Mulgrave. She was from a fishing cruise, performed on the ocean, beginning and terminating at Portland. Her touching at Port Mulgrave, it must be remembered, was not for the purposes of trade; the salt was not taken there for any such object; but she was in that port only for the moment, and for the very necessaries of life. It would never be said that a vessel from Cuba, with a cargo of sugars, touching at Holmes' Hole for orders only, had brought her cargo of sugars from Holmes' Hole; but all would admit that they were brought from Cuba; and so also, Port Mulgrave could never be understood or described as the place from which this vessel brought this salt, which was on board both when she passed within and without the jurisdiction of Nova Scotia. If she had gone there for the purpose of trade, with a cargo on board to dispose of, had there entered at the custom house and endeavored to sell her cargo, and, for want of a market, had been obliged to return with her outward cargo, it might be claimed that such cargo was brought from such foreign port; but the reason fails entirely, when the vessel does not make the port for trade, but from necessity, neither entering nor clearing at the custom house, remaining only long enough to relieve such necessity, and having no cargo on board in the usual and ordinary acceptation of the word. Libel dismissed.

Case No. 4,325.

ELASTIC TRUSS CO. v. PAGE et al.

[4 Ban. & A. 328;[1] 16 O. G. 1045.]

Circuit Court, D. Massachusetts. June, 1879.

PATENTS—VALIDITY—NOVELTY.

Letters patent No. 70,324, granted to Solon Dike, October 29th, 1867, for a truss and supporter, *held* invalid for want of novelty.

[This was a suit by the Elastic Truss Company against J. A. Page and others for the alleged infringement of letters patent No. 70,324, granted to S. Dike, October 29, 1867.]

F. W. Jacobs and George E. Betton, for complainant.

George L. Robert and John L. S. Roberts, for defendants.

LOWELL, Circuit Judge. This case furnishes a good illustration of the way in which a meritorious invention may be justly defeated, and yet the inventor may have honestly claimed an article of manufacture which he invented and supposed that he was the first to make.

The patent is for a truss made up of a flexible body-brace, to which are attached adjustable pads, and the brace and pads are kept in position by an elastic band passing round the body and another or two others passing under the thigh or thighs.

There are three particulars in which the complainant finds novelty in its truss: First, in making the short body-brace or support, which covers a part of the abdomen, of a certain degree of flexibility, so that it will bend with the movements of the body, but will not wrinkle or bend back upon itself. Second, in fastening the elastic bands with a slot and pin, instead of buckles. Third, in making the pads adjustable.

The defendants deny that the pads of the plaintiff are adjustable, in any proper sense to make them new in the combination. In several of the earlier patents the statement is that the pads are to be adjusted or adapted to the patient, and they are then to be sewed into their proper position. In the patent of Dike the pads are set upon a plate, in which is a hole for a screw, and, in order to adjust a pad, it is screwed upon the part of the body-brace where it should go. It is not adjustable by any contrivance for moving it when once it has been screwed into position, any more than the old pads when sewed into position.

I am inclined to think that a pad and plate adapted to be screwed, though miscalled adjustable, might be a new element in a combination; but this I do not decide. Braces or supporters for the abdomen more or less flexible, elastic bands for the body and the thighs, and fastenings by pin and slot are found in some of the several earlier patents introduced in evidence. If the plaintiff's adjustable pads are not a new element, then the combination is found in Wood's English patent granted in 1859, provided his support or brace, to which the pads are attached, is flexible. He describes his support or brace as "a plate of metal, or of any other suitable material, of such shape and size as will allow of its being comfortably worn," &c., and there is no doubt that a metal plate may be made flexible; but whether Wood knew that flexibility was important and intended his plate to be made flexible, is a fair question.

It is proved by evidence admitted to be

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

true, that a form of truss was made and sold in Boston some years before the date of this patent, which was a modification of what is called the "London Supporter." This article, in its usual form, had a broad flexible band or brace for supporting the abdomen, which was fastened round the body and the thighs by a band partly of leather and partly of elastic webbing. By the witness Richard Palmer, in the employ of Codman & Shurtleff, well-known dealers in this city, there were added to this supporter pads made adjustable, precisely as Dike's are made adjustable, by a plate and screw. The thigh-band was fastened to the plate by a pin and slot, and the body-band was attached to the brace or supporter by buckles. These articles were sold in several instances, and one, which is an exhibit in the cause, was worn for about two years during the late war by Captain Nims, commander of the second Massachusetts battery.

The London supporter, as thus modified, differs from the plaintiff's truss as manufactured by them only in this, that the brace or supporter is made partly of leather and partly of elastic cloth, and that the body-band is fastened to the supporter by buckles, while the plaintiff makes a band of several thicknesses of webbing, which will bend backward and forward, so to say, but will not wrinkle or bend back upon itself, and his body-band, like the thigh-bands in both of the trusses, is fastened to the plate of the pad by a pin and slot.

As to the brace or support for the abdomen, the patent says it should be made of "leather, cloth, or other flexible material." It does not point out the necessity of any exact degree of flexibility. The truss of the London supporter is made of leather and cloth, and is flexible, and there can be no possible question that, if it had not been made before 1867, it would infringe the patent.

With respect to the fastening of the band, the early patents and the London supporter itself prove that a pin or slot was one well-known mode of fastening, as a substitute for the strap and buckle in trusses; and to fasten both bands in this mode when one band of the anticipating truss was so fastened, or to fasten it to the plate of the pad rather than to the brace which holds the pad, which is not proved to make any change in its operation as a band, is not enough to establish a novelty in the Dike combination as compared with this modified London supporter, which, I dare say, was wholly unknown to Dike, but which, so far as the validity and construction of his patent are concerned, he is conclusively presumed to have been conventionally acquainted with, and which, therefore, anticipates and defeats his patent, so far as it is in issue here. There is one detail of his invention which the defendants do not use, and which, for anything that appears in this case, was new. Bill dismissed, with costs.

Case No. 4,326.

In re ELDER.

[1 Sawy. 73;[1] 3 N. B. R. 670 (Quarto, 165); 17 Pittsb. Leg. J. 178; 3 Am. Law T. 140; 2 Chi. Leg. News, 241; 1 Am. Law T. Rep. Bankr. 198.]

District Court, D. Nevada. March 28, 1870.

BANKRUPTCY—PROOF OF CLAIM — PARTICULARS—COIN DEMAND — FRAUDULENT PREFERENCE — STATUTE CONSTRUED.

1. Upon proof of a claim in bankruptcy, the particulars of the consideration must be stated in the deposition.

2. A demand by its terms, payable in gold coin, should be proved according to its terms.

3. Where a creditor has attempted to obtain a preference over other creditors, by fraudulently increasing the amount of his claim, the whole claim will be rejected.

[Cited in Re Hook, Case No. 6,672.]

4. Section 22, Bankrupt Act 1867 [14 Stat. 527], construed.

[Cited in Re Merrick, Case No. 9,463.]

Petition in bankruptcy proceeding [by George Elder], to have claim of a creditor disallowed and rejected.

R. S. Mesick, for petitioners.

T. H. Williams and W. E. F. Deal, for respondents.

HILLYER, District Judge. George Elder was adjudged a bankrupt on his own petition, on the thirtieth day of October, A. D., 1869. On the twenty-fifth of November, Henry Vansickle made proof before the register of a debt against Elder's estate amounting to $17,025.49. No objection to the proof was made before the register. Subsequently, the register being about to transmit the list of claims proved to the assignee, for the purpose of paying a dividend declared, Randall & Fox, two creditors of the estate, petitioned this court to have the claim of Vansickle disallowed and rejected, except as to the sum of $126.20, upon the following alleged grounds, viz.:

1. That the deposition of Vansickle, made in proof of his claim, does not state or set forth any consideration for any portion of said claim, except said $126.20.

2. That said claim is founded in fraud and illegality; in this, that there was not due said Vansickle, at the time of making his proof, from said bankrupt, or said estate, any sum above $6,000, and that this was well known to Vansickle when he swore to his proof.

Upon the day set for hearing, Vansickle, by leave of the court, amended his proof by stating, or purporting to state, a consideration for his claim. To the amended proof, Randall & Fox urge the same objections made against the original.

The objection to the original proof was well taken, and the claim must have been

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

rejected if it had not been amended. The bulk of the claim is evidenced by eight promissory notes, and the statement of the consideration for which the first note was given, is as follows: "That between the thirteenth day of April, A. D., 1865, and the thirteenth day of April, A. D., 1866, deponent sold and delivered to said George Elder, at Genoa, Douglas county, hay, barley and merchandise, and furnished board to said Elder for the agreed price of $2,300 United States gold coin." The consideration of the other seven notes is stated in substantially the same manner.

To entitle a claimant against the estate of a bankrupt, to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation before the proper register or commissioner, setting forth the demand, the consideration, and other matters not necessary to notice now; "and no claim shall be allowed, unless all the statements set forth in such deposition, shall appear to be true." Bankrupt Act, § 22. This proof, if satisfactory to the register, is to be delivered to the assignee, who shall examine the same, and compare it with the books and accounts of the bankrupt and register in a book, "the amount and nature of the debt." Id.

Certainly, the consideration ought to be so stated, that the assignee upon comparing the claim and books, can determine whether the claim proved, and the books agree. And here it is proper to notice what appears to be a serious defect in the bankrupt act. In this case, at the creditor's election, Henry Vansickle was chosen assignee. Now, is it to be expected that, if there be any illegality or fraud in his claim, he would compare it with the bankrupt's books, or apply to the court to have it rejected under section 22, or that, if his claim should be rejected, he would, after appealing, plead and answer his own statement under section 24? It is far more likely that he would make use of his own position to cover up the fraud or illegality, if any there was.

In order to secure perfect fairness and impartiality, the assignee should either be an officer of court, or selected from among other persons than creditors of the estate. But what was the object of the law maker in requiring the consideration to be stated in the deposition? The answer to this will help to ascertain how particular the statement of it must be. One object, no doubt, was to enable the register to say whether it is legal in its nature, and will support a demand or promise. Another, to show him whether or not the demand is unliquidated, and must be ascertained by assessment before its allowance. Another, to afford the assignee means for comparing the books of the bankrupt with the proof. But the chief object, no doubt, was to put a check upon the proof of fraudulent and fictitious claims, by requiring the claimant to give such a particular and definite statement of the consideration, as would enable other creditors to trace out, discover, and expose the fraud or illegality of the claim, if any existed.

The requirement is intended to be for the benefit of all other creditors of the estate and the bankrupt, and to prevent fraud. If the statement of the consideration is so general and indefinite, as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient.

Touching the question now being considered, I can find no adjudications directly upon this part of the bankrupt law. I must, therefore, be guided by the evident purpose of the law, and such decisions in analogous cases as may throw light upon the question.

Upon a confession of judgment in California and New York a statement is required which must "state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed therefor is justly due." Practice Act Cal. § 374; 3 Rev. St. N. Y. Under this provision it is held that the failure to state the amounts due severally for goods and for money itself would be fatal. Such an averment would be insufficient in a complaint. Cordier v. Schloss, 18 Cal. 576. The mere statement that the debt is by note is insufficient. Id.; Plummer v. Plummer, 7 How. Pr. 62. In Schoolcraft v. Thompson, 7 How. Pr. 446, the amount of the debt was stated, and then that it arose out of the following facts: "For goods, wares and merchandise sold and delivered to me by Messrs. Schoolcraft & Co., Albany, of which firm plaintiff is a member; the goods were purchased by me in the years 1851 and 1852." The supreme court of New York says of this statement: "This is far short of a compliance with the statute. One important object was, that other persons than parties to the judgment might by reference to the statement, be informed of all the material facts relating to the indebtedness, and thus defeat fraud, if any. The statement is much too general; no essential beneficial purpose would be answered by such a statement, as to the nature, consideration and origin of the debt. The kind of goods, wares and merchandise, the quantities, the prices charged for them, the times or near the times in the years stated, when the purchases were made, ought to be shown."

The New York statute regulating confessions of judgment by warrant of attorney, required "a particular statement and specification of the nature and consideration of the debt or demand on which such judgment is confessed," and it was held that a specification so general as a common count, was not sufficient; that it ought to be as particular and precise as a bill of particulars. If for goods sold, the kind, quantity and price of goods, and the time of sale, as in a bill

of parcels. Lawless v. Hackett, 16 Johns. 149.

The court of appeals held this language to be applicable to a statement under the first mentioned law. Chappel v. Chappel, 12 N. Y. 215. In this case, the confession or statement states that the debt arose out of a promissory note. This was held insufficient; the court saying: "The statute looks not to evidence of the demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise." To the same effect as the foregoing, numerous other cases might be cited. All of them treat the words "fact out of which the indebtedness arose," as equivalent to "consideration," as was done in the case last cited.

Regarding the object of these state laws as identical with that of section 22 of the bankrupt law, these decisions are entitled to weight. Indeed, the purpose of the framers of the bankrupt law to secure, in every proceeding under its provisions, the utmost honesty and good faith on the part of the bankrupt and creditors, is disclosed in almost every section. The deposition required of a claimant on proof of his debt, by section 22, is much more searching, and descends more into particulars, than the statement on confession of judgment before noticed. All the statements set forth in the deposition must appear to be true. That is, as I understand it, the facts must be stated with so much certainty, particularity and detail, as that upon its face, without extrinsic proof, the deposition shall appear to the register to be true. The more the deposition goes into details of time, place, quantity and price, the more it will appear to be true, and the less likelihood there will be that a fraudulent or illegal claim will be presented, or if presented, allowed; for the deponent seeking to prove an illegal or fraudulent claim, will always take refuge in generalities, and will reconcile the oath with his conscience by some specious reason, knowing the difficulty of convicting him of falsehood when subjected to an examination. But if he must make oath as to time, place, quantity, quality, price, etc., he will not be likely to state anything but the truth, for every detail stated increases the probability of detection if it be untrue.

[Let a claimant, for instance, swear that the bankrupt is indebted to him in a certain amount, that this debt is evidenced by a promissory note, and that the consideration is hay furnished to the bankrupt, without further particulars, and that the amount is justly due. Every statement might, in one sense, be true, and yet the whole claim be simulated and false, and gotten up expressly to give to the claimant a preference. The claimant would swear the amount was justly due, because the debtor had given him his promissory note, and that the consideration was hay, although the quantity might be so small as to show fraud, if duly stated, and have been given for the purpose of enabling the claimant to flatter himself that he was swearing to the truth.][2]

I have gone thus at length into this question because it is new in this court, and because it is important now that a rule should be fixed which is correct and as certain as the nature of the case will admit, for the infinite variety of considerations which will support a promise renders it impracticable to state an inflexible rule, or anything more than the principle to be applied to all cases.

Looking then at the object of the law and the reasons for requiring a statement of the consideration in the deposition, I consider that a general statement that the consideration of a demand is goods, wares and merchandise, or hay, barley and board, is not sufficient; that the kind of goods, the quantity, the price, and near the date of sale, should be stated; that the quantity of hay, or barley, the price, and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period, should be stated. If the proof falls short of this, the register ought not to consider it satisfactory, and should withhold his approval. He has the right, and it is his duty to permit and require the deposition to be amended, subject always to the provision of section 4, which requires all issues of law or fact raised and contested by any party to the proceedings, to be adjourned into court for decision.

If the proof is not satisfactory to the register, it should be made so before it is signed by the deponent or transmitted to the assignee. Where, as in this case, the proof has been passed as satisfactory by the register, and the question of due proof or not, comes up before the court, upon the application of creditors to have the claim rejected, if the evidence taken before the court, shows the consideration to be legal and sufficient, the claim will not be rejected. Such, I consider, the fair construction of the last clause of section 22. If defects in the deposition have justified the application, costs can be imposed upon the party in fault.

Tested by the above rule, neither the original nor amended deposition of Vansickle is sufficient. Whether the proof taken before the court has shown the consideration of his claim to be fair and legal, will be determined in considering another branch of this case. It is alleged by the creditors, that note No. 8 is illegal. This note was given by Elder, on the 29th day of October, the day before the petition of Elder was filed, as is said, for a balance of account due that date. It appears from the books and other testimony, that from the 20th to the 29th of October, Elder was charged on the books of Vansickle, double the prices for hay, oats and barley, that other customers were, and that these

[2] [From 3 N. B. R. 670 (Quarto, 165).]

charges were made on a currency basis. A charge appears on the blotter, dated October 29, to Elder for $234.80 worth of feed, the whole of which is included in this note.

The testimony shows that this was the estimated amount of feed which would be used by Elder during the remainder of the month of October and had not at the time of the making of the note been delivered, and that a large portion of it (more than one half) never was furnished to Elder. The double price was charged in pursuance of an agreement made between Lynds (Vansickle's agent) and Elder. By reason of the double price charged, changing in currency and the including of the hay and grain not furnished, the amount of this note is more than double.

I think the testimony shows a large portion of the consideration of this note to be founded in illegality; and in accordance with a well settled principle of law, this illegality of a part of the consideration makes the whole note void and unavailable so far, at least, as the interests of creditors are concerned. 1 Pars. Cont. p. 380.

Note numbered seven, given October 19, for the sum of $855.57, is for a balance of account which amounted at that time, as shown by Vansickle's ledger, to $641.68. The explanation given for this difference is, that the charges were made on the book at coin rates, and when the note was taken, one third was added to the account to make the note, payable in currency, the equivalent of $641.68 in coin. This note also includes in its amount $35.29 interest improperly and illegally charged in the account against Elder.

No direct proof was made of a specific agreement by Elder to pay coin, nor is there anything to establish such agreement beside the presumption arising out of the fact that business in this state is generally done on a coin basis. In the absence of a contract stipulating in terms for the payment of gold or silver, this book account was payable in currency.

To allow a debtor, on the eve of bankruptcy, to do what was done here, would lead to abuse, and enable a debtor by raising the demand of a creditor one third, to give such creditor a preference over others less favored. Suppose that another creditor had a claim on book account for $641.68, and the bankrupt refuses to make any note or agreement to pay in coin, or to raise it to such basis. This creditor can prove only $641.68, while the preferred one who gets the currency note, proves and receives dividends on $855.57. The latter then receives a preference equal to the dividend on the difference, $213.89.

I consider that Vansickle has illegally increased the amount of this portion of his claim, and it must be rejected for this illegality. So far as the notes, numbered 3, 4, 5 and 6, are concerned, if there was nothing against their validity, except the fact that they had been changed into currency from coin notes, which expressly stipulated for payment in coin, I should hold them to be valid. The better and correct practice, where a party has a demand by its terms payable in coin, is to prove it according to its terms.

The demand should then be entered on the books of the assignee as payable in coin, and the claimant would be entitled to receive his dividend thereon in the stipulated currency. The correctness of this rule is established, in my judgment, by the decision of the supreme court of the United States, in the case of Bronson v. Rodes, 7 Wall. [74 U. S.] 229, where it is held that "an express contract to pay coin dollars can only be satisfied by the payment of coin dollars," and that "when contracts made payable in coin are sued upon, judgment may be rendered for coined dollars and parts of dollars; when made payable in dollars, generally without specifying in what description of currency payment is to be made, judgment may be entered accordingly without such description."

Note numbered two, for $2,300, dated at Genoa, April 13, 1866, and note numbered one, for $1,350, dated at Carson City, June 7, 1867, both bearing two per cent. interest per month and payable in gold coin, the petitioners say are founded in fraud and illegality, and nothing else.

[3][Giving due regard to the presumption of honesty which is made in favor of any one at the outset, after carefully and anxiously considering all the facts and circumstances proved, I am forced to the conclusion that these notes are illegal and fraudulent. I shall not attempt to state all the circumstances tending to this result, but will notice some. First, the two notes, although purporting to have been made at different towns, and in different years, are both written on what was, it is admitted, once one piece of paper. The notes themselves when examined show this. All of the experts agree that the two pieces of paper on which these notes are written were once one; that they appear to have been written under the same conditions, at the same time, with the same pen, the same ink, and by the same person. No satisfactory explanation was given of these circumstances.

[Elder says the notes were written and given to Vansickle on the days they bear date. Vansickle says, that he did not see either of them written; that Elder brought them to him, one in Genoa, the other in Carson; that he did not have the Genoa note with him when the Carson was given to him; that it was at that time at home in his safe. The consideration of these notes is stated generally by both Vansickle and Elder to be hay, barley, blacksmithing, and on account. The books containing this account are not produced, although Vansickle says that some of them could be, while others have been lost or destroyed. Cosser speaks of seeing Elder give Vansickle a note in April or May, 1866;

[3] [From 3 N. B. R. 670 (Quarto, 165).]

says Vansickle and Elder were talking about money matters; that Vansickle told Elder he wanted a note; gave Elder a sheet of plain writing-paper, and Elder wrote the note, handed it to Vansickle, who folded it up and put it in his pocket. Van Cott says, that a year ago he saw notes similar in appearance to these and same amount, in Vansickle's safe. Blunt says, that in 1868 Van showed him a note against Elder for two thousand dollars and upwards, and told him he had many of that denomination.

[Vansickle testifies, that the note first given was not then stamped, that the second was not properly stamped, and that he put stamps on them at some time before Elder went into bankruptcy, but does not know when. Elder says the second note was stamped by Van in Carson, and that he saw it afterwards, and canceled the stamps himself; that the first note was not stamped for over a year after it was given. Taylor swore that he worked for Vansickle eighteen months prior to June, 1867; that he had examined the old books; that there was no account against Elder for more than sixty dollars, as he thinks; that he had access to the safe; had seen there notes of Mallory, Thompson, Noteware, and others, but never any note against Elder. Wencke, another bookkeeper, testifies that he never heard of this old debt against Elder as late as October 19, 1869.

[In the spring of 1868, Vansickle told Barker that Elder owed him one hundred and fifty or two hundred dollars; said nothing about these notes. In February, 1869, Vansickle told Bruso that Elder would owe by the 1st of March about seven thousand dollars, while if these notes are included the true amount was over eleven thousand dollars. About the 20th of October, 1869, Vansickle told Mallory that Elder owed him seven or eight thousand dollars, while if these notes were counted the true amount would have been thirteen or fourteen thousand dollars.

[To all this must be added the testimony as to the circumstances before and after the filing of his petition by Elder.

[Ten days before, Elder renews the three coin notes, giving currency notes in exchange as their equivalent, the computation being made on the basis that currency was worth seventy-five per cent. of coin; the interest of the new notes was double that of the old. Vansickle at the same time buys a claim against Elder of Farrell, raises the amount of that to currency, and takes a new note of Elder. At the same time, knowing Elder was about to break up, and for the purpose, as the witness Lynds says, of driving Elder away, Vansickle commences charging Elder double prices for everything furnished him, and takes the notes (No. 7 and 8) under the circumstances before stated, the last one the day before Elder filed his petition, and containing an estimate of what the teams would use during the rest of the month; Vansickle saying, as one witness testified, that the teams would need that much before anybody else got them.

[The witness Wencke testifies that this was done because Elder was going to break up; that the double charges were made with a view to Elder's bankruptcy, and to secure a larger percentage, and gives the same reason for changing the coin notes into currency. Vansickle being chosen assignee, and about to sell the teams, went, on the morning of the sale, to Mr. Crosby, and wanted he should buy in the teams, promising to give him a load of hay if he would do so. Crosby was not to buy for himself, but for Mr. Lynds (Vansickle's agent)—the understanding was that he (Crosby) was not to bid against Mr. Lynds. Mr. Crosby did attend the sale, and bought two teams and some other property. Vansickle gave him a bill of sale, and Crosby gave one to Mr. Lynds. Vansickle sent Crosby the promised load of hay. Before going to Mr. Crosby, Mr. Vansickle went to Mr. Derby and asked him to bid in the stock. Mr. Derby declined, and referred Vansickle to Crosby. Mr. Derby testified that he judged from what Vansickle said, that the stock was to be purchased for Elder—that Vansickle wanted to assist Elder.

[Now, on his first examination, Vansickle stated that Crosby bought one team at the sale; that he did not know that Crosby bid it in for some one else; that he had no understanding with Crosby, and never gave him a cent. When recalled, subsequent to the witnesses Crosby and Derby, he admitted the conversation with Crosby and the sending of the load of hay. Aside from every other consideration, little regard can be given to the testimony of a witness who swears thus recklessly. Elder's testimony is still worse: he stated that he never offered to give either Mr. Bruso or Mr. Barton a note for more than was due them. These gentlemen both testified that he did offer to do so. Barton says Elder owed him two thousand dollars, and offered to give him a note for four thousand dollars.

[Elder states that about the 7th or 8th of October, 1869, he gave John Frazier a note for six thousand dollars, although he owed him only about one thousand four hundred dollars. He also admitted that on the 29th of October he sold a team (nine mules and one horse) to Frazier, who was to give it back when he (Elder) got "fixed;" that this was done with a view to breaking up.][4]

These notes, although purporting to have been made at different towns, and in different years, are both written on what was, it is admitted, once one piece of paper. The notes themselves, when examined, show this. All of the experts agree that the two pieces of paper on which they are written were once one; that they appear to have been written under the same conditions, at the

[4] [From 3 N. B. R. 670 (Quarto, 165).]

same time, with the same pen, the same ink and by the same person. No satisfactory explanation was given of these circumstances.

The whole testimony compels me to the following conclusions of fact: That the notes one and two are fraudulent and void as to the other creditors of the estate. That these two notes were made for the purpose of fraudulently enlarging the claim of Vansickle against the estate. That the transactions of October 19, and up to and including October 29, were done with a view to Elder's bankruptcy and for the purpose of giving Vansickle an undue advantage, under the bankrupt act, over the other creditors of Elder. That before and since the filing of Elder's petition and since Vansickle has been acting as assignee, there has been an understanding between Vansickle and Elder, having for its object their mutual benefit at the expense of the other creditors of the estate.

It only remains to determine what effect the fraudulent and illegal portion of this claim has upon that part of it which is admitted to be just, if separated from the other. From the language of sections 8, 22 and 24 of the act, and forms 66 and 68, it is evident that in a proper case, a claim may be allowed in part, or allowed or disallowed as a whole. What the action of the court will be, must depend in each case upon the circumstances of that particular case.

The object of the bankrupt law is to enable the honest debtor to obtain, by a full surrender of his property, a discharge from his debts, and to distribute to the honest creditors, pro rata, the property of the debtor. The law is full of provisions to prevent, not only actual frauds, but any act which tends to defeat its object. The thirty-ninth section provides that any creditor receiving any payment, gift, grant, sale, conveyance or transfer of money, or other property, estate, rights or credits from the bankrupt, he intending to give a preference, and such creditor at the time having reasonable cause to believe the debtor insolvent, shall not be allowed to prove his debt in bankruptcy. Here a creditor is debarred from proving his debt, if he has accepted part payment, however just his claim, or however free he might be of any actually dishonest motive in accepting this preference.

Can this court say that the creditor who deliberately commits a fraud upon the act, and the other creditors by other means, shall receive at his hands better treatment than this creditor who has accepted a preference from a debtor of a partial payment of a just debt? The conduct of Vansickle is fully within the spirit and intention of the prohibition and penalty of this section, if not strictly within its letter, and a thing clearly within the intention is within the law though not within the letter.

Every party to proceedings under the bankrupt law must be held to the utmost good faith; and he who attempts a fraud cannot, if discovered, complain, when made to abide by the legal consequences of his act. If the strict rules of other courts in adjusting the priorities of creditors are applied, this claim must fall as a whole. If a party having several just claims includes in his judgment one that is unjust, or one that is not yet due, or more interest than is due, his whole judgment, so far as it is a lien having priority over other creditors, will be postponed until the junior creditors are paid. Peirce v. Partridge, 3 Metc. (Mass.) 44.

Where one had obtained a judgment and included in it the amount of one note known to be fraudulent, it was argued that the judgment ought to stand for so much as was just, but the court said: The argument amounts to this—that a man having a just claim to a small sum, who should fraudulently bring forward claims to a much larger amount not due, and who should be detected, should be placed in as good condition, at least, as if he had not mixed the good and bad together. We think the law is directly the reverse, and that the fraud corrupts and destroys the whole. Fairfield v. Baldwin, 12 Pick. 388. This language is cited with approval by the supreme court of California, in a case where a party had taken judgment on five notes, one of which was not due. Taaffe v. Josephson, 7 Cal. 352. To permit Vansickle to now separate the good portion of his claim from the bad, and thus be put in as good condition as if he had attempted no wrong, would be contrary to well settled principles of law and to the plain requirements of the bankrupt act.

The order of the court, which the clerk will enter, is as follows: Upon the evidence submitted to the court upon the claim of Henry Vansickle against said estate of Geo. Elder, and upon hearing counsel thereon, it is ordered that said claim be disallowed and expunged from the list of claims upon the assignee's record in said cause.

It is further ordered that the said Henry Vansickle do pay the costs of this proceeding.

ELDER (UNITED STATES v.). See Case No. 15,039.

Case No. 4,327.

The EL DORADO.

[1 Lowell, 289.] [1]

District Court, D. Massachusetts. Nov., 1868.

LIBEL FOR WAGES AND LOSS OF CLOTHES.

1. Where the first mate had been drunk two or three times on board the ship, and on the day the vessel was to go from London to Gravesend in his charge to begin her homeward voyage, got drunk and did not join her till the

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

evening after she had arrived at Gravesend, the master was justified in discharging him.

[Cited in The Garnet, Case No. 5,244.]

2. But the master, having lawfully discharged the mate, was not justified in sending him on shore at night, with no responsible companion, when he was incapable of taking care of himself, if there was ample time to dismiss him in the morning; and must account for the mate's clothes that were lost thereby.

The case was tried in a summary way with no formal pleadings excepting the libel and claim, on the oral evidence of the libellant, and the affidavits of the master and second mate. The evidence tended to show that the libellant had been a master of a vessel, but that his habits were not good and he had lost that position, and was taken as first officer on this voyage by a master who was his townsman, as a matter of friendship; and the relations of the parties were always harmonious. The libellant had been drunk on board the ship more than once, and on the day the ship was to go from London to Gravesend under his charge, though with a pilot to direct the navigation, he went on shore to go to the post-office, and did not appear again until the ship was at Gravesend, though the pilot had waited some hours for him. When he did come on board he was very drunk, and the master dismissed him and sent him on shore.

C. G. Thomas, for libellant.

Mr. Hunter, agent of the owners, for claimants.

LOWELL, District Judge. Courts of admiralty are not very severe with seamen who happen to get drunk once or twice, especially if they are off duty. But the first officer has a much higher responsibility than the crew, and must be proportionally careful in his conduct; and if he fails when left in command of the ship, the master is justified in visiting such an offence with a severe punishment. In this case, to discharge the libellant at a port where he could readily obtain employment, or a passage home, does not seem to me too harsh. The wages were paid in full, and no damages for the dismissal are to be recovered.

I hold the master to be wrong in sending the mate on shore at night in a condition in which he was wholly incapable of taking care of himself; for he was quiet, or at least was fully under control and could have been kept in his room, and the vessel was not to sail until the tide should serve in the morning. A master must exercise self-control and even forbearance, and must punish his men in a mode which will work them no unnecessary injury. So far as the clothes are concerned I consider him to have acted at his peril. Decree accordingly.

EL DORADO, The (CRARY v.). See Case No. 3,362.

Case No. 4,328.

In re ELDRED.

[3 N. B. R. 256 (Quarto, 61); 1 Chi. Leg. News, 389.][1]

District Court, N. D. Illinois. 1869.

BANKRUPTCY — FRAUDULENT TRANSFER TO WIFE OF BANKRUPT—INSOLVENCY—DISCHARGE.

An opposing creditor to discharge of bankrupt in Illinois, charged substantially that he had covered up property in his wife's name. *Held*, under the state statute a married woman is entitled to all she obtains from a source independent of her husband, but a man in embarrassed circumstances and insolvent, cannot make use of his wife, directly or indirectly, to cover up from his creditors any of his property, or any of his earnings or his skill.

In this case a question came up, the decision of which involved a construction of the statute of Illinois, passed in 1861, sometimes called the married woman's act. The specifications were, in substance, that the bankrupt had covered up property which should go to his creditors, by placing it in the name of his wife. The opposing creditor was the bankrupt's brother, Anson Eldred, of Milwaukee, and he was scheduled as a creditor to a very large amount. The property was a bark, "The Two Fannies," and a house and lot on Michigan avenue. It appears in testimony, that a son of the bankrupt and the wife (Mrs. Eldred), had at one time furnished to her as a gift the sum of five thousand dollars, by the purchase of a house in Detroit; he had as well some years before received a loan of a like sum from his father, to enable him to go into business.

DRUMMOND, District Judge, in delivering the opinion of the court in substance said:

The only property or money so far as we know, which Mrs. Eldred obtained, independent of her husband, by which this property was purchased, was what was obtained from her son; he also, however, indorsed the notes that were given for the vessel. One of the embarrassments of the case arises out of the relation in which the party who made these advances, or gave this assistance, stands to the person who, it is claimed, made the purchase, and to the bankrupt, he being the son of both the parties. If the money had come from a party not connected with the others, the difficulty of such a case would be less. It is, therefore, proper to consider what had appeared in evidence, to wit: the advance made by the father to the son at a time when it was claimed he was insolvent, and could not, in honor, make such an advance. If there was a free gift, having no sort of connection with what the father had done for him, then the mother would be entitled to the full benefit growing out of such a circumstance, but otherwise not, as then the father's pecuniary relation would have entered into the transaction. For while the statute gives to a married woman the

[1] [Reprinted from 3 N. B. R. 256 (Quarto, 61), by permission.]

right, independent of her husband, to control and manage her own property, not coming from her husband, it is clear that it never contemplated that a married woman should be made use of as an instrument by which the pecuniary interest of the husband should be protected as against his creditors. So that while it is just and right that whatever the wife acquires during coverture from an independent source, should be kept for her protection and support, it is also just that that which comes indirectly from her husband should not be sequestered and excluded from his creditors. In this case whatever went into the property as a gift, pure and simple, with which the money of the father had nothing to do, in that the wife should be protected.

When a man is in embarrassed circumstances, and insolvent, he cannot make use of his wife, directly or indirectly, to cover up any of his property, or any of his earnings, or his skill. So far as she gets property of her own, independent of him, she is to be protected; but he cannot make use of her as an instrument to gather about her his means, skill, or labor, or anything that is connected with him. Thus, a man has no right to go to his wife and say, This is a good bargain; make this purchase; give your notes for this property, that property, or the other; and make the purchase, and then escape the responsibility of transaction, so far as he is a debtor, if there is nothing proceeds from his wife as a consideration of the purchase. That is his transaction, the result of his skill and judgment, and his creditors are entitled to it, and he cannot in that way cover up the interest which he may have in that property, which is the fruit of his skill and his judgment, from his creditors. If, on the other hand, there is a consideration proceeding from the wife, belonging to her, money or property with which he is unconnected, then she should be protected in the property.

The bankrupt was found not guilty under the specifications. The matter stands on a new trial, made by Rae & Mitchell, for the opposing creditor.

ELDRED (MICHIGAN INS. BANK v.). See Case No. 9,528.

ELDREDGE (JENKINS v.). See Cases Nos. 7,266–7,269.

Case No. 4,329.

ELDREGE v. CHACON.

[Crabbe, 296.] [1]

District Court, E. D. Pennsylvania. Dec. 12, 1839.

BILLS AND NOTES — EVIDENCE OF DEMAND — EXTENSION OF TIME — CONSENT OF ENDORSER — RELEASE.

1. If a notary public states, in his protest, a demand on the drawer of a note, non-payment, and that notice was given to the endorser, it is sufficient primâ facie evidence of the notice, and that it was given in a due and regular manner.

2. It is well settled that, if the holder of a note releases the drawer, or gives him time for payment, with the approbation and consent of the endorser, the liability of the latter is not discharged.

3. Where it appears, from the circumstances of a case, to have been the intention of the parties releasing the drawer of a note, to preserve the liability of the endorser, equal effect will be given to such intention as to a positive and express declaration.

4. It seems that, unless the contrary appears, the assent of an endorser to the release of the maker of a note, by the holder, will, of itself, prevent such release from operating as a discharge of the endorser.

This was an action [at law by Levi Eldrege] against the defendant [Pablo Chacon] as the endorser of a promissory note, drawn by one Isidoro d'Angulo, dated on the 5th August, 1837, payable to the defendant at sixty days after date, for $874 59. A jury was sworn on the 18th February, 1839. The whole amount claimed was $944 52. The note was properly proved, and the protest was produced, drawn in the usual form, by a notary duly commissioned. The counsel for the defendant being then engaged in another court, and the case turning on questions of law, it was agreed by the plaintiff's counsel that a verdict should be taken for the plaintiff, and that the defendant should have the same benefit of the points of law on a motion for a new trial, as if they were then made to the court. A new trial was afterwards ordered, for the purpose of introducing evidence that had been omitted at the former trial. On the 20th November, 1839, another jury was sworn, when, in addition to the former evidence, the plaintiff produced a general assignment made by Isidoro d'Angulo of all his estate, for the benefit of his creditors; the assignment was dated on the 18th September, 1837, and had a schedule of debts, assets, &c., annexed to it. There was also given in evidence an agreement, dated on the 21st September, 1837, signed by the plaintiff and defendant, and two other creditors of d'Angulo, and the purport of which was that these creditors, with a view to enable d'Angulo to pay them the amount of their debts in instalments, out of the means and profits of his establishment (which was a public hotel), from time to time as the same came in, acceded to the terms of the general assignment, and further agreed that d'Angulo should continue, under the direction and superintendence of the general assignees, to carry on his business in the house, possessing and using the furniture of the hotel; the assignees and d'Angulo agreeing that a proportionate payment or dividend should be made, out of the receipts of the hotel, to the creditors, from time to time, and as frequently as the receipts would warrant. The general assignment stated the indebtedness

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

of d'Angulo to divers persons, and that he was desirous of applying his estate and effects to the payment of his debts. He then assigned all his estate, real and personal, goods, &c., to the assignees named, to and for the uses and purposes thereinafter mentioned. First, to pay and fully discharge to Pablo Chacon the sum of $5,258, being the amount in which he was indebted to the said Pablo Chacon for money lent, and for money for which the said Pablo was responsible for him, as appeared by the schedule annexed. In thus sum of $5,258, was included the note on which this suit was brought. After this preference, followed trusts to pay the other creditors, and to repay the balance, if any there was, in the usual form. On this evidence a verdict was taken for the defendant on an agreement, signed by the counsel respectively, and filed with the clerk of the court, that the verdict should be subject to the opinion of the court on all the facts of the case, as they appeared on the judge's notes; and, if the opinion of the court should be in favor of the plaintiff, judgment should be entered for him, non obstante veredicto, for the amount of the promissory note declared upon, with interest and costs.

On the 1st December, 1839, the case was argued before Judge HOPKINSON, under the agreement.

Mr. Oakford, for plaintiff.

There is nothing in the agreement of 21st Sept., 1837, which can be construed into giving time to the maker of the note. Time is given to the assignees, but the maker is only allowed to retain possession of his stock in trade. There is no consideration for the agreement; but, to validate it, there should have been a valuable consideration. There was not even an agreement not to sue d'Angulo, though, in fact, he was not sued. Chit. Bills, 408; M'Lenore v. Powell, 12 Wheat. [25 U. S.] 554; People v. Jansen, 7 Johns. 332; Hunt. v. U. S. [Case No. 6,900]; Planters' Bank v. Sellman, 2 Gill. & J. 234. The indulgence, whatever it was, was given with the assent and concurrence of Chacon, which prevents his liability from being discharged. Clark v. Devlin, 3 Bos. & P. 363; Chit. Bills, 415; Bruen v. Marquand, 17 Johns. 58; Gloucester Bank v. Worcester, 10 Pick. 528, 532. The protest sets forth a demand on the drawer, non-payment, and notice to the endorser; it is according to the usual form, and is sufficient. Hastings v. Barrington, 4 Whart. 486.

Mr. Ingraham, for defendant.

The note was due on the 7th October, 1837, that is, after the agreement was made, and the liability of the endorser was not then fixed. Chacon was the preferred creditor, and would have taken the whole fund, but for the agreement made between him and the other creditors, by which he agreed to share the fund with them. No suit could have been brought against d'Angulo after this agreement. Okie v. Spencer, 2 Whart. 253; Lewis v. Jones, 4 Barn. & C. 506, 515. It was clearly an agreement for time; the payments were to be "from time to time." The pledge of future earnings was a sufficient consideration. There should be proof of notice to the endorser, of non-payment by the drawer. The indorser here had no such notice; the only proof offered of it was the protest: this is not evidence of anything but the facts which appear on its face. Act Assem. Pa. Jan. 2, 1815 (6 Smith's Laws, 238; Dunl. Laws, Ed. 1853, p. 302). This act says that the protest shall be evidence of the facts therein stated; but this protest states no fact which shows notice to the endorser. The notary states that he duly gave notice to the endorser: this is only his opinion; he does not say how he gave notice, but assumes that it was such as the law requires. Hastings v. Barrington, 4 Whart. 486.

HOPKINSON, District Judge. The question to be decided is whether, on the evidence, the defendant, the endorser of the note, is or is not discharged from his responsibility for the payment thereof. A preliminary objection has been taken to the protest, as not sufficiently showing that notice was given, to the endorser, of the dishonor of the note by the maker. The notary states, in his protest, a demand on the drawer, the non-payment, and that notice was given to the endorser. I think this sufficient prima facie evidence of the notice, and that it was given in a due and regular manner; and no evidence has been given to impeach it. Dickins v. Beal, 10 Pet. [35 U. S.] 580; Nicholls v. Webb, 8 Wheat. [21 U. S.] 326.

The real question between the parties is, whether, on the evidence of the two instruments of writing produced on the trial, to wit, the general assignment, made by Isidoro d'Angulo, on the 18th September, 1837, and the subsequent agreement or arrangement made, on the 21st of the same month, between the assignees and certain of the creditors of d'Angulo, including the plaintiff and defendant, the defendant is discharged from his responsibility for the payment of the note in question. The second instrument is an acceptance by the creditors who signed it, of the terms and provisions of the first. It then proceeds to add to this acceptance an agreement between the said creditors, the assignees, and the debtor; or rather, a declaration by the said creditors, by which they allow the debtor to retain the furniture and carry on his business in the manner above mentioned; but makes no change in the rights of the creditors by and under the general assignment; nor does it in any manner affect the arrangement, thereby made, for the payment of the debts of the insolvent, and the appropriation, for that pur-

pose, of his estate. It is no more than a permission or authority to the assignees to allow the insolvent to retain the goods, at the risk of the creditors who assented to it.

No principle of the law, on the subject of notes, is better settled than that, if the holder releases the maker, or gives time for payment, after the note has fallen due, he thereby discharges the endorser from his responsibility; but it is equally well settled, by the same principle of equity, that, if this release or indulgence is given with the approbation or consent of the endorser, it does not discharge him. He cannot claim a constructive release from an act to which he was himself a party. Another case is where the holder of the note did assent to the release or indulgence, but with a reservation, express or implied, of his rights against the endorser. Was there such a reservation in the case before us? The holder of the note, the present plaintiff, and the endorser, the defendant, joined in the same act of forbearance to the maker. If this had been done by the holder, without the assent of the endorser, doubtless the latter would have been discharged. On the other hand, the assent of the endorser would continue his responsibility, if it had been a simple explicit declaration of such assent. We are then to inquire whether, from the acts of these parties, the law will say that such assent has been given. The defendant alleges that the intention and effect of the whole arrangement was that all the creditors who signed the instrument of the 21st September, were to look only to the insolvent and his earnings for the payment of their debts; to come into the common fate, to take the same chance, and to have no other security. The plaintiff, on the other hand, contends that he was willing to accede to this kindness to the insolvent, to give his permission to the assignees to allow him to go on with his business, but not to surrender another and a better security he had for his debt. These contradictory allegations bring the case to the question, what was the intention of the parties? What construction will the law put upon their acts, in relation to the continuance of the responsibility of the endorser of the note, or his discharge from it?

Various cases have been cited on this question; but two of them are so very similar in their circumstances to that before us, and their principles are so satisfactory to me, that I shall confine myself to them. The first is the case of Bruen v. Marquand, 17 Johns. 58. It was a suit by the holder of a note, against the endorser. Both the endorser and the holder had signed a release of the maker. The endorser claimed to be discharged on the ground that the holder had released the maker. The plaintiff contended that, as the defendant, as well as himself, was a party to the release, and had assented to it, their rights, as between themselves, could not be affected by it, and that it was apparent from the release itself that it was the understanding of the parties that this note was to be provided for by the endorser, the defendant. In delivering the opinion of the court, Van Ness, Justice, said, the question arises "whether or not the release and discharge of the maker is, in this case, a release of the defendant, the endorser? The general rule is not disputed; but it is argued that this case is not within it." The judge says that the reason for discharging the endorser does not apply, which is, that the remedy of the endorser against the maker is materially affected, or taken away; and this reason does not apply because the endorser, who is a party to the assignment, released the maker from liability to him. He has, therefore, released all his remedy against the maker in case he should be compelled to pay the note. The judge further remarks: "This is a question of intent on the whole instrument. There is no express release of the defendant (the endorser), and the release of the maker is a discharge of the endorser, by construction only; and if the intention of the parties was to preserve the liability of the endorser, it was competent for them to do so." After stating the circumstances of the case, the judge concludes that it appears to him there was a full understanding that the liability of the endorser should remain unimpeached. Referring to the inventory which accompanied the assignment, he says, in still stronger language, that, in his opinion, it is a plain and unequivocal recognition, by the defendant, that his liability as endorser, was not to be extinguished by the discharge of the maker. Again: the intent of the parties clearly appears to have been, that both the holder of the note and the endorser should set the maker free, but that the remedy against the endorser should remain; for the reason that, the debt was put in the first class, the maker intending to secure the endorser. The reason, arising from this preference given to the debt, is more fully enlarged upon by the learned judge. As between the holder of the note and the maker, there was no reason for this preference; but as between the maker and the endorser it was otherwise. The judge was quite satisfied that this was the true construction of the assignment, and, on this ground, the defendant was held to be liable, as endorser.

The case before us is so much stronger than that cited, as the money due on this note is not only preferred to all other debts, but it is so preferred as a debt due to the defendant, as a claim he has upon the estate. Now, if it were intended that he should be discharged from all liability to pay that note, why was it included in the list of debts for which he was to have a preference? How can we suppose the holder intended to exchange his claim upon a good responsible endorser for the uncertain resort to an insolvent's estate?

The case of Parsons v. Gloucester Bank, 10

Pick. 533, is decided on the same principle, although the intention of continuing the liability of the endorser is more explicit, being expressly declared, and not collected from the circumstances of the case and the provisions of the assignment. Whenever, however, it is satisfactorily ascertained by circumstances, the effect is the same as if it had been expressly declared. In that case, an insolvent debtor made an assignment of his property, for the payment of his debts. It was assented to and executed by the holder and endorser of one of his notes. It contained a release of the debtor, but with a declaration, or proviso, that it should not affect any collateral security taken by a creditor. The instrument of release, with this proviso or reservation, being executed by the endorser, of course had his assent; he agreed that the maker of the note should be released, and he also agreed that this release should not affect any collateral security held by any creditor of the maker of the note. The endorser had paid the money due on the note to the holder, and brought his suit to recover it back, as having been paid by mistake; but the court thought he had altogether failed to make out his ground of action.

In the case of Gloucester Bank v. Worcester, 10 Pick. 528, the maker of a note which was endorsed made a general assignment in trust to pay his debts, which was executed by the holder and endorser of the note, and contained a general release of all claims against the assignor. The endorser was sued, and claimed to be discharged on the general ground of the release of the maker. The opinion of the court is thus given: "We think that it is very clear, from the assignment or indenture itself, independently of the parol evidence, that the plaintiffs did not intend to discharge the defendant from his liability as endorser; and that the discharge, contained therein, of the maker, by the plaintiffs, was by the approbation of the defendant." The parties provided always "that nothing therein contained should be construed to impair or affect any lien or pledge theretofore created or obtained as security for a debt or claim due from (the maker) the party of the first part." The court thought that an endorsement was well described by the words "lien or pledge;" and say that the defendant, by becoming a party, agreed to the arrangement that the principal debtor should be discharged, in consideration of the property assigned by him to be distributed, and that the pledge or undertaking which he had given by his endorsement should continue. It will be observed, if it could be doubted, that the assignment by the debtor of his property to be distributed to his creditors is considered to be a sufficient consideration for the release, and the agreements made by the creditors.

The principles recognized in these cases by the courts of New York and Massachusetts, in which I concur, reduce the case now to be decided to the question, whether it appears, by deeds or instruments executed or assented to by the plaintiff and defendant, that it was or was not the intention or understanding of the parties to continue the liability of the endorser to the holder of the note, notwithstanding the release of the maker? In the cases cited, affirmative proof of this intention was drawn from the instruments themselves; that is, the courts were satisfied that such was the intention, from the provisions and agreements of the instruments of assignment and release. Without, however, looking for direct or circumstantial proof of the intention of the parties to continue the liability of the endorser, in any particular case, it seems to me that, unless the contrary appears, the assent of the endorser to the release of the maker of a note, by the holder, will of itself prevent such release from operating as a discharge of the endorser. It is a release without his assent that brings this consequence upon the holder; and, therefore, unless it appears, by direct proof or a fair construction of the acts of the parties, that the liability of the endorser was to be discharged, notwithstanding his assent to the release of the maker, his liability will continue. When the endorser assents to the release, and has himself released the maker, the reason for discharging him, as given in Bruen v. Marquand, altogether fails; that is, that his remedy against the maker is affected or taken away by the release of the holder, for he (the endorser) has himself, by his own act, abandoned or given it away.

We have, then, to inquire, from the circumstances of the transactions between Isidoro d'Angulo and his creditors, and the construction of the deeds to which they were parties, what was the intention in regard to the endorsed notes, or, more particularly, the note which is the subject of this suit? Was it intended that the holder of this note should discharge the endorser, and look only to the estate of the insolvent for the satisfaction of his debt? At first blush, it would seem to be strange that he should give up a good and substantial security, for the chance of getting his money from the earnings of d'Angulo in the hotel and business in which he had already failed.

What intention does the law infer from these deeds or instruments?—that is, the assignment of the 18th September, and the instrument of the 21st of the same month, by which the holder and endorser of this note, with some other creditors, agree that the assignees shall permit the said d'Angulo to continue in possession of his furniture, &c., he agreeing to make payments to them, in proportion to their debts, from time to time, as his receipts should warrant. It is to be observed that no release is stipulated for in the assignment, nor given by the subsequent instrument; but time is given to d'Angulo to pay this note by dividends from the profits of his business, and this indulgence is given

both by the holder and endorser of the note, and, of course, is done with the approbation and consent of both.

Without recurring to the principles already recognised to make an application of them to the circumstances of this case, it will make the intention of the parties, if possible, more clear, to remember that this note is included in the list of debts due to the defendant; that, of course, he was entitled to receive the dividends or payments to be made on it, from the earnings and business of d'Angulo; and that the plaintiff, Eldrege, had no claim whatever to any such dividend or payment which might be made for, or on account of, this note; nor is Eldrege ever named as a creditor, so fully did it seem to be the understanding that he was to look to Pablo Chacon for his money. Again, the debts for which Pablo Chacon has a priority or preference over all the other creditors of d'Angulo are described as debts due to him for money lent to d'Angulo, or for which he (Chacon) had become responsible. In the list, this note is put down as one of the responsibilities of Chacon.

I am of opinion that the assent of the endorser to this indulgence to the maker, to this endeavor to afford him an opportunity to pay the debt, has the effect to continue his liability for the payment of the note, and to take from him the discharge which such an arrangement, without his consent, would have entitled him to. Let judgment be entered for the plaintiff, according to the agreement filed.

Case No. 4,330.

In re ELDRIDGE.

[2 Biss. 362;[1] 3 Chi. Leg. News, 177; 4 N. B. R. 498 (Quarto, 162).]

Circuit Court, E. D. Wisconsin. Oct., 1870.

MORTGAGE ON AFTER-ACQUIRED PROPERTY.

1. A mortgage of personal property being, under the laws of Wisconsin, ineffectual to pass after-acquired property, the assignee in bankruptcy is entitled to such property as against the mortgagee.

[Cited in Re Foster, Case No. 4,964.]

2. Though a mortgage be valid as to property then in possession, the authority in a mortgage subsequently given to cover the property afterward acquired, does not enable the mortgagee, by taking possession of such property, to hold it as against the assignee. This would be, in effect, a preference, and against the spirit of the act.

3. A mortgagee in possession being entitled to retain all property upon which his mortgage was valid, on a sale of such property by order of the district court, he should only be charged with the reasonable expenses of the sale of such property, and not with any portion of the costs in bankruptcy.

4. A chattel mortgage "of all the goods and merchandise" in a store, here *held* not to include fixtures.

In bankruptcy. Spencer Eldridge and Leslie R. Treat were merchants engaged in business in Janesville in this state, and on the 1st day of April, 1867, borrowed of Robert B. Treat, two thousand dollars. They continued business until November 21, 1867, when Treat sold out his interest to Fenton F. Stevens. Eldridge and Stevens became responsible for the debts of Eldridge and Treat and among the rest for the debt due Robert B. Treat. On the 12th of March, 1868, Stevens sold his interest in the firm to Eldridge. Robert B. Treat agreed to release Stevens, and Eldridge agreed to pay Robert B. Treat and the other debts of Eldridge and Stevens. Eldridge, on the 13th of March, 1868, gave Stevens a mortgage for $3,200 on his stock. At this time the stock was estimated to be worth between eleven and twelve thousand dollars. On the same day Eldridge gave a second mortgage to R. B. Treat, to secure his debt of two thousand dollars. These mortgages purported in terms to cover all after-acquired property.

On the eighth day of May, 1868, Eldridge gave Stevens and Treat new mortgages intended to cover goods obtained since the 12th of March. These last mortgages made no reference to any after-acquired property. Between the 8th of May and the 15th of October, 1868, Eldridge had purchased and put into the store at Janesville a quantity of goods invoiced at $6,644.45. On the last named day Treat and Stevens took possession, under their mortgages, of all the goods in the store. On the 19th of October, 1868, a petition in bankruptcy was filed against Eldridge, and on the 30th of October of that year he was adjudged a bankrupt by the district court for this district. The court decided that the mortgages were valid on all the goods in the store at the time the mortgagees took possession. The property was sold by the assignee under the order of the district court, and the proceeds paid into court.

No question being made but that the mortgage of Stevens was prior to that of R. B. Treat, the district court decided that out of the money in court there should be paid, in the first place, all the costs and expenses connected with the proceedings in bankruptcy and the sale of the goods; secondly, the mortgage of Stevens; and lastly, the balance to be applied upon the mortgage of R. B. Treat. There was not, in fact, without the after-acquired property, sufficient to pay the mortgages. From this order the assignee appealed.

Conger & Sloan, for Stevens, first mortgagee.

Jackson & Ebberts, for Treat, second mortgagee.

Palmer & Cassidy, for assignee.

DRUMMOND, District Judge. The questions in this case must depend in part upon the law of Wisconsin. The 14th section of the bankrupt law [of 1867 (14 Stat. 523)] declares that no mortgage of any goods or chat-

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

tels made as security for any debt or debts in good faith and for present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated or affected by the bankrupt law.

Under the law of Wisconsin, in order to render a mortgage of chattels valid, the mortgagee must be in possession, or the mortgage must be recorded in the manner particularly pointed out in the statute.

The supreme court of Wisconsin has held in Chynowieth v. Tenney, 10 Wis. 397, and in Single v. Phelps, 20 Wis. 398, that mortgages of personal property do not cover what is afterwards acquired—that as to such property it is in the nature of a revocable license to take possession.

The point is not entirely free from difficulty, but on the whole my opinion is that the mortgages of the 13th of March and the 8th of May, 1868, for the property actually in possession of the mortgagor at the time, are valid under the law of Wisconsin. They appear to have been executed in good faith and for a valuable consideration, and were duly recorded. I see no good reason, therefore, for disturbing the decree of the district court on that point. But as to the property afterwards acquired there was not a valid mortgage, but only authority to take possession, and the rights of creditors, under the bankrupt law, must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking possession under the license contained in the mortgage. Then Eldridge was insolvent and the mortgagees must have known it, or had reason to believe it. The 35th section of the bankrupt law declares in substance that if any insolvent person within four months before proceedings in bankruptcy are commenced by or against him, and in order to give a preference to a creditor, makes a transfer of his property, and the person to whom it is made has reasonable cause to believe him insolvent, the transfer shall be void as to general creditors. It is true in this case there was not, in one sense, a transfer made on the 15th of October, 1868, because the instruction or authority to take possession of after-acquired property, as the supreme court of Wisconsin construes it, was given in the mortgages executed some months before. But it is not competent for a party to give this authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the bankrupt law because literally he has not made a transfer. That certainly would be a facile method of evading the scope and spirit of the law. In legal effect it was a transfer within the meaning of the law. It was a continuing act from the date of the authority to the taking possession, the last act being the consummation of the transfer, and in this instance the transfer giving a preference, the mortgagor being insolvent, and the mortgagees knowing the fact. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagees took possession. It was in substance, then, the case described in the 35th section, and as against the assignee of Eldridge representing the general creditors, was void.

All the costs of the bankruptcy proceedings and expenses of the sale were, by decree of the district court, first to be paid out of the proceeds of the sale of the goods. The mortgagees should not have been taxed with the costs of the proceedings in bankruptcy. To the goods included in their mortgages they had a legal right. Over the goods not included, the district court had complete control for the benefit of the general creditors. It is only the fund within the legitimate power of the court that should have been charged with the costs and expenses of the proceedings in bankruptcy. But we have to deal with the case as it stands. The goods of the mortgagees have been converted into money, and that is now in court, and it is not inequitable to charge them with what would have been reasonable expenses for the sale of their goods. If they had retained possession of them, this charge they would have been obliged to meet, and and to that extent the claim on the fund in court will be allowed, as it is not claimed that the goods were not fairly sold.

Fortunately, in this case there is no difficulty in determining the amount and value of the goods included in the mortgages, and what were afterwards acquired, and the proceeds of the sale in each case.

That part of the decree of the district court deciding that the after-acquired property was covered by the mortgages, and that all the expenses of the bankruptcy proceedings and of the sale of the goods should be first deducted out of the money in court, will therefore be modified, and the proceeds of the sale of the after-acquired property will be directed to be paid over to the assignee, deducting the sum of one hundred dollars, which is allowed as a proper charge for selling that part of the property. There is a question made as to the fixtures in the store at the time the mortgages were executed. In the mortgage to Stevens the property is described as "all of the goods and merchandise now in the store." In the mortgage to Treat it is described as "all of the stock of goods and merchandise now in the store, and fixtures."

It was understood throughout that the mortgage of Stevens should take priority over that of Treat, and it was first recorded; and therefore it becomes necessary to decide whether Stevens' mortgage included the fixtures. They were of the value of two hundred and sixty dollars. Under some circumstances the term "goods and merchan-

dise in the store" might perhaps be presumed to include the fixtures there; but here there are facts which seem to limit the construction of the language in the Stevens mortgage to the goods and merchandise proper in the store. The mortgages were written by the same person, it is to be inferred, under special instructions from the mortgagor; and in the one the fixtures were omitted, and in the other the description of the property is substantially the same, save that the fixtures are added. The mortgages were executed together on the 13th of March, and the fair inference is that the Stevens mortgage was not intended to include the fixtures.

NOTE [from original report.] Consult In re Kahley [Case No. 7,593], and Harvey v. Crane (March Term, 1871) [Id. 6,178]. The bankrupt act leaves all deeds and instruments of writing not expressly saved, to the general principles of jurisprudence. In re Wynne [Id. 18,117]. It is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid. Id. The preference which the law condemns is a preference made within the limited time by the bankrupt, and not a priority lawfully gained by a creditor. Id. Where a mortgage embraces property situated in two states, and is not recorded in one of them so as to make it valid as to the property there, it may nevertheless be valid as to the property situated in the state where it was recorded. In re Soldiers, etc., Dispatch Co. [Id. 13,163]. A secured creditor should always prove his claim; any other theory is entirely irreconcilable with the provisions of the bankrupt act. If the enforcement of his lien satisfies his demand, the debt will be discharged; but if it does not, then the balance remains as a general claim against the estate, like all other unsecured claims. In re Winn [Id. 17,876]; In re Davis [Id. 3,618]; In re Ruehle [Id. 12,113]. But if he makes his proof without reference to his lien or security, and without apprising the bankrupt court of its existence, he thereby waives his lien, and relinquishes it to the assignee. Stewart v. Isidor [5 Abb. Pr. (N. S.) 68]; In re Bloss [Case No. 1,562]; In re Stansell [Id. 13,293]. Costs in bankruptcy are left by the act entirely in the discretion of the court, and questions arising in relation to them must be disposed of on equitable principles. In re Dumont [Id. 4,127]. Creditors who have endeavored to have a mortgage prima facie fraudulent, declared void, are entitled to be reimbursed the amount of their reasonable costs, expenses and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale. Id.

Case No. 4,331.

In re ELDRIDGE et al.

[2 Hughes, 256; 12 N. B. R. 540; 1 N. Y. Wkly. Dig. 243.] [1]

District Court, E. D. Virginia. 1875.

BANKRUPTCY —LIMITATIONS — RIGHTS OF CREDITORS —VESTING OF ASSETS IN ASSIGNEE — PETITION — PROOF OF CLAIM — STATE STATUTES OF LIMITATIONS.

1. The statute of limitations ceases to run against the creditor of a bankrupt at the commencement of the proceedings in bankruptcy, and, if not barred at that time, his claim may be proved afterwards, though at the time of proof it would be otherwise barred.

[Cited in Re Brunquest, Case No. 2,055; Nicholas v. Murray, Id. 10,223; Re McKinney, 15 Fed. 912; Re Waties & Co., 39 Fed. 265.]

2. The effect in bankruptcy of the petition, the adjudication, and the assignment is to vest the assets in the assignee as a trust, against which the statute of limitations ceases to run.

[Followed in Trustees Mut. Building Fund & Dollar Sav. Bank v. Bosseiux, 3 Fed. 822.]

3. The filing of the petition by a bankrupt and his including the claim of a creditor in the schedule of debts, is equivalent to a new promise, so as to prevent the claim, if not already barred, from being defeated by the statute of limitations.

4. A court of bankruptcy, like a court of equity, will respect state statutes of limitation, and apply them in cases in which they are properly applicable.

5. The proof of claim in bankruptcy is not a suit, the commencing of which is per se necessary to suspend the running of the statute of limitations.

In bankruptcy. M. Eldridge & Co., of Alexandria, were adjudicated bankrupts on the —— day of December, 1872. A debt of eight thousand six hundred and fifty-six dollars and fifty-eight cents was proved against them by Richard A. Hawes & Co., of Boston, on the 6th of March, 1875. This debt was contracted and was due in 1861, and was evidenced by certain notes and acceptances bearing date in that year. The assignee interposes the plea of the statute of limitations against this claim.

HUGHES, District Judge. It cannot now be doubted that the federal courts are bound to pay the same regard to the statutes of states limiting the time within which actions may be brought, as is paid them by the state courts. [Shelby v. Guy] 11 Wheat. [24 U. S.] 361; [M'Clung v. Silliman] 3 Pet. [28 U. S.] 270; [Green v. Neal] 6 Pet. [31 U. S.] 291; [Ross v. Duval] 13 Pet. [38 U. S.] 45; [U. S. v. Wiley] 11 Wall. [78 U. S.] 513; [Levy v. Stewart] Id. 249; [Stewart v. Kahn] Id. 493; [Hanger v. Abbott] 6 Wall. [73 U. S.] 532; and also 1 Stat. 92, § 34.

It is equally well settled that courts of bankruptcy, like courts of equity, recognize statutes of limitations. 15 Ves. 478; 19 Ves. 468; 2 Rose, 59; 2 Glyn & J. 46; 1 Bing. 324; 8 Moore, 190; 7 Ir. Ch. 284; 3 Deac. 294; 34 U. S. Law J. 44; Kidd, 7 U. S. Law J. 613.

The only question, therefore, is, what is the limitation in Virginia, and whether the act ceases to run at the date of adjudication, or of the proof of the claim of Hawes & Co.

In Virginia, the statute of limitations did not run from July 26th, 1861, until the 1st of January, 1869. Beginning to run at the latter date, if the adjudication in bankruptcy stops the running, then this claim of Hawes & Co. is not barred; whereas, if the statute

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 1 N. Y. Wkly. Dig. 243, contains only a partial report.]

runs until the proving of the debt, then this claim is barred, there having elapsed more than five years between the 1st of January, 1869, and the 6th of March, 1875.

Authorities were cited at bar—Bump, Bankr. 566, 543, 8th Ed.; In re Cornwall [Case No. 3,250]—deciding that the proof of a claim is the beginning of a creditor's suit against an assignee, and, therefore, stops the running of the statute. The weight of authority, however, is greatly in favor of the proposition that the petition in bankruptcy is the act which stops the running of the statute, it being a new promise, and the creation of a trust. As the question is one of importance, I will give the authorities on the subject.

That the statute of limitations did not run during the late war was decided by the supreme court of the United States in [Hanger v. Abbott] 6 Wall. [73 U. S.] 532; [Freeborn v. The Protector] 9 Wall. [76 U. S.] 687; and [U. S. v. Wiley] 11 Wall. [78 U. S.] 508 and 509.

In Virginia, a stay law was enacted July 26th, 1861, in which it was provided: "Nor shall the time during which this act is in force be computed in any case in which the statute of limitations may come in question." This act was renewed and extended, each time with this same provision, by the following acts, viz., that of February 10th, 1862; that of December 20th, 1862; that of January 30th, 1863; that of January 12th, 1864; that of January 23d, 1865; that of March 2d, 1866; and by Acts 1866–1867, c. 297, it was extended to January 1st, 1869.

The act of March 2, 1866, c. 69, § 7, provides that: "The period during which this act shall remain in force shall be excluded from the computation of the time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceedings to preserve, or prevent the loss of, any right or remedy."

I believe it is a fact that there was no time during which the statute was running from July 26th, 1861, until January 2d, 1869. From that time to the petition in bankruptcy in this case was a period of less than five years.

"All debts due and payable from the bankrupt at the time of the adjudication in bankruptcy, may be proved." Section 19, Bankr. Act.

"The statute of limitations does not run against a claim after commencement of the proceedings so as to prevent its proof, if it was not barred at the time the proceedings were commenced; but the claim may be proved after it would otherwise have been discharged." Avery & H. Bankr. 147; 48 Mass. [7 Metc.] 348; Ex parte Ross, 2 Glyn & J. 46, 330.

"It seems that including a demand in the schedule of an insolvent's debts is evidence of a new promise, if within the period of limitation." Bowie v. Henderson, 6 Wheat. [19 U. S.] 514. In this case, although it was held that the assignee, under the peculiar assignment which was under consideration, was not a trustee, and that recording the debt did not change its nature as to make it a debt of record, yet the court say, "The effect of recording this debt was merely an admission of its existence, and not a change of its nature. It would have been sufficient evidence, if five years had not elapsed after recording, to have sustained an issue, on a replication of a new promise, to the plea of the statute of limitations. But more than five years having elapsed, it could have no application in this case."

See, also, 3 Cow. 159, and 2 W. Bl. 702. In this last case the court say, "No objection can arise if the debt is not barred at the time the act of bankruptcy was committed."

A proceeding in bankruptcy is in the nature of a suit in which the bankrupt is plaintiff and all his creditors are defendants. Bump. Bankr. (8th Ed.) p. 374. Debts may be proven at any time. Id. 77.

The meaning of the phrase sometimes used, that when the statute of limitations commences to run it never stops, notwithstanding disabilities of the parties, means where the disability applies to the plaintiff. That is, if the plaintiff, once being free from disability, afterwards becomes disabled, as by marriage, death, bankruptcy, etc., it does not stop the running of the statute. A slight consideration will show that any other meaning is impossible.

The effect of going into bankruptcy is to promise to pay to all creditors pro rata to the extent of the assets, and to devote all assets to that purpose, in consideration of a discharge from further payment. This applies to all debts "due and payable" at the time. Minot v. Thacher, 48 Mass. [7 Metc.] 348. Syllabus: "The statute of limitations does not run against a claim upon an insolvent debtor after the publication of the messenger's notice of the issuing of a warrant against the debtor, under St. 1838, c. 163. A claim not barred by that statute, when such publication is made, may be proved at a meeting of the creditors held after it would otherwise have been barred."

The court say (Dewey, J.): "The first objection to the allowance of the claims of the appellees is, that the same were barred by the statute of limitations. The position assumed by the assignees is, that though six years had not elapsed since the cause of action accrued, computing the time with reference to the publication of the proceedings in insolvency, and the appointment of the messenger to take possession of the effects of the insolvent, yet, as it had elapsed before the time of the meeting of the creditors at which the demands were presented, it is a good statute bar to these demands. It seems necessary only to state the proposition to show that it cannot be sustained. By force and effect of the appointment of a messenger, and the

publication thereof conformably to the statute, the property of the insolvent debtor is sequestered for the benefit of all the then existing creditors. After such publication, a suit by the creditor would be of no avail, as the property is all transferred to the assignee, and the body of the debtor is to be discharged from arrest on execution. The debts presented for allowance against the insolvent are to be considered with reference to their validity at the date of the publication by the messenger. If they are found to be barred by the statute of limitations at that period, it would of course be competent for the assignees to object to their allowance, but not to compute the six years with reference to the time of the meeting of the creditors. A different rule would work manifest injustice. Take the case of a creditor who has a debt that would be barred in thirty days. He knows that by law he has until the last of these thirty days to institute his suit, and intends so to do; but in this state of things the debtor, upon his voluntary application, goes into insolvency under St. 1838, c. 163; the incipient proceedings are all regularly taken, but no meeting of the creditors is held for proving their debts, until thirty days have elapsed. Is the debt of this creditor to be regarded as barred by the statute of limitations? Clearly not. But the principle contended for by the assignees would lead to that result in the case supposed."

This case also holds that, although the insolvent had, prior to proof, obtained his discharge, it makes no difference: "Prior to these proceedings in bankruptcy the debtor, by his voluntary application as an insolvent, had caused all his property to be sequestered for the payment of his debts pro rata, and these creditors, by virtue of those proceedings, had acquired a right to claim their proportional dividend to be paid from the assets of the debtor in the hands of his assignees on filing and proving their debts according to the provisions of the statute." The same case holds that claims may be proved at any meeting of creditors, which is also permissible under the present national law of bankruptcy.

In Ex parte Ross, 2 Glyn & J. 46, the syllabus is: "After a commission issued, the statute of limitations does not run against a creditor of the bankrupt." In this case the notes were dated May 21st, 1810, payable three and four months from date. Commission issued July 10th, 1810. Application to prove in December, 1824. Sole ground of defence, six years had elapsed. The vice-chancellor said that "after a commission issued, the statute of limitation did not run against a creditor; that the commission was a trust for the benefit of all the creditors, and it was a known principle that the statute did not run against a trust, and it was ordered that it be referred back to the commissioners to receive the said proof in respect to the said two promissory notes, having regard to the said declaration, and that the petitioners do tender their proof accordingly."

On appeal to the lord chancellor (Id. p. 330), this was sustained, and he said: "Whatever may be the technical objection, the effect of the commission clearly is to vest the property in the assignees for the benefit of the creditors; they are, therefore, in fact, trustees, and it is an admitted rule that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by the lapse of time. . . . I think the decision of the vice-chancellor was right."

In Richardson v. Thomas, 79 Mass. [13 Gray], 381, the debtor had gone into insolvency, but never obtained a discharge. Action brought at law afterwards. Held, that putting the debt in the schedule and payment by the assignee of part did not revive the debt; and in such case the pendency of proceedings did not suspend the operation of the statute, because he might still have sued, etc. The court say: "Nor do any of the authorities cited have a contrary bearing. They tend to prove that the statute of limitations does not run against the right of the creditor to prove his debt against the estate of the insolvent in competition with his other creditors, provided he had a good cause of action not barred by the six years' limitation at the time of the first publication of the insolvency. 48 Mass. [7 Metc.] 435. But it is a very different question whether the same statute is a bar to the creditor suing the debtor in a common law action upon the original cause of action. The reasons for this are obvious and are fully stated in the cases cited." 79 Mass. [13 Gray] 381; 73 Mass. [7 Gray] 274, 387,—are of same nature.

The case of Bowie v. Henderson, 6 Wheat. [19 U. S.] 514, is one relating to an act of congress which provided that where the debtor made a schedule of his assets and liabilities, recorded it in the clerk's office, and devoted the assets to the payment of his liabilities, he would be discharged from imprisonment. He was not discharged from his debts. After this was done it was sought to charge the debtor himself as a trustee for his creditors in respect to his future property. The court held that he was not such trustee; but it will readily be seen that it has no application to the principle of the bankrupt law, that the assignee as to property in his hands is trustee for the benefit of the creditors, entitled to have it applied to the payment of their debts.

In Collester v. Hailey, 72 Mass. [6 Gray] 517, Chief Justice Shaw said: "At the time of the first publication the assets of the insolvent were sequestered and placed in the custody of the law, in trust for those who were then creditors who then had provable debts. Of course, the further lapse of time could not defeat the right thus vested to

prove for a share equally with other creditors in this trust fund."

The general principles applicable to all bankrupt and insolvent laws are these: The filing of the petition and the including of a debt in the schedules by the debtor, is a new promise. The goods are sequestered. They are in the custody of the law. They are in trust. The statute of limitations which ran against the debt ceases to run against the trust, and the debt is not barred if the time of limitation had not expired at the commencement of the insolvency or bankrupt proceedings. This is a matter of course; the right of the creditor is vested in the trust fund. This would be the case even under a more general assignment to a trustee for the benefit of creditors. It is a general principle.

The decisions of Massachusetts do not profess to be based upon any special language or provision of the statute upon which they were rendered. They quote to sustain them the English cases, not because of any similarity between the statutes, in language or provisions, but because of the general principles upon which they rest. The English cases themselves are not based upon any special provisions of the English bankrupt act, but upon the general principle that the property of the bankrupt is set apart as a trust to be applied to the payment pro rata of the debts due and payable at the time of the bankruptcy.

The assignee is a trustee for the creditors. There is no adverse interest between them. Bump, Bankr. (8th Ed.) 545. It is not, therefore, proper to say that a proof of debt is a suit. It is a mere statutory proceeding to ascertain the amount due, the proceeding for the collection of the debt having already been commenced. "The proceeding in bankruptcy, from the filing of the petition to the discharge of the bankrupt, and the final dividend, is a single statutory case or proceeding." Bump, Bankr. 325. The proof of a debt is made before the register, and is uncontested. The assignee is not a party to it at all. There is no necessity of giving him any notice. Proving the claim has nothing of the character of a suit. Suits imply a controversy between parties; they are commenced by some sort of process; there must be adverse parties. But there is no adverse party to a proof of debt. It is, therefore, technically inaccurate to style the proofs of claims in a bankruptcy proceeding as a "group of suits."

I conclude this discussion with a quotation from Angell on Limitations (section 167), the standard work on this subject:

"The statute does not run against the creditor of the bankrupt, as a commission in bankruptcy constitutes a trust for all the creditors. This was held by the master of the rolls; and afterwards, on appeal, the decision was confirmed by the lord chancellor, who said that the effect of the commission was to vest the property in the assignee for the benefit of the creditors, and that he was therefore in fact a trustee, and that it was an admitted rule that unless debts are already barred by the statute of limitations when the trust is created. they are not afterwards affected by the lapse of time." See, also, 24 Pa. St. 482; 14 Serg. & R. 487; and Trecothick v. Austin [Case No. 14,164].

The proof of the claim of Hawes & Co. in this cause must therefore be allowed.

Case No. 4,332.

The ELDRIDGE.

[Deady, 176.] [1]

District Court, D. Oregon. July 6, 1866.

PILOTS—ACT WASH. T. JAN. 26, 1863—TENDER OF SERVICES.

The pilot act of the territory of Washington, January 26, 1863, authorized certain pilots to take charge of vessels bound in or out of the Columbia river, provided such pilot "shall first show the master his warrant:" *Held*, that the exhibition of the warrant to the master was a necessary part of the tender of services, and, unless the same was expressly waived, or intentionally prevented or avoided by the master, the pilot could not recover for such tender of services.

In admiralty.

Joseph N. Dolph, for libellant.

Amory H. Holbrook, for claimant.

DEADY, District Judge. The libel in this cause was filed January 11, 1866, and states that on or about August 24, 1865, the bark Eldridge, with Joseph Williams as master, being on a voyage from the Sandwich Islands to the port of Portland, crossed the bar at the mouth of the Columbia river; that at the date aforesaid, the libellant was a duly commissioned pilot of said bar, under and by virtue of an appointment of the pilot commissioners of the territory of Washington; and at the time said bark approached the bar, that the libellant then being in the steamtug Raboni, hailed the bark and offered to pilot her over the bar, but the master refused to recognize the libellant as a pilot or permit him to pilot the bark over the bar. On account of this tender of services and refusal, this suit is brought to recover the sum of one hundred dollars, the amount of full pilotage.

The claimant, John McCracken, excepts to the sufficiency of the libel, because it does not aver that the libellant exhibited his warrant to the master, before offering to pilot the bark.

The law under which the libellant seeks to recover, was passed by the legislature of the territory of Washington, January 26, 1863. The provision upon which this exception is based is contained in section 3 of the act: "Every such branch pilot is authorized and directed, by himself or his deputy, to take charge of any vessel requiring his services,

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

bound in or out of the Columbia river, or Shoalwater bay, but shall first show the master his warrant." Section 7 provides that no vessel shall be compelled to take a pilot, but vessels over one hundred tons burthen shall be liable to pay half pilotage, in and out, to the first pilot offering his services, but if the master requires the services of a pilot, in any case, the pilot shall take charge of the vessel, "first exhibiting his authority."

The libel does not aver that the libellant exhibited his authority—showed the master his warrant, at the time of hailing the bark, and tendering his services as pilot. The allegations of the libel are only to the effect that at the time the libellant was duly authorized and qualified to take charge of the bark as pilot, and that the master refused to recognize him as such pilot and receive the tender of his service. Counsel for the libellant cites Com. v. Ricketson, 5 Metc. [Mass.] 426, in support of the libel. In that case the court held that it was not necessary, in establishing the tender of services on the part of the pilot, to even show that he had his warrant with him at the time. But the statute of Massachusetts only directed the pilot to first show his warrant if required. The pilot act of Oregon [Gen. Laws Or. 707, § 14] agrees with that of Massachusetts in this respect—the pilot not being bound to show his warrant unless required. But the Washington act is peculiar in this respect, and if construed literally, it might often be impossible for a pilot to make sufficient tender of his services, if the master of the vessel desired to prevent him. It would only be necessary to keep away when hailed, so that the pilot could not show his warrant, and the tender of service would be insufficient. This would allow the master to take advantage of his own wrong. I think the statute is open to this construction at least, that the pilot ought to be excused from actually exhibiting his warrant, if he was prevented from so doing by the wrongful conduct of the master. It is the duty of a vessel when on pilot ground, to so conduct herself as to enable the pilot to make a proper tender of his services, in the cases provided for by statute. But the statute cannot be construed out of existence. The master is not bound to require the production of the warrant, and if he allows the pilot a reasonable opportunity to exhibit it, and the latter fails to do so, I think he must take the consequences of his neglect or omission. The duty of demanding the production of the warrant not being devolved upon the master, his omission to do so is not a waiver on his part of anything. The tender of service on the part of the pilot, to be sufficient must include the exhibition of his warrant, unless prevented from so doing by the wrongful act of the master.

The right of the libellant to recover pilotage in this case, rests upon a sufficient tender of his services as pilot on the occasion in question. And, unless the libel shows by direct and plain averment that such a tender was made, or a valid reason why it was not made, it is insufficient; it does not show a right to recover. The tender is in the nature of a condition precedent to the right to recover, and the libel must aver performance of it. The libellant might have been a qualified pilot, and hailed the bark as alleged; but it does not follow from this that he showed his warrant to the master, and unless he did, these acts were not sufficient to entitle him to pilotage. The exception is sustained.

Decree, that the libel be dismissed, and that the claimant recover his costs and disbursements.

Case No. 4,333.

ELDRIDGE v. The ASHLEY.

[2 N. Y. Leg. Obs. 68.]

District Court, S. D. New York. June, 1842.

PROCTOR'S LIEN FOR COSTS.

[1. Where the master of a vessel, after summons sued out to recover seaman's wages, settled unbeknown to the proctor with the seaman, with knowledge that suit had been brought, and with positive notice that the seaman's demand had been assigned to the proctor, *held*, that the proctor was justified in proceeding with the suit, and that he was entitled to recover his taxed costs.]

[2. Whether an attorney can institute a suit to recover his costs created in taking measures to collect a demand admitted to be due, and which is settled between the debtor and creditor while such measures are in preparation, quaere.]

In admiralty.

A. Nash, for libellant.

E. Seely, for claimant.

PER CURIAM. This suit is prosecuted in behalf of the proctor to recover the costs incurred in the institution of the action, and upon the allegation that the master or owner of the vessel, settled with the libellant the demand for wages, with full knowledge that suit had been brought, and after distinct and positive notice that the demand was assigned and must be paid to the proctor alone. On the hearing before a justice of the peace, in the absence of the judge, those facts were given in proof upon the return of a summons taken out by the libellant, and the justice thereupon gave a certificate that there was sufficient cause for admiralty proofs, upon filing of which the vessel was arrested.

The defence is that the master was always ready to pay the seaman his wages, and did pay them to him personally, at the first opportunity he could have to meet him; and that the seaman who earned the wages is the proper person to whom payment should be made. The proofs show very clearly that the master did not object paying the money to the proctor in the first instance; he professed his readiness to do so and obtained change for making payment,

but then insisted on having a concurrent release of all claims for assaults and other torts committed by the libellant during the voyage. The proctor refused to execute such release, but offered to give a full receipt for the wages, and to receive them without costs. After one or two interviews to the same effect, a summons was sued out, and then the master proceeded to pay the money to the sailor himself. After that payment, the proctor offered to discontinue the suit on payment of the costs to that period, and to allow the payment to the libellant to stand good. This the master peremptorily refused, and then steps were taken to carry forward this action, and written notice was given that it was continued solely for the recovery of costs. This intrinsically is an exceedingly small matter; first, as to the amount of wages in arrear, and secondly, in respect to the costs in dispute when the action was put in prosecution. Yet the case is to be decided upon the same principles that must govern those of highest magnitude, and that would have applied to this, had the demand embraced the earnings of the entire voyage, or the costs for a contested litigation.

The court will be always solicitous to promote the settlement of claims for wages without suit, and regard payment directly to the sailor as the most satisfactory disposition of his money; still the substance and not merely the formula of payment is to be regarded, and the court should be no less awake to the protection of seamen against unjust delays, against costs incurred in pursuing their rights, and against adjustments into which they may be drawn out of eagerness for ready money, or in disregard of the rights of others connected with their demands. In this case, it is made evident upon the proofs that the sailor could not obtain his wages by application to the master, as, though the master admitted them to be due, yet he refused to pay them to a third person, free of costs, unless he also had an acquittance from all liabilities to the seaman for assaults and batteries, &c. during the voyage. Whether any allegation of such wrongs existed, does not appear, but clearly the master had no right to exact any such collateral stipulation as the condition of paying wages, and the seaman rightfully applied to the court for a legal remedy. The summons against the vessel pursuant to the provisions of the act of congress, was therefore properly taken out; and if this could be regarded the commencement of an action, the question as to the right of the proctor to continue it for satisfaction of costs is settled by adjudications of this court, and the well established practice of courts of law. This doctrine is declared in the fullest terms in Toms v. Powell, 6 Esp. 40; 7 East, 536; 3 Smith, 554; 6 Price, 15; and in this court in the case of The Mary Jane [unreported]. But it is very clear that the summons is not the commencement of the suit in prosecution. It is only an inquiry conducted by the magistrate to ascertain if such suit can be brought. The court does not become possessed of the action before the certificate is filed, if it can be regarded as commenced until the attachment or monition is actually issued. This case therefore in that aspect, does not fall within the privilege of those before cited; the action not having been in progress of prosecution, when the payment was made to the libellant.

The English authorities uphold the practice of going on with an action initiated, to secure payment of costs, when the matter is settled out of court after the retainer of an attorney, and after notice from the attorney or in fraud of his lien. 2 Barn. & Ald. 402; 1 Chit. 241; 5 Bing. 190. And it has been allowed to be commenced for that object when the debt was acknowledged and was paid to the creditor, after the debtor knew an attorney was retained to prosecute its recovery. The state courts do not seem to have been called upon to adjudicate on the incipient rights of attorneys to costs previous to action brought, but their doctrines are clear and definite that the attorney's lien for costs accruing in the prosecution of a suit will be pursued against any settlement between the parties intending to evade or disregard such lien. 15 Johns. 405; 3 Caines, 145; 1 Cow. 172; 10 Wend. 617; 4 Cow. 416.

Passing it by then as a question not settled definitely upon the authorities, whether an attorney can institute a suit to recover his costs created in taking measures to collect a demand admitted to be due and which is settled between the debtor and creditor whilst such measures are in preparation, another feature of the case demands consideration. When the proctor gave notice to the master, he held an absolute assignment of the debt to himself of which the master was fully apprized

This assignment it appears was made in part to cover an advance actually made to the sailor by the proctor, but no doubt the essential object was to put the demand under the control of the proctor, to prevent any adjustment of it except with him. It is understood that these assignments or irrevocable powers of attorney have been the common method by which counsel protect themselves for advances and liabilities in managing sailors' claims, and are not to be regarded as given with the intent to pass over the absolute property in the demand. In point of fact that was undoubtedly the case in respect to this assignment, because the proctor offered to allow the payment made the sailor to stand good if the costs were satisfied by the master. The debt remained substantially the property of the libellant, and the assignment or power of attorney ought to be regarded as operating no further than to protect the proctor's legal or

equitable liens. This certainly would be its interpretation as between the sailor and his counsel; and if any urgent equity intervened demanding that construction to sustain the rights of other bona fide parties, I can perceive no reason in policy or principle for not applying it. But I am not inclined to disturb in this case the adjudication of the magistrate who had all the parties before him, and heard the facts recapitulated immediately after they occurred. He decided that the proctor was entitled to receive the money, and that the master paying with full knowledge of that fact, paid in fraud of that right, and could not set up such payment as satisfaction of the wages. A certificate was accordingly given that the wages had not been paid, and that there was proper cause for process against the vessel. I think the proofs will warrant that decision, and I should not be inclined to disturb it even if the preponderance was the other way, inasmuch as the proceeding of the master was palpably with intent to defeat the costs of the proctor.

The master having put himself upon a mere technical rule, and that having been found against him, he must bear the consequence of his mistake or wrongful intention. I should mark most emphatically, any effort of a proctor to make a law suit out of slight and casual advantages on his side or misapprehensions on the other. If any such purpose was disclosed here, it certainly would not succeed. But I think upon the proofs the conduct of the proctor was forbearing and liberal. He proposed a settlement upon terms entirely to the advantage of the master and owner, but it was refused on a supposed advantage they had obtained by a side adjustment with the sailor, and as that was designed wholly as sharp practice against the proctor, there is no reason for them to complain if failing in it, they have to pay the consequence of their wrongful practices. I shall accordingly decree that the libellant recover in this case his costs to be taxed. Decree for libellant.

ELDRIDGE (BLANCHARD v.). See Cases Nos. 1,509 and 1,510.

Case No. 4,334.

ELDRIDGE et al. v. FORTY-ONE BARS OF RAILROAD IRON.

[N. Y. Times, June 17, 1854.]

District Court, S. D. New York. June 15, 1854.

SALVAGE—FRAUDULENT CONTRACT—TENDER.

[A contract for salvage services procured by the salvors upon the false representation that other parties, to whom the contract was originally given, had abandoned the same, *held* not enforceable, and the recovery restricted to the amount of a previous tender, without costs.]

[This was a libel for salvage by William H. Eldridge and others against 41 bars of railroad iron.]

The libel in this case was filed to recover salvage compensation for raising forty-one bars of railroad iron which were sunk in the middle of the Hudson river, a little below Forrest's point, in about thirty feet of water. The claimants of the iron, the New York and Erie Railroad Company, alleged the facts to be, that a large quantity of railroad iron belonging to them had been lost there, and they had employed one Munroe to raise it; that Munroe had raised over 430 bars of it, and having another job a little way up the river, he left the iron for awhile, meaning to come back and finish his job; that while he was gone the libellants came and raised the iron without their consent or that of Munroe; that after they had raised the iron they came to the agent of the claimants and represented that Munroe had abandoned the job, and the agent then agreed to give them $5 a bar if they would get it up; and afterward, finding that they had been imposed upon, they tendered the libellants $100 for their services.

Owen & Betts, for libellants.
Morton & Haskett, for claimants.

DECREED BY THE COURT: That the libellants recover the sum of $100, being the amount of the tender, and that against this the costs of the respondents should be set off pro tanto.

ELDRIDGE (RICHARDSON v.). See Case No. 11,781a.

ELDRIDGE (ROBERTS v.). See Case No. 11,901.

ELDRIDGE (STEVENS v.). See Case No. 13,396.

Case No. 4,335.

The ELEANORA.

[17 Blatchf. 88;[1] 8 Reporter, 810.]

Circuit Court, S. D. New York. Aug. 28, 1879.

COLLISION—STEAM AND SAIL—FOG—SPEED—CONTROL OF VESSELS — FOG SIGNALS — LIGHTED TORCH.

1. A steamer must, in a fog, run at only such a speed as is consistent with the utmost caution; and she must, if possible, be kept under such control that she can be stopped after another vessel with which she is in danger of collision may be seen or otherwise discovered.

[Cited in The City of New York, 15 Fed. 629; Clare v. Providence & S. S. Co., 20 Fed. 536; The Nacoochee, 22 Fed. 857; The Parthian, 55 Fed. 428. Followed in The Oregon, 27 Fed. 755.]

2. A schooner sailing in the night, in a fog, in a common thoroughfare of approaching steam vessels, and heading on a course crossing their regular tracks, and hearing fog signals from them from various directions, was *held* in fault for not exhibiting a lighted torch, a collision having occurred between her and one of such steamers.

[Cited in The Isaac Bell, 9 Fed. 848; The Narragansett, 11 Fed. 921; The I. C. Har-

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

ris, 29 Fed. 928; Hood v. The Lehigh, 43 Fed. 601.]

3. Nothing short of an absolute certainty that the torch could do no good, to be established by proof, will justify an omission to obey the rule.

[Cited in The Excelsior, 12 Fed. 203; The Hercules, 17 Fed. 607.]

4. The schooner was *held* in fault because, while on her port tack, she sounded one blast only at a time of her fog horn, instead of two blasts at a time. The rule of the supervising inspectors of steam vessels on that subject, though it does not have the force of law as regards a sailing vessel, had become binding on the schooner, as a usage of the sea.

[Cited in Re Long Island Transp. Co., 5 Fed. 623; The Nacoochee, 22 Fed. 858; U. S. v. Miller, 26 Fed. 97.]

5. The schooner was *held* in fault for sailing short handed in a fog, having only two men on deck, one attending to going about, and acting as a lookout, and the other steering and blowing the fog horn.

[Cited in Meyers Excursion & Nav. Co. v. The Emma Kate Ross, 41 Fed. 828.]

6. A schooner and her cargo were lost by a collision with a steamer. The steamer being sued separately for the two losses, both vessels were *held* in fault. The damages for the loss of the schooner were apportioned between the two vessels. A decree was given to the owners of the cargo for the full amount of their loss; and a credit was allowed to the steamer, on the decree in favor of the schooner against her, for a sum equal to one-half of the decree in favor of the owners of the cargo. As, in the suit by the schooner, both parties had appealed to this court, the costs in this court in that suit were equally divided between them.

[Cited in The Hudson, 15 Fed. 165; Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 282; Empresa Maritima a Vapor v. North & South Am. Steam Nav. Co., Id. 505; The Canima, 17 Fed. 272; The John E. Mulford, 18 Fed. 459; The Hercules, 20 Fed. 205; Briggs v. Day, 21 Fed. 730; The Bristol, 29 Fed. 875; The Queen, 40 Fed. 695.]

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

In admiralty. These were two libels in rem, filed in the district court, in admiralty, against the steamship Eleanora, one by the owners of the schooner Transit, and the other by the owners of her cargo, to recover for the loss of the schooner and her cargo by a collision between the schooner and the steamship. The district court held that both vessels were in fault, and apportioned equally between the schooner and the steamship the damages for the loss of the schooner. It gave to the owners of the cargo a decree against the steamer for the full amount of the damages sustained by the loss of the cargo. In the suit by the owners of the schooner, both parties appealed to this court. In the suit by the owners of the cargo the claimants appealed to this court. The decision of the district court, (Blatchford, J.,) was as follows:

"These libels are filed, the first of them by the owners of the schooner Transit, and the second of them by the owners of her cargo, to recover for the damages caused by the loss of the schooner and her cargo of coal, which took place on the night of the 30th of August, 1875, shortly before midnight, in consequence of a collision between the schooner and the steamship Eleanora, in Long Island Sound, off Faulkner's Island, during a dense fog, the schooner and her cargo being sunk and totally lost, and the master of the schooner being drowned. The steamer was bound from New York to Portland, Maine. The schooner was bound to the eastward. The wind was east, and very light, and the tide was running flood or to the westward. The schooner was on her port tack, beating, and heading about south southeast, or six points off the wind. The course of the steamer had been a little north of east. The stem of the steamer struck the starboard side of the schooner a few feet forward of the stern of the schooner, and substantially cut off the part of the schooner that was aft of the line of the blow. The libels allege that those on the steamer were either negligent in not discovering the schooner in time to avoid the collision, or, seeing the schooner and her lights, or, hearing her signals on her fog horn, were negligent in continuing to run the steamer at the rate of ten or twelve knots an hour, and in not causing the steamer to be stopped before colliding, or causing her course to be changed. The answers allege, that a fog came on at 20 minutes past eleven o'clock; that the steamer was running at a moderate rate of speed, and had competent lookouts, properly stationed and keeping a vigilant lookout, and her whistle was sounded at regular and proper intervals; that, while thus proceeding cautiously, the lookout reported, and there was, at the same time, heard, one blast of a fog horn, about one half a point over the port bow of the steamer; that thereupon, immediately, her wheel was put hard-a-port, and thereafter kept so, and she was stopped and backed; that, immediately thereafter, the sails of the schooner came into view, crossing the bow of the steamer from port to starboard; that the schooner exhibited no flash nor other lights at any time, nor was any signal given from her except the one blast of her fog horn, just immediately before the collision; that she had no competent officers, nor crew; nor lookout, nor wheelsman, at or previous to the collision; that, notwithstanding every effort, from the moment of receiving any signal from the schooner, to avoid her, was made by those in charge of the steamer, the vessels came into collision; that the collision occurred about 20 minutes to 12 o'clock, midnight, and was inevitable as to the steamer; that the collision was solely owing to negligence and want of skill and care on the part of the schooner, in that she had no competent crew, and had no proper lights set and burning, and exhibited no flash light, and had no competent or proper lookout, and gave no sufficient or timely or proper signals

by lights or fog horns, and did not indicate her port tack by two blasts of her fog horn, so that vessels approaching her might be warned in time and thus avoid her, and had no competent helmsman, and, for some time before, and at the time of the collision, had no one at all at her helm; that the only signal, to wit, the one blast of the fog horn, which the steamer received, was acted upon promptly; and that, had such signal been timely and proper, and had those navigating the schooner not been guilty of the other negligent acts above-mentioned, the collision could have been avoided. The fog was very dense. The steamer, when the fog came on, reduced her speed to the rate of between 5 and 6 miles an hour, her ordinary rate being 10, and blew her fog whistle at proper intervals. There were in her pilot-house her master, and first mate, and one seaman, and there was a seaman on watch just outside of the pilot-house, and one on the lookout forward, on the forecastle deck, close to the stem. All were listening attentively for sounds of fog horns and looking attentively for lights. The schooner, as I find, on the evidence, had her colored lights set and burning, but they were not seen at any time from the steamer, nor could they, or the lights of the steamer, have been seen in such a fog at any useful distance. The schooner had on her deck a seaman, who was at the wheel, and her mate. Her master came on deck very shortly before the collision. The persons on the deck of the schooner were listening and looking. They had a fog horn on deck, and it was being blown by them at proper intervals. Yet, it is plain, from the evidence, that neither vessel became conscious of the presence of the other, until just before the collision. I cannot resist the conclusion, that the collision was due, in part, at least, to the improper speed of the steamer. The violence of the blow, and the fact that, notwithstanding the steamer stopped and reversed at full speed, as soon as she became aware of the proximity of the schooner, by hearing her fog horn, the impetus carried her, despite the obstacle, a considerable distance ahead and beyond the place of collision, before she came to a standstill, indicates that her speed was too great. The schooner gave blasts on her fog horn at proper intervals, unconscious of the approach of the steamer. The schooner was bound to the eastward, with her booms off to starboard. The blasts of her fog horn were delivered, as was natural, towards the eastward, and the position of the sails of the schooner would tend to intercept the sound from being heard by a vessel approaching the starboard side of the schooner nearly at right angles. The moment the whistle of the steamer was heard on board of the schooner, the fog horn of the schooner was blown over the starboard side of the schooner, and towards the direction from which the blast of the whistle came. The steamer was running at the rate, at 5½ miles an hour, of 484 feet in a minute. The wind was blowing the sound of the whistle directly away from the schooner. It will not do to say that the fact that the schooner did not hear the steamer's whistle sooner, or the fact that the steamer did not hear the schooner's fog horn sooner, it appearing that those on both vessels were watchful and attentive, proves that the steamer gave no blasts of her whistle before the first one that the schooner heard, or that the schooner gave no blast of her fog horn before the first one that the steamer heard, in the face of the clear evidence that both whistle and fog horn were blown, and blown at proper intervals, in view of the existing state of things before the blasts which were respectively heard. If the steamer had been going at less speed, or had gone ahead a short distance and then stopped still and listened, and thus made her speed, or her passage from point to point through the intervening space, and not merely her running rate while in forward motion, that "moderate speed" which the statute requires, it is quite apparent, that, blowing her whistle continually, at proper intervals, the blast would have been heard by the schooner, and answered by the fog horn over the starboard side of the schooner, in sufficient season for the steamer to have stopped and backed, and be brought to a stand-still, before reaching the schooner. Therefore, the steamer was in fault as to her speed. It is contended that the schooner was in fault in not showing a lighted torch. It is provided, by section 4234 of the Revised Statutes, that every sail vessel shall, 'on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching.' In order to make this provision operative, it is necessary that the sailing vessel should be aware of the approach of the steam vessel towards her, or, that, if ignorant of such approach, such ignorance should not arise from negligence or inattention on the part of the sailing vessel. In the present case, I do not find, on the evidence, that there was any negligence or want of attention on the part of the schooner, in watching for sounds from the steamer. The schooner was provided with a torch, but it was not on deck. I am not satisfied, on the evidence, that there was a sufficient interval of time between the hearing of the steamer's whistle by the schooner, and the hearing of the schooner's fog horn by the steamer, for the torch to have been lighted and exhibited in such manner as to have done any good, or to have indicated the presence or position of the schooner to the steamer sooner or better than the fog horn did, even if the torch had been on deck. Here, again, the difficulty goes back to the speed with which the steamer was approaching the course of the schooner. But, there is an obstacle to the entire exoneration of the schooner from fault. The board of super-

vising inspectors of steam vessels, in January, 1875, established certain regulations, which were approved by the secretary of the treasury. They are contained in a printed pamphlet of 45 pages, entitled: 'General Rules and Regulations prescribed by the Board of Supervising Inspectors of Steam Vessels, and approved by the Secretary of the Treasury, 1875.' Among these regulations, on page 41, are 'Rules prescribing certain fog signals to be observed by steamers, sailing vessels and other craft.' One of those regulations is as follows: 'Sailing vessels, and every craft propelled by sails, upon the ocean, lakes and rivers, shall, when on their starboard tack, sound one blast of their fog horn; when on their port tack, they shall sound two blasts of their fog horn; when with the wind free, or running large, they shall sound three blasts of their fog horn; when lying to or at anchor they shall sound a general alarm.' This regulation was in force at the time of this collision. The statute respecting fog signals (rule 15 of section 4233 of the Revised Statutes) does not cover the point of an indication of the starboard tack by one blast of a fog horn, and of the port tack by two blasts. The power of the board of supervising inspectors of steam vessels to establish the regulation in question is claimed to be derived from section 4405 of the Revised Statutes, which provides, that 'the board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the secretary of the treasury, shall have the force of law.' This provision was a re-enactment of a like provision found in section 23 of the act of February 28, 1871 (16 Stat. 449). I find it impossible to hold that the regulation respecting the indication of the tack is a necessary, or even an appropriate, regulation to carry out any provision that is found in the title in question, title 52. It is urged that the clause referred to gives to the board power to make any regulation which tends to prevent the loss of life on board steam vessels. The provisions of title 52 are, indeed, many of them, provisions to prevent such loss of life. But they are specific provisions in regard to various matters. None of them relate to fog signals, or to the navigation of a steamer or a sailing vessel in a fog, or to the manoeuvring of a steamer with reference to a sailing vessel. Therefore, I cannot hold that the regulation respecting the indication of the schooner's tack had the force of statutory law, as respected either the schooner or the steamer. But, the evidence is clear, that, as the language of the sea, the steamer had the right to understand one blast of a fog horn as indicating a sailing vessel on her starboard tack; and, in view of the evidence on the part of the steamer, and the absence of testimony on the part of the schooner, to the effect that one blast of a fog horn was not understood by those on the schooner to indicate the starboard tack, it must be held that the schooner knew that a single blast would indicate to the steamer that the blast came from a sailing vessel on her starboard tack. The schooner had, very shortly before, been on her starboard tack. On that tack, the one blast was proper. When she came on her port tack she continued her one blast. The steamer heard that one blast a little on her port bow, not over half a point. With the headway she had, she ported her helm. This threw her head to starboard, and, on the evidence, she changed, by compass, before the collision, a point and a quarter, or from east one-quarter north to east by south. Her view was, that the fog horn was on a sailing vessel which was on the starboard tack, and had already got on the port bow of the steamer, and was moving away from the course of the steamer. Therefore, porting would ensure the passage of the steamer under the stern of such vessel. But, the schooner was on the port tack, and was moving towards the line of the steamer's course. As it was, although the steamer, by porting, changed a point and a quarter, she struck the schooner at a point only 15 feet from the schooner's stern. If the schooner had, by two blasts of her fog horn, indicated that she was on the port tack, it is apparent that the steamer, hearing the sound only half a point on her port bow, would not have ported, and that, if she had kept her course, or, much more, if she had starboarded to the same extent to which she ported, she would have passed under the stern of the schooner without striking her, or the blow would have been a sliding and glancing one, inflicting less injury on the schooner and her cargo. I must, therefore, hold the schooner in fault. I do not find that any of the other faults alleged against the schooner are established. It follows, that, as regards the suit brought by the owners of the schooner, the damages for the loss of the schooner must be apportioned between the schooner and the steamer. The decision in The Atlas, 93 U. S. 316, requires, that, in the suit by the owners of the cargo, there should be a decree against the steamer for the full amount of the damages sustained by the loss of the cargo. In each case there must be a reference to ascertain the damages."

This court found the following facts: "A little before midnight of the 30th of August, 1875, the schooner Transit, owned by the libellants in the first suit, laden with two hundred and thirty-two tons of coal, owned by the libellants in the second suit, was sunk by a collision with the steamship Eleanora, in Long Island Sound, between one and two miles to the eastward, and six and seven miles to the southward, of Faulkner's Island. The schooner and cargo were a total loss, and the captain of the schooner was drowned. The wind was light from the eastward, and the tide flood, running to the westward

about two miles an hour. The schooner was eighty feet keel, and twenty-eight feet beam. Her registered tonnage was one hundred and fifty tons or thereabouts, and her carrying capacity about two hundred and thirty. She was beating eastward, on a voyage from Newburgh, N. Y., to New Bedford, Mass., and making very little headway. Her crew consisted of her captain, mate, one able seaman, one ordinary seaman and a cook. At the time of the collision she was on her port tack, having come about from the starboard tack only a little while before. The steamship was one hundred and eighty-six feet long, and thirty feet beam. Her registered tonnage was a little less than one thousand tons. She was propelled by a screw, and her usual speed was not far from ten miles an hour. She was on one of her regular trips between New York and Portland, Maine, bound east, having left her dock in New York a little after four o'clock in the afternoon of the same day. About eleven o'clock at night, a very thick fog came on, which lay low upon the water, and it was impossible to see a vessel at any considerable distance. Ordinary signal lights were of but little use. The mate's watch, consisting of the able seaman and himself only, commenced on the schooner at eight o'clock. The mate was at the wheel and the seaman on the lookout until the fog came on, or a little after. The mate then called the seaman to the wheel and went himself into the cabin, for the fog horn. On coming out he went forward near the foremast and blew the fog horn at short intervals, acting at the same time as lookout. He then came aft and gave the horn to the man at the wheel, with directions to blow it. Then he went below again and called the captain. Coming on deck soon after, he went forward and let go the jib sheets and superintended the navigation of the vessel, as she came about on her port tack. The man at the wheel steered the vessel, gave the necessary attention to the sails aft, as she came about, and did all that was done toward blowing the fog horn after he was assigned that duty by the mate. Soon after the vessel got on her port tack, the captain came on deck and looked under the sails to the starboard. Down to that time, after the vessel had come about, the blasts of the fog horn had all been given on the port side, and the sound to the starboard was obstructed by the sails. The captain at once directed that the horn be blown on the starboard side. This order was obeyed, a single blast only being given. Almost immediately afterwards the steamer appeared through the fog and struck the schooner on her starboard quarter, about fifteen feet from the stern. The steamer passed by without stopping, and, in so doing, broke off the entire stern of the schooner. Soon afterwards the schooner filled and sank. After the schooner got about on her port tack, the mate went aft to the mainmast on the port side, and remained there until the collision. The lights of the steamer were not seen until just before the steamer herself came in view, and that was only a few moments before the vessels came together. The course of the schooner was directly across the track of the steamers bound east from New York, and leaving their docks that afternoon from four to six o'clock. Their courses and position at the different hours in the night were well understood by those accustomed to navigate the Sound, and they were regularly due in that place about the time the fog came on. Fog whistles were heard on the schooner a considerable time before the collision, and they indicated the close proximity of several of the steamers. The mate heard whistles when the schooner was going about, and afterwards. Some of the steamers he had seen before the fog came on. After he got on the port tack he heard whistles near by, but gave no special attention to the sounding of the horn. No torch light was exhibited from the schooner. The torch was in the cabin, but was not brought on deck. Both the Eleanora and the Transit had the ordinary regulation lights set and burning. In June, 1871, the board of supervising inspectors, appointed under the act of February 28, 1871 (16 Stat. 449), recommended certain fog signals to be observed by steamers, sailing vessels and other craft. Among other recommendations was the following: 'Sailing vessels, and every craft propelled by sails, upon the ocean, lakes, and rivers, shall, when on their starboard tack, sound one blast of their fog horn; when on their port tack, they shall sound two blasts of their fog horn; when with the wind free or running large, they shall sound three blasts of their fog horn; when lying to or at anchor, they shall sound a general alarm. In each instance, the above signals shall be sounded at intervals of not more than two minutes.' This rule was approved by the secretary of the treasury and promulgated from the department, July 18th, 1871. Printed copies were sent to the custom houses generally, for distribution on board of vessels. In October, 1873, the collectors of customs were instructed by the department to issue to each sailing vessel, with its other regular papers, two copies of a circular intended to bring the rules to the attention of navigators, and to enjoin their observance. A supply of these circulars was furnished to collectors generally, but none appears to have been sent to Port Jefferson, a small port on Long Island, where the Transit was registered, until after the collision occurred. No direct evidence has been produced to show that actual notice of the rule had been given to the captain or the mate of the Transit, but it is abundantly established that the circulars were distributed generally to the custom houses of the country, and had been furnished to vessels in accordance with the in-

structions. The evidence also establishes the fact that this rule was generally understood and acted upon by all careful and prudent navigators in Long Island Sound, and by those sailing into and out of the harbor of New York. In August, 1875, it had been generally adopted, by common consent, as a rule of navigation. This rule was not observed by the Transit. She sounded only one blast of her fog horn while on her port tack, instead of two, as the rule required. The Eleanora was, in all respects, properly manned and equipped. She ran on her usual courses and at her usual speed, from the time she left her dock in New York, until she became enveloped in the fog. She had at all times, down to the moment of the collision, competent lookouts properly stationed on deck and performing their duties. When she reached the fog, no special orders were given to slacken her speed, but it was a rule of the boat to let the speed run down while the fog whistles were being sounded. Soon after the steamer got into the fog she commenced blowing her fog signals, and kept them up at proper intervals until the vessels came together. When the engineer heard the fog signals, he closed the throttle valve somewhat and opened the furnace doors, to let the steam run down, so that, when the collision occurred, the steamer was going at somewhat less than full speed, without any direct orders to that effect having been given. The Eleanora had been running for a considerable time in company with the eastern bound steamers leaving New York that afternoon. Some ran to the north and some to the south of her. Their fog signals were plainly heard from her. Fog horns were also occasionally heard. None, however, were recognized as near by until a single blast was heard but a moment or two before the collision. The captain was then on deck, and he promptly gave the orders to port the wheel and to stop and back. All these orders were obeyed, but, before much change was made in the course, or the speed could be stopped, the vessels came together. After the collision the steamer ran out of sight of the schooner in the fog, before she was finally stopped. She then came back and did all that could be done to save life and property. The fog signals of the other passing steamers were distinctly heard and recognized from the Eleanora until they had passed beyond hearing distance. The report of the commissioner as to the amount of damages in both cases is sustained by the evidence."

Horace Barnard, for libellants.
F. A. Wilcox, for claimants.

WAITE, Circuit Justice. I have had no difficulty in reaching the conclusion that both vessels are responsible for this collision. A simple slackening of speed by a steamer in a fog is not always enough. She must run at a moderate speed (Rev. St. § 4233, rule 21), and is never justified in coming in collision with another vessel, if it be possible to avoid it (Sup. Ins. rule 4). This implies such a speed only as is consistent with the utmost caution. Having complete control of herself, and being capable of so much damage if a collision does take place, the law has imposed on her the obligation of so directing her own movements, in the midst of the uncertainties of a fog at sea, as to be at all times under easy command. If she fails in this she must suffer the consequences. Her rate of speed must be graduated according to the circumstances. The more dense the fog the greater the necessity for moderation. The object is to keep her, if possible, under such control that she can be stopped after another vessel, with which she is in danger of collision, may be seen, or otherwise discovered. She has the right to assume that other vessels will perform their duties and act accordingly, but she has no right to disregard any obligation placed on herself.

Guided by these rules, which are well settled, it is easy to see that the Eleanora was in fault for going at too great a rate of speed. She was running in a dense fog, where the ordinary signal lights were of no use, and objects could not be seen much, if any, more than her own length away. Her officers and men appear to have been watchful on deck, and a vigilant lookout was maintained, but her engineer, at his place in the engine-room, was left to act only on his general orders to slacken speed when the fog whistles were being blown. He did not know whether the fog was dense or not, and he contented himself with opening the furnace doors, to let the steam run down, and shutting off the throttle valve somewhat; how much does not distinctly appear. No orders were given to him from the deck. It is true, the witnesses, some of them, say she was going as slow as she could and have her wheels pass the centre; but in this they are evidently mistaken. The fog horn of the Transit was heard before the vessel herself came in sight. As soon as it was heard, the orders to stop and back were given and obeyed. Notwithstanding this the steamer kept on until the schooner came in sight, then ran over the schooner, and then ran again out of sight in the fog, before coming to a stop. In this way the steamer must have run three or four times her length, under a reversed engine, against a head tide of two miles an hour. It needs no argument to show that this could not have been done if, as claimed, when the order to stop and back was given, she was under no more than mere steerage way, or if she had been going, since she came into the fog, at least half an hour before, with her throttle valve to any considerable extent closed, and her steam running down. To my mind it is clear she was doing what

is too often done under such circumstances, taking the risks of running too fast.

As to the Transit I have had no more difficulty than with the steamer. Confessedly, she did not exhibit a torch light. She was sailing in what she knew, or ought to have known, was a common thoroughfare of approaching steam vessels at the time. Their fog signals were heard from various directions, and she was heading on a course crossing their regular tracks. The statutory rule is imperative, that every sailing vessel "shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching." Rev. St. § 4234. No sailing vessel has a right to disregard this regulation because she thinks it unimportant. If she knows of the approach of a steam vessel she must exhibit the light, or take the risks of loss occasioned by its absence.

In this case no attention was paid to the rule. The light was not only not exhibited, but the torch was not brought on deck. If exhibited, possibly it might not have been seen far enough away to have done any good; but such a possibility furnishes no excuse to the vessel for its absence. Nothing short of an absolute certainty that it could do no good, to be established by proof on the trial, will justify an omission to obey the rule. In a fog, all vessels must do all that is required of them by law or usage. While more is demanded of a steamer than a sailing vessel, it is as important that the sailing vessel should obey all the rules prescribed for her, as that the steamer should not neglect those which are to govern her. Actual safety is dependent upon a strict performance by each, of all their respective duties. While the Transit was sailing on her starboard tack, while she was coming about, and while she was on her port tack, fog signals from steamers in her immediate neighborhood were heard, and it is by no means certain that some of them did not come from the Eleanora. It was not proper to assume that the torch light would have done no good. It was her duty to exhibit such a signal, and, under the circumstances of this case, I cannot but consider it a fault that she omitted to do so.

But, even if this were otherwise, her failure to give two blasts of the fog horn while on the port track was, certainly, a fault. The testimony taken since the appeal leaves no doubt on my mind that, when this collision occurred, in 1875, the recommendation of the supervising inspectors in respect to special signals to indicate the course and movements of sailing vessels during a fog, had been adopted by navigators in Long Island Sound and in and about the harbor of New York, as part of their "language of the sea," and that it had been so long in use as to make it a fault on the part of the schooner, if it was not known and understood by those responsible for her navigation. The supervising inspectors had no power to prescribe rules which would have the force of law, for the government of sailing vessels, and they did not attempt to do so. Their absolute authority did not extend beyond steam vessels, but they certainly had the authority to suggest rules for the consideration of sailing vessels, by which their conduct towards steamers should be regulated, and these rules, if generally acted upon by navigators, might in time become binding, as usages of the sea. The suggestions of the supervising inspectors were eminently practical. They were approved and promulgated by the secretary of the treasury more than four years before this accident. They were immediately taken up and acted upon to some extent. Two years afterwards, extraordinary efforts were made by the government to give them publicity and to secure their observance. It is possible that these efforts had not been put forth at the little port of Port Jefferson, where the Transit was registered, but it is quite certain that the suggestions were known and acted upon in almost every other port she entered from the time of their promulgation until the collision. Under these circumstances, if her officers had not learned of this new sound in fog language at sea, they must be considered as unfit for the positions they occupied, and the consequences of their ignorance must be visited on her. The Eleanora, when she heard the one blast of the fog horn almost ahead, acted as if the vessel from which the sound came was on the starboard tack, and put her wheel to port. This, if the signal had indicated the truth, would have been right, and quite likely would have avoided a collision. As the fact was, the movement was exactly wrong, since it brought the steamer on to the schooner. If the wheel had been put to starboard, and the steamer swung the other way, as would likely have been done if two blasts of the horn had been given instead of one only, a passage under the stern might have been made in safety.

The Transit too was, I think, short handed on deck at the time. While the number of her crew may have been sufficient, and two might have been enough for a watch on deck, under some circumstances, it is easy to see that a mate, who was attending to the navigation of a vessel and letting go her sails while going about in a fog, was in no condition to act as lookout on the watch for the fog signals from steam vessels which might momentarily be expected; and that a man at the wheel, steering the vessel and looking after the sails aft, as they came about, would not be likely to give as much attention to the fog horn as the necessities of the case for the time being required. This is shown by the fact that, although the steamers were due, and approaching from the west, the horn was not sounded in that direction until after the captain came on deck, which was

but just previous to the collision. Until then, the sound in the direction of the danger had been obstructed by the sails. A fog horn, at the best, can be heard only for a comparatively short distance, and is by no means reliable for signal purposes under all circumstances. Hence, it is important that those who are responsible for its use should be vigilant and attentive. As it is the way prescribed by law for giving information as to the position of a sailing vessel in a fog, when sight is of but little use, the duties of the man who has it in charge are as important as those of a lookout under other circumstances. Steamers are bound to keep out of the way of sailing vessels, but sailing vessels must, in the night and in a fog, by the use of the prescribed signals, furnish the steamer with the means of knowing how this may be done. This duty on the part of the sailing vessel is as obligatory as that of the steamer to keep away.

Both vessels being in fault, as between themselves, the damages must be apportioned. Castner and others, who sue the Eleanora alone for the cargo, are entitled, under the rule in this case of The Atlas, 93 U. S. 302, to a decree for the full amount of their loss; and, as the Transit, if she had been joined, would have been liable for one-half this loss, a credit may be allowed the Eleanora, on the decree in favor of the owners of the Transit, for a sum equal to one-half of the damages to the cargo. Although separate libels were filed by the owners of the vessel and the owners of the cargo, they constitute, in effect, but a single suit. They have been heard together and submitted on the same evidence. Having all parties before it, the court may do what it would have done if there had been but one libel, that is to say, divide the damages of the collision throughout between the two colliding vessels. A formal claim, to that effect, on the part of the Eleanora, is not necessary. It is rare that, in any case, a defending vessel makes a demand for a division of damages. A complete defence is generally insisted upon in the pleadings, and the apportionment is made by the court, on the facts as they are finally developed at the hearing. It is unnecessary to decide what the rule in this particular would be if the Eleanora had not been subjected in the suit for the cargo, because here she has been, and that, too, upon the very testimony submitted in the suit between the two vessels. The fund belonging to the Transit, growing out of the collision, is in court, and no injustice is done by using it to reimburse the Eleanora for what she has paid for the Transit, on account of the mutual fault of the two vessels.

While the allowance made by the commissioner in his report for the value of the Transit seems large, I think it is sustained by the evidence. As to the other exceptions to the report in the case of Davis, it is sufficient to say they are overruled. The exceptions in the other case have not been seriously insisted upon here. A decree may be entered in favor of the libellants in the suit of Castner and others, for $1,114.17, and interest at six per cent. from October 25th, 1875, until the date of the decree. In the case of Davis and others, the damage to the vessel and freight amounted to $4,660.14; one-half of this is $2,330.07; deduct one-half of the value of the cargo, $557.08, and the balance due to the Transit is $1,772.99; to which add interest at the rate of six per cent., from October 23d, 1875, to the date of the decree. In the case of Castner, a decree may be entered against the Eleanora for costs in both courts. In the case of Davis, the libellants are entitled to costs in the district court, but, as both parties appealed, the costs in this court may be equally divided between them.

Case No. 4,336.

Case of ELECTORAL COLLEGE.

[1 Hughes, 571;[1] 9 Chi. Leg. News, 106; 14 Alb. Law J. 448; 4 Cent. Law J. 72.]

Circuit Court, D. South Carolina. Nov., 1876.

FEDERAL JURISDICTION—HABEAS CORPUS—IMPRISONMENT FOR CONTEMPT BY STATE COURT WHILE IN THE PERFORMANCE OF DUTIES CREATED BY LAWS OF THE UNITED STATES.

1. It is competent for a federal court to issue the writ of habeas corpus, in favor of petitioners imprisoned for contempt by a state court, where the acts of alleged contempt were committed in the performance of duties created by the constitution and laws of the United States, and the petitioners were acting under the protection of the laws and the courts of the United States.

[Cited in Re Neagle, 39 Fed. 851.]

2. Where it clearly appears from the record that the state court exceeded its powers in committing such petitioners, it is competent for a federal court to release and discharge them from imprisonment.

The petition was as follows:

"To the Honorable Hugh L. Bond, Circuit Judge of the Circuit Court of the United States, in and for the said Circuit and District: The humble petition of H. E. Hayne, Thomas C. Dunn, Francis L. Cardozo, William Stone and Henry W. Purvis, respectfully shows:

"That your petitioners, Henry E. Hayne, as secretary of state, of the state of South Carolina, Thomas C. Dunn, as comptroller-general of said state, Francis L. Cardozo, as state treasurer of said state, William Stone, as attorney-general of said state, and Henry W. Purvis, as adjutant and inspector-general, were, by the laws of the said state, constituted the board of state canvassers and authorized and required to canvass the returns and other evidences of election for each general election occurring in said state, and among other things to make a statement of the whole number of votes given at such elec-

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

tion for the various officers voted for, upon the certified copies of the statements of the boards of county canvassers, and to certify such statements to be correct; and to certify their determinations to the secretary of state, and further, to determine and declare what persons have been by the greatest number of votes duly elected to such offices, with power and duty to decide all cases under protest and contest, when the power to do so does not by the constitution reside in some other body.

"That the secretary of state, upon receiving such certificate of the determinations of the board of state canvassers, is required to transmit a copy thereof under seal to each person thereby declared to be elected; and as to members of the congress of the United States to prepare a general certificate under the seal of the state, addressed to the house of representatives, of the due election of the persons chosen at such election as representatives of said state according to such certified determination of said board of state canvassers; and as to the electors of president and vice-president of the United States, the board of state canvassers is required to make a statement of all the votes and determine and certify the persons elected in the same manner as provided for in the election of other officers; and the secretary of state is required to cause a copy of such certified determination of said board to be delivered to each of the persons therein declared to be elected, and further to prepare three lists of the names of the electors of president and vice-president, and deliver them, with the signature of the governor, and under the seal of the state, to the president of the college of electors on or before the first Wednesday in December; and for a fuller and more specific statement of the duties and powers hereinbefore set forth, reference is now craved to the statutes of said state.

"That the legislature of said state in conferring upon your petitioners the powers and duties hereinbefore set forth and referred to, acted in pursuance and solely by authority in respect to the election of members of congress of section 4 of article 1 of the constitution of the United States, and in respect to the election of president and vice-president, of section 1 of article 2 of the constitution of the United States.

"That in pursuance of the constitution and laws of the United States, and of the said state, a general election for electors of president and vice-president of the United States, for members of the house of representatives of the United States, for the various state and county officers, members of the general assembly of said state, and for circuit solicitors of said state, was held on the 7th day of November, 1876.

"That in pursuance of the powers and duties hereinbefore named, your petitioners assembled and organized, upon notification of the secretary of state, on the 10th day of November, 1876, for the purpose of performing the duties imposed upon them by law as a board of state canvassers; that they adjourned from day to day, Sundays excepted, until the 22d day of November, 1876, on which day by the laws of said state defining their powers and duties, their powers to act as a board of state canvassers of said election ceased and determined by the express provisions of the twenty-seventh section of chapter 8 of title 2 of the General Statutes of said state, on which said day, your petitioners having fully, legally, fairly and honestly, according to the measure of their best skill and judgment, discharged and fulfilled their powers and duties as a board of state canvassers, did adjourn without day.

"That in the lawful discharge of their duties as a board of state canvassers your petitioners duly canvassed, according to law, the returns of the election of electors of president and vice-president of the United States, and of members of the house of representatives of the United States, and determined and certified that John Winsmith, Christopher C. Bowen, Timothy Hurley, Thomas B. Johnston, Wilson Cooke, W. B. Nash, and William F. Myers, were duly elected by the greatest number of votes as electors of president and vice-president of the United States, and that Joseph H. Rainey, Richard H. Cain, Robert Smalls, D. Wyatt Aiken, and John H. Evans were duly elected members of the house of representatives of the United States.

"That in canvassing the returns of said election for members of congress and for electors of president and vice-president, and determining, declaring, and certifying the result thereof, your petitioners were compelled to canvass and declare the election for all the state and other officers voted for at said election, except the governor and lieutenant-governor, not only by reason of their duties as defined by the laws of said state, in respect to such state officers, but also by reason of the fact that the returns of all the persons voted for, and all other papers and evidences pertaining to said election and within the custody and jurisdiction of the board of state canvassers, covered and embraced the entire election, and were, therefore, necessarily blended and commingled as one general whole.

"That if your petitioners had failed to discharge their duties in full on or before the said 22d day of November, 1876, the said election for electors of president and vice-president and members of congress would have failed, inasmuch as by the laws of said state, no power is given to the board of state canvassers or to any other person or persons to canvass and determine said elections after said day.

"That on the 13th day of November, 1876, after your petitioners had organized as the board of state canvassers, and while they were in discharge of their duties as such board of state canvassers, your petitioners

were served with a notice, signed by James Conner, as counsel for certain relators in a proceeding in the supreme court of said state, wherein your petitioners were informed that motions would be made in said supreme court, on the 14th day of November, 1876, for writs of prohibition and mandamus against your petitioners; that, as subsequently appeared, the said proceeding in the said supreme court was intended to restrain your petitioners from acting in a judicial capacity as a board of state canvassers, or to inquire into any matter not appearing on the face of the returns of said election, and further to compel your petitioners to proceed to perform the merely ministerial duty of aggregating the returns of the several boards of county canvassers, and to certify the results thereof in accordance with the results of such aggregation; that your petitioners appeared in said supreme court, by their counsel, whereupon a rule of said court was made requiring your petitioners to show cause before said court why writs of prohibition and mandamus should not be issued against them in accordance with the prayers of said relators; that said court subsequently granted an order requiring your petitioners to proceed to aggregate the returns of the several boards of county canvassers, and to report the results to said court; that your petitioners thereupon proceeded to aggregate said returns of the boards of county canvassers and reported the results to said court, including the results of said returns as to the electors of president and vice-president of the United States, and as to the members of the house of representatives of the United States; that your petitioners, in regarding the order of said court, and in reporting the results of said canvass to the said court, acted in a spirit of courtesy to a high judicial tribunal, but then and now protesting and averring that the said court had no authority to issue said order, or otherwise to restrain or coerce your petitioners as a board of state canvassers, or to guide or direct them in the discharge of their duties; that your petitioners having, as hereinbefore stated, performed the duty required of them by the supreme court, and having, as hereinbefore stated, fully discharged all their duties in strict accordance with the constitution and laws of the United States, and the constitution and laws of the said state, as a board of state canvassers, adjourned without day, whereupon, after said adjournment without day, your petitioners were served with an order of the said supreme court requiring them as a board of state canvassers to certify the elections, as senators and representatives in the general assembly of said state, of all persons who appeared by the said report of your petitioners to the said court to be elected, and to deliver a certified statement thereof to the secretary of state, and requiring your petitioner, Henry E. Hayne, as secretary of state, to certify such statement of your petitioners to the said persons so to be declared elected; that your petitioners having already discharged all their duties as a board of state canvassers, and having at the time of the service of said order ceased to exist as a board of state canvassers, were and are wholly unable to perform any other or additional duties as a board of state canvassers; that your petitioners, failing to comply with the last-named order of the said court, for the reasons now set forth, the said court proceeded, at 1.30 p. m. of the 24th day of November, 1876, to issue its order requiring your petitioners to show cause to the said court why they should not be attached for contempt of the said court in failing to obey the said order of the court, and made the said rule returnable at 4 o'clock p. m. of the said 24th day of November; that at said hour your petitioners appeared by counsel and by affidavit informed the court that for want of time they were unable to make due answer to said rule, whereupon the court refused to grant your petitioners further time to answer, and adjudged them forthwith to be in contempt of said court, and on the 25th day of November, 1876, ordered that your petitioners do each pay a fine of $1500, and that the sheriff of Richland county do take them into custody and confine them in the common jail of said county until they be discharged by the order of said court; that subsequently, on the 25th day of November, 1876, your petitioners were taken into custody by the sheriff of said county, and confined in the common jail of said county, where they are now, and each of them confined and restrained unlawfully and against right and justice of their liberty.

"And your petitioners further show that a part of the proceeding hereinbefore referred to in the supreme court of said state consists of a petition for a writ of mandamus to compel your petitioners, as a board of state canvassers, to proceed to change the results determined and declared by them on or before the 22d day of November, 1876, while your petitioners were lawfully acting as such board of canvassers, as to the election of president and vice-president of the United States, and to compare and correct said results by the returns of the managers of the several polls or precincts throughout the state, and otherwise still further to change said results as to said electors; that in accordance with said petition for mandamus the said supreme court issued its rule to your petitioners, requiring them to show cause, on the 24th day of November, 1876, why a writ of mandamus should not issue in accordance with the prayer of said petition; that your petitioners made return to said rule that they were no longer capable of acting as a board of canvassers, whereupon the said court heard argument as to the sufficiency of said return, and, as your petitioners are advised

and believe, the said court now have the said matter under consideration; that a part of said proceedings in said supreme court likewise consists in an application by the relators therein that the said court shall restrain and command, guide and direct your petitioners as a board of state canvassers in the discharge of their duties in determining, ascertaining, and declaring the results of the election of members of congress voted for at said election; that, as appears both by the order of commitment, and the reasons therein set forth under which your petitioners are now confined, and by other proceedings in said cause in the supreme court, the said court did, by its order, require your petitioners to make certified statements to said court of the persons who had received the highest number of votes for all the offices for which they were respectively candidates at the said general election held on the 7th day of November, 1876, including among said offices the offices of electors of president and vice-president of the United States, and of members of the house of representatives of the United States.

"And your petitioners further show that the said proceedings in said supreme court, including all its said orders, were wholly without jurisdiction, and an interference with the legal powers and duties of your petitioners as a board of state canvassers in respect to said election for electors for president and vice-president and members of the house of representatives of the United States, which powers and duties, as hereinbefore stated, your petitioners were during said proceedings in said court executing under the laws of the said state, passed in pursuance of the authority conferred by the constitution of the United States; that said proceedings, and especially said order committing your petitioners to jail, were and are an attempt by unlawful means to induce your petitioners as a board of state canvassers and as officers whose duty it was to ascertain, announce, and declare the result of the said election, wherein an election was held for members of the congress of the United States, and whose duty it was to give and make certificates, documents, and evidence in relation thereto, to violate and refuse to comply with their duty and the laws regulating the same; that for this reason said proceedings and said order committing your petitioners to jail were and are in violation of section 5511 of the Revised Statutes of the United States.

"Wherefore your petitioners, and each of them, show that they are in custody and confinement, and restrained of their liberty, for acts done in pursuance of laws of the United States, and that they are in custody in violation of the constitution and laws of the United States.

"Wherefore your petitioners humbly pray your honor to grant the writ of habeas corpus directed to Jesse E. Dent, sheriff of Richland county, in whose custody your petitioners now are detained in jail as aforesaid, requiring him to produce the bodies of your petitioners before your honor, at such time as your honor may direct by said writ, to be disposed of as law and justice may require.

"And your petitioners will ever pray," etc., etc.

An order for the issuing of the writ was made returnable immediately.

The writ was served by the marshal on the sheriff, which latter officer made the following return:

"The State of South Carolina, Richland County. I, Jesse E. Dent, sheriff of said county, do hereby certify and return to Hon. Morrison R. Waite, chief justice of the supreme court of the United States, that by virtue of a judgment and order issued out of the supreme court of the state of South Carolina, and signed by Hon. F. J. Moses, chief justice, the said H. E. Hayne, William Stone, F. L. Cardozo, T. C. Dunn, and H. W. Purvis were by me taken into custody and confined in the jail of said county on the 25th day of November, A. D. 1876, one of which said judgments and order is in words as follows: 'It is now adjudged that the said H. E. Hayne is in contempt of this court, and it is ordered that he do pay a fine of fifteen hundred dollars, and that the said sheriff of Richland county do take him, the said H. E. Hayne, into custody, and confine him in the common jail of said county until he be discharged by the order of this court.' And the same order was made in respect to each of the above-named persons, certified copies of which are herewith filed, and the bodies of the said Hayne, Stone, Cardozo, Dunn, and Purvis I have here, as commanded by this writ of 27th November, A. D. 1876."

Counsel for the petitioners made the following reply to the return of the sheriff:

"Ex parte H. E. Hayne, Thomas C. Dunn, Francis L. Cardozo, William Stone, H. W. Purvis. United States Circuit Court. Comes now the said petitioners and for reply to the return made by the said J. E. Dent, sheriff, etc., they say that they admit that the order set out in said answer was made by said supreme court, but they say the same was made in a certain cause wherein the state ex relatione R. M. Sims and others, as citizens and candidates, were petitioners, and these petitioners were defendants, and they now file and make part hereof a copy of the record and proceedings had in said court, and make the same a part hereof; and they say that the said supreme court had no jurisdiction, or authority, or jurisdiction of the subject-matter in said proceedings alleged or over your petitioners, and that, therefore, the said order of said court was and is void. And they further say that, at the time the said order set out in the said answer was made, the said petitioners had completed their labors as a board of canvassers, and had adjourned and ceased to be a board, and, therefore, they were unable to comply with any order said

court could or did make in the premises. D. T. Corbin, Thomas Settle, J. C. Denny, for petitioners."

BOND, Circuit Judge. Upon the petition of several persons, styling themselves the "Board of State Canvassers of South Carolina," which was presented to me on the first day of the regular term, I issued a writ of habeas corpus commanding the sheriff of Richland county, in whose county they were alleged to be, to produce the bodies of the petitioners before me, that I might inquire into the legality of their imprisonment.

This is a motion to dismiss the petition and remand the petitioners into the custody of the sheriff.

Section 755, tit. 13, Rev. St. U. S., provides that "the court or justice to whom application for the writ of habeas corpus is made shall forthwith award it unless it appears from the petition itself that the party is not entitled thereto."

It is not a question, at the time of the application for the writ, whether or not the facts alleged in the petition are true or false.

They are to be verified by the oath of the petitioner, and if he sets out in his petition what is necessary to give a federal court jurisdiction, the writ must issue, and the truth or falsity of the facts alleged must be determined at the hearing.

Whether or not, then, this writ issued properly or improperly depends upon the fact whether the petitioners have embraced in their petition what is necessary to give jurisdiction to the federal courts.

To give such jurisdiction the party must allege that he is in custody in violation of the constitution or of a law of the United States.

These petitioners do allege, in substance, that they were a board of state canvassers, charged with the duty, among others, of canvassing the votes recently cast at a general election, at which members of congress and presidential electors were to be chosen.

That they proceeded to canvass the votes cast, when, on the 13th day of November, 1876, while in discharge of their functions, they were informed an application had been made to restrain them from exercising what they thought to be their powers as a board of canvassers, charged as well with a federal as state trust, and that in consequence of further proceedings against them, under said notice, they are now restrained of their liberty for acts done in pursuance of laws of the United States and are in custody in violation of the constitution and laws of the United States.

When such a petition, including every requirement of the statutes was presented to me there was nothing to be done but to order the writ to issue.

But it is very plain that if these parties are in custody for disobedience of an order of a state court of competent jurisdiction, there is no power in the federal courts to release them.

It is not to the point to show that the order of commitment is erroneous. It must be absolutely void. The judgment of a state court having jurisdiction of the person or thing in controversy must be respected by every other court. It cannot be reviewed except in the way pointed out by the statute.

The first question, then, to be decided at this time and upon this motion is whether or not the supreme court of the state of South Carolina had jurisdiction to hear and determine the matter before it.

Article 1, § 26, of the constitution of South Carolina, provides: "In the government of this commonwealth the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

Section 4 of article 4 of the same instrument, defines the power of the supreme court thus: "The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law under such regulations as the general assembly may by law prescribe; provided, the said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in the state."

The powers of the board of state canvassers, so far as this case is concerned, are defined by chapter 8, tit. 2, §§ 24–26, thus:

"Section 24. The board when thus formed shall, upon the certified copies of the statements made by the board of county canvassers, proceed to make a statement of the whole number of votes given at such election for the various officers, and for each of them voted for, distinguishing the several counties in which they were given. They shall certify such statements to be correct, and subscribe the same with their proper names.

"Section 25. They shall make and subscribe on the proper statement a certificate of their determination, and shall deliver the same to the secretary of state.

"Section 26. Upon such statements they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them. They shall have power, and it is made their duty, to decide all cases under protest or contest that may arise, when the power to do so does not, by the constitution, reside in some other body."

And the objection to the jurisdiction of the supreme court made by the petitioners is, that they are a part of the executive department of the government charged with the execution of a law of the state, and that they alone are authorized to canvass the votes, and that they are not subject in the exercise of their functions to the control of the judicial branch of the government.

The supreme court of the United States, in a very able opinion by Mr. Justice Miller, in the case of Gaines v. Thompson, 7 Wall. [74 U. S.] 347, has clearly determined what the law is on this subject, and that is, "that if it appear that the act which the court is asked to compel the officer of the executive department of the government to do be purely ministerial, the court, having jurisdiction to issue the writ of mandamus, may compel the executive officer to perform his duty; but, if the act required to be done by the executive officer be not merely ministerial, but discretionary, or one about which he is to exercise his judgment, a court cannot, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of official duty; and the court further says that the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given them;" and for this Mr. Justice Miller quotes the opinion of Chief Justice Taney, in the case of the Commissioner of Patents v. Whitely, 4 Wall. [71 U. S.] 522, and the law is stated to the same effect in a very celebrated case in Maryland, by Mr. Chief Justice Bowie (Miles v. Bradford, 22 Md. 170), a case where the power of the governor to canvass the votes was not so broadly given as in the case at bar.

That the duty of this board of canvassers was not merely ministerial, but that they were clothed with a large discretion, seems to me, is very plain. They were not merely to take the returns and aggregate them. They were to canvass them. That is, they were to examine, to sift, to scrutinize them, which implies a power to reject such as were not lawful in their judgment; and more, they were to decide all cases under protest or contest that might arise when the power to do so did not, by the constitution, reside in some other body.

They were the executive officers, appointed to declare the election of such persons as had, in their judgment, the majority of the legal votes cast. If they decided erroneously or falsely, the remedy of those candidates who thought themselves wronged was by quo warranto, but no court had the jurisdiction to compel the board of state canvassers to do otherwise than their own judgment dictated.

It remains now to be seen what the court was asked to do by the relators. Their suggestion sets forth: "That the board is proceeding to hear and determine all matters of contest or protest before them in regard to the election of persons who were candidates at the general election, and is proceeding to certify their determination on such contests and protests to the secretary of state." And they pray that a writ of mandamus may issue commanding them to ascertain from "the managers' returns and statements forwarded to them by the boards of county canvassers, the persons who, at the general election held on the said 7th day of November ult., had the highest number of votes; and commanding them and compelling them to revoke and annul any determination or decision which they may have made in any case of contest or protest, if any such there be."

Under the cases cited in the opinion of the supreme court of the United States (Gaines v. Thompson, 7 Wall. [74 U. S.] 347), above referred to, I am of opinion that the supreme court of the state of South Carolina had no jurisdiction to entertain any such "suggestion" or petition.

But it does not follow because a party is in custody by reason of a void judgment of a state court that a federal judge or court has jurisdiction to release him from his imprisonment.

He must be in custody in the language of the statute for an act done or omitted, in pursuance of a law of the United States, or in custody in violation of the constitution of the United States, and the question therefore presents itself whether the board of state canvassers, in exercising their functions in reference to the late general election in the state at which members of congress and electors of president and vice-president were to be chosen, were acting in any respect in pursuance of an act of congress or under the constitution of the United States. That they were so acting is partly shown from the fact that congress has undertaken by statute to punish these state officers for dereliction of duty. Section 5515 of the Revised Statutes of the United States provides, "that every officer of an election at which representatives or delegates in congress are voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any state, territorial, district, or municipal law or authority," who commits the acts forbidden by that section, shall be punished as therein provided. This was beyond the power of congress unless these officers were acting in pursuance of a law or under or by virtue of the constitution of the United States.

But that these petitioners, though appointed by the state, are under the protection of the courts of the United States, is apparent from the fact that the board of state canvassers have certain powers to perform the authority for the exercise of which is derived directly from the constitution of the United States.

Section 1, art. 2, of the constitution, provides that electors shall be appointed in such manner as the legislature of each state may direct. When the legislature of a state, in obedience to that provision, has by law directed the manner of appointment of the

electors, that law has its authority solely from the constitution of the United States. It is a law passed in pursuance of the constitution.

In South Carolina the legislature has passed such a law. It has provided that electors shall be chosen by the qualified voters of the state, and the power of the state canvassers to canvass, determine and declare the result of such election, and to hear all questions of protest and contest relative to said officers, is expressly given in the sections of the statute above quoted. Section 2, art. 1, of the constitution of the United States, provides that members of congress shall be chosen by the people of the several states, and in South Carolina the mode of choosing them has been fixed by law, and the board of state canvassers are appointed the proper officers for determining and declaring the result of such election.

An examination of the laws of South Carolina will show "that state and county officers are elected on the same day that electors of president and vice president and representatives to congress are voted for, and that they are voted for on the same general ticket, and that all ballots at the several precincts in each county are deposited in the same box, and are counted and returned by the same set of election officers, and the result of such election is certified to the board of state canvassers by the officers holding the election."

And section 5514, tit. 70, Rev. St. U. S., provides "that any one who is proved to have voted at such general election shall be deemed to have voted for representatives in congress."

The board of state canvassers is required to meet on the 10th day of November for the purpose of sifting, scrutinizing, not merely aggregating, the statements of the county boards. The validity of the entire election in a certain precinct or county depends upon a state of facts applicable to every officer, state or federal, who has been voted for on the general ticket at that particular precinct. So far as the laws of the United States are concerned, at an election where members of congress are to be chosen, any alleged intimidation or violence toward a voter, or other misdemeanor described in section 5511 of the Revised Statutes, would be a proper consideration for the board in determining the result; because such violations of the laws of the United States, if sufficient in degree in the judgment of the board of state canvassers, would control the result.

This is the law of South Carolina as applied concurrently with the paramount law of the land—the acts of congress made in pursuance of the constitution of the United States.

The board of state canvassers was not at liberty in canvassing the votes to shut its eyes to the laws of congress respecting what was a fraudulent poll. In the petition the board alleges it was necessary, in canvassing the returns for federal officers at this general election, when both state and federal officers were voted for on the same ticket, to canvass all the votes polled and to declare the election of state officers after such canvass as well as federal officers, and it is manifest that to determine a general election the amount of fraud and intimidation, if there was any exercised to control the vote for state officers, must have had some influence upon the election of federal officers, and what the effect of it was upon such election, it was for the board to determine.

The return of the sheriff shows that he holds the petitioners under an order of the supreme court, in which it is alleged they are in contempt of that court for disobedience of an order passed in a certain cause.

This cause, by the papers filed, appears to be the case of the state at the relation of R. M. Sims and others against H. E. Hayne, chairman, and others, as members of the state board of canvassers.

We have shown from the "suggestion" itself that in our judgment the court had no jurisdiction to entertain it, and though the returns show that the parties are in custody to-day solely for not obeying the mandate of the court respecting state officers, it is our duty to go behind the returns and look at the case as it presented itself to the supreme court at its inception. U. S. v. Harris [Case No. 15,313]; Ex parte Bridges [Id. 1,862].

What the relators asked the court to do in their original suggestion is perfectly plain, and we have above quoted the paragraphs of the "suggestion" which constituted the ground of complaint of the relators. In my judgment, the whole matter was beyond the jurisdiction of the supreme court, and any order passed by them upon such "suggestion" is void.

A commitment for contempt is like any other judgment in a criminal case. While it gives me great concern to hear and determine a cause where parties are charged with disobedience to the orders of a state court, yet where the liberty of men is concerned, who have a right to appeal, under the act of congress, to the federal courts, I am sure my brother judges of the state courts will not think me wanting in courtesy if I hear them, as I am bound by law to do, and will believe me when I say there is no one who regrets more than myself this conflict of jurisdiction.

I think this proceeding in the supreme court was beyond the jurisdiction of that court. That the state board of canvassers were clothed, under the law, with discretionary powers, which required them to discriminate the votes, to determine and certify the candidates elected after scrutiny, and that they were a part of the executive depart-

ment of the government, and were in no wise subject to the control, as to what they should do after they had commenced to perform that duty, of the judicial department; and that as this was a general election, at which members of congress were to be elected, and electors of president and vice-president of the United States to be chosen, they were acting in a federal capacity, or, in other words, in pursuance of a law of the United States, and, therefore, if any one disturbs them in the exercise of their functions, they are entitled to the protection of the courts of the United States.

And while I greatly regret to differ from my brethren of the state court, I shall make an order discharging the parties from custody.

I am happy, however, to think that this controversy may be referred to a tribunal whose judgment we all respect,—the supreme court of the United States; and I shall be displeased as little as any one to hear that in this judgment I have been in error.

In the course of the preparation of these notes I have had to refer to the following authorities:

Authorities.

The circuit court can look behind the return of the officer and the commitment and examine into the cause of the detention. Rev. St. U. S. § 753; U. S. v. Harris supra; Ex parte Bridges [Case No. 1,862]; opinion of Bradley, J., in same case [supra]; Ex parte Jenkins [Case No. 7,259]; Ex parte Mattison [Id. 9,296]; opinion of Bond, J., U. S. Cir. Ct. Dist. S. C.; Bigelow v. Forrest, 9 Wall. [76 U. S.] 339; Ex parte Lange, 18 Wall. [85 U. S.] 163; People v. Liscomb, 60 N. Y. 573.

The supreme court had no jurisdiction to control, by mandamus, the action of the board of state canvassers in matters within their discretion. Const. S. C. art. 4, § 4; Id. art. 1, §§ 26, 33; Gen. St. S. C. c. 8; Astrom v. Hammond [Case No. 596]; Elliott v. Piersol, 1 Pet. [26 U. S.] 328; People v. Liscomb, 60 N. Y. 560; Gaines v. Thompson, 7 Wall. [74 U. S.] 347; Secretary v. McGanahan, 9 Wall. [76 U. S.] 298; Mississippi v. Johnson, 4 Wall. [71 U. S.] 475; Attorney General v. Barstow, 4 Wis. 567; State v. Marlow, 15 Ohio, 114; Rice v. Austin, 19 Minn. 103 (Gil. 74). See, as to executive officers in South Carolina, Gen. St. c. 16, § 1.

Mandamus will not lie where there is any other remedy. People v. Cover, 50 Ill. 100; Bassett v. School Directors, 9 La. Ann. 513.

Board could not reassemble after adjournment sine die. Cooley, Const. Lim. 622; Clark v. Buchanan, 2 Minn. 346 (Gil. 298); 33 N. Y. 603.

Board cannot be punished for disobedience to a void order. Walton v. Develing, 61 Ill. 201; Dickey v. Reed [78 Ill. 261]; Ex parte Grace, 12 Iowa, 207. Board was acting under constitution and laws of the United States. Const. U. S. art. 1, § 2; Id. art. 2, § 1; Rev. St. U. S. §§ 5510, 5511; Hurd, Hab. Corp. 412; Ex parte Kearney, 7 Wheat. [20 U. S.] 38; New Orleans v. Steamship Co., 20 Wall. [87 U. S.] 392; U. S. v. Johnson [Case No. 7,418]; Norris v. Newton [Id. 10,307]; Tarble's Case, 13 Wall. [80 U. S.] 407; Alleman v. Booth, 21 How. [62 U. S.] 523; Ex parte Cabrera [Case No. 2,278]; Ex parte Watkins, 3 Pet. [28 U. S.] 201.

Case No. 4,337.

The ELECTRA.

[1 Ben. 282.] [1]

District Court, S. D. New York. July, 1867.

COLLISION BETWEEN STEAMER AND FERRYBOAT IN THE EAST RIVER — SPEED — BOTH VESSELS IN FAULT—FAILURE TO CARRY A WHISTLE.

1. Where a large steamer, having come through the main ship channel of Hell Gate, bound to New York, at the rate of twelve miles an hour, as she approached the slip of the Astoria ferry, saw a ferryboat in and just leaving the slip on the New York side, and blew two whistles, but the ferryboat came out of her slip so far that the steamer, not being able to pass ahead of her, blew one whistle and tried to go astern, but the ferryboat then stopped and backed and was struck amidships on the port side and sunk, the evidence being very conflicting and unsatisfactory: *Held*, that the ferryboat was in fault in not holding back for the steamer to pass ahead of her.

2. The steamer was in fault in not slackening her speed as she rounded a point just above the ferry.

[Cited in The Free State, Case No. 5,090.]

3. The ferryboat was guilty of gross negligence in omitting to carry a whistle, though that circumstance seems to have had no influence on the movements of either vessel.

This was a libel filed by Anthony W. Winans, owner of the steam ferryboat Astoria, to recover the damages caused by her being sunk by a collision with the Electra, the ferryboat being on her trip from her slip at Eighty-Sixth street, New York, to Astoria, and the Electra being bound to New York. The collision took place about nine o'clock in the morning. The tide was flood, running to the eastward, and there was a good deal of floating ice in the river. It was claimed on behalf of the Astoria that she was some way out in the river when she saw the Electra coming around Horn's Hook, a point on the New York shore at the foot of Eighty-Ninth street; that the Electra blew two whistles indicating that she was going ahead of the Astoria, which thereupon backed, when the Electra blew one whistle and undertook to go under her stern, and though her engine was at once started ahead the Electra struck her amidships, sinking her in a few moments. On the part of the Electra it was claimed that as she came round Horn's Hook the ferryboat was seen in her slip, whereupon two whistles were blown to tell her to stay there till the steamer had got by; that instead of so doing she came out and kept on until it

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

was clear that the steamer could not get by ahead; that the steamer then blew one whistle to tell her to keep on and tried to go under her stern, but the ferryboat stopped and backed right in the track of the steamer. There was great conflict in the testimony as to the position and movements of the vessels. The ferryboat had no whistle. The speed of the steamer was about twelve miles an hour as she came by Horn's Hook.

Beebe, Dean & Donohue, for libelant.
Benedict, Tracy & Benedict, for claimants.

SHIPMAN, District Judge. This suit is instituted to recover damages for a collision which occurred in the East river, near the west shore, and just below Horn's Hook, on the morning of the 16th of February, 1865, between the Electra and the steam ferryboat Astoria, owned by the libelant. The ferryboat was on her regular route from near the foot of Eighty-Sixth street, New York, to Astoria, Long Island. The Electra was bound from Providence, R. I., to New York.

The Electra came down in the west or main ship channel, and as she came out past Horn's Hook she sounded two whistles, which indicated that she intended to cross the Astoria's bow. There is a conflict of evidence as to where the Astoria was when these two whistles were sounded, her witnesses insisting that she was three hundred feet out in the stream and above her slip; those of the Electra that she was in or very near her slip.

It is difficult to determine which is right on this point. The pilot of the Astoria says that he was three hundred feet out when the two whistles sounded, and that he commenced to back, and that after he had commenced backing he got another signal from the Electra that the latter intended to go astern of him; that he rung to go ahead, and that the collision immediately took place.

On the other hand, Captain Nye, who had charge of the Electra, and who was in her pilot-house, says that he sounded his two whistles before the Astoria left her slip, but that the latter came out and got nearly ahead of the Electra, when one whistle was sounded by him to indicate to the Astoria that he was going to the right, and that at the same time he put his wheel hard aport. He says at that moment the Astoria commenced backing, which brought her in the track of the Electra. He says that he could not then change so as to cross her bow, and that if the Astoria had not backed contrary to his last signal, he should have passed her stern in safety.

No signal was given by the Astoria, as she had no whistle. There was considerable running ice and a strong flood tide in the river at the time. I have compared the evidence very carefully, and on the whole am inclined to the opinion that the Astoria was in and just leaving her dock when the two whistles were blown. The evidence on both sides is extremely inconclusive and unsatisfactory. The pilot is the only person on the Astoria who heard the two whistles. There was evidently some alarm on her, as well there might be, for the Electra was not far off as she came in sight round the point of Horn's Hook, and was coming at a pretty rapid rate, as her captain states, at a speed of twelve miles an hour. This was too great a speed for such a steamer in the vicinity of ferries near a large city, with the river full of running ice which would render the movements of small craft slow and uncertain. The Electra was a large boat while the Astoria was a very small one, and I am inclined to the opinion that the latter did not get much backward way on her, after she reversed her wheels, with the ice as it then was.

On the whole, as the best result I have been able to reach in this doubtful case, I decide First, that the Astoria was in fault in not holding back for the Electra to cross her bow; second, that the Electra was in fault in not slackening her speed as soon as she rounded the point of the Hook. If she had done so she would probably have been able to have backed soon enough to have avoided the collision.

The omission of the Astoria to carry a whistle, was gross negligence, though it is not easy to see that this circumstance had any influence on the movements of either boat at this time. I note this fault of the Astoria therefore, not because it is important in this case, but to avoid any inference in future that it is sanctioned by the court.

Let a decree be entered in conformity with this opinion, with an order to a commissioner to compute the damages.

Case No. 4,338.

The ELECTRA.

[6 Ben. 189.][1]

District Court, S. D. New York. Oct., 1872.

COLLISION IN HELL GATE—STEAMER AND SCHOONER—SUDDEN ANCHORING IN CHANNEL.

1. A propeller, bound to New York, was coming through Hell Gate, with an ebb tide, in the day time. A schooner which was going through ahead of her came to anchor off Hallett's Point, and was struck by the propeller and sunk. The schooner alleged that the wind had died away, and that, finding she was in danger of drifting on Hallett's Point, she came to anchor, and had been at anchor several minutes before the propeller came in sight, and that the propeller could have avoided her by going on either side. The propeller claimed, that the schooner was slowly crossing the channel towards Ward's Island, when the propeller came to Negro Point, and that she there took her course to go under the schooner's stern, and between her and Hallett's Point, and that, when she was within five or six hundred feet of the schooner, the latter suddenly came to anchor in midchannel, right ahead of the propeller, and when it was too late for the propeller to avoid her. *Held*, that the weight of the evidence sustained the defence of the propeller.

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

2. Even if the schooner was in peril of going on the rocks, by reason of the dying away of the wind, which led her to anchor when she did, she voluntarily threw upon herself the greater danger of anchoring in a narrow and dangerous tide-way, in the course of the propeller coming with the tide.

3. The anchoring of the schooner took place at a time and in a position when and where the propeller, discovering the fact as soon as she ought to have discovered it, could not avoid the schooner, and the propeller was not liable for the damages.

In admiralty.

D. A. Hawkins, for libellants.
R. D. Benedict, for claimants.

BLATCHFORD, District Judge. This libel is brought by the owners of the schooner Lucy C. Hall, to recover for the damages sustained by them in consequence of injuries to the schooner, through a collision which took place between her and the steam propeller Electra, on the 15th of March, 1871, at about half past seven o'clock, a. m., the schooner being at the time at anchor in Hell Gate, between Hallett's Point and Negro Point, and the propeller being on a trip from Providence to New York, and the tide being a strong ebb and with the course of the propeller.

The libel alleges, that the schooner was passing through Hell Gate, on her way to New York from the Sound, with a moderate breeze from the eastward; that, when she reached a point in the channel opposite Negro Point bluff on Ward's Island, the breeze fell off, leaving her at that point in nearly a dead calm, and she drifted with the ebb tide towards Pot Rock eddy, when, finding it impossible to keep in the channel way, by reason of there being at that time no wind and a swift current setting on to Hallett's Point, and getting dangerously near to Hallett's Point, and being too near to clear it, and being entirely at the mercy of the tide and current by reason of the falling off of the wind, and having swung around about head to the northward, she let go her anchor, to avoid going upon the rocks, and paid out about fifteen fathoms of chain; that the anchor took at once, and brought her up head to the tide and clear of the rocks, and about 150 feet to the eastward of Hallett's Point, in a proper and safe place, under the circumstances, to anchor, being about 1,000 feet from the easterly shore of Hell Gate, or Holmes' Rock, or the Hog's Back; that, on the schooner's coming to anchor, the propeller was just passing Negro Point bluff, on her way from the eastward, being about one-third of a mile distant from the schooner; that the propeller, by gross carelessness and negligence on the part of those in charge of her, instead of passing to the northward of the schooner, in the regular and usual course of vessels passing through Hell Gate, came directly down upon the schooner, as she lay at anchor, and attempted to pass in the narrow space between the schooner and Hallett's Point reef; that, as soon as it was evident that she intended to go southward of the schooner instead of northward, the master of the schooner attempted to avoid being run down, by putting his helm hard a-starboard, so as to give the schooner a sheer to port; that the starboard bow of the propeller struck the bowsprit of the schooner, and broke it off, and carried away her foremast and rigging, and did other damage, and parted the schooner's cable, and the propeller sailed on, leaving the schooner to drift; and that the collision was caused wholly by negligence on the part of the propeller.

The answer sets up, that the wind was about east southeast; that the schooner was going through Hell Gate ahead of the propeller, and, after having passed Negro Point, tacked to the northward, and was standing across the river towards Ward's Island, in such a direction, and with such speed, as made it proper for the propeller to pass under her stern; that, accordingly, the course of the propeller was so shaped as to pass under the stern of the schooner, and she would have passed the schooner, had not the schooner, when in the true tide, and without any cause or excuse, cast her anchor overboard, and swung around to her anchor right in the channel, and in the way where the propeller must be swept against her by the tide; that, as soon as the fact that the schooner had dropped her anchor could be discovered from the propeller, it was discovered, and immediately her helm was put hard a-starboard, to endeavor to swing her away from the schooner, but it could not be done and the side of the propeller was carried by the tide against the bows of the schooner; that the propeller was only about 300 or 400 feet from the schooner when the latter came to anchor, and was then heading to the southward of her, so as to pass between her and Hallett's Point, and it was not possible to pass on the north side of the schooner, and the propeller's only course was to keep on in the course she had taken, which was a regular and usual course of vessels in passing through Hell Gate; that the collision was caused by no negligence on the part of the propeller, and the accident was, so far as she was concerned, inevitable; and that the schooner was in fault in coming to anchor as she did in midchannel, and is solely responsible for the collision.

The schooner had three persons on her at the time of the collision. They were her master, a mate, and a man who acted as hand and steward. All three of them have been examined as witnesses for the libellants, and they are the only witnesses for the libellants who saw the collision, except a person named Ruskin, who says he was at the time on another schooner bound from the eastward. On the part of the propeller six persons who saw the collision have been examined as witnesses. They are Mott, her

master, Reynolds, her bow watchman, Shirley, her pilot, Griffin, her second pilot, Howell, wheelsman, and Kelly, a passenger. Mott, Shirley, Griffin and Howell were in the pilot house, attending to their duties, from the time the schooner came into view from the propeller, and Reynolds was on the bow.

The contested point in the suit is, as to whether the anchoring of the schooner was or ought to have been observed from on board of the propeller, soon enough for her to have been able to avoid the collision. On the part of the schooner, it is contended, that she was at anchor in a position visible to the propeller, for a sufficient length of time prior to the collision for the propeller to have taken a course to the northward of her, free and clear. On the part of the propeller, it is contended, that, as the propeller came around Negro Point bluff, the schooner was seen ahead, in motion, heading over towards the Ward's Island side, on the starboard hand, below Negro Point and about in a range between the propeller and Hallett's point; that the propeller went on to Negro Point, and when off that, and in the usual place for determining what course to take and what channel to go through, whether the one between Flood Rock and Hallett's Point, or the main ship channel around by Manhattan Island, and when a gap was opening between the stern of the schooner and Hallet's Point, as the schooner moved onward, heading towards the Ward's Island side, the pilot of the propeller determined to take that course which was the safer and more usual one for a steamer as large as the Electra, when coming from the eastward, on an ebb tide, namely, to go through the channel between Flood Rock and Hallet's Point; that, accordingly, when the propeller was off Negro Point, her helm was changed, by porting, some six points, and she headed for Hallet's Point, having the schooner a point and a half on her starboard bow, after having got headed for Hallet's Point; that the schooner then suddenly, when the propeller was only 600 or 700 feet off from her, let go her anchor and swung to the tide; that the propeller was then so near to her that it was impossible for the propeller, by porting, to pass to the northward of her, or, by starboarding, to clear her to the southward; that the propeller could not, in the rapid tide and dangerous navigation of Hell Gate, and in the sudden emergency thrown upon her by the anchoring of the schooner, and in her close proximity to the schooner when the latter so anchored, effect any useful result by slowing, stopping, or backing; that the moment it was seen, from the propeller, that the schooner was anchoring, the wheel of the propeller was hove to starboard, and an effort made to sheer her head to port and clear the schooner to the southward, which was ineffectual; and that the collision was, so far as the propeller was concerned, inevitable.

I think this defence is established. The weight of the evidence sustains it. Without regard to the question whether there was any wind, or more or less wind, at the time the schooner anchored, or the question whether the falling off in the wind, or the absence of wind, brought her into peril, or induced a reasonable apprehension of peril, which caused her to anchor, or the question whether she was, in fact, in danger of drifting on shore, so as to make it proper for her to anchor where she did, the weight of the evidence is, that, to those on the propeller, faithfully observant of their duties, the schooner seemed to be going with the tide, and to be afloat, making more or less headway through Hell Gate, ahead of the propeller, and to be in such a position as to justify them in assuming that she would continue to move on with the tide; that, if she had done so and not come to anchor as and where she did, there would have been abundant room for the propeller to go between her and Hallett's Point; that the propeller, at the usual place for selecting her course, selected it, and made a proper selection, in view of the appearance then presented to her by the schooner; and that, after the propeller had got on her course heading for Hallett's Point, and at a time when it was too late, and the vessels were too near to each other for the propeller to go to the northward, or to go any further to the southward, or to effect any useful object by slowing, stopping or backing, the schooner suddenly cast anchor directly in the path of the propeller, and brought upon herself the consequences which ensued. It may have been that the schooner was in peril, and was right in anchoring where she did, but she must abide the consequences of anchoring there when she did. Intent on avoiding what she conceived to be danger of going on shore, she voluntarily threw herself into the greater danger of suddenly anchoring in the dangerous and narrow tide-way of Hell Gate, in front of and directly in the course of a large steamer coming with the tide. If the schooner, when she determined to anchor, saw the propeller approaching, she took the risk of the unusual circumstance of a vessel's anchoring in that spot being discovered by the propeller soon enough for the propeller to avoid her. If the schooner, when she determined to anchor, did not see the propeller approaching, it makes no difference. The only question is, whether the anchoring of the schooner took place at a time and in a position when and where the propeller, discovering the fact as soon as she ought to have discovered it, could not avoid the collision. This point I must, on the evidence, resolve in favor of the propeller and against the schooner.

The libel is dismissed, with costs.

Case No. 4,339.

The ELECTRA.

The NIAGARA.

[7 Ben. 344.][1]

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

COLLISION IN EAST RIVER—STEAMERS CROSSING—TUG AND TOW — RULES 14 AND 18 (NOW 19 AND 23).

1. A ship lying with her stern towards the river, at the upper side of a pier in Brooklyn, below the Fulton Ferry, was to be taken out by the tug N., assisted by another tug, the P. The N. was fastened on the port side of the ship, as she lay alongside of the pier, while the P. took a line from her starboard quarter, and the two backed the ship out till she was clear of the pier, when the P. swung in alongside of the ship on her starboard side. The steamer E., coming down the East river, as she was about abreast of the Fulton Ferry, found on her starboard hand a boat towing a raft of spars, and a schooner coming up the river and, on the port hand, the ship thus backing out. She gave one whistle, and kept on, going as close to the schooner as possible. Just before she reached the ship, the tug N. stopped backing and went ahead, but the stern of the ship came in collision with the side of the E. The owners of the ship filed a libel against the E. to recover the damages sustained by the ship, and the owners of the E. filed a libel against the N. to recover the damages sustained by her. *Held*, that the case was not one in which the E. was bound to keep her course and the N. was bound to keep out of her way, under the 14th (now 19th) and 18th (now 23d) articles of the rules for avoiding collisions.

[Cited in Millbank v. The A. P. Cranmer, 1 Fed. 258.]

2. The N., being incumbered with a ship in tow, and proceeding stern foremost, could not turn out of her course without difficulty, or, by the movement of her engine, control with facility the movement of the ship. It was, therefore, a case of special circumstances, under article 20 (now 24).

3. The E. was in fault, in keeping on with undiminished speed, when she saw the ship backing out. The N. was not in fault.

In admiralty.

W. R. Beebe, for the Niagara and the Carrie Reed.

E. C. Benedict and R. D. Benedict, for the Electra.

BLATCHFORD, District Judge. On the 12th of June, 1872, at a quarter past 7 o'clock a. m., or thereabouts, the ship Carrie Reed, owned by Samuel G. Reed, the libellant in the first above entitled suit, was lying with her stern out towards the river, and her stem towards the shore, at the east or upper side of a pier at Harbeck's stores, in the city of Brooklyn, in the East river, and parallel with the length of said pier. She was not loaded, and, with a view to transport her to a pier on the opposite side of the river, to be loaded, the steamtug Niagara and the steamtug President came to her, to tow her. The Niagara, which is the vessel sued in the second above entitled suit, was lashed with her starboard side against the port side of the Carrie Reed, her stem pointing the same way with the stem of the Carrie Reed. The President took a line from the Carrie Reed, from the starboard quarter aft of the Carrie Reed to the stern bitts of the President, the stem of the President heading towards across the river, with a view, as the Niagara should back, to have the President go ahead, and by pulling on said line, keep the side of the Carrie Reed which was next to the pier from unduly pressing against the pier, as she was backed out. The Niagara backed and the President pulled until the Carrie Reed had gone out a certain distance, when the President swung around, still holding fast by said line, with a view to lash herself along the starboard side of the Carrie Reed, with her stem pointing the same way with the stem of the Carrie Reed. While the Carrie Reed and the tugs were in this position, the steamer Electra, the vessel sued in the first above entitled suit, owned by the libellants in the second above entitled suit, came down the East river from the eastward, on a trip from Providence to New York; and she and the Carrie Reed came into collision. The port side of the Electra, at some distance aft from her stem, came into contact with the stern of the Carrie Reed. On the part of the Carrie Reed, $10,000 damages are claimed, and on the part of the Electra $1,500.

The Carrie Reed charges that the collision was the fault of the Electra, in not keeping a course down the middle of the river, in running too close to the Brooklyn shore, in running at too great a rate of speed, in not changing her course so as to avoid the Carrie Reed, and in not slowing, stopping and backing in time to avoid the collision. It is contended for the Carrie Reed, that, at the time of the collision, her stem was just clear of the outer end of the pier, and that the Electra came along at a full rate of speed, improperly close to the Brooklyn shore, and did not stop, back or change her course.

The case set up on the part of the Electra is, that, as she was coming from the eastward, and approached the Fulton Ferry slip on the Brooklyn side, she saw in the river to the west of or below the Fulton Ferry, a boat towing some spars, a lighter which apparently was bound to New York, and a schooner which was heading towards New York; that the only proper and safe course for the Electra was to go under the stern of the schooner and between her and the Brooklyn shore; that it was not prudent for her to attempt to go nearer the New York shore than she did; that she also saw the Carrie Reed being towed out stern foremost by the Niagara fastened alongside of her; that the Electra blew one blast of her whistle, as a signal to the Niagara not to come out so far into the river as to interfere with the passage of the Electra; that the Niagara did not pay any attention to the said whistle,

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

and did not take proper measures to avoid the Electra, as it was her duty to do, but towed the Carrie Reed so far out into the stream, that, before the Electra could pass by the Carrie Reed and the Niagara, the Carrie Reed was carried stern foremost against the side of the Electra, striking her nearly amidships; that it was not possible for the Electra to have sheered further to starboard, by reason of the fact, that, when the said schooner, which was nearly ahead of the Electra's course, had passed slightly to the starboard of that course, she suddenly changed her course, which would otherwise have carried her far over towards the New York shore, and headed directly up the East river, on a course nearly parallel with the course of the Electra; that, as soon as that change of the schooner's course was seen, the helm of the Electra was slightly starboarded, until her course was such as to enable her to clear the said schooner, when her helm was again changed, in order to give as much room as possible to the Niagara with the Carrie Reed in tow; that the collision was occasioned by the fault of the Niagara, in that she paid no attention to the whistle of the Electra, and in that she had not a proper and sufficient lookout, and in that she failed to avoid the Electra, which was on her starboard hand, and whose course was crossing hers, and in that she failed to stop in time, or to change the direction of the Carrie Reed from a backward to a forward motion in time, and thus carry her clear of the course of the Electra, when there was abundant room between the tug and the piers for the tug to have done so; and that the collision could not have been avoided by any action on the part of the Electra.

The evidence shows, that the Electra distinctly saw, from a point a long distance up the river, that the Carrie Reed was being backed out into the river from the piers, stern foremost, by a tug which was herself proceeding stern foremost, and was interposed between the Carrie Reed and the Electra. Yet, confessedly, the Electra, seeing in the river between the Carrie Reed and the New York shore, the lighter, the tow of spars and the schooner, kept on without slacking her speed, or stopping and reversing, at any time before the collision, taking the chance of getting around the stern of the Carrie Reed before the passage by should be closed. All this time she saw, or ought to have seen, that the Carrie Reed was backing and moving out into the river, and upon the course of the Electra. She now seeks to avail herself of the principle of article 14 of the steering and sailing rules, by insisting that the course of the Electra, as one steam vessel, and the course of the Niagara and the Carrie Reed, regarded as another steam vessel, were crossing courses, and so crossing as to involve risk of collision, and that the Niagara and the Carrie Reed, as having the Electra on their own starboard side, were bound to keep out of the way of the Electra, and the Electra was bound, under article 18, to keep her course. But article 20 of the rules provides, that nothing therein shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the special circumstances of the case; and article 16 provides, that every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.

A steamtug with a ship in tow, especially when both vessels are proceeding stern foremost out of a slip or from a pier into a waterway, is in a very different situation from a steamer which is unincumbered and is moving stern foremost. The Niagara, thus incumbered, and proceeding stern foremost, slowly and cautiously, could not turn out of her course and turn into it again without difficulty and without inconvenience. She could not, by the movement of her engine, control with any facility the movement backward or forward of the mass composed of herself and the Carrie Reed. The Independence, 1 Lush. 270. There were, thus, special circumstances in the case, which called on the Electra, seeing, as she did, at a sufficient distance off, the two vessels moving out stern foremost, to take all the precautions to avoid a collision with either of the two vessels, which such special circumstances called for. An obvious precaution was not to keep on, as she did, with undiminished speed. The evidence shows that she could easily have avoided the collision if she had stopped and reversed at a sufficient distance off, as required by article 16. Risk of collision was apparent at a sufficient distance off to have enabled her, by stopping and reversing, to avoid the collision which happened. I must, therefore, hold the Electra to have been in fault.

In regard to fault on the part of the Niagara, I am not prepared to hold that a tug situated as the Niagara was, was bound, under article 14, to keep out of the way of the Electra. When the Niagara started to back the Carrie Reed out, the Electra could not have been in sight. There was a projecting point on the shore above where the Niagara started, which gave to her a restricted view up the river. She moved out slowly. The Electra came down at rapid speed, without checking or slackening such speed. The Niagara, as soon as danger was or ought to have been visible to her, stopped her engine and reversed it, so as to try and give herself and the Carrie Reed motion towards the Brooklyn shore, and away from the course of the Electra. She did all she could do, and all she was bound to do, to avoid the collision.

There must be a decree for the libellant in the suit against the Electra, and the libel in the suit against the Niagara must be dismissed.

Case No. 4,340.

The ELEDONA.

[2 Ben. 31.][1]

District Court, S. D. New York. Dec., 1867.[2]

MATERIAL MAN—LIEN—NECESSITY FOR CREDIT.

1. Where the libellant furnished a mast for a foreign vessel in the port of New York, supposing that the master of the vessel was ordering it for the vessel, and rendered a bill against the vessel and owners on the same day that he furnished it, but had made no inquiry, and received no information, as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for him to obtain it on the credit of the vessel; and where it appeared that the master had at the time means to pay for the mast, and had contracted with parties other than the libellant to furnish the mast, and actually paid them for it on the day it was put into the vessel: *Held*, that there was neither a real, nor an apparent, necessity for pledging the credit of the vessel, and that the libellant, therefore, had no lien on the vessel.

[Cited in The Suliote, 23 Fed. 923. Distinguished in Hardy v. The Ruggles, Case No. 6,062.]

2. The twelfth admiralty rule of the supreme court was only intended to regulate the practice of joining ship, freight, owner, and master in one suit; and that the question of the right to sue ship, or freight, or master, or owner, for supplies or repairs, does not depend on the twelfth rule, but on the general admiralty and maritime law.

3. The cases of Thomas v. Osborn, 19 How. [60 U. S.] 22, and Pratt v. Reed, Id. 359, discussed.

This was a libel [in admiralty] by David J. Taff, against the brig Eledona, a British vessel, belonging to the port of Halifax, in Nova Scotia, to recover the sum of one hundred and fifty dollars, as the value of a main-mast, which he alleged he furnished to the vessel, at New York, on the 30th of August, 1867. The libel alleged that the vessel was in need of the mast, and that the libellant furnished it, at the request of the master or agent of the vessel, and on the credit of the vessel. It did not allege that the master or owners were without credit or means, or that the mast could be obtained only on the credit of the vessel, or that such credit was necessary; and the answer excepted to the libel for the want of these averments. The answer set up, as a defense, that, the vessel being at New York, and the master and owners having abundant credit and means, certain persons, of whom the libellant was not one, contracted to do certain repairs on the vessel, including the furnishing of the mast in question, and that those persons furnished the mast, and that, if the libellant ever owned the mast, it was sold to those parties.

It appeared by the evidence, that, on the 22d of August, 1867, the master of the Eledona entered into a written contract, at New York, where the vessel then was, with the firm of Clickener & Fowler, shipwrights, caulkers, and spar-makers, to make sundry repairs to the vessel, including the furnishing of a new main-mast, and the taking out of the old main-mast, and the putting in of a new one, for the sum of two hundred and twenty-five dollars. The master testified that the vessel needed the mast; that he paid Clickener & Fowler for the mast on the 30th of August, 1867, the day it was put into the vessel; that such payment was made with his own money; and that he required no credit for the mast, having the money to pay for it. The mast was procured from the libellant, but it did not appear that the libellant knew anything about the contract between the master and Clickener & Fowler, or knew that Clickener & Fowler had anything to do with furnishing or putting in the mast. The libellant supposed that he was furnishing the mast on the order of the master of the vessel, and he made out a bill for it against the vessel and her owners, on the 30th of August, 1867, the same day that the mast was furnished by him, but he suffered the mast to leave his premises and control before presenting the bill at the vessel. The libellant, before furnishing the mast, made no inquiry, and received no information, as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for the master to obtain the mast on the credit of the vessel, but was satisfied to deliver the mast upon the simple fact that he supposed the master was ordering it for the vessel.

A. F. Smith, for libellant.
C. Donohue, for claimant.

BLATCHFORD, District Judge. On the facts in this case, the libellant claims a lien on the vessel, for the value of the mast—one hundred and fifty dollars. It is urged, on his part, that, in order to give a lien on a vessel to a material man, for supplies or repairs furnished or made to the vessel, it is only requisite to show that a necessity existed for the supplies or repairs, and that they were furnished or made to the vessel in a foreign port; and it is claimed that the cases of Thomas v. Osborn, 19 How. [60 U. S.] 22, and Pratt v. Reed, Id. 359, decided at the December term, 1856, so far as they established a different rule, were a departure from prior well established principles, and have been since overruled by the reënactment by the supreme court, at the December term, 1858, of so much of the twelfth rule in admiralty as relates to suits by material men for supplies or repairs or other necessaries for a foreign ship, or for a ship in a foreign port, and by the decision in the case of The St. Lawrence, 1 Black [66 U. S.] 522. It is also

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

[2] [Affirmed in Case No. 4,341.]

urged, that Mr. Justice Nelson, who delivered the opinion of the court in Pratt v. Reed, has since, in cases adjudged by him, given to the decision in that case a construction which will admit of the existence of a lien on the vessel in this case in favor of the libellant, on the facts in proof. The claim on the part of the libellant comes to this, that, inasmuch as the contract in this case under which he furnished the mast was a maritime contract, and the mast was furnished for a foreign vessel, and was in fact necessary for her, he has a right, under the twelfth rule in admiralty, to proceed against the vessel in rem, to recover the value of the mast.

There was nothing new in the decisions in Thomas v. Osborn and Pratt v. Reed [supra]. They merely applied and enforced the well settled principles of admiralty and maritime law, established for the protection of shipowners whose vessels are found in foreign ports, as well as for the security of parties furnishing necessaries to such vessels. In Thomas v. Osborn, it was held, that the master of a vessel has power, in a foreign port, to hypothecate the vessel for necessary supplies and repairs furnished and made to her, either by an express hypothecation of her, as by a bottomry bond, or by an implied hypothecation of her, by obtaining such supplies and repairs on her credit, in a case of necessity; but that his authority so to hypothecate her is limited to cases where there is a necessity for obtaining the supplies or repairs on her credit, as well as a necessity for having them at all; that the person furnishing the supplies or repairs must see to it that apparently such necessities, both of them, exist, before he can claim that the vessel is hypothecated to him; and that this limitation on the authority of the master, and this duty imposed on the furnisher, are as ancient and well established as such authority itself. It was also held, in that case, that, to constitute a case of apparent necessity, not only must the supplies and repairs be needful, but it must be apparently necessary for the master to have a credit to procure them; that if the master has funds which he ought to apply to pay for the supplies and repairs, then no case of actual necessity for a credit exists; and that, if the furnisher knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the vessel. The case of Pratt v. Reed only enforced the decision in Thomas v. Osborn, by holding again, that to create an implied hypothecation of a vessel for supplies furnished to her in a foreign port, not only must a real or apparent necessity exist, at the time, for the supplies, but a real or apparent necessity must also exist, at the time, for giving a credit upon the vessel in order to procure them.

So much of the twelfth rule in admiralty as is invoked in behalf of the libellant was in force in the same language, when these decisions were made, that is found in the twelfth rule, as amended at the December term, 1858. That rule, in saying that, "in all suits by material men for supplies or repairs, or other necessaries, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam," only means, that, where a material man has a right to sue for supplies, repairs, or necessaries for such a ship, he may, if he has a right to sue the ship in rem, and the freight in rem, join them in one suit in rem, but that he cannot join the master and the owner, or either of them, as a respondent, in personam, in the same suit with such proceedings in rem; and that, if he has a right to sue the master in personam, and the owner in personam, he cannot sue them both in one suit in personam, but may sue either of them in personam. But the question of the right to sue ship, or freight, or master, or owner, in a court of admiralty, for the particular supplies, repairs, or necessaries, does not depend at all on the twelfth rule, but depends on the general admiralty and maritime law.

Nor has the ancient rule been at all relaxed since the decisions in Thomas v. Osborn and Pratt v. Reed. The case of The St. Lawrence, 1 Black [66 U. S.] 522 contains nothing to affect those decisions; and, in the circuit courts within the second circuit, their authority has been upheld and applied, in very recent cases, by Mr. Justice Nelson. In the case of Youngfall v. The James Guy [Case No. 18,184], in the circuit court for the eastern district of New York, on appeal (Sept. 1867), Judge Nelson upholds the soundness of the decision in Pratt v. Reed, as above defined, and holds that, in every case, the question of the necessity for the repairs or supplies, as well as the question of the necessity for creating a lien on the vessel for them, must depend on the facts and circumstances of the case. Again, in the case of Ross v. The Neversink [Id. 12,079], in the circuit court for this district, on appeal (Nov. 1867), Judge Nelson refers to the cases of Thomas v. Osborn and Pratt v. Reed, and says, in regard to those cases, that the decisions in them were placed upon ancient and settled authority; that those decisions extend no rule beyond its ancient strictness, and lay down the principles which are to govern cases of the kind; that no fixed rule can be laid down in advance as to what will be sufficient proof of an apparent necessity for giving credit to a vessel, but the question must rest in the sound judgment of the tribunal before which the proof is presented; that good faith and fair dealing must be exacted, in every case, on the part of the person furnishing the supplies or repairs; and that the absent owner ought to be guarded against any collusion of the master

with the material man or the furnisher of supplies, and against an unnecessary tacit incumbrance upon his vessel. In that case, Judge Nelson upheld the lien on the vessel, because the supplies were furnished at a place where the owners of the vessel were not present, and, in the sense of the maritime law, in a foreign jurisdiction, and because the master had no means wherewith to pay for the supplies. He held, therefore, that there was an apparent necessity for a credit to the vessel. In the case of Bickford v. The Caroline [Id. 1,385], in the district court for the district of Massachusetts (Nov. 1867), it was held, by Judge Lowell, on the authority of Pratt v. Reed, that the material man had no lien on the vessel for the supplies, the evidence being, that the supplies were furnished to her at Boston, she being a foreign vessel, on the order of her master, who was also her owner, under circumstances not sufficient to satisfy the court that the supplies could be obtained only upon a pledge of the credit of the vessel.

Now, in the present case, the mast was necessary for the vessel, but there was clearly no real necessity, and not even an apparent necessity, for pledging the credit of the vessel to procure the mast. The master had the money to pay for the mast, and did pay for it. On the evidence, he paid the party who furnished it to him, and, although the libellant has not been paid for the mast, yet his own negligence is the cause. He could have learned, by the exercise of due diligence, that the master had the means of paying for the mast, and that there was no necessity for pledging the credit of the vessel to pay for it. But he made no inquiry on that subject. It may be that the conduct and language of the master were such, on his interview with the libellant, as to make the master personally liable to the libellant for the value of the mast; but neither the owner nor the vessel is liable. This case is one fully illustrating the propriety of adhering strictly to the rule laid down in Thomas v. Osborn and in Pratt v. Reed. The master had the money to pay for the mast, and did pay for it to the party with whom he contracted for it, and who procured it from the libellant; and, although it may have been furnished by the libellant, under circumstances which led him to suppose that he was furnishing it to the vessel on the direct order of the master to him for it, yet no facts existed which authorized the master to pledge the credit of the vessel to the libellant for the mast. To allow the lien in this case would be to create an unnecessary incumbrance on the vessel, and to open the door for collusion between masters and material men—evils which the law, as expounded in the cases referred to, aims to cure.

The libel must be dismissed, with costs.

[NOTE. This decree was subsequently affirmed by the circuit court in Case No. 4,341, following.]

Case No. 4,341.

The ELEDONA.

[10 Blatchf. 511.][1]

Circuit Court, S. D. New York. March 3, 1873.[2]

MARITIME LIEN FOR MATERIALS—PAYMENT TO CONTRACTOR—CONTRACTOR'S CREDITORS.

The master of a vessel made a written contract with persons described in it as shipwrights and spar makers, to furnish a mast to the vessel, for an agreed price. He had the money to pay for it. The contractors ordered it from the libellant, and took it from his yard, and put it into the vessel, and the master paid the contractors for it, but they did not pay the libellant. *Held*, that the libellant had no lien on the vessel for the value of the mast.

In admiralty

Augustus F. Smith, for libellant.

Charles Donohue, for claimant.

WOODRUFF, Circuit Judge. The decree herein [Case No. 4,340] should be affirmed. The master of the brig made a contract for the mast in question, with third parties. He made no contract, express or implied, with the libellant. He did not procure, nor attempt to procure, the mast upon credit; certainly not from the libellant. With money in his possession, he bargained with third persons for the mast, to be made and put in upon his individual personal responsibility. The contract bound him to pay on performance of the contract. There was no idea of credit to any one, save that necessarily involved in beginning the making of the mast, and placing it in the vessel, in confidence that the purchaser will thereupon make payment. That payment the master made with funds in hand.

Had the contractors gone to a ship yard, and purchased a mast, without mentioning the ship into which it was to be placed, there could be no pretence that the seller could, on ascertaining what, in performance of their own agreement, they had done with it, proceed against the vessel therefor, and recover, notwithstanding the master had paid therefor to the parties with whom he contracted. The master, by entering into the agreement which he made, did not constitute the contractors his agents to purchase a mast on the credit of either himself or the vessel. Nor did the master, by going to the yard at which the mast was made, or by anything which, I think, the proofs establish, create a liability to the libellant, either on his own part or that of the vessel. All that he did was in entire harmony with his relation to the contractors. They took him to the yard where the mast was to be made. It had, in fact, been already ordered. Of course, he had an interest in the subject. He would, of course, state, if enquired of, the dimensions of the spar, though I greatly doubt that he did that. Those dimensions

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

[2] [Affirming The Eledona, Case No. 4,340.]

had already been given, and been furnished by the contractors to the libellant, and, from the memorandum furnished by the contractors, they were entered in his book, with the price at which, on the application of the contractors, the libellant had agreed to make it. The libellant was informed that the master of the brig would come up to see the stick; and he testifies that he went up, with Fowler, to see the stick. He knew nothing of the relations between the contractors and the libellant. There was nothing to suggest to him that the contractors were not simply performing their contract. That contract described them as shipwrights and spar makers, and nothing appears to have indicated to the master that the spar was not in progress at a yard which was under their own direction or control. Certainly, there was nothing to suggest that the person he saw at the yard was acting independently of those contractors and looked to him in any wise for payment. Even the libellant, in his own testimony, does not show that the master had any negotiations with him, or that the price of the mast was at any time mentioned to the master. Had that been mentioned by the libellant, it would, obviously, have led to explanation, and the master would have been apprised, if, in fact, it was true, that the libellant proposed to look to him, or to the vessel, for the payment of $150 for a mast for which he had agreed to pay other parties.

The libellant was, possibly, misled; but, if so, it was his own fault. Very slight diligence, indeed, very natural and obvious inquiry, would have informed him that the master had funds; that he had agreed with other parties for the mast; and that the purpose of his call at the yard was precisely what the libellant had been informed he would come for, namely, not to buy a mast, not to negotiate for a mast, but to see the stick, and so judge of its fitness for the purpose, and nothing else. Again, the libellant was directed by the person who ordered the mast to send the bill to Pierce & Co., No. 9 South street; and this was assented to. They are not shown to have had any connection with the vessel or the master. In short, the libellant did not furnish the mast to the vessel, nor to the master, but to those who had agreed with the master to furnish it, who ordered it from the libellant, and who received it at the yard and placed it in the vessel.

If the libellant acted under any mistake, it was due to his own carelessness. He did not put the mast in the vessel. He learned that those who ordered it had taken it away. He could not have supposed that the master of the vessel was about to put in the mast himself. Nor does it appear that he intended to give credit to any one. He did not deliver it. He was not bound to deliver it until paid for. The mast appears to have been taken without his actual knowledge at the time. If he had then followed the mast, and made known to the master that the mast had not been paid for, or if, without that, he had notified those on board that he had not delivered the mast, and had demanded it, he might have protected himself.

The case is not at all within the cases of The Grape Shot, 9 Wall. [76 U. S.] 129, and The Lulu, 10 Wall. [77 U. S.] 192. In each of those cases, the master had no funds in fact, and, in each, the master did order the supplies on credit.

The conclusions I have thus stated, from the evidence of the actual transaction, render it unnecessary to consider the other grounds urged for the dismissal of the libel, or those fully stated in the opinion of the court below.

A decree dismissing the libel, with costs, must be entered, in affirmance of the decision of the district court.

Case No. 4,342.

ELFELT et al. v. SNOW et al.

[2 Sawy. 94;[1] 6 N. B. R. 57.]

Circuit Court, D. Oregon. Oct. 30, 1871.

COMPROMISE WITH CREDITORS AVOIDED BY FALSE REPRESENTATIONS — DEBTOR RESPONSIBLE FOR ACTS OF HIS AGENT — COMPOSITION DEED — WHAT WILL AVOID.

1. A debtor who seeks a compromise with his creditors must act in good faith, and if he induce his creditors to agree to his discharge by false representations or fraudulent concealments, the agreement is void.

2. Such debtor is responsible for the false representations or concealments of his agent, though innocently made, and without his knowledge—if the debtor was aware of the real state of the facts at the time.

3. At the time of payment under a composition deed, plaintiffs, in pursuance of a previous arrangement, received a sum of money from the debtor, without the knowledge of the other creditors, in excess of the sum stipulated in the deed: *Held*, that in an action by the plaintiffs against the debtor upon the original obligation, upon the ground that the composition deed was fraudulently procured by the latter, the acceptance of such sum of money not a bar to the action.

4. When a debtor represents that he will have "some means" left after paying his creditors forty-five cents on the dollar, it is not to be presumed that such expression was understood by the creditors as meaning that the debtor would have more "means" by half than he was paying his creditors.

This was a motion for a new trial. The action was commenced in the circuit court of the state for the county of Multnomah, on April 5, 1867 [by Augustus B. Elfelt], to recover from the defendants, H. H. Snow and D. M. Jessie, a balance of $7,026 with interest from November 8, 1866, alleged to be due the plaintiffs on a promissory note made by the defendants to J. Kohn & Co., on July 28, 1862, for the sum of $8,320.12,

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

and by the latter indorsed to the plaintiffs in 1864.

Defendant Jessie was not served, and did not appear. On July 31, 1867, Snow filed a second amended answer to the complaint, in which he denied that the defendants were indebted to the plaintiffs in anywise; and alleged that on November 19, 1866, the defendants being indebted to the plaintiffs and others, "and much embarrassed financially on account thereof," said plaintiffs and others, naming them, did then execute and deliver to defendants a certain writing, by which such plaintiffs and others agreed to accept forty-five cents on the dollar, in gold coin, to be paid in two weeks, in full satisfaction of their several claims, which amounted in the aggregate to $10,672.77; and that said defendants in pursuance of said agreement, afterwards paid said plaintiffs and others said forty-five cents on the dollar, which sums said plaintiffs and others accepted in full satisfaction of said claims, and discharged defendants from further liability thereon; and that the claim mentioned in said writing is the debt upon which the plaintiffs' action is brought.

On August 1, 1867, plaintiffs replied to the answer alleging that in November, 1866, the defendants represented to the plaintiffs that they were insolvent, and the only property owned by them or Snow, was $4,000 worth of gold dust and a train of mules, from which they could realize about $3,000, and that $7,000 would only pay about forty-five cents on the dollar "of the original amount they owed," and that plaintiffs relying on, and confiding in the truth of said representations, agreed to accept, and did receive the sum of forty-five cents on the dollar of the original indebtedness due from the defendants, and in pursuance thereof, delivered said note to the defendant Snow; but that said representations were false and fraudulently made by said defendants with intent to deceive the plaintiffs; and that said defendants fraudulently concealed from the plaintiffs a large amount of property then belonging to said Snow, over and above the said forty-five cents on the dollar, to be paid plaintiffs and others, consisting of real estate and a stock of goods at Lafayette, Oregon, and a large sum of money, of which plaintiffs had no knowledge.

After three trials in the state court, in one of which there was a verdict and judgment for plaintiffs, which was reversed on appeal for error in the charge of the court, and in the others the jury disagreed, the cause was removed to this court on July 15, 1870, upon the petition of the plaintiffs, who are non-residents of the state. The cause was tried in this court before SAWYER, Circuit Judge, and DEADY, District Judge, and a jury on May 9, 10 and 11, and a verdict found for the plaintiffs for $10,187.70—the balance due upon the note sued on. The defendants moved for a new trial upon the following grounds:

I. The evidence was insufficient to justify the verdict.

II. The verdict is against law.

III. For error in law occurring at the trial, and excepted to by the defendant.

For error of the court in giving and refusing instructions.

On May 18, the motion for a new trial was argued and submitted, and taken under advisement.

David Logan and D. Fredenreich, for plaintiffs.

W. W. Page and Joseph N. Dolph, for defendants.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

BY THE COURT (DEADY, District Judge). Before considering the first ground for a new trial it will be necessary to state the issue between the parties upon which the jury passed. The pleadings substantially admit the making of the note as alleged and that the composition deed was in fact signed by the plaintiffs and others, creditors of the defendants, and delivered to Jessie on November 19, 1866, and that within two weeks thereafter, Snow in pursuance of the terms of said deed, paid plaintiffs forty-five cents on the dollar of the principal of the note, and also a further sum, in pursuance of a private understanding between plaintiffs and Jessie, amounting in the aggregate to $4,000; and that plaintiffs then accepted said sum in full payment and discharge of defendant's note and delivered the same to Snow.

The issue submitted to the jury arose upon the allegation of the replication, to the effect that the execution of the composition deed and the delivery of the note upon the receipt of the $4,000, was procured by the false representations of the defendants as to their means of paying their debts, and that therefore the plaintiffs were not bound thereby.

If the evidence is sufficient to support this allegation the verdict must be correct. It appears from the evidence that prior to July, 1862, Snow and Jessie had been engaged in the business of retail merchants at Lafayette, Oregon, and purchased goods of plaintiffs and their predecessors in business, J. Kohn & Co. About this time Jessie removed to the east of the mountains, in the territory of Washington. Snow continued the business in Lafayette until the spring of 1865, when he sold the stock of goods and six lots in the town, including his store-house, to one Allen for $6,000, for which the latter gave his promissory notes, with a mortgage upon the lots to secure one half of them. Soon after this Snow went east of the mountains, and engaged with Jessie in packing and trading between the upper Columbia and Idaho and Montana. Jessie lived at Walla Walla and Snow appears to have been upon the road and in Montana. In November, 1866, Snow came into Walla Walla, bringing with him $11,664 in gold dust and a

young man by the name of Harris, in whose name he deposited this dust for assay, so as to prevent his creditors, including plaintiffs, from knowing that he had it. Here Snow stopped and sent Jessie forward to Portland to effect a settlement with the Portland creditors. Upon his arrival at Portland, Jessie called upon the plaintiffs, the principal creditors, and entered into negotiations with one of them—Solomon Goldsmith—for a compromise. According to his own testimony, Jessie then represented that Snow and Jessie, or Snow & Co., as they were called, were insolvent. That their assets consisted of only $4,000 in money and a train of mules worth about $3,000; and that with this amount—$7,000—he thought they could pay forty-five cents on the dollar of their indebtedness, excluding accruing interest. That he, Jessie, had about $5,000 worth of individual property, and owed $3,000[2] of individual debts. When asked by Jessie how the proposed settlement would leave Snow, Jessie replied "that he knew but little about Snow's business—that he had some means, and that the property at Lafayette was sold;" to which Goldsmith replied "that he knew about that, that Snow had told him what he sold it for."

According to Goldsmith's testimony, Jessie stated that Snow and Jessie were giving up all their property, and that Jessie did not state that he did not know what property Snow owned individually. But that he informed him about his own individual property, and for that reason no attempt was made to prosecute the action against Jessie.

The result of the negotiation was the execution of the composition deed of November 19, Goldsmith writing it and procuring the other creditors who are parties to it, to sign it. Jessie then returned to Walla Walla, and gave the writing to Snow, who immediately came to Portland, and proceeded to the plaintiff's store with two gold bars, worth about $6,600,[3] where he met Goldsmith and informed him that he was ready to settle upon the terms agreed upon with Jessie. Goldsmith said that in consideration of cash advanced by plaintiffs to defendants, to help get their goods up the Columbia river, Jessie had promised to pay them something more than forty-five cents on the dollar—in all $4,000. With some show of reluctance and surprise, Snow assented to this arrangement. Goldsmith bought the gold bars and retaining $4,000 for the plaintiffs, and the sum due Wasserman & Co., one of the parties to the deed, gave Snow the promissory note and the remainder of the money to pay the other creditors, which he did. Before closing the transaction with Snow, and handing him the note, Goldsmith testifies that he said to him, "Snow, the amount you are paying us is very small, and from the treatment you received from us, we expected you would do better; but we make this settlement only upon the representation made to us by Jessie, that you are giving up all you have;" and that Snow answered, "Jessie's representations are true; we are giving up all that we have." Goldsmith also testifies that he was aware of the sale of the Lafayette property to Allen, but not of the mortgage by him to Snow: and that he believed from the representations of defendants that Snow was substantially giving up all his property, and that thereby he was induced to settle with them and accept forty-five cents on the dollar as he did.

Alfred E. Elfelt, not one of the plaintiffs, testifies that he was present at the conversation between Goldsmith and Snow, and that it took place as the former states it.

The defendant Snow was examined as a witness for the defense. His account of the transaction, so far as it went, did not differ materially from the foregoing. He stated that he told S. Goldsmith, about the time of the sale to Allen, that he got notes secured by mortgage for the real property in Lafayette, but was not certain that he informed him that he got Allen's notes for the stock of goods. He admitted that at the time the $4,000 was paid, and the note returned, that S. Goldsmith said to him that the amount paid was small, and that the plaintiffs were induced to make the settlement by the representations of Jessie that this was all that Snow & Co. could pay, and that he replied that he presumed that what Jessie said was correct; and also that at the same time he had in his possession of his own property $6,500 in gold bars and dust, which he had brought from Montana, besides being the owner of the train of mules aforesaid, for which he realized $2,100 in cash, and Allen's notes for $6,000, as aforesaid, which were worth $3,000—in all, $11,600 over and above the $7,000 of partnership funds paid to the creditors.

Upon the argument of the motion, the only point urged under this head was, that upon the testimony of Jessie it did not appear that he had made any false representation or fraudulent concealment as to Snow's individual assets, because when asked how the settlement would leave Snow, he replied: "I know but little about Snow's business; he has some means," etc. Upon this answer it is maintained by counsel for defendant that Jessie substantially disclaimed any knowledge of Snow's individual means; and that, therefore, in this respect the plaintiffs made the settlement upon their own knowledge, and not the representations of the defendants. It is admitted that the law applicable to the question was correctly given to the jury as follows:

When a debtor seeks to make a composition of his debts by the payment of a part only of what he owes, he is not bound to make any representations concerning his assets or resources; but he must act in good faith, and if he does make any such representation, either voluntarily or upon the re-

[2] [6 N. B. R. 57, gives $4,000.]

[3] [6 N. B. R. 57, gives $6,500.]

quest of his creditor, he must make it truly and completely, or he will be guilty of fraud.

Now, Jessie did not absolutely disclaim all knowledge of Snow's affairs; and under the circumstances the jury was warranted in inferring that he knew quite as much about them as he said he did. He said he knew but little about Snow's business—that he had some means. What was the impression that this remark was calculated to make upon Goldsmith? Certainly not, that while Snow was proposing to compromise his debts at forty-five cents on the dollar of the principal, with the sum of $7,000, he had of his own means, beside this, $11,000 in cash and cash values—enough when put together to have paid all the debts in full and left him at least $2,000 surplus. "Some means" is a relative expression, to be measured by the surrounding circumstances. Ordinarily, when we say that a man has something left after paying his debts or sustaining a loss, we do not mean, nor are we understood as asserting, that he has nearly twice as much left as he paid or lost. When it is said that a debtor will have some means or something left after settling with his creditors at forty-five cents on the dollar, it is necessarily understood that this something or some means is very small in proportion to the amount paid. In this case the aggregate amount paid the creditors was only $7,000, and it could not have been understood by Goldsmith, or any person in like circumstances, that the "some means" which the settlement was to leave Snow with, was more than one or two thousand dollars. The statement then that Snow had only "some means" left of his own, after making this settlement, was under the circumstances, a false representation. Relatively he had much "means."

But this argument assumes that Jessie's testimony was all the evidence before the jury on this point, while the fact is that Goldsmith corroborated by Elfelt, testifies that Jessie said that Snow and Jessie were giving up all their property, except the individual property of the latter. Neither of them state or admit that Jessie said he was ignorant of Snow's business, or that the settlement would leave him with "some means." It was the province of the jury to determine from the testimony of these witnesses what representation Jessie did make. They have found by their verdict that the representation as to Snow's "means" was untrue, and I think they might reasonably have come to the same conclusion upon the testimony of Jessie alone.

Furthermore, the jury were warranted in believing from the conduct and declarations of Snow from the time he left Montana to come to Walla Walla, that he intended to procure a settlement with his creditors for fifty or forty-five cents on the dollar, without reference to his ability to pay more, and that from the time he left the latter place to come to Portland to perform the agreement which his agent had succeeded in obtaining from his creditors, he was conscious that he had obtained by such agreement an unfair advantage over such creditors.

Snow persistently concealed from the plaintiffs that he had in his possession the $6,500 in gold over and above the amount paid the creditors. He brought Harris with him from Montana to Portland as the pretended owner of the treasure he had, for the purpose of deceiving his creditors in that respect. Although he deposited the $6,500 with the plaintiffs immediately on his arrival, and although their house had always been his headquarters in Portland, he did not take the $6,500 there, but took care to keep it out of their sight and knowledge. Now, if Snow honestly believed that the settlement which he had procured was agreed to by the creditors with the understanding, expressed or implied, that he would have $6,500 in cash left, besides the pack train and Allen's notes, he would not have taken this trouble to conceal from them the fact that he had it. His conduct in this respect reasonably admits of the explanation, that he was conscious his creditors had been induced to sign the agreement to take forty-five cents on the dollar, upon the representation or understanding that he was substantially giving up to them all he had individually as well as otherwise. So, when Goldsmith informed him that he was only induced to make this settlement upon the representation of Jessie, that he was giving up all he had, instead of replying, "you are mistaken, you must have misunderstood Jessie. I will have between $11,000 and $12,000 in cash and cash values left," he said that what Jessie said was correct, thereby directly adopting and affirming a representation of his agent which he knew to be grossly false in fact.

It is true that the compromise deed cannot be avoided by the plaintiffs on account of what was said or done by the defendant after it was executed; at least so the court instructed the jury at the request of the defendant. But the conduct and declarations of Snow at the time of making the payment, and receiving the note, after he was informed of the representations upon which the plaintiffs were induced to sign the agreement, are pertinent to show that Snow authorized, intended or contrived that Jessie should make such representations for the purpose of misleading and defrauding the plaintiffs.

Upon a careful consideration of the premises, I am of the opinion that the verdict of the jury upon the issue arising upon the pleadings is supported by the weight of evidence, if indeed there be any to the contrary. In my judgment, the facts and circumstances of the case all tend to prove that the defendant Snow, intending to procure a settlement with his creditors at not to exceed fifty cents on the dollar, did, by

his representations made through Jessie and his own conduct, concealments and declarations, cause the plantiffs to believe that Snow and Jessie could only pay forty-five cents on the dollar of their indebtedness, after deducting the interest due on the same, and did thereby induce the plaintiffs to execute the composition deed, whereby they agreed to receive that sum in full of what was due them.

The remaining grounds of the motion are for alleged errors in law, and will be considered collectively. Upon the argument of this branch of the case, counsel for defendants made two points: 1. That the plaintiffs cannot maintain this action, and the court erred in refusing so to instruct the jury, because the plaintiffs having induced their co-creditors to sign the composition deed, and having received from the defendants in pursuance of a secret agreement to that effect, more than the per centum stipulated in such deed upon their demand, without the knowledge or consent of such creditors, did thereby commit a fraud upon them. 2. That the court erred in instructing the jury to the effect, that Jessie being Snow's agent to negotiate this compromise, if he, through ignorance of the truth, which was known to Snow, made a false representation as to the affairs or pecuniary resources of the latter, Snow is responsible for such representation, the same as if he made it in person.

Two authorities are cited in support of the first proposition; namely, Breck v. Cole, 4 Sandf. 79, and Wood v. Roberts, 3 E. C. L. 411. Neither of these cases are in point. The first was an action brought by a creditor to enforce payment of a note given by his debtor, upon the execution of a composition deed, as a condition of the former's signing the same, for that portion of the debt not provided for in such deed. The court held that the arrangement was void as against the other creditors, upon whom it was a fraud, and also as to the defendant, upon the ground that it was obtained from him by moral duress. Now, in the case at the bar, the plaintiffs are not seeking to enforce or claim the benefit of any secret arrangement with the debtor to the prejudice of their co-creditors in the composition deed, but on the contrary they repudiate the whole transaction as a fraud committed upon them by the defendants. This action is not brought to enforce the composition deed, nor any additional security secretly given to the plaintiffs in connection therewith, but upon the original promise of the defendants contained in this note to J. Kohn & Co.

The case of Wood v. Roberts, supra, was an action by a creditor for a balance of account after having accepted a portion of his demand in pursuance of an arrangement for a composition between the creditors, including himself, and the debtor. There was a verdict for the defendant, the court instructing the jury that to allow the plaintiff to recover would be a fraud upon the other creditors who had in pursuance of the composition accepted the partial payment and discharged the defendant. In other words, the court held, as is now well established, that a debt may be discharged by the payment of a smaller sum, where it is made in pursuance of an arrangement to that effect among the creditors and with the debtor; and that therefore such composition and payment thereunder was a bar to an action by the creditor for the remainder of his debt. The reason given by the court—that to allow the creditor to maintain the action for the balance would be a fraud upon the other creditors—is not the one upon which the courts have finally rested the validity and binding force of what are called composition deeds, or compromises between a failing debtor and his creditors. The general rule is, that a simple agreement between a debtor and creditor that the latter will take a sum in payment of his debt less than the amount thereof is a nude pact, and therefore void for want of consideration. But when two or more creditors agree with one another and the debtor to take a part in payment of the whole amount of their several debts, and discharge the debtor from the remainder, it is held that the mutual promises of the creditors to and with one another is a sufficient consideration to support the agreement.

In support of the second proposition as above stated, counsel for defendant maintains that Snow is not liable for the misrepresentations of Jessie, unless it appears that he expressly authorized or was cognizant of them, or they were brought to his knowledge before the payment of the money and the delivery of the note.

The latter alternative of this argument admits too much for this motion, because, as has been shown, the evidence warrants the conclusion, and justified the jury in finding that Snow was aware of Jessie's misrepresentations concerning his "means," at least before he paid plaintiffs the money and received his note. In support of the position that Snow is not liable for Jessie's representations unless he expressly authorized them, counsel cited Chit. Cont. 679, where it is said that "the mere fact that an agent having innocently made a misrepresentation of facts while effecting a contract for his principal, will not amount to fraud on the part of the latter, if the principal, though aware of the real state of the facts, was not cognizant of the misrepresentation being made, nor ever directed the agent to make it." Chitty cites Cornfoot v. Fowke, 6 Mees. & W. 358, which he states to have been an action for the non-performance of a written agreement to take a ready furnished house. The defense was fraud on the part of the plaintiff. The facts were, that one Clarke, the agent of the plaintiff, let the house to the defendant, and that

while the parties were making the bargain, the defendant asked Clarke if there was any objection to the house, to which the latter answered there was not, whereupon the defendant signed the agreement. Afterwards he discovered that the adjoining house was a brothel, and on that ground refused to fulfill the contract. It also appeared that the plaintiff knew of the existence of the brothel, but that the agent did not. The court held that the facts did not establish fraud on the part of the plaintiff—the chief baron, Lord Abinger, dissenting. In my judgment, the law of this case is doubtful; but be that as it may, the case itself is very different from the one at bar. That was a case of a misrepresentation by one of two strangers dealing with each other at arm's length, about a matter which, so far as appears, was equally open to the observation of both of them.

The case at bar arises between a creditor and debtor. The latter is seeking a discharge from his debts upon the payment of forty-five cents on the dollar, on the ground that he was unable to pay more. In such case, the law very properly requires the utmost good faith on the part of the debtor. Here, Snow asked to be discharged from fifty-five per centum of debts for which he was individually liable. It was natural and reasonable that the creditors should want to know what condition the proposed settlement would leave him in individually. Under these circumstances, Jessie comes to the creditors to see what can be done. He was Snow's agent in this matter in a double sense: (1) By reason of their being partners; and (2) because Snow had specially authorized and requested him to negotiate this compromise with the creditors, while he practically remained without their reach, at Walla Walla. Snow spoke through Jessie, and it was his business to inform Jessie of the true condition of his affairs, so that he could speak truly, if he spoke at all. If he omitted to do so either from negligence or design, and the agent made false representations concerning his means which misled the plaintiffs to their injury, he is responsible for it, the same as if he made them in person. Snow cannot be allowed to have the benefit of a composition with his creditors which was confessedly procured by the false representations of his agent, upon the ground that the agent was ignorant of the truth, and made the representation in good faith. If such were the law, dishonest debtors could cheat and deceive their creditors with impunity, by means of honest but conveniently ignorant agents. Under the head of "Fraudulent Concealment," it is laid down in Add. Cont. 130, that, "If a debtor induces his creditors to compound their claims and execute a deed of composition for their several debts, by concealing from them the true state of his affairs, and withholding information which ought, in good faith, to have been afforded, the deed will be void, and the creditors will be remitted to their original rights, and will be entitled to sue for the full amount of their several debts;" also (page 634), "If a principal * * * purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he was dealing; * * * he would be guilty of fraud."

In Stafford v. Bacon, 1 Hill, 535, Mr. Justice Cowan says: "The duty of a debtor who comes for a discharge on part payment, is clear. If he willfully misrepresent or suppress any material fact in the statement of his affairs the accord and satisfaction are void."

In 1 Pars. Cont. 63, it is said, that, "Though there be no actual fraud on the part of the agent, yet if he makes a false representation as to a matter peculiarly within his own knowledge or that of his principal, and thereby gets a better bargain for his principal, such principal, although innocent, cannot take the benefit of the transaction."

In Chit. Cont. 687, it is said, that, "If it appear that there has been a willful withholding by the debtor of information respecting his estate, it will avoid the composition, and remit the creditor to his right to sue for the whole."

In the light of these authorities, as well as upon the reason of the matter, there can be no doubt but that Snow is responsible for Jessie's misrepresentations, though innocently made and without his knowledge. There is no error in the charge of the court on this point.

Indeed, after long and careful consideration, it appears to me, both upon the law and the facts, that this verdict is not only a just determination of the controversy between the parties to this action, but that its effects will be wholesome and promotive of good morals in the community upon the subject of contracts for the composition of debts between debtor and creditor.

The motion for a new trial must be overruled, and the plaintiffs have judgment upon the verdict.

ELGAR (PIERSON v.). See Case No. 11,157.

Case No. 4,343.

ELGEE v. LOVELL.

[See Case No. 4,344.]

Case No. 4,344.

ELGEE'S ADM'R v. LOVELL.

[1 Woolw. 102;[1] Rev. Cas. 72.]

Circuit Court, D. Missouri. Oct. Term, 1865.[2]

PLEA OF ALIEN ENEMY — DISABILITY AT COMMENCEMENT OF SUIT—DISABILITY ARISING AFTERWARDS—IN ACTION ON CONTRACT—PLEADING IN DETINUE — ACT RELATING TO ABANDONED PROPERTY — PLEA MUST SHOW NON-EXISTENCE OF SPECIAL PROPERTY IN PLAINTIFF — REMEDY TO RECOVER PROPERTY SEIZED UNDER ABANDONED PROPERTY ACT EXCLUSIVE IN COURT OF CLAIMS — AMNESTY OATH — RELATIONS OF CITIZENS OF NATIONS AT WAR — ENEMIES TO EACH OTHER — NO ACT OF DISLOYALTY NECESSARY— EFFECT OF PROCLAMATION ON STATUS OF LOYAL RESIDENTS OF "CONFEDERACY"—CANNOT CHANGE THE RULE—ITS DESIGN — SUCH PERSONS NEED NO PARDON — WHETHER ACTION SUSTAINABLE, QUAERE?

1. In a plea of alien enemy, by which it is sought to avoid the suit altogether, it is necessary to aver that such was the status and character of the plaintiff at the commencement of the suit.

2. If the disability arise afterwards, the further prosecution of the suit is suspended merely until peace is restored.

3. In an action on contract, the plea is good in bar, to show that the contract was made in time of war, with a public enemy, by a party in allegiance to the government in whose courts the suit is brought.

4. Notwithstanding the artificial words of a declaration in detinue, if the action be grounded on a tortious seizure by the defendant of the property mentioned, it will not be held, contrary to the fact, an action on contract.

[Applied in Shippen v. Tankersley, 13 Fed. 539.]

5. Whether a public enemy can sustain an action in our courts for a trespass committed in his country in time of war, quaere?

6. The bar to an action provided in section 6 of the act of July 17, 1862 (12 Stat. 591), commonly known as the "Confiscation Act," applies only to property seized under the act. A plea which does not allege that the property was seized under the act, is bad.

7. A plea based on the act of March 3, 1863 (12 Stat. 820), relating to abandoned property, which does not aver that the property had been taken in a district which had been declared in insurrection, is bad.

8. The plea must exclude the idea of any special property in the plaintiff, with a present right of possession in him, in order to be good.

9. The remedy provided by the act of March 3, 1863, for the recovery of property captured or abandoned in the enemy's country, whether the capture be in accordance with its provisions or not, is exclusive in the court of claims.

10. This position is supported by a consideration of the circumstances of the agent of the treasury, who collects the property.

11. The act contemplates that, in some instances, property will be seized which should be returned to the owner.

12. The act makes the government the holder of the proceeds of the property, in trust for such claimant as may appear and show himself entitled to it. It can be recovered from the government only by such proceedings as it may authorize.

13. It is no answer to a plea of alien enemy, to aver that the plaintiff has taken the oath prescribed by the amnesty proclamation.

14. In time of war, all the subjects of the belligerent nations are themselves enemies to each other.

15. In the Rebellion, a resident in the "Confederacy," and subject to its control, is a public enemy, although he may have committed no act of disloyalty.

16. No proclamation can change or modify this rule, and it is doubtful if it can relieve a party from the disabilities which it imposes.

17. The president, in his amnesty proclamation, did not intend to place parties who should avail themselves of it in any better position than those who, residing in the insurrectionary districts, had always maintained their allegiance to the federal government.

18. When the war ceases, all their rights are at once restored, and their disabilities are removed.

19. Whether a public enemy can sustain an action in our courts for a trespass committed in his country in time of war, quaere?

The plaintiff brought his action in the circuit court of the state of Missouri for the county of Saint Louis, to recover the possession of 275 bales of cotton. The defendant appeared, and made affidavit that he held the cotton for the government of the United States, as its agent, and prayed that the case might be removed into this court, under the act of congress of July 28, 1866 (14 Stat. 329). The state court ordered the removal accordingly. The plaintiff having died, and Gills having been appointed his administrator, the cause was proceeded in, in his name.

Under a rule to re-plead in this court, the plaintiff filed the ordinary declaration in detinue, to which the defendant pled the general issue and four special pleas. These four pleas were as follows:

"2. And for further plea in this behalf, the said defendant says, that the plaintiff ought not to have and maintain his aforesaid action thereof against him, because, he says, that before and at the time of the committing the grievances in the said declaration complained of, and before and at the time of the commencement of this suit, the said John K. Elgee, the original plaintiff herein, was a resident of the state of Louisiana, the people whereof were then, and now are, in insurrection against the United States, and at war with the same, and that the said Elgee was then and there in rebellion against the lawful government of the United States, and did then and there adhere to, and aid, and acknowledge allegiance to, the so-called 'Confederate States of America,' then waging war against the United States of America, and was then and there a public enemy of the United States, and not a loyal citizen thereof, and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him."

"3. And for a further plea in this behalf, the said defendant says, that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because, he says, the said John K. Elgee, in his lifetime,

[1] [Reported by James W. Woolworth, Esq.]

[2] [See note at end of case.]

claimed, and this plaintiff, since his death, claims, the said cotton in said declaration mentioned, as the property of the said John K. Elgee, wrongfully taken and detained from him, the said John K. Elgee, by the agents of the United States, and not otherwise. And the said cotton was, at the commencement of this suit, and now is, claimed by the United States as abandoned property, under the act of congress approved March 12, 1863; and that, at the time of the commencement of this suit, the said defendant was in possession of the said cotton in the said declaration mentioned, as agent of the United States, and not otherwise, and this the said defendant is ready to verify; wherefore," &c.

"4. And for a further plea in this behalf, the defendant says Actio non, because, he says, that the said goods and chattels in said declaration mentioned were, at the time of the commencement of this suit, and now are, the property of the United States, and this he is ready to verify; wherefore," &c.

"5. And the said defendant, by his attorney, comes and defends the wrong and injury when, &c., and says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because, he says, that the said 572 bales of cotton, for the recovery of which this action was instituted, had, prior to the institution of said action, to wit, in the month of March, 1864, in the state of Mississippi, been taken, received, and collected, as abandoned property, into the possession of one Ralph S. Hart, a special agent, appointed by the secretary of the treasury to receive and collect abandoned or captured property in said state, in pursuance of the terms of the first section of an act of congress entitled, 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' approved March 3, 1863; that prior to the time when the said cotton was taken, received, and collected into the possession of the said Ralph S. Hart, special agent as aforesaid, the said state of Mississippi had been, by the proclamation of the president of the United States of July 1, 1863, designated as in insurrection against the lawful government of the United States; that the said cotton was, in pursuance of the second section of the act aforesaid, forwarded by the said Ralph S. Hart, special agent as aforesaid, who had received and collected the same, from the said state of Mississippi, to a place of sale within the loyal states, and, in the course of being so forwarded, came, at the city of St. Louis, in the state of Missouri, into the possession of this defendant, as agent of the United States, and at the time of the institution of this action, and the issue and service of the summons therein, was in the possession and custody of this defendant as such agent, and not otherwise; that the possession and custody of said cotton by this defendant, at the time of the institution of this action, and the issue and service of the summons therein, was in pursuance of the act aforesaid; that this defendant then and there held such possession and custody for and on behalf of the United States, and not otherwise; and that the said cotton was then and there claimed by the United States as abandoned property under the act aforesaid, and is still so claimed. And this defendant is ready to verify; wherefore," &c.

To these pleas were demurrers, which to the second and fifth were overruled, and to the third and fourth sustained. Thereupon, to the second and fifth pleas, the plaintiff filed replications, as follows:

"And now comes the said plaintiff, and for replication to the plea of said defendant by him secondly above pleaded, says, that the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred from having and maintaining his aforesaid action thereof against the defendant, because, he says, that before, and at the time of the commencement of this suit, the people of the state of Louisiana were not, nor are they now, in insurrection against the United States, and were not in rebellion against the lawful government of the United States; and the said John K. Elgee did not there and then adhere to, or aid, or acknowledge allegiance to, the so-called 'Confederate States of America,' then waging war against the United States of America, and was not there and then a public enemy of the United States, and was a loyal citizen thereof; and this the said plaintiff prays may be inquired of by the country," &c.

"And for a further replication to the plea of the defendant by him secondly above pleaded, the said plaintiff says that he, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because, he says, that the president of the United States did issue his proclamation, bearing date the 8th day of December, 1863, whereby there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the said insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe, and keep inviolate, a certain oath therein prescribed; and that, prior to the commencement of this suit, the said John K. Elgee, then living in said insurrectionary districts, not being one of the persons excepted by the proclamation of the president of the United States aforesaid, did take and subscribe the oath required by said proclamation, which was duly registered in accordance therewith, and said John K. Elgee did, from thenceforth, for ever afterwards keep and maintain said oath inviolate, by means whereof all his rights of property in the

goods, wares, and merchandise mentioned in said declaration, were, by the laws of the United States, and by the force of this proclamation, restored to him, and this he is ready to verify; wherefore he prays judgment," &c.

"And for replication to the plea of the defendant by him fifthly above pleaded, the said plaintiff, by reason of anything in said plea mentioned, ought not to be barred or precluded from having or maintaining his aforesaid action thereof against said defendant, because, he says, that the property in said declaration mentioned was, prior to and at the time it came into the possession of said Ralph S. Hart, as alleged in said plea, the property of, and belonged to, the said John K. Elgee; and that the president of the United States did issue his proclamation, bearing date the 8th day of December, 1863, whereby there was promised a full pardon and amnesty, with restoration of all their rights of property, except as to slaves, to all those living in the said insurrectionary districts, except certain classes of persons therein mentioned, who should thereafter take, subscribe, and keep inviolate, a certain oath therein prescribed; and that, prior to the commencement of this suit, the said John K. Elgee, then living in said insurrectionary districts, not being one of the persons excepted by the proclamation of the president of the United States aforesaid, did take and subscribe the oath required by said proclamation, as therein mentioned, which oath was duly registered in accordance therewith, and said John K. Elgee did, from thenceforth, for ever afterwards keep and maintain said oath inviolate, by means whereof all his rights of property in the goods, wares, and merchandise mentioned in said declaration were, by the laws of the United States, and by the force of said proclamation, restored to him, and the said property was so taken and held from said John K. Elgee contrary to said proclamation and the laws of the United States, and this he is ready to verify; wherefore he prays judgment," &c.

And to these replications the defendant demurred.

Glover & Shepley, for plaintiff.

Drake, Hughes, Broadhead, & Hill, for defendant.

MILLER, Circuit Justice. The second plea is evidently directed to the personal character of the plaintiff. It may be regarded as a denial of his right, either to bring any suit in this court, or to bring a suit for property found in an insurrectionary district.

Looked at in the first view, it is a plea in abatement, in analogy to the plea of alien enemy. As such it seeks to defeat this suit by the charge that the plaintiff is in the attitude towards the government, in whose courts he seeks relief, of an alien enemy in time of war. But the plea does not contain an averment that such was the character and status of the plaintiff when the suit was commenced. That is a necessary averment in such a plea. For want of it, the plea is bad. Chitty, in his approved forms, incorporates such an allegation (3 Chit. Pl. 911); and on this point, in Levine v. Taylor, 12 Mass. 8, it is said: "This disability resembles that arising from the outlawry of the plaintiff; as to which, if pleaded in disability, it is decided that if the cause of action accrues, or perhaps if the action is commenced whilst the plaintiff is thus disabled, the plea quite overthrows the writ; and after a pardon or reversal of the outlawry, the plaintiff must begin de novo. But if the disability occurs after the commencement of the action, it only suspends the proceeding quousque, &c.; and after the disability is removed, the plaintiff may recontinue the suit by re-summons or re-attachment. Accordingly, in several cases, where the action was commenced before the declaration of war, this court have expressed an opinion that it produced only a temporary disability; and, at their recommendation, the parties have agreed to continuances without costs on either side, in order to avoid the trouble and expense of new process at the termination of the war."

It is obvious from this, that when the effort is to avoid the suit altogether, the disability must exist at its commencement, for if it arise subsequently, the further prosecution is suspended merely until peace is restored. See Faulkland v. Stanion, 12 Mod. 400.

In an action on contract, the plea of alien enemy is good in bar, when it shows that the contract sued on was made in time of war with a public enemy, by a party in allegiance to the government in whose courts the suit is brought. Ex parte Boussmaker, 13 Ves. 71; Willison v. Patteson, 7 Taunt. 439.

It is insisted that this is an action on contract, because the declaration alleges a bailment by the plaintiff to the defendant to be re-delivered on demand, and a demand and refusal;—that therefore the plea is good in bar.

It is true that there are authorities holding that the action of detinue is sometimes treated as an action on contract; and it is no less certain that the allegations of the declaration set out in words a contract in bailment.

But without pursuing the authorities as to whether detinue is to be held an action on contract or in tort, it is sufficient to say, that it is often brought for a tort; and we think it would be straining the technical point beyond its just use, to hold the plaintiff to the literal meaning of the words of his declaration. The form of words, like that in trover and ejectment, is purely artificial and conventional, and is never required to be proved as laid. It being clear, from all that appears in this case, that the suit is grounded on a tortious seizure by the defendant of the property mentioned, we will not hold, on this demurrer, contrary to the fact, that the plaintiff has sued upon a contract, because, by the

rules of pleading, he has been compelled to use a fictitious form.

Viewing the case as in tort, the question has been asked and discussed, whether a public enemy can sustain an action in our courts for any trespass committed in his country, in time of war, by one owning allegiance to our government. It is unnecessary to decide this question here. It is claimed that section 6 of the act of July 17, 1862 (12 Stat. 591), commonly called the "Confiscation Act," is decisive of the question raised on this plea. That act provides that the property of certain individuals may be seized by the president, or under his orders, and turned over to the courts, which shall, by a regular judicial proceeding, confiscate and sell the same. The closing provision of the 6th section alluded to, reads thus: "And it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Assuming that the plaintiff is shown to be one of the persons described in that section which is doubtful, we are of opinion that the bar applies only to property seized under that act, and to no other. This is apparent from the terms of the section. Provision is made for the seizure of the property, and for a judicial proceeding for its condemnation; and then follows the clause giving a bar to the proceeding. The bar could be alleged and pleaded only to a suit to condemn property seized under the act. There is no allegation here that this property was seized under the confiscation act, or that the defendant had any purpose to libel it in any court for condemnation.

On the whole, the defendant having expressed a wish to amend this plea, so far as to make the allegation of the plaintiff's character apply to the time of the bringing of this suit, he is permitted to do so now; and such amendment being made the demurrer to that plea will be overruled.

The third plea is based on the act of March 3, 1863 (12 Stat. 820), which provides, that the special agent may "receive and collect all abandoned or captured property in any state or territory, or any portion of any state or territory, of the United States, designated as in insurrection against the lawful government of the United States, by the proclamation of the president of July 1, 1862." In order to show his right under this act, the agent must show that the property was taken by him in a district which had been designated as in insurrection. This plea does not contain such averment, and is therefore bad.

The fourth plea is bad, because, while the general property in the cotton may be in the United States, this fact does not exclude the idea of such a special property, with present right of possession in the plaintiff, as may enable him to sustain the action.

The fifth plea presents the main ground of defence on the merits, if the personal status of the plaintiff is such that he can bring his suit in this court. It contains a full statement of the facts in the case. It shows that the cotton mentioned in the declaration was seized as abandoned property in one of the districts declared by the proclamation to be in a state of insurrection, by a special agent of the treasury department for that district; and that, when this suit was brought, it was held by the defendant as an agent of the government, with the view of disposing of it under the act.

The objection taken to it is, that it does not aver that the property, when taken possession of by the treasury agent, was captured or abandoned property, nor in any other manner show that it was rightfully seized.

Much and able argument has been presented on both sides of this issue, drawn from considerations of the powers possessed by military and civil officers in an enemy's country; the general policy of the government in reference to permitting suits to be brought to recover property in the hands of its revenue officers; and from the construction of the act of March 2, 1832 (4 Stat. 632), as applicable to this case. But the majority of this court are of opinion that the solution of the question must be found in the just construction of the act under which the treasury agent proceeded, namely, the act of March 3, 1863 (12 Stat. 820).

This statute enacts, that property in any of the states, or parts of states, the inhabitants of which are declared to be in insurrection, which has been captured by our military forces, or been abandoned by its owner, shall be taken possession of by special agents of the treasury department, appointed for that purpose, and may be used by the United States, after appraisal, for any of its purposes, or sold, and the proceeds of the sale deposited in the treasury. Section 3 of the act, after providing that such agents shall give bond, with such securities, and in such amounts, and as often, as the secretary may require, and keep, in proper books, accounts of all their transactions, adds: "And any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the Rebellion, prefer his claim to the proceeds thereof, in the court of claims; and on proof to the satisfaction of said court of his ownership of said property, to his right to the proceeds thereof, and that he has never given any aid or comfort to the present Rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

The question is, whether congress intended to make the remedy given by this act exclusive of all others, or to permit the treas-

ury agents to be sued for the possession of proceeds of such property wherever the party aggrieved might find a court of general jurisdiction.

The hardships, on the one hand, of allowing these agents, without liability to the law, at their discretion, to seize upon any property anywhere in these insurrectionary districts; and, on the other hand, of subjecting persons in their situation to be harassed by litigation at the hands of every person claiming an interest in the property, have been forcibly urged upon us. It is not inappropriate to remark, that their functions were to be exercised, so far as the seizure of property was concerned, in an enemy's country. They were vested with almost unlimited powers over all the property in the designated districts. They could take, and hold, and proceed against, whatever they, in the exercise of their arbitrary judgment, saw fit to seize. All that, on behalf of the plaintiff, has been urged in this regard is very true. But if, in the exercise of functions so delicate and so odious, in an enemy's country, surrounded by hostile inhabitants, they were to have every step in their proceedings tested by the courts of law, the expenses of judicial proceedings imposed upon them, and the delays incident thereto interposed, their office would be practically useless, and few men of responsibility would be willing to accept it. The very considerations urged for the plaintiff, go to show that the remedy prescribed by the law was intended to be exclusive.

Another circumstance of their situation, which should be noted, is this, that they were to discharge these duties not only in an enemy's country, but in such parts thereof as had been overrun, and were then held by our military forces. While these forces were in the occupancy of any section of country, all the movable property therein would necessarily be liable to destruction by the soldiers. And when the army advanced to other lines, the yet more lawless mob were left to depredate upon what should remain. Under such circumstances, it could be no great hardship—on the other hand, it might be the best and the only protection to the owner—to have an authorized agent of the government intervene, and take and preserve the property, to be restored at a proper time and under proper circumstances. Congress saw fit to prescribe that time and those circumstances in the act, evidently intending to exclude all other means of determining them.

The act evidently contemplates that, in some instances at least, property will be seized which ought to be returned to its owner, or for which compensation should be made by paying him the proceeds. Otherwise it were unnecessary to provide any means of determining when a return should be made. And the remedy applies to property taken by mistake, or by the unjustifiable act of the agent, equally as to property which has been abandoned or captured. It is equally appropriate and necessary. Indeed, the just occasion for it is greater. It is answered, with much ingenuity, that the remedy is by petition in the court of claims, and that, in fact, the whole act assumes that it is only captured or abandoned property which, or the proceeds of which, may be recovered by that process; that, beyond the definite limits set by those terms, the remedy has no application. But this I think is sticking in the bark. It does not meet the fact patent upon the act, that, by means of the remedy which it provides, an inquiry whether the property is abandoned or captured is to be made, in order to determine whether a return should be awarded.

There is yet another view which may be taken. The proceeds of property seized by the agent are to be deposited with the treasury, where, for the time limited, they may be said to await the claimant who shall show himself entitled thereto. The act makes the government a holder of the property, or its proceeds, as a trustee for such party. A proceeding of some sort against the government is necessary to compel it to surrender the property which it thus holds in trust. But it cannot be sued for this, or any other matter, unless it authorize the proceeding against it. Of course it may, in its grant of such authority, prescribe the manner and the court in which it shall be called to account; and that manner must be pursued in the tribunal provided. That is what congress has done here. It has authorized a suit against the government, to be prosecuted by petition in the court of claims. That is the situation in respect of the proceeds of property which has been sold. And whatever may be said in that respect, is equally true of the property when in the hands of the agent. To suppose that congress sent forth its civil agents into a hostile country to perform these delicate functions, and left them liable to actions for damages in any court within whose territorial jurisdiction they might chance at any time to be, and at the same time provided a forum and a rule by which what it considers right in the premises may be determined, is a reflection on that body, which, in this case, I do not think it deserves.

I have not noticed the fact that the statute provides that a bond, with abundant security, is to be given by the agent, because it is somewhat aside from this inquiry. It may be that, in the case of an arbitrary exercise of authority over property not liable to seizure, under color of the law, the agent's bond might be sued by the government for the use of the injured citizen. But upon that, I need not here remark.

I am of opinion that congress intended to prescribe to all claimants, who should prove their loyalty and their right to the property,

this remedy for all cases of seizure by agents under this law, whether made in strict accordance with its provisions or not; and also, that this should be the exclusive remedy in such cases, unless, perhaps, in some cases, a suit might be maintained on the official bond.

The demurrer to this plea is overruled.

At a subsequent day in the term, the plaintiff filed replications to the second and fifth pleas. To these replications, demurrers were interposed, which, being argued by the learned counsel who had argued the questions raised before, were decided by the court.

MILLER, Circuit Justice. The act of March 3, 1863, evidently contemplates that property of loyal citizens might and would be taken under it; for the provision for claimants asserting their rights in the court of claims is restricted to such persons as can prove that they have "never given any aid or comfort to the present Rebellion." Such persons never having been guilty of any offence against the government, need no pardon, and are surely in as good condition as pardoned traitors.

Property seized by a treasury agent in an insurrectionary district, as abandoned property, may be owned by a loyal citizen of a loyal state; and yet his only remedy is an application to the court of claims. The amnesty of the president was not intended to, nor could it, place a man who has committed treason in a better situation, in reference to property so seized, than a loyal citizen of a loyal state. This replication is therefore bad as an answer to the fifth plea.

Does the act remove the disability to sue which is set forth in the second plea? This plea is not founded on any act of congress, nor on any law growing out of our state or national jurisprudence. It is based on a principle of the law of nations, recognized and enforced in all civilized countries, that, in time of war, an enemy cannot sue in the courts of the country with which his nation is belligerent. This grows out of the principle, that all persons, citizens or subjects of the nations thus at war, are themselves enemies each to the other. In the war of the current rebellion, this principle has been extended to all the citizens of the rebellious states found inside of the so-called "Confederate Lines." The Prize Cases, 2 Black [67 U. S.] 635; Mrs. Alexander's Cotton, 2 Wall. [69 U. S.] 404.

According to this principle, a man residing in the Confederacy, and subject to its control, is, in law, a public enemy, although he may have committed no act of disloyalty. He is so far a public enemy that, while the war is flagrant, his property found on the high seas is lawful prize of war; and that he cannot, in our courts, maintain any suit against citizens residing in loyal states. These are disadvantages imposed upon him by the law of nations, and not by our local, or national legislation. And as no proclamation of the president can change or modify this law, I doubt very much whether it can relieve any party from the disabilities which it imposes. This disability is independent of any personal guilt, and grows out of no violation of any criminal statute. The right of the president to pardon for all offences against the laws of congress, to extend amnesty where there has been personal guilt, is not questioned. Whatever his power, I have no idea that he intended to do more than this. He did not purpose to place the parties who should avail themselves of this proclamation in any better position than those who, residing in the insurrectionary districts, had always maintained their allegiance to the federal government.

Such persons need no pardon. In by judgment, all their rights of property and person are at once restored when the war ceases. The disabilities under which they lay were imposed, not by reason of their personal guilt, but were necessities of the Civil War. When those necessities ceased, their disabilities ceased, in all courts, and in all places. Being without guilt, they need no pardon. On the contrary, they merit the gratitude of the government and of the people. It is absurd to suppose that the president, if he had the power, would have the wish, to place traitors in a better posture than that in which loyal persons stand.

That the plaintiff, after taking the oath of allegiance, became a loyal citizen, and, at the time of bringing his suit, was under no disability from residence, may be true; but these replications do not show it, and are therefore bad.

The demurrer is sustained. Demurrer sustained.

Judgment was ordered on these demurrers for the defendant, and the judgment afterwards affirmed in the supreme court by an equal division of the judges.

[NOTE. Five several claims for the proceeds of this cotton were afterwards filed in the court of claims, including one by the heirs and executrix of Elgee. Judgment was rendered in favor of four of the claimants, including the representatives of Elgee, and appeals were duly taken to the supreme court, where the judgment of the court of claims was reversed, and the record remitted, with instructions to dismiss the petitions of three of the claimants, and enter a judgment in favor of the personal representatives of Elgee for the net proceeds of the cotton. The Elgee Cotton Cases, 22 Wall. (89 U. S.) 180.]

ELIASON (DIGGES v.). See Case No. 3,904.

ELIASON (PANNILL v.). See Case No. 10,707.

ELIASON (UNION BANK v.). See Case No. 14,350.

ELIASON (UNION BANK OF GEORGETOWN v.). See Case No. 14,355.

ELIASON (UNITED STATES v.). See Case No. 15,040.

ELIOT (BANK OF WASHINGTON v.). See Case No. 949.

ELIOT (BRADLEY v.). See Case No. 1,778.

ELIOT FELTING MILLS, In re. See Cases Nos. 789 and 11,252.

ELIOT NAT. BANK (HAYWARD v.). See Case No. 6,273.

Case No. 4,345.

The ELI WHITNEY.

[1 Blatchf. 360.][1]

Circuit Court, S. D. New York. Oct. Term, 1848.[2]

CHARTER-PARTY—MISREPRESENTATION AS TO TONNAGE—LIBEL IN REM.

1. Parol evidence is inadmissible to enlarge or vary the terms of a charter-party.

[Distinguished in The Baracoa, 44 Fed. 103.]

2. In the case of a charter-party, a suit in rem against the vessel is not maintainable for the misrepresentation or concealment of facts by her master or owner in respect to her tonnage or capacity.

[Cited in Baker v. Ward, Case No. 785; Williams v. Providence Washington Ins. Co., 56 Fed. 160. Distinguished in The Electron, 48 Fed. 690.]

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

Balchen & Schmidt, of New-York, filed a libel in rem in the district court against the ship Eli Whitney, for an alleged breach of a charter-party for a voyage from New-York to Bremen, in that the master had refused to receive on board the full amount of cargo that was stipulated for according to the terms of the charter-party. The decree of the district court was against the libellants [Case No. 792a], and they appealed to this court.

THE COURT held that parol evidence was inadmissible to enlarge or vary the terms of the charter-party, there being no stipulation in it as to the precise amount of cargo to be carried, and that, in the case of a charter-party, a suit in rem was not maintainable for the misrepresentation or concealment of facts by the master or owner of a vessel in respect to her tonnage or capacity.

Decree affirmed.

ELI WHITNEY, The (BALCHEN v.). See Case No. 792a.

Case No. 4,346.

The ELIZA.

[2 Gall. 4.][3]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

REVENUE AND NAVIGATION ACTS — VESSELS LICENSED FOR THE COASTING TRADE—FISHERIES—FOREIGN GOODS IN UNREGISTERED VESSEL — "FOREIGN PORT OR PLACE."

1. A "foreign port or place," within the meaning of the 1st section of the act of 6th of July, 1812, c. 129 [2 Stat. 778], is a port or place within the sovereignty of a foreign nation.

[Cited in The Nymph, Case No. 10,388; The Martha Anne, Id. 9,146.]

2. The 6th section of the coasting act, of February, 1793, c. 8 [1 Stat. 307], inflicts a forfeiture of the ship and cargo only in cases of unregistered vessels, found with foreign goods on board, in the coasting trade, and not of vessels licensed for the fisheries.

[Distinguished in The Swallow, Case No. 13,666. Cited in The Nymph, Id. 10,389; U. S. v. The Reindeer, Id. 16,145.]

3. If a vessel licensed for the fisheries be engaged in an illegal traffic, she is forfeited under the 32d section of the coasting act.

[Cited in The Swallow, Case No. 13,666; The Atlantic, Id. 621; U. S. v. The Paryntha Davis, Id. 16,004.]

[See The Resolution, Case No. 11,709.]

4. If the claimant does not show a good title to the property, it will not be restored to him, although it is not condemned as forfeited. But it will be retained in the registry until the real owner appears and proves his title.

5. In such a case, if the property has been engaged in a trade with the enemy, the United States may proceed against it, as prize of war.

In admiralty.

STORY, Circuit Justice. The boat Eliza and cargo were seized by the revenue cutter, belonging to the district of Boston and Charlestown, on or about the 29th day of September, 1813, for an alleged forfeiture under the laws of the United States. The information propounded in the cause contains three counts: (1) For an alleged departure of the vessel from Boston bound to some foreign port or place without having given the bonds required by the act of the 6th of July, 1812, chapter 129, § 1. (2) For the vessel's having on board goods of foreign growth and manufacture, and being found trading between different places in the district aforesaid, without being enrolled and licensed therefor, contrary to the 6th section of the act of 18th February, 1793, c. 8, regulating the coasting trade and fisheries. (3) For the said vessel's being employed in a trade, other than the fisheries, for which she was licensed, contrary to the 32d section of the act last mentioned.

From the evidence in the cause it appears, that the Eliza is a vessel of 20 tons burthen and upwards, and regularly licensed for the fisheries. On or about the 28th of August last past, Wilson, the owner and claimant of the Eliza, was applied to, and contracted with Mr. Woodward, as agent for the claimant, Mr. Inglee, to take on board two cases of wine, one box of bottled cider, one box of cigars, and some other articles of provisions, which had been previously purchased by Mr. Woodward for the account of Mr. Inglee, and to transport the same to a schooner, which would (as was alleged) appear in Boston bay, at a few leagues from land. The schooner was described to be a large black schooner, with a white signal at her foretopmast head. Wilson was to be allowed

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

[2] [Affirming Case No. 792a.]

[3] [Reported by John Gallison, Esq.]

$10 for every day, not exceeding five days, during which he should be employed in cruising in order to find said schooner, and for every day exceeding five days, he was to be allowed $7, and if the schooner was not found within ten or twelve days, he was at liberty to return with the goods. It is stated to have been represented to Wilson, that the employment, in which he was then engaged, was not illegal. But the fact cannot be material, as it forms no justification for any actual violation of law.

On the next day, the Eliza was boarded on the high seas, off the west end of Long Island, by the revenue cutter, and upon search and examination was seized. Sundry letters were found on board, two of which were without signature, and one partly written in cipher, and in enigmatical language.

The claimants attempt to justify themselves in this enterprise, by alleging that the provisions were designed for a Swedish ship, which was expected in Boston bay, and were purchased at the special request of the captain of that ship by Mr. Inglee, who is his friend and agent. And in confirmation, a letter is produced by Mr. Inglee, purporting to be signed by "P. Stromberg," and dated "at Eastern Port, 16th August, 1813," which Mr. Inglee alleges was delivered to him in the street by an unknown person, and that "P. Stromberg" is a Swede well known to him, as the writer of the letter. The first clause in the letter is, "I sail in five or six days from this, bound to a southern port, in the Swedish schooner ——," and the writer then proceeds to state, that he has passengers on board, and wishes the wine, &c. to be procured for him. On this letter I cannot but remark, that it is not strictly evidence in the cause. There is not a shadow of evidence, independent of Mr. Inglee's affidavit, to show its authenticity, and he is not competent in this case to prove it. I confess myself not much better satisfied on examining the contents of the letter. It carries upon its face the most evident marks of being merely colorable. It states no port from whence written, and no vessel, which the party commands. The directions are such, as would very properly apply to a case, where a fraudulent or inimical traffic was intended. If such a vessel so commanded were in any eastern port, why has there been no proof of the fact? If she was bound to some southern port, why is her arrival not shown? If there was a Swedish vessel really bound to a southern port, why should wine be ordered at Boston? If a supply were necessary for the ultimate voyage, why should it not be purchased at the southern port of destination? We all know, that wines are common in almost all the principal ports of our country; and I should be glad to know, why they might not have been purchased at "the eastern port" where the vessel is supposed to have been. The mysterious letters found on board evidently point to other transactions, than such as innocence would authorize. They connect themselves with the other circumstances of the case, and throw over it a load of suspicion, from which no ingenuity of counsel can relieve it. I have no hesitation in declaring my perfect conviction, that the whole of this transaction was founded in an illegal contract, and if this had been a process on the prize side of the court, I should have felt no difficulty in applying the penalty of confiscation for trade with the public enemy.

Under this view of the facts, it remains for me to consider, how far they show any infraction of the municipal laws of the United States.

It has been contended, on the part of the United States, that the case comes within the prohibitions of the first section of the act of the 6th of July, 1812, c. 129. That section provides, in substance, that if any vessel, owned in whole, or in part, by a citizen of the United States, shall depart from any port of the United States, "for any foreign port or place," without giving the bond prescribed in the same section, the vessel and cargo shall be forfeited.

And it is urged, that the being bound to the high seas, without the jurisdictional limits of the United States, is being bound "to a foreign place" within the meaning of the statute. I consider this construction utterly untenable on principle and authority. It is clear to my mind, that a "foreign port or place," in the statute, means a port or place exclusively within the sovereignty of a foreign nation. Such has been the construction of the same words in the 3d section of the act of the 9th of January, 1808, c. 8, by the supreme court of the United States. Such has been the uniform construction in the district and circuit courts of this circuit, in cases where words of a similar import have been drawn into controversy: and I shall therefore content myself with a bare expression of my opinion on this point, without entering into the reasons, which cogently press it upon me. The first count must therefore be abandoned.

The validity of the second count depends on the true construction of 6th section of the coasting act of 18th February, 1793, c. 8. That section provides in substance, that every unregistered ship or vessel, of 20 tons and upwards, found engaged in the coasting trade or fisheries without being duly enrolled and licensed, if in ballast or laden with goods of domestic growth or manufacture, (distilled spirits excepted,) should pay the fees and tonnage of foreign vessels, and if having on board goods of foreign growth or manufacture, or distilled spirits, the ship and cargo should be forfeited. It is contended, that the true meaning of this section is, that every vessel not having a license for the employment, in which she is engaged, is forfeited, if she has foreign goods on board, although she has been enrolled and licensed for another employment under the act. I cannot accede to

this construction. On the contrary, I think, that the language and the intent of the section may be satisfied by confining the forfeiture to unregistered vessels, found with foreign goods on board, in the coasting trade or in the fisheries, without enrolment and license for either employment. I am the more confirmed in this view by the language of the 32d section of the same act, which imposes a forfeiture for the identical offence supposed in the argument to be comprehended in the 6th section. Unless the conclusion were unavoidable, I should not incline to presume a legislative intent twice in the same statute to enact a penalty for the same offence. This is not the only difficulty. Upon the construction urged in behalf of the United States, if a vessel licensed for the fisheries were found engaged in the coasting trade, or a vessel licensed for the coasting trade were found engaged in the fisheries, with domestic goods only on board, such vessel would, under the 6th section, be considered as incurring no penalty, and as merely subjecting herself to pay the fees and tonnage of a foreign vessel. It is clear, however, that such an employment would be a gross violation of her license, and, under the 32d section of the act, would subject her to forfeiture and condemnation. Now it seems to me difficult to maintain that construction of a statute to be a sound one, which punishes in one section what in another section it does not deem unlawful; that it should provide for the payment of fees and tonnage, as of a foreign vessel, where it sweeps the whole property from the owner upon the ground of illegal traffic. I am therefore satisfied, that the construction of the 6th section, urged by the United States, ought not to prevail.

It may not, however, be absolutely necessary to decide this point, because, if the case fall within the prohibitions of the 32d section of the same act, the forfeiture will reach the vessel; and the cargo, under either section, must share the same fate, unless saved by the redeeming proviso of the 33d section of the same act.

I come therefore to the third count, founded on the 32d section. And in my judgment it is fully supported by the evidence. It is clear, that the Eliza was employed in a trade, other than that for which she was licensed. She was licensed for the fisheries, and she was employed in the transportation of merchandise for hire. This was a traffic or business wholly beside the nature and object of her license. It was a "trade" in the sense, in which that term is used in the statute, as equivalent to employment or business. It has been argued, that the great object of the statute was, to protect the revenue, and therefore, that no trade is within the prohibition, except a trade in fraud of the revenue. Against this construction the language of the section may be strongly urged, which makes no such exception, and where none is made by the legislature, I am not bold enough to create one. But this distinction has been directly overruled by the supreme court in a recent decision. U. S. v. The Active, 7 Cranch [11 U. S.] 100. And it may therefore be considered as the settled law, that the forfeiture attaches in every case of a trade, of whatever nature and with whatever object, which is not expressly authorized by the tenor of the license.

As to the intentions of Mr. Wilson in engaging in this transaction, if they were perfectly innocent, as he has endeavored to prove, I sincerely regret the unfortunate predicament in which he has placed himself. Still, this innocence of intention can afford no protection against the penalty imposed for a breach of the act. If a law be actually violated, it is immaterial, whether the offence be by wilfulness or negligence, by deliberation or by mistake. In either case the court is bound to enforce the rigor of the law, and leave to another tribunal the more benignant prerogative of mercy, in cases where it ought to be bestowed.

I feel myself bound, therefore, to condemn the vessel and her appurtenances, as forfeited.

As to the wine and other articles on board, claimed by Mr. Inglee, as his own property, as they do not appear to have belonged to the master, owner, or mariners of the Eliza, they are saved from forfeiture by the proviso of the 33d section of the act, if they are not liable to duty, or the duty on them has been actually paid or secured. Such is the construction given to this proviso by the supreme court. U. S. v. The Active, 7 Cranch [11 U. S.] 100. As to the wine, having been purchased in the open market, a presumption of its fair and regular importation does, under the circumstances of this case, certainly arise. The other articles, being of domestic produce, are exempted from duty. I cannot however restore these articles to Mr. Inglee. He claims them, as his own property, but upon his own showing they are the property, and were purchased with the funds, of another person. Who that person is I will not now undertake to decide. It is sufficient that Mr. Inglee has no claim. As the cause affords very strong presumptions, that these articles actually belonged to, or were destined for the use of, the public enemy, I shall order the proceeds to be brought into court, and deposited in the registry, there to remain until the real owner shall appear and prove his right, or the United States shall choose to interpose a claim for the property as prize of war.

Lest this decision should be misunderstood, I would add, that it is only in cases, where the constat of property in the claimant is rebutted in the evidence, that I should feel at liberty to retain the proceeds in court. Vide The Aquila, 1 C. Rob. Adm. 37, 41.

Vessel condemned.

Case No. 4,347.

The ELIZA.

[1 Lowell, 83.][1]

District Court, D. Massachusetts. June, 1866.

CHARTER-PARTY —FREIGHT FOR ROUND VOYAGE— LIEN ON CARGO SHIPPED AT OUTWARD PORT — ASSIGNEE OF CHARTER-PARTY.

Where, by the terms of a charter-party, the whole freight for a round voyage was to be paid on arrival at the home port, but one-half to be considered as earned on the outward voyage, the master on arriving at home was held to have a lien for the whole freight upon the goods shipped at the outward port for the account of an assignee for value of the charter-party, to whom the whole cargo, with a trifling exception, was shipped by order of the charterer, and under a bill of lading requiring payment of freight "as per charter-party."

[Cited in The Hyperion's Cargo, Case No. 6,987.]

Libel against a cargo of logwood brought to Boston from Aux Cayes, in St. Domingo, in the schooner Eliza, of Georgetown. in Prince Edward's Island. On the thirty-first day of January, 1865, the vessel was lying in Boston, and was then and there chartered by her master to Mr. E. Wheelwright, for a voyage thence to Aux Cayes and back to Boston, at twelve hundred dollars for the round voyage, of which only twenty-five dollars was to be payable at Aux Cayes, and the remainder on discharge of the cargo here. One-half the charter to be earned on delivery of the cargo at Aux Cayes. Two or three days after the charter was made, and before the schooner sailed, the charterer obtained an advance of two thousand dollars from Mr. Wildes, the claimant, and as security therefor, assigned him the freight and charter of the schooner, together with her cargo, to be furnished by the charterer, consisting of logwood or other merchandise. Payment to be made on return of the vessel, or, if she should be lost or detained, in four months, with interest and certain commissions. It was not disputed that the cargo here referred to was the homeward cargo only. Orders were sent by Wheelwright to Labastille & Co., his agents at Aux Cayes, to procure a return cargo and ship it to the order of the claimant, which was done, and the master gave a bill of lading acknowledging its receipt from Labastille & Co., to be delivered to Wildes or assigns, he or they paying freight for said goods as per charter-party. This was all the cargo, excepting eight barrels of honey, of small value, shipped by a third person for a specific freight of one dollar per barrel. The charterer had failed before the return of the vessel. and upon her arrival, Mr. Wildes, the claimant, tendered to the master a reasonable freight for the carriage of the logwood from Aux Cayes to Boston, but the master refused to deliver the goods until paid the full amount remaining due by the charter; and he brought this libel to enforce that demand.

H. C. Hutchins, for libellant.

S. H. Phillips, for claimant, cited Perkins v. Hill [Case No. 10,986].

LOWELL, District Judge. By the charter-party, the libellant is owner for the voyage, and the master has a lien, as against the charterer. The point raised is, that he has waived it in favor of this claimant. As a general rule, the master would have no right to waive the lien, and in the case of a person having knowledge of the charter, could not do so. Gracie v. Palmer, 8 Wheat. [21 U. S.] 605; The Salem's Cargo [Case No. 12,248]. Here it is said the master, who made the charter-party on which the libellant relies, must be presumed to have power to vary it, no limitation of his authority being shown. Assuming this to be so, the question is, whether such a waiver is expressed or implied by the bill of lading, or by the conduct of the parties.

The claimant had what is called an assignment of the homeward cargo, but it was of a cargo not in being, as such, when the assignment was made. He could acquire no title, either legal or equitable, to the logwood until it became a cargo by being laden on board the schooner; but the instant it was so laden, the master's lien attached to it. Small v. Moates, 9 Bing. 574; Gledstanes v. Allen, 12 C. B. 202. So that the lien has once attached against this cargo. It is not to be presumed that a master intends to waive his lien without some good reason being shown for such action, or some explicit contract, or some conduct inconsistent with its intended enforcement.

Looking first at the bill of lading, does the master thereby contract to deliver these goods for a reasonable freight, reckoned simply upon the service performed in respect to them? The charter-party does not provide for a distinct freight for the homeward voyage. The agreement that one-half the freight should be earned at the out port, is intended to regulate the rights of the parties between themselves and with underwriters of freight, in case of a loss of the vessel. One-half of the freight is put at risk on each trip. But the freight that is payable at Boston by the charter-party, is eleven hundred and seventy-five dollars; and it may well be said, then, this is what is payable "per charter-party," under the terms of the bill of lading. If it be said that this construction fails to give due effect to the words, "freight for the same," because payment is not wholly for the carriage of these goods, the answer is, that the claimant's construction leaves out of view the expression, "as per charter-party;" and so we are still to seek what is, upon the whole, the more reasonable construction, and the one most in accordance with admitted principles.

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

And here the ship-owner's ground appears to be the stronger. It is usual for the master to give the charterer a bill of lading for his goods, and this is deemed to be subordinate to the charter party, and not to enlarge or diminish the rights thereby created, so far as owner and charterer are concerned. Lamb v. Parkman [Case No. 8,020]. If this cargo had been shipped directly to Wheelwright, the master would probably, in the usual course of trade, have given him precisely such a bill of lading as is here relied on; and it could not have been maintained that he thereby bound himself to receive any less sum than the charter-party entitled him to receive at the home port. Can it be said that the assignee of the charter-party is entitled to a more liberal construction of this paper? I have discovered no equity in his favor upon which to found such a distinction. He is not a bonâ fide purchaser of the cargo without notice, but a purchaser of the charter-party itself, and must be affected with a knowledge of its contents. Under these circumstances, the master gives the usual bill of lading, which is of value to the claimant in many respects: as evidence, for example, of a legal title to the goods, as well as a receipt binding the master and owners; but when its terms are ambiguous, it must be construed according to the existing rights of the parties, and in favor of the existing lien.

The case of Perkins v. Hill [supra], was much relied on by the claimant. We have no report of Judge Sprague's final decision in that case, but are told in a note that the decision which is reported was reversed by the judge on a rehearing, in which new facts were presented. By the report of the case in the circuit court, where the final and unreported decision of this court was affirmed, it appears that these new facts were many and important. The result in both courts was, that a shipper of outward cargo, whose dealings were with the charterer, and who had accounted to him, was not bound to pay freight to the owner of the vessel by reason of having taken a bill of lading, referring to the charter party, when, by the terms of that instrument, no freight was payable for outward cargo. That case did not decide that freight payable as per charter-party means that no freight is payable, but that where, upon reference to the charter-party, it appears that none is payable, the charter-party rather than the bill of lading may, in some cases, prevail, and the whole clause concerning freight in the latter may be rejected. The claimant here desires, in opposition to that doctrine, to overrule the charter-party by the bill of lading, the greater by the less, and that without showing any inconsistency between them, unless it be in a construction of the very clause which in that case was rejected. If we follow that case implicitly, and give no effect to the controverted part of the bill of lading, the lien remains good, and the libellant must prevail.

Independently of the presumptions in favor of the lien, the construction of the bill of lading, which the claimant asks for, appears somewhat forced and over-nice. If the master had intended to deliver this cargo for any sum less than his remaining charter-money, he would probably have expressed himself so, and have stipulated for a specific freight, as in the case of the eight barrels of honey. An agreement for a reasonable freight is unusual, inconvenient, and unmercantile; it may be necessary to infer such an agreement in some cases, as in such an one as appeared on the first hearing in Perkins v. Hill, but I see no reason for saying that this is one of them. Decree for the libellants.

Case No. 4,348.

The ELIZA.

[2 Ware (Dav. 316) 318.][1]

District Court, D. Maine. March, 1847.

AFFREIGHTMENT — EXCUSE FOR NONPERFORMANCE — DIFFICULTY IN OBTAINING MASTER AND CREW.

1. Every engagement to perform a future act is subject to an implied condition that the performance of it is not rendered impossible by an accident of major force, or a fortuitous event.

[Cited in The Ethel, Case No. 4,540; Reed v. U. S., 11 Wall. (78 U. S.) 606.]

2. An unusual difficulty in obtaining a master and crew to navigate a vessel is not one of those events that will ordinarily excuse an owner from performing a contract of affreightment for the conveyance of goods.

This was a libel filed against the schooner Eliza, for the breach of a parol contract for the transportation of a quantity of lumber from the port of Saco to New York. The libel was filed on the 4th of February, and the contract was entered into on the last day of November, or the first of December. The cargo was put on board, December 1st, while the schooner lay at the upper ferry, and she then dropped down to the lower ferry to avoid being detained by the ice, which began to be made in the river. She lay there, without proceeding on her voyage, to the time of the filing of the libel, and in fact continues there to this time, with the cargo on board. The schooner, though a small vessel, was proved to be in a good condition and every way fit for the voyage, though at that season of the year the voyage is one of considerable danger. She is now ready for sea and is said to be about sailing on the voyage. The libel was for damage for not proceeding on the voyage within a reasonable time.

Mr. Haines, for libellant.

Howard & Leland, for owner and respondent.

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

WARE, District Judge. The fact, that a contract of affreightment was made and the cargo taken on board in pursuance of the contract is admitted. The controversy is, what were the terms of the contract? The libellant contends that it was a contract in the ordinary and usual terms of such engagements, to receive the cargo on board and to proceed on the voyage without unnecessary delay. The owners allege that it was conditional; that it was to receive the cargo on board where the schooner lay, and drop down to the lower ferry, and then to proceed on the voyage as soon as a master and crew could be obtained to navigate her; the vessel being small, and the voyage at that season being hazardous, that their engagement to perform the voyage was made subject to the condition that a master and crew could be obtained, and that they have made all reasonable efforts to procure a master and have not been able to succeed. It is proved that they applied to several masters to take charge of the vessel, who all, for various reasons, declined; but not particularly on account of the dangers of the voyage.

The question then, which is before us at this time, is this, What were the terms of the contract? Was it absolute or conditional? It was not reduced to writing, and no witness appears to have been present when it was concluded. The terms cannot therefore be learnt from direct evidence. One witness has been examined, who was present when the application was first made by Davis, the libellant, to Gilpatrick, one of the owners. He says he went with Davis and introduced him to Gilpatrick, and that Gilpatrick offered him the vessel for $100 for the run. No condition was annexed to the offer, and nothing was said about a master. The contract was not made at this time, but the witness went with Davis to examine the vessel. Ellis, another witness, was present at a subsequent conversation on the first of December, and at this time it appears that the contract had been made, or that it was then made, for the price was mentioned which was to be paid for the run. At this time, Gilpatrick stated to Davis that he had no master or crew, that his clerk was to be absent, and that he could not attend to loading her that day. To which Davis replied that he had men whom he could employ, and that he, Davis, would assist in loading, and the cargo was in fact put on board that day, in part by men employed by the owner, and in part by Davis. The testimony of this witness brings us nearer to the contract than any other part of the evidence, as it seems probable that the bargain was then concluded. But, unfortunately, he heard but part of the conversation. He says that Davis offered eighty dollars for the run—the sum that was finally agreed—and this, connected with the remark of the owner that he had no master engaged, renders it highly probable that the bargain was not concluded before. Why was this difficulty interposed by the owner, that is, the want of a master and crew? The circumstances, I think, easily and naturally explain it. The vessel was lying at some distance up the river, and it was about time for the navigation to be closed by the ice. If the schooner was to perform the voyage, she must be ready immediately, or the voyage would be prevented by the ice. The cargo must be taken on board at once. The owner, therefore, objected that he had no master and crew; and to obviate it, Davis replied that men might be employed for that purpose, and that he would himself assist; and the vessel was in fact loaded that day. It seems, therefore, altogether probable that the want of a master and crew was mentioned in reference to the necessity of immediately putting the cargo on board, and not to the ultimate performance of the voyage, if she could be loaded and carried down to the head of winter navigation before the river closed. There is other testimony that bears more or less on this matter, the want of a master; but taken altogether, it does not materially vary the posture of the case as it is left by the testimony of this witness.

The conclusion to which I am brought by the evidence is, that the contract was not made dependent on a condition that a master and crew could be found, but that it was, as charged in the libel, in the ordinary form, that the vessel should proceed on her voyage without unnecessary delay. It is true that every engagement to perform a future act is, in one sense, conditional. If it becomes impossible by any event not imputable to the party who is bound to perform it, unless he assumes the risk of all contingencies, he is excused. The law compels no one to impossibilities. Poth. Oblig. 148; 6 Toull. 227. Those events called accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition, in every engagement, for a future act. If the vessel had been burnt by an accidental fire, or destroyed by a tempest, this would have been a valid excuse. But the difficulty of obtaining a master and crew is not one of those contingencies implied in a contract of affreightment, to excuse a non-performance of the contract. It is not unusual for an owner to engage a vessel for a voyage before he has engaged a master, and a crew is rarely engaged until the voyage is determined upon and the vessel nearly ready for sea. These contingencies the owner takes on himself. I do not mean to say that the difficulty of obtaining a master and crew to navigate a vessel may not be such as to amount to an impossibility, and thus come within the class of fortuitous events that will excuse a party from performing his engagement. But the circumstances must be very extraor-

dinary to amount to a justification. It is proved by the testimony, that the owner made efforts to obtain a master. Five different persons were applied to without success. But others might have been found, if not in Saco, in some of the neighboring towns. And I do not think that any such extreme case is proved, as will excuse the owner from his engagement, under the notion that it has become impossible by a fortuitous event or an accident of major force. Decree for libellant.

ELIZA, The (JOHNSON v.). See Case No. 7,383.

ELIZA, The (UNITED STATES v.). See Case No. 15,041.

Case No. 4,349.

The ELIZA AND ABBY.

[Blatchf. & H. 435.] [1]

District Court, S. D. New York. May 24, 1834.

COLLISION — INEVITABLE ACCIDENT — BAD MANAGEMENT NOT PROXIMATE CAUSE OF COLLISION — SKILL AND PRUDENCE OF MASTER AND PILOT — COSTS.

1. The master or pilot in command of a vessel is only bound to exercise ordinary skill and prudence in getting his vessel under weigh.

2. Where a collision occurs from inevitable casualty, without the fault or negligence of either party, each must bear his own loss.

[Cited in The Moxey, Case No. 9,894.]

3. In case of a collision, bad management on the part of the libelled vessel, but which is not the proximate cause of the collision, will not subject her to damages.

[Cited in The Nereus, 23 Fed. 457.]

4. In a libel for collision, where there is strong probable cause of action, but the libel is dismissed, costs will not necessarily be imposed on the libellant.

This was a libel in rem, on a collision at the quarantine ground, in New York harbor, alleged to have occurred through the negligence or mismanagement of the claimants' vessel. It appeared that the Atticus, the libellants' ship, had come into port, from the West Indies, a day or two previous to the accident, and was to lie at quarantine for some time. The Eliza and Abby had dropped down the day preceding, prepared to go to sea, and, through careless and improper management that night, had been allowed to drag her anchor before a southeast wind for some distance; but, when the wind died away, she had come to, and had taken a berth about one hundred yards from the Atticus. The weather in the morning was calm; and, according to the testimony of the master, the mate and a pilot on board of the Eliza and Abby, there were indications of a favorable wind for going to sea, though a witness upon the other side testified that the clouds were threatening in the northwest. The small anchor of the Eliza and Abby was tripped preparatory to getting under weigh, but, before it was raised to the deck, or the crew had commenced hauling on the main anchor, the vessel was struck by a sudden and violent gust. The tide was flood, and the wind came from the northwest, or west northwest, so that the wind and tide acted in contrary directions. The libellants charged that the collision subsequently took place in consequence of the Eliza and Abby's dragging her main anchor, and running down upon the Atticus; and they introduced evidence to show, that if the kedge anchor had been promptly dropped, the two would have held the ship in her position and prevented the accident. The master and mate of the Eliza and Abby testified, on the other hand, that she did not drag her anchor, but that both vessels were driven ahead by the gale, and ran out their anchors to the end of the chains, and, being then brought up, took a sheer, and, by the pressure of the tide, were drawn off diagonally to the course they had run, upon the wind, and towards each other, until they came into collision, in a trough of the sea, with great violence. The witnesses testified, that the accident occurred within the space of five minutes after the squall came up, and most of them thought the time did not exceed three minutes. After the collision, efforts were immediately made on board of both vessels, by setting some of their sails to veer them apart, but unsuccessfully. The sails were shivered, and the vessels continued striking with a force that endangered the safety of both. The master of each called to the other to slip his cable and drop off, but neither was willing to incur the hazard of such a movement. The wind was blowing directly upon the Long Island shore, from which the vessels were distant from ten to twelve hundred yards, the Eliza and Abby being to windward, and it was supposed that, as her best bower anchor was slipped, the other would not be sufficient to hold her from going on shore. After the vessels had continued in collision from fifteen to thirty minutes, the master of the Eliza and Abby slipped his cable, when the wind drove his vessel astern, and she rubbed against the Atticus, and did the chief damage which the latter vessel sustained.

Edwin Burr, for libellants.

Daniel Lord, Jr., and Charles Walker, for claimant.

BETTS, District Judge. The libellants charge upon the Eliza and Abby carelessness and mismanagement in various respects. It is urged, that the state of the weather rendered it improper for her to attempt to go to sea, and that raising one anchor, where she lay, was improvident and negligent management. The opinions and judgments of witnesses given after the event, cannot be relied upon to determine whether the conduct of the

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

master of the Eliza and Abby, previous to the squall, or under its exigencies, was justifiable or prudent. Whether he was guilty of culpable negligence in either respect, must be decided upon the circumstances before him at the moment. The squall was from the northwest. It seems, that in this harbor a southeast wind is usually followed by one from the northwest, and that the changes are not uncommonly abrupt and violent. Nothing more was discernible at the time, on circumspect and careful observation, than the common signs of a change of wind from its then point to the opposite one. Experienced navigators, not connected with the vessel, give their opinion upon the facts, that the conduct of the pilot was sufficiently guarded and prudent in that state of the wind, in heaving up the anchors and getting himself in readiness for putting the vessel under way. An extreme caution and apprehensiveness might have induced a pilot to wait until the weather had assumed a settled character; yet, there seems to have been no want of ordinary precaution in proceeding upon the then state of the wind and atmosphere, without preparation against a sudden and dangerous change. Officers in charge of a vessel must rely essentially upon their own judgment, in adopting or rejecting measures of mere precaution as to making sail or coming to. The law exacts of them, in so doing, no higher responsibility than the exercise of ordinary foresight and skill.

It is, however, strongly insisted, that if he was justified in proceeding with his preparations to get under way, still, when the squall broke upon him, he was culpably negligent in not paying out cable and dropping the kedge anchor, which had been raised; and many suggestions and hypotheses have been urged to show that the two anchors would have held the Eliza and Abby in her position. In respect to the arguments and inferences upon this topic, it is to be observed, that there is no proof that the Eliza and Abby dragged her main anchor at all. The position in which the two vessels struck would strongly countenance the supposition of the master and pilot of the Eliza and Abby, that both vessels had run over their anchors with great velocity, and, being then suddenly checked in that direction, were drawn backwards, but diagonally, and on lines converging towards each other, and in that manner were brought into collision, without the anchor of either having dragged. Upon that supposition, the additional aid of the kedge was not required to hold the Eliza and Abby at her anchorage, and would have been of no service unless so dropped as to hold and bring up the ship before she reached, on her course, the point of her check and recoil by the main cable. There is no evidence enabling the court to form an opinion as to the justness of that hypothesis, nor as to the sufficiency of the kedge to hold the vessel without the aid of the main anchor.

But, admitting that the small anchor, if let go in due time, might have averted the collision, it does not follow that the omission to do that particular act casts upon the claimant any responsibility for the consequences which ensued. The witnesses represent that the coming on of the gust was sudden and violent in the extreme, and that the two vessels were brought together within three minutes after it struck them. That interval evidently allowed no opportunity for selecting or putting in execution means to avoid any particular disaster. The natural apprehension, when the blast struck the vessels, must have been, that each of them was itself in instant and imminent peril of destruction. It is not to be expected that the measures which might afterwards have been deemed most appropriate, would have occurred to the minds of the master or pilot of the Eliza and Abby, in the confusion and alarm naturally attendant upon a peril of the kind. Their exertions would be first put forth for the safety of their own vessel and crew, without regard to the situation of others. The Atticus was, at the same time, flying with like velocity before the gale, without any apparent restraint from her anchor; and, if any attention had been given to her, it would have been reasonable to suppose that both vessels were driving with their anchors, and would continue to run in the same direction. They came into dangerous proximity only when, after being brought up by their anchors, they were carried in a new direction, veering towards each other. Neither that movement, nor the cause of it, could be foreseen or was to be expected. It appears to me, then, that the collision was the result of an inevitable casualty, and was owing to no fault or negligence on the part of the Eliza and Abby, and that each party must, accordingly, bears its own loss. The authorities supporting this doctrine are numerous. Abb. Shipp. 354; Story, Bailm. §§ 514, 608; The Woodrop Sims, 2 Dods. 83; The Dundee, 1 Hagg. Adm. 120.

The libellants further insist, that if no legal blame is imputable to the Eliza and Abby for the act of collision, she is responsible for the consequent damages, because, with reasonable skill and exertion on her part, all those injuries might have been prevented. It was urged that, as she was the windward vessel, and had come last into the position leading to the collision, and was ready for sea, and was therefore better prepared to manage herself when adrift, it was incumbent upon her to slip her cable and thus free the two ships from their dangerous contiguity. The proof is clear, that such a procedure would necessarily have involved great exposure and danger to the vessel which should let go her anchor. She would have been carried stem foremost towards a lee shore, but a few hundred yards distant, with-

out anchors to stay her; and, if the violence of the gale had continued, the use of sails for her government would have been impracticable, and she must inevitably have been cast ashore. The witnesses on both sides consider, that the exposure would have been so great from slipping the cables of the vessels in their then situation, that, as a measure of the last extremity, it would have been warranted only to avoid instant and certain destruction from the concussion of the vessels. Each vessel would properly have struggled to the last against taking a step so perilous to herself, and have left the hazard to her companion. There is some difference of opinion as to which vessel could have done it most readily, and with the least risk. But that is matter of conjecture alone, and not to be weighed or determined by judicial decision. There was no paramount obligation on the claimant to assume the peril, since it was not his fault which produced the exigency; and, the Eliza and Abby not being legally responsible for the collision itself, no obligation was imposed on her, in this respect, that did not equally rest on the Atticus. Each officer, looking first to the preservation of his own vessel, was also bound to do every thing the circumstances of the case would permit, for the safety of the other; and I do not perceive in the proofs, or in the judgment of skilful experts upon the facts, cause for imputing any blamable misconduct to the Eliza and Abby, which should render her liable for the injuries the other ship sustained.

It has been further urged, that the Eliza and Abby was improperly worked the night previous, and was allowed to drift from her anchorage and come into dangerous proximity to the Atticus. Had injuries been received from the Eliza and Abby that night, in the progress of her movement or in the manner of her coming to, there would have been color for holding her chargeable for such injury, because of careless or unskilful management. But she had been brought to a safe anchorage, and had taken a berth at a suitable distance from the Atticus, and in no way threatening to the latter vessel. It is true, that the accident would probably not have happened, had the Eliza and Abby retained the situation at which she was anchored the night before. So, it may be said, it would not have happened if she had remained at the New-York wharf. Her shifting her anchorage was not the proximate cause of the collision. It was, undoubtedly, in one sense, connected with it and the cause of it, but so indirectly and remotely as not to subject her to the consequences. If, when she first anchored, she had taken the berth at which she finally brought up, and had remained there till the occurrence of the gale in the morning, there would be no ground, upon the proofs, to charge her with fault or negligence in coming to at that point. The libellants cannot invoke, in support of their action, any antecedent misconduct of the claimant's vessel, not necessarily and directly connected with the injury they afterwards sustained.

The libel must be dismissed. But, as the libellants sustained serious injury, without fault on their side, and as, under the circumstances known to them at the time, there was strong probable cause of action, I shall not impose costs on them. Libel dismissed, without costs.

ELIZA AND SARAH, The (KNAP v.). See Case No. 7,873.

Case No. 4,350.

The ELIZABETH.

[Blatchf. Pr. Cas. 250.][1]

District Court, S. D. New York. Nov. 17, 1862.[2]

PRIZE — PRODUCTION AND EXAMINATION OF PERSONS CAPTURED WITH PRIZE—MASTER AND MATE OF CAPTURED VESSEL — FAILURE TO OBSERVE 12TH PRIZE RULE—CONDEMNATION.

1. Intervention by a neutral consul for the alleged owners of vessel and cargo. Oral exceptions, taken at the hearing, to the regularity and sufficiency of the proofs, on the ground that, of twenty persons composing the crew of the prize vessel, only the master and a cabin boy were produced as witnesses, overruled, on the ground that the claimant was guilty of laches in not making the objection at an earlier day.

2. The 12th prize rule of this court is express, that the captors must produce to the prize commissioner, to be examined as witnesses, three or four, if so many there be, of the company or persons who were captured with or who claim the captured property; and, in case the capture be a vessel, the master and mate, or supercargo, if brought in, must be two.

3. An omission to observe this rule is an irregularity, which, if properly and seasonably taken advantage of by a claimant, might lead to the rejection of the proofs offered, or compel the libellants to show a satisfactory excuse for the omission.

4. In this case the court, of its own motion, on seeing that the rule had not been complied with, suspended a final decree in the case, and gave leave to the libellants to submit proofs to the court within ten days, showing why the terms of the rule had not been observed.

5. Within the time so allowed satisfactory evidence was produced to the court that no malpractice had been intentionally allowed in the case, and that the failure to produce more than the two witnesses was the result of misapprehension or accident, and not of any purpose to disregard the rule.

6. Vessel and cargo condemned on these grounds: 1. The vessel was not bona fide a neutral vessel. 2. Her papers as to her destination were false. 3. She had on board articles contraband of war, intended for an enemy port, and on transportation by her to such port at the time of her arrest. 4. She was seized while attempting to violate a known blockade.

In admiralty.

BETTS, District Judge. The libel in this case was filed July 7, 1862, alleging that the

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

[2] [Affirmed in The Elizabeth, Case No. 4,351.]

vessel, with her cargo, was captured, as lawful prize, by the United States steamer Keystone State, William E. Le Roy, of the United States navy commanding, on the 29th day of May, 1862, on the Atlantic ocean, off Charleston harbor. The monition issued on the libel was made returnable, and was returned in court, on public proclamation, July 29 thereafter; and thereupon Pierrepont Edwards, the acting British consul for this port, intervened, by his proctor, for the interest of the owners of the steamer and cargo, and filed a claim in that character thereto, as being owned by British subjects out of the jurisdiction of the court, and subjoined to the claim his own test oath to such ownership, his knowedge, as stated by him, being acquired "from his position as present acting consul in the port of New York, and from conversation with the master and crew of the above steamer Elizabeth." No other claim or answer was interposed in the case. The proctor and counsel for the claimant appeared on the trial, and, after the ship's papers and the preparatory proofs were heard, put in various points or objections against the condemnation of the vessel and cargo, and submitted the cause to the decision of the court thereupon, without oral argument. Written points were also submitted on the part of the libellants.

The vessel had a British certificate of registry, issued at Nassau, N. P., to John Holmes Hanna, of New Orleans, merchant, dated February 6, 1862. She is certified to have been built at Glasgow, July 29, 1859, and the registry states that her foreign name was "General Miramon, formerly Pagnes Coneo."

The vessel was cleared at Nassau. The clearance and shipping agreement with her crew were dated at that port in May, 1862, for St. John, New Brunswick. Her pilotage out was receipted at Nassau, May 24, and she went to sea the 25th, and was captured some thirty miles or less out from Charleston, May 29th, at about 7 a. m. No log-book was produced with the papers, and no evidence of the course the vessel pursued from Nassau, or of the state of the weather or the speed of her progress. She was a steam propeller. As Nassau and Charleston are situated about two degrees of longitude and seven degrees of latitude apart, and the period occupied by the prize in making the transit from her place of departure (in latitude about 25° north, and longitude 77° west) to that of her arrest (in latitude about 32° north and longitude 79° west) must, from the circumstances, have been less than four days, her course from the one to the other point must, obviously, have been as short in time and distance run as would be ordinarily practicable, and, being accomplished so promptly, could not be presumed, in the absence of all proofs to the contrary, to have been retarded by baffling or adverse weather, or by deviation from a direct track. On the contrary, her position west of the Gulf Stream, thirty or less miles out from Charleston, in five or six fathoms of water, would denote that her destination had been in search of a port immediately at command on the route she was running, rather than to St. John, in New Brunswick, many degrees of longitude east and latitude north of the place of her arrest. These palpable circumstances bear strongly against the integrity of the representation upon the clearance and shipping agreement, and in the testimony of the master, that the voyage was destined for St. John, New Brunswick, and not to Charleston; and that distrust will not be found removed or diminished by the tenor of the proofs in preparatorio.

The crew consisted of twenty-one persons, including the master, two mates, two engineers, a steward, a cook, a cabin boy, five seamen, and five or six negroes. Of this number only the master and the cabin boy were produced and offered as witnesses before the prize commissioners for examination. No reason was assigned to this court at the hearing of such limitation of the number of witnesses examined. The counsel for the claimants, on the argument, excepted orally to the regularity and sufficiency of the proofs so returned, and filed his exception in writing, as a point of defence in law to the suit. The existing 12th prize rule of this court (and the standing rule, from the earliest compilation of the rules has been substantially the same) is direct and positive, that the captor shall produce to one of the commissioners three or four, if so many there be, of the company or persons who were captured with or who claim the captured property. And in case the capture be a vessel, the master and mate or supercargo, if brought in, must be two, in order that they may be examined by the commissioner in preparatorio. The rule of this court corresponds, in substance, with the practice of the other district courts of the United States, with that of the continential government during the revolutionary war (5 Wheat. [18 U. S.] Append. 118, art. 6), and with that of the supreme court (1 Wheat. [14 U. S.] Append. 496). The English and our continental practice is founded upon the like principle (God. Adm. Ins. 25, 26; The Dame Catharine de Workeem, 1 Hay & M. 244), though it does not appear, with other jurisdictions, to rest in general rules, but to be governed by specific instructions of the judge, and, at his discretion, limited to one or more witnesses (Marriott's Formulary, 32). During the revolutionary war instructions were given by congress to cruisers to bring in one or more witnesses from the prize for examination (5 Wheat. [18 U. S.] Append. 118), and by the president, to private armed vessels, to bring in the master and one or more of the principal persons (2 Wheat. [15 U. S.] Append. 81, art. 4).

The omission on the part of the captors to observe the requirements of the rule in this respect is an irregularity which, if properly taken advantage of by claimants regularly intervening in the suit, might lead to the re-

jection of the proofs offered in that condition, or compel the libellants to show adequate cause for the omission to produce and have examined before the prize commissioners the required number of witnesses out of those found on the prize at the time of its seizure. The rule is not one of positive law, constituting a prerequisite to a right to a condemnation on the part of the libellants, and is, therefore, subject to explanation or excuse conformably to the substantial rights and equities between the parties litigant.

The capture was made May 29, 1862. The prize was delivered to the commissioners of prize in this district, as appears by their register, on the 4th of June thereafter, and the examination in preparatorio of the two witnesses whose testimony was produced on the final hearing was taken and certified the next day, June 5. The libel was filed July 7, 1862. No reason is assigned for that delay; but it is a probable inference that a pause in the proceedings occurred on account of the small proportion of the ship's crew first produced for examination, and to await the presentation of others subsequently. Nothing appears upon the pleadings or papers introduced by either party in relation to the subject; and, on the 29th of July, the British vice-consul for this port intervened and filed the claim in behalf of British subjects, before referred to, as owners of the prize property at the time of such appearance, and persons out of the jurisdiction of the court. He was a competent party to the end. 1 Kent, Comm. 43; The Bello Corrunes, 6 Wheat. [19 U. S.] 152. An affidavit of the intervenor, appended to the claim on his test oath thereto, asserts the belief of the deponent in the allegations of the claim, and that he acquired his knowledge of these matters from his position as acting consul in the port of New York, and from conversations with the master and crew of the above steamer Elizabeth.

The parties are authorized by the prize rules (rule 13) to attend personally, or by their agents, the examination of witnesses before the commissioners; and the presumption is, accordingly, forcible that it was well known, when the claim was interposed and filed, who of the crew had been examined as witnesses, and what testimony had been given, as well as the reason why no greater number was produced. No other party has supplanted the official intervenor, or assumed to take charge of the defence; and the exception he raises to the alleged irregularity in practice, in giving in the proofs, could have been as well known to him or his proctor at the inception of the suit or the presentation of his claim, as at the time of the final hearing on the issue. And there is no intimation in any judicial recognition of its official powers which indicates that they exceed the legal authority of the principals he may represent. No privilege or immunity in respect to questions of irregular practice on the part of the libellants in the prize commissioner's office, or otherwise, is reserved to a consular representative in court, in managing a defence to the action, which could not be exercised by the owners of the property seized. The defectiveness of the proceedings complained of must, in contemplation of law, have been known to him when the evidence was given, as fully as at the present term of the court, when the exception is first suggested. It was therefore, palpable laches to withhold the objection to the mode of taking the proofs until the hearing on the merits in court, and the motion to exclude or disregard the depositions because additional portions of the crew were not added must be denied. It is a principle governing the proceedings of all judicial tribunals, that the neglect by a litigant party to bring forward at the proper period objections touching the form and regularity of the acts of his opponent in conducting his cause in court shall be deemed to be a waiver of such objections, or equivalent to an admission that, if they had been made known, the other side could have satisfactorily removed them. Graham, Pr. 566; Tidd, Pr. 533; Rowan v. Lytle, 4 Cow. 91; Jones v. Dunning, 2 Johns. Cas. 74.

But it appearing upon the depositions read on the hearing that a large number of persons, being the crew and passengers of the vessel at the time of her capture, and captured with her, have not been examined as witnesses in the suit, and no excuse being furnished for the omission, the court will suspend a final decree in the case until the libellants furnish satisfactory evidence to the court, by depositions filed within ten days after this order, that the omission to examine the number of witnesses required by the standing rule of the court arose from reasonable and justifiable cause, and was not owing to any culpable or improper purpose on the part of the prosecution. This order is made that the court may be well satisfied that all the proceedings have been fairly conducted in pursuing the condemnation of the prize, and not because of any regular or lawful defence interposed in the suit, which renders the proceeding therein other than one of entire default and absence of defence in the suit on the part of the owners of the property seized.

November 12.—Interlocutory order. An objection being taken in court by the proctor of the official claimant, on the final hearing of this cause, that the number of witnesses required by the stated rules of the court to be examined in prize suits were not produced by the libellants, and examined in preparatorio by the prize commissioners, although it is considered by the court that the objection is not available in law to the claimant, yet the court, in protection and enforcement of its standing rules, and in support of the ends of public justice, will,

ex suo motu, notice an omission of its officers to observe and comply with those rules: therefore, it is ordered that further proceedings in this cause, upon the proofs now before the court, and the motion of a decree of condemnation and forfeiture of the property under arrest, be suspended for ten days after notice of this order to the district attorney and the proctor of the captors, with leave to the libellants to submit, within that time, proofs to the court showing why the rules of court in that respect have not been complied with in this suit.

November 17.—Affidavits presented this day by the assistant district attorney and the counsel for the captors in the cause, with the evidence in preparatorio, show that, on the capture of the prize, her crew, except the two witnesses examined and two or three colored men, were separated from the prize vessel because of the largeness of their number and the smallness of the vessel, and were transferred to the public ship, the Bienville, and were brought by that ship into the port of Philadelphia; that part of the crew have never been transmitted to this port, and, it is believed, were allowed to disperse; that the negroes accompanying the prize were not sent in for examination, because it was considered they were stupid and unintelligent persons; that the master of the vessel and the cabin boy, a young man nineteen years of age, were produced for examination; and that the other portions of the captured crew had, as is supposed, been discharged from the Bienville, at Philadelphia, as not needed for witnesses. This evidence satisfies the court that no malpractice has intentionally been allowed in the case and that the failure to produce other witnesses from the prize crew is the result of misapprehension or accident, and not of any purpose to disregard a full observance of the rule of court.

The libellants insist, upon the case as it now stands, that the facts presented in the ship's papers and the preparatory proofs place the vessel and her cargo in the class of those adventures so common and so frequently made the subject of adjudication in this court during this war, in which vessels and cargoes assume to be engaged in a neutral trade to or from the port of Nassau, but are, in reality, covered with proofs that the purpose and effort of the enterprise is to carry cargoes into, or to bring them from, the blockaded ports of the adjacent seceded States, in violation of the blockade, and in fraud of the rights of the United States under the law of the nations.

In addition to the pleadings and evidence previously before the court, a paper log-book of this last voyage of the vessel is now laid before the court by the counsel for the claimants, with the assent of the counsel for the libellants, as being one which was left in his charge by the master of the prize when she arrived in this port, and was accidentally not sent with the ship's papers to the prize commissioners. This document changes the evidence already in the case only in fixing with more precision the times and places of the beginning and ending of the voyage. Her departure was at latitude 27° 55′ north, and her arrest at latitude 32° 19′ north. She left Nassau, Sunday, May 25, 1862, towards St. John, N. B. Royal Bay was, at 4 p. m., south-southeast, ten miles distant. The vessel was brought to and arrested the Thursday after at 4½ a. m. On Wednesday, the 28th, the log notices "coal getting short and water likewise."

The argument is still maintained for the libellants—1. That the vessel is enemy property; 2. That the cargo is contraband of war; 3. That the papers are simulated and false as to the real destination of the vessel; that the voyage was undertaken and prosecuted with the intent to run into Charleston, and that the vessel was captured while making that attempt.

The claimant denies these positions, and urges—1. That the evidence required by the rules of court has not been furnished by the libellants; 2. That the evidence of the cabin boy is inadequate proof against the vessel; 3. That a neutral ship can carry any description of cargo. 4. That the residence in any enemy port of the neutral owner did not render the vessel enemy property at the time of her seizure, May 29, New Orleans having been open to the general commerce, by proclamation, May 12, 1862.

The vessel was owned in New Orleans, by Hanna, when the master was appointed to her. He was put on board of her by the owner at Mobile in December, 1861. The crew were reshipped by the master for the last voyage in May last. The vessel carried two small brass guns forward. The master says that the vessel, on the voyage on which she was captured, was bound from Nassau to St. John, N. B., and back to Nassau. She carried a full cargo, consisting of castor oil, kerosene oil, tin, lead, rifles, sabre blades, saltpeter, dry goods, and casks of some kind of hardware. She had on board goods contraband of war. The vessel went, in December, 1861, from New Orleans to Mobile; thence, with a cargo of spirits of turpentine, to Havana; thence, with another cargo, to Nassau; and thence to New Orleans, where she arrived February 20, last. Thence she carried a full cargo of cotton to Havana, and there took on board a new cargo, and proceeded to Nassau, where she received part of a new cargo, and started on the voyage on which she was captured. When the vessel went from Havana and Nassau on the previous voyage, she cleared for Matamoras and went to New Orleans. The cargo captured was shipped and claimed by Henry Adderly & Co., of Nassau. The master says that he does not know who were the consignees of the cargo, or that Adderly & Co., had any

interest in it; that he had heard at Charleston and southern Confederate States were under blockade, and that he believes that Charleston was actually blockaded at the time of the capture of this vessel, as a number of blockading vessels were lying there. When the prize discovered the capturing vessel, she was about four miles off, and the prize altered her course. When the first gun was fired by the capturing vessel, the prize was then heading not towards Charleston, but outward and towards the Gulf Stream. The Gulf Stream would be the direct course from Nassau to St. John. The prize was about two points off that course when taken, and was then endeavoring to get back to it. The cabin boy testifies that the vessel was captured in about three fathoms of water, because she was charged with attempting to run into Charleston; that he resides at Nassau with his father, an Englishman, and supposes that Adderly & Co., owned the vessel, because they advanced; that he was shipped at Nassau with the rest of the crew, at a shipping office there; that the vessel first sailed from Nassau to Havana, with a small cargo of coal for the steamer's use, and then back to Nassau; from which place he supposes the vessel intended to run the blockade of Charleston, although, by the shipping articles, she was destined to New Brunswick; because it was generally so understood by the crew, just after leaving Nassau, because the vessel had arms and warlike materials on board, and because she went so close to Charleston; and that the vessel, when she ran over to Havana from Nassau, took nothing but fuel for her own use, and brought back several square boxes (the contents of which he did not know) to Nassau, and then immediately had loaded on board, without landing the boxes, arms, munition of war, and other merchandise.

The evidence, from the preparatory examination, that the prize ran from Nassau to Havana for a portion of the cargo on this her last voyage, and returned directly thence to Nassau, and there, without unlading that portion on her return, took in, at the latter port, the residue of her lading, gives great significancy to the observation in the log-book, before quoted, as, unless the voyage then proposed to be continued was to be a very short one, it is incredible that the steamer should be sent to sea with water and coal not sufficient to supply her for four days. Some part of this short period, as also appears from the log, was run under sails only.

Without dilating upon the facts thus placed before the court, I am clear in the conclusion that this vessel had not acquired a bona fide neutral character at the time her last voyage was undertaken; that St. John, N. B., was not the true destination of her voyage from Nassau, whence she last sailed; that her papers in that respect are simulated and false; that she had on board articles contraband of war, intended for an enemy port; that she was arrested in attempting to carry such articles to such port; that her owner, her master, and the owners of her cargo well knew of the blockade at Charleston, and that it was efficiently maintained, and, under that knowledge, endeavored to break the blockade; and that the vessel and cargo were seized in the attempt to carry out that intention.

A decree of condemnation and forfeiture of both vessel and cargo is ordered to be carried into effect.

This decree was affirmed, on appeal, by the circuit court, July 17, 1863 [Case No. 4,351, following].

Case No. 4,351.

The ELIZABETH.

[Blatchf. Pr. Cas. 642.][1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—VIOLATION OF BLOCKADE—EVIDENCE.

[A vessel which cleared from Nassau for St. John, New Brunswick, on May 24, 1862, but was captured five days later off Charleston, S. C., heading towards the land, and found to be laden with arms and munitions of war, *held* liable, in the absence of any other reason to account for her position, to condemnation for intending to violate the blockade.]

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

In admiralty.

NELSON, Circuit Justice. This vessel was captured, on the 29th of May, 1862, off Charleston, South Carolina, some twenty miles west of the Gulf Stream, about eight o'clock, a. m., by the steamer Keystone State. She was laden with arms and munitions of war, partly at Havana and partly at Nassau, N. P., and cleared from the latter port for St. John, N. B., on the 24th of May preceding her capture. Her heading was towards the land, off Charleston, when she first discovered the blockading vessel. She then changed her course to east by north. She had been out of the port of Nassau only four or five days when she was captured. She was what is called an auxiliary steamer, using both sails and steam. No satisfactory reason is given for the position of the vessel at the time of her capture; and the inference is irresistible, from the evidence, not in dispute or doubt, that her intention was to run the blockade of Charleston, and that she was in the act of doing so when she discovered the Keystone State, and changed her course.

Some irregularities were committed on the part of the captors, and in the proceedings on the part of the government, in the court below, which I should afford an opportunity

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

[2] [Affirming Case No. 4,350.]

to the claimant to correct, were I not entirely satisfied, upon the facts which are undisputed, and could not be substantially varied by any further proof offered, that the voyage was in reality intended for the port of Charleston, and not for that of St. John.

Decree below affirmed.

Case No. 4,352.

The ELIZABETH.

[1 Paine, 10.][1]

Circuit Court, D. New York. April Term, 1810.

EMBARGO LAWS—COASTING TRADE—LICENSE—DEPARTURE FROM PORT—DISTRICT — LONG ISLAND SOUND.

1. By the provisions of the embargo laws, a vessel licensed for the coasting trade was not required to obtain a clearance or permit on departing from a port of the United States, but a clearance was necessary only on her departure from a district of the United States. The bond required to be given by vessels of this description was the only security provided against their leaving a port.

[Cited in U. S. v. Freeman, 3 How. (44 U. S.) 565; Harrison v. Vose, 9 How. (50 U. S.) 379; Marriott v. Brune, Id. 636.]

2. Long Island Sound does not belong to either Connecticut or New-York, nor to any district of either of those states. A coasting vessel, therefore, sailing from the port of New-York into the Sound, although she did not enter a district of Connecticut, departed from the district of New-York, and not having a clearance, as required by the embargo laws, was held to be forfeited.

[Cited in Keyser v. Coe, Case No. 7,750.]

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

In admiralty.

G. Griffen, for appellants.

N. Sanford, D. A., for respondents.

LIVINGSTON, Circuit Justice. The sloop Elizabeth, a vessel whose employment was confined to the navigation of the river Hudson, sailed about the middle of July, 1808, from the port of New-York with a cargo of 190 barrels of flour, without a permit or license, and without a manifest of her cargo having been delivered to any person. A few days after she was taken by the revenue cutter in Long Island Sound, at the distance of about 110 miles from the city of New-York. When she was first discovered by the cutter, on the day of her capture, she was considerably nearer to the shore of Connecticut than to that of Long Island. On being brought to the city of New-York, the Elizabeth and her cargo were libelled in the district court of this district, and condemned for a contravention of the act laying an embargo, and certain acts supplementary thereto. The infractions relied on, and to which alone the proofs and admissions apply, are that she departed from the port of New-York without a clearance or permit, and also that she left the district of the city of New-York without such papers.

It being admitted that the Elizabeth left the port of New-York without a permit or clearance, it becomes a question of law, how far such conduct in a vessel of this description, works a forfeiture of herself or cargo. This consequence is supposed to be produced by the 3d section of the first supplementary act, which passed the 9th of January, 1808; and which declares "that if any ship or vessel shall depart from any port of the United States without a clearance or permit, such ship or vessel, and goods, &c., shall be wholly forfeited." From the very general and comprehensive phraseology here used, it is contended on behalf of the United States, that the court cannot except vessels of any description whatever. It is very certain that this section taken by itself, and without reference to other parts of this and other acts made in pari materia, would include the case of the Elizabeth. But it is the duty of a court, in construing a written law, in doubtful cases, to compare all its parts, in order to discover the intention of the legislature; and however broad some of its expressions may be, yet, if on such examination, it shall clearly appear that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly.

The first embargo law having required no security against its violation from any others than registered or sea-lettered vessels, those licensed for the coasting trade were at liberty to depart from any port without bond being given to reland their cargo in the United States. This omission was soon perceived, and in the very next month a supplementary act was passed. By the first section of this act, in case of a vessel licensed for the coasting trade, a bond was to be given in double her value, and that of her cargo, that she should not proceed to any foreign port, and that the cargo should be relanded in the United States; and the second section provides, that it shall be sufficient, in the case of a licensed vessel whose employment has uniformly been confined to rivers, bays, and sounds, to give bond in an amount equal to three hundred dollars for each ton, with condition that such vessel shall not be employed in any foreign trade during the term limited in the condition of the bond. Having thus confined, by very heavy penalties, coasting vessels, within their legitimate spheres, the provisions of the third section most obviously refer to other vessels; for it can hardly be imagined, that after taking such ample security from river vessels, it would be thought necessary to impose on all sloops, &c. navigating the different rivers of the United States, the necessity of taking a permit or clearance every time they sailed, for the permit which might have been obtained at the time of the vessel's being licensed, would not be a compliance

[1] [Reported by Elijah Paine, Jr., Esq.]

with the act. But whatever doubt might be entertained on the construction of this section, it is much diminished, if not entirely removed, by a provision we find in another of the supplementary embargo laws, which passed the 25th of April, 1808, subjecting to forfeiture vessels of the description of the Elizabeth, if they depart from any district of the United States without having previously obtained a clearance. There is no way of accounting for this act passed by the same legislature and at the same session, than on the supposition that, in their opinion, such vessels were, under the same laws, liable to no penalty whatever for leaving a port without a clearance; for if this interdiction already existed, and that under the heavy penalty of a forfeiture, what use could there be in saying, and that too by way of a further sanction, that she should be forfeited for leaving a district, when departing only from a port, was already followed with that consequence? This then is not deemed a cause of forfeiture.

The other ground taken by the attorney for the United States is, that the Elizabeth left the district of the city of New-York without a clearance. Here the parties are agreed as to the law, but dispute the fact. To show that she had not departed from the district of New-York, the counsel for the appellants have had recourse to the charter of the colony of Connecticut, granted by Charles the Second: establishing its southern boundary on the sea, by which was no doubt intended, as is conceded by the counsel of the United States, the Long Island Sound. By this boundary is not intended the Atlantic ocean, but the sea into which the Narraganset river falls, which is Long Island Sound. That the sea here spoken of is the Sound, is not disputed by either party, although very different conclusions are drawn from it. The appellants say that no part of the sound being granted to Connecticut, the whole necessarily belongs to the state of New-York; and being in no other district of this state it must be within that part of it which comprises the district of New-York; that therefore the Elizabeth, when taken, was still within the district from which she sailed, and had consequently committed no offence against any law. The correctness of this argument will now be examined. Reference having been had to the original charter of Connecticut, to show that the Sound was not comprehended within it, if it shall appear, on a like reference to the grant of Charles II. made to his brother the Duke of York, that it is not contained within the boundaries of that instrument, it will follow, upon the appellant's own premises, that it makes no part of the territory of either of these states, and of course cannot be part of the district of the city of New-York. The boundaries in this deed are thus described: "All that part of the main land of New England beginning at a certain place called or known by the name of St. Croix, near adjoining to New Scotland in America, and from thence extending along the sea coast unto a certain place called Pemaquie or Pemaquid, and so up the river thereof to the furthest head of the same as it tendeth northward; and extending from thence to the river of Kimbequin, and so upwards by the shortest course to the river Canada northwards; and also all that island or islands commonly called by the several name or names of Matewacks or Long Island, situate and being towards the west of Cape Cod, and the narrow Higansetts, abutting upon the land between the two rivers, there called or known by the several names of Connecticut and Hudson's river; together also with the said river called Hudson's river, and all the land from the west side of Connecticut river to the east side of Delaware bay, and also several other islands and lands in the said letters patent mentioned." There can be but little doubt that the part of the sea coast here described, is the north side of the Sound, and not the western shore of Long Island, which island is afterwards granted by itself, which would have been unnecessary if the bounds of the grant had already extended to the Atlantic ocean, and thus taken in the whole island. According to this understanding of the boundaries, the Sound itself did not pass by this deed, notwithstanding a general grant of all waters, &c. to the premises belonging, which can only mean waters lying within the bounds or limits thereof. If these are so described as to exclude the Sound, it cannot be made to pass by words which can affect it no more than any tract of land or piece of water not within such boundaries. If the Sound belongs not to the state of New-York, it is very unnecessary to inquire to whom it does belong, whether it be a territorial sea appertaining to the United States, or a part of the high seas and common to all nations; for if it has never been granted to the state of New-York, and such is the opinion of the court, it is not easy to perceive how it can be any part of the district of the city of New-York. But if it really belonged and exclusively to the state of New-York, it is not very clear that it has at any time been made part of the district just mentioned, which includes all such part of the coasts, rivers, bays, and harbours of the said state as are not included in other districts thereof. Now as no part of this description includes a piece of water like the Sound, the court cannot say that the place where the Elizabeth was taken, was within the district of New-York.

The judgment of the district court must therefore be affirmed with costs.

It was stated by the appellant's counsel that he considered these acts as unconstitutional; but as this point was not argued by either party, this court will not take upon itself the high and delicate office of pronouncing any law of the United States un-

constitutional, unless the case were so clearly so that it were scarcely possible for any two men to differ in sentiment on the subject. This is so far from being the case with these laws, that it is in the knowledge of the court, and matter of general notoriety, that many condemnations have taken place under them; and although this question has been made and fully argued, in some of the inferior tribunals of the United States, yet the supreme court, although many cases have gone there on appeal, has never been called on to say that they were repugnant to the constitution.

NOTE. Vide the case of The Active [Case No. 35], and Id., 7 Cranch [11 U. S.] 100.

ELIZABETH, The (BORDMAN v.). See Case No. 1,657.

ELIZABETH (AMERICAN NICHOLSON PAVEMENT CO. v.). See Cases Nos. 309; 310; 311; and 312.

ELIZABETH (BLAKE v.). See Case No. 1,495.

ELIZABETH (GOELET v.). See Case No. 5,502.

Case No. 4,353.

The ELIZABETH v. RICKERS et al.

[2 Paine, 291.] [1]

Circuit Court, S. D. New York. Dec. 1831.[2]

SEAMAN'S WAGES — FORFEITURE FOR MISCONDUCT —WAIVER — EXTRA WAGES FOR SHORT ALLOWANCE—SEAMEN AS WITNESSES FOR EACH OTHER.

1. Although there is some diversity of practice in the admiralty courts as to whether seamen, having a common interest in the immediate point in dispute, are competent to testify for each other; yet the more general and better opinion is, that it should be considered an interest in the question only, and not in the event, analogous to the rule adopted in the courts of common law, and that, therefore, the objection should go to the credit and not to the competency of the witness.

2. The punishment of seamen by the master, and continuing them in his employ after absence without leave, is a waiver of all claim to forfeiture of wages.

3. By the terms of the act of congress of July 20, 1790 (2 Laws U. S. p. 119 [1 Stat. 135, § 9]) and according to the rules of construing penal statutes, before the master can be made liable to the penalty of paying extra wages, the crew must both have been put on short allowance and the vessel not have been provided as the act requires.

4. In order to subject the master or owner of the vessel to the payment of extra wages for short allowance, some order or command to that effect must have been given, or there must have been some gross negligence in the master; an accidental or unintentional deficiency would not subject him to the penalty.

5. Quaere. Whether forfeiture of wages, for desertion, can be incurred by seamen, at the port of discharge where the voyage for which they shipped terminates.

In admiralty.

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [Affirming and modifying Case No. 4,361.]

THOMPSON, Circuit Justice. This case comes up on appeal from the decreee of the district court for the southern district of New York.[3] Several minor points have been made and argued at the bar, which it will not, according to the view which I have taken of the case, be necessary for me to notice. The claim set up in the libel is for wages, and compensation for short allowance. Exceptions were taken, in the court below, to the answer, which, however, I shall not stop to notice, as they appear to have been disposed of by arrangement between the parties, and not finally passed upon by the district judge. It is unnecessary for me, also, to consider the point, whether this suit was prematurely commenced, or whether that question was open for the decision of the court below, after the proceedings before the magistrate preliminary to the filing of the libel. That wages are due, unless they have been forfeited, is very satisfactorily established by the proofs; and the material inquiries will be, whether any forfeiture has been incurred, and whether the libellants are entitled to the compensation decreed by the district court for short allowance.

The ground upon which a forfeiture of wages is set up, as applicable to the whole crew, is, that they deserted and abandoned the ship without unloading her cargo, and before the same was unladen, and before ten days had elapsed after said vessel had been safely moored; and with respect to several of the crew, a forfeiture is set up on account of disobedience of orders and mutinous conduct, as well as desertion.[4]

With respect to the first ground, the district judge considers it yet an open question whether a forfeiture of wages can be incurred by the seamen by desertion, at the port of

[3] [See Case No. 4,361.]

[4] In Cloutman v. Tunison [Case No. 2,907], Judge Story said:—"It is commonly enough supposed, that an absence from the ship without leave of the proper officer, or in disobedience of his orders, constitutes desertion. But this is certainly a mistake. Desertion, in the sense of the maritime law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty. There must be the act of quitting the ship, animo derelinquendi, or animo non revertendi. If a seaman quits the ship without leave, or in disobedience of orders, but with an intent to return to duty, however blamable his conduct may be, (and it is certainly punishable by the maritime law, not only by personal chastisement, but by damages by way of diminished compensation,) it is not the offence of desertion to which the maritime law attaches the extraordinary penalty of forfeiture of all antecedent wages. And even in a case of clear desertion, if the party repents of his offence, and seeks to return to duty, and is ready to make suitable apologies, and to repair the injury sustained by his misconduct, he is entitled to be received on board again, if he tenders his services in a reasonable time, and before another person has been engaged in his stead, and his prior conduct has not been so flagrantly wrong, that it would justify his discharge. Upon this subject it is well known that the maritime law

discharge where the voyage terminates for which they shipped. It is unnecessary for me to decide this point in this case; and I the more readily waive it, as the district judge seems rather inclined against a forfeiture of wages in such case. It is, therefore, expedient to leave it an open question until that point shall become the point in judgment. It does not necessarily arise here, because if the seamen were discharged, there would be no desertion; and I think, on an attentive examination of the testimony, the weight of evidence is, that from the acts and declarations of the master, the seamen had good grounds to conclude that the master assented to their leaving the vessel as they did; and although they might not have been formally discharged according to the understanding of the captain, and as he has sworn, yet if his conduct was such as to give the seamen reasonable grounds to conclude that they left the ship with his assent, it would be harsh to visit with a forfeiture of wages a misapprehension on the subject. I forbear to enter into an examination of the evidence on this point, as I entirely concur in the conclusion to which the district judge has arrived.

A point has been made on the argument here, as to the competency of the seamen to testify for each other. This objection does not appear to have been made in the court below; and it would be a sufficient answer to it that it comes now too late. I would, however, barely observe, that although there is some diversity of practice in admiralty courts on this question, where the seamen have a common interest in the immediate point in dispute, yet I think the more general and better opinion is, that the objection should go to the credit, and not to the competency, of the witness, considering it an interest in the question only, and not in the event, analogous to the rule adopted in the courts of common law.

The allegation of misconduct and disobedience of orders extends only to Rickers, Davis and Foy. Although I am not very well satisfied with the conduct of Rickers, and am inclined to think it would have been dealing justly with him to have made some deduction from his wages, yet I am not disposed to interfere with the decree as to him. The conduct of Davis and Foy was extremely reprehensible; and had it been treated by the captain as a sufficient cause for their dismission or suspension from duty, it might perhaps have been considered sufficient grounds for forfeiting their wages; but the master

encourages a reasonable indulgence to human infirmity, and especially to the known thoughtlessness and rashness of seamen. It favors repentance and condonation; and will not permit a master to insist upon the utmost stretch of authority, or forfeiture, unless there is a clear propriety in exerting it. My learned friend, Mr. Chancellor Kent, has, in his Commentaries (volume 3, 2d Ed., lect. 46, p. 198), put this doctrine on its right footing, and persuasively shown its justice and sound policy.

"But there must not only be a desertion, but the desertion must be in the course of the voyage, and before its termination in the home port, to justify an infliction of the forfeiture by the maritime law. It is not sufficient that there has been a desertion after the voyage has ended, although it be within the period for which the party is bound to do duty on board the ship. It must be during the voyage. Now, when is the voyage ended, in the sense of the maritime law? I answer, when the ship has arrived at her last port of destination, and is moored in good safety in the proper and accustomed place. I do not say that the officers or seamen are then discharged from any farther duty, and are not bound to attend to the unlivery of the cargo. On the contrary, I maintain that the seamen, and a fortiori the officers, are bound to remain by the ship and watch over her concerns and assist in the unlivery of the cargo, if made in a seasonable time; unless there be some express or implied agreement, or established usage, to dispense with their farther services. There is a clause in the common ship articles, pointed to this very duty. 'And whereas,' says the clause, 'it is customary for the officers and seamen, on the vessel's return home in the harbor, and whilst her cargo is delivering to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the said parties, that neither officer or seaman shall, on any pretence whatever, be entitled to such indulgence; but shall do their duty by day in discharging the cargo, and keep such watch by night as the master shall think proper to order for the preservation of the same.'"

"It is manifestly implied in the reasoning of that truly great judge, (princeps inter pares,) Lord Stowell, in the case of The Pearl, 5 C. Rob. Adm. 224, which has been cited at the bar. But it is still more directly announced in the more recent case of The Baltic Merchant, Edw. 86. In this latter case, which turned upon the very point, whether the voyage was ended by a mere arrival in port, Lord Stowell on that occasion said: 'By interpretation of law, the voyage is not completed by the mere act of arrival. The act of mooring is an act to be done by the crew; and their duty extends to the time of the unlivery of the cargo. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore; and, therefore, the law, not only the old law, but particularly the statute, by which the West India trade has been in later times regulated,' (and the case before him was of a West India ship,) 'has enjoined in the strictest manner, that the mariners shall stay by the vessel until the cargo is actually delivered. I take this to have been always a part of the duty of the mariners; their contract is legally understood to go this length; and there never can have been a time when the owner was not entitled to some consideration against the mariners, on account of the non-completion of the contract. This is a consideration not in modum poenae, but it is a civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject.' His lordship here points out the very distinction between cases of compensation for an imperfect performance of the contract, and cases of forfeiture for desertion, which are strictly in poenam. And he afterwards proceeded to decide that the voyage in that case could not, upon the true construction of the statutes on the subject of the West India trade, be deemed to be ended (not until the cargo was unlivered, but) until the vessel was safely moored in the West India docks; and when so moored, he held the voyage complete and ended, so that the forfeiture for desertion would not afterwards attach. But the desertion being before such mooring, he pronounced for a forfeiture in the case."

adopted a different, and probably the better course, by punishing and continuing them in the discharge of their duty. This ought to be considered a waiver of the claim to a forfeiture. They have also been punished by a deduction from their wages; and with the decree of the district court in this respect, I am satisfied.

The district court has also decreed to all the libellants, except Rickers and Anderson, a compensation for short allowance. This part of the decree is not satisfactorily sustained by the proofs in the cause. The act of congress of the 20th of July, 1790 (2 Laws U. S. 119, § 6) requires, that every ship or vessel belonging to a citizen or citizens of the United States, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and, one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and above such other provisions, stores and live stock as shall, by the master or passengers, be put on board; and in like proportion for longer or shorter voyages: and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance, in water, flesh or bread, during the voyage, the master or owner of such ship or vessel shall pay to each of the crew one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance.

The specific allegation in the libel is, that the libellants were not, from the 7th day of April until the third day of June, 1830, during the voyage from the port of London to the port of New York, supplied with good and wholesome provisions for their sustenance, although it was fully within the power of the master, at all times, to have supplied the same; but, on the contrary thereof, they received from the said master a short allowance of bread.

There is, also, a general allegation, that the ship had not on board, at the time of leaving the port of London, well secured under deck, the quantity and quality of bread and provisions required by the act of the 20th of July, 1790. The master or owner is subjected to the penalty of paying extra wages only when the crew shall be put on short allowance of water, flesh or bread, and the vessel shall not be provided as the act requires; both must concur, by the terms of the act, and according to the rules of construing penal statutes. There is no complaint of being put on short allowance, except as to bread. This is the specific allegation in the libel. The allegation that the libellants were not supplied with good and wholesome provisions, and all the evidence as to the quality of the provisions, which forms a considerable portion of the testimony, are irrelevant to the point whether or not the crew were put on short allowance of bread. In order to apply the evidence to the question whether, in point of fact, the crew were put on short allowance, it would seem necessary to define what is meant in the statute by the terms short allowance. The statute has nowhere defined what shall be considered a full allowance. No judicial decision upon that point has been referred to on the argument, nor has any fallen under my notice. No evidence has been given of any usage or practice in the merchants' service, to aid the court in the construction of the statute. Under these circumstances, I feel some difficulty in defining what shall be considered short allowance. By the act of congress, passed the 1st July, 1797 (3 Laws U. S. 6 [1 Stat. 524, § 7]) providing a naval armament, a pound of bread a day is required to enter into the composition of a ration; and in the absence of any regulation by law on this subject in the merchants' service, I think it reasonable to assume that a pound of bread a day to each man would be a full allowance of that article, and anything less than that would, of course, be short allowance. To subject the master or owners to the extra wages, the crew must be put upon short allowance; by which I should understand that there must be some order or command to that effect given, or some gross negligence in the master. An accidental or unintentional deficiency in weight would not subject the master or owner to the penalty.

If the evidence in the cause is examined with this understanding of the law, it appears to me very clearly that the crew were not, in point of fact, put upon short allowance in bread. The witnesses on the part of the libellants, with the single exception of Ellison, whose testimony is very unimportant, consisted of the crew themselves; and all of them, except Rickers and Anderson, claiming compensation for short allowance. Although they were competent witnesses, yet they were so directly interested in the question, that their testimony, when brought in conflict with other witnesses, ought to be received with caution. But I do not perceive that, upon the inquiry as to short allowance in bread, there is any material conflict. The crew in answer to the inquiry, speak very generally that they were put on short allowance, some fixing one time, and some another; most of them, however, fix the 7th of April. But when they speak of short allowance, I understand them to mean short of a pound a day. Foy says they were put on short allowance, and yet says a pound of bread a day was weighed out to them. Shaply says they were put on short allowance, or if put on full allowance, they did not get it. Rickers, who was too unwell to do duty almost the whole voyage, says the crew, one day when he came on deck, were complaining that they were short of bread. He asked them to show it to him, and he considered it a little short. Some days after they were again complaining, and he saw for several evenings afterwards the bread in the

barge, and in his judgment it fell short in weight. These witnesses evidently mean by short allowance of bread, short of a pound a day to each man. But this question, it appears to me, must be put at rest by the testimony of the steward and first mate. It is worthy of notice, however, that Rickers' testimony is rendered a little suspicious by that of Morgan, one of the passengers, who represents him as being the great cause of the difficulty between the captain and crew. Dearborne, the steward, says, after being out about twenty days from London, the crew were put on short allowance of bread. He does not explain what he means by short allowance, but goes on to state that the allowance was a pound a day per man. He weighed it by order of the captain about a dozen times, and marked the barge where the eleven pounds came; and when he measured it, he believes he put in the same quantity as when he weighed it. That on the night of the difficulty with Foy, he went forward and called for the barge at the forecastle door. Foy handed it to him, and said, "do not put much in tonight, I am coming aft to kick up a row with the captain." He, however, gave them their full allowance. Howe, the chief mate, says, after being out about a week or ten days from London, the crew were put upon a pound of bread a day. The captain ordered him to see the crew had each a pound of bread a day; and he goes on to state that when the vessel arrived in New York, there was on board from five to seven hundred weight of bread, and five barrels of beef and pork; so that there could have been no possible inducement to put the men on short allowance. He says, also, that when they left London, the bread-room, which will hold about twenty-two hundred weight, was nearly full; a hundred or two weight would have filled it. There is evidence also leading pretty satisfactorily to the conclusion, that the bread was wasted by the crew, and that their complaints were entirely unfounded, and I cannot, from any attentive examination of the evidence, resist the conclusion that the crew were not, in point of fact, put upon short allowance of bread, within the sense and meaning of the act of congress; and they were not, of course, entitled to any extra pay on that account. If the evidence on this point struck me as nearly balanced, or but little preponderating in favor of the appellants, I should not think proper to disturb the decree, especially as some of the witnesses were in the court examined in open court, and a better opportunity afforded of judging of their credibility. But as I am so strongly impressed from the evidence, when taken all together with the injustice of the claim for short allowance, I cannot consent to impose it upon the appellants.

This must, accordingly, be expunged from the decree of the district court, which is in all other respects affirmed, but no costs on the appeal to be allowed on either side.

Case No. 4,354.

The ELIZABETH AND HELEN.

[4 Ben. 101.][1]

District Court, S. D. New York. March, 1870.

COSTS—WITNESS' FEES.

Witness' fees and mileage for the attendance of a party to an admiralty suit, cannot be taxed in his favor against the other party.

In admiralty. This case came up on an appeal from the clerk's taxation of costs. The cause was one of collision, and resulted in a decree dismissing the libel with costs. The claimants sought to tax against the libellant witness' fees and mileage for one of the claimants who had been examined as a witness in the cause. The clerk refused to tax it, and the claimants appealed.

R. D. Benedict, for libellant.

W. R. Beebe, for claimants.

BLATCHFORD, District Judge. In view of the provision of the 3d section of the act of February 26, 1853 (10 Stat. 168), that the "amount paid" to witnesses shall be taxed and be included in and form a portion of a decree against the losing party, in cases where costs are recoverable in favor of the prevailing party, such amount being the "witnesses' fees" specified in the same section, and of the provision of the 1st section of the same act, that the compensation specified in that act, and no other, shall be taxed and allowed in the courts of the United States, and of the decision made by the supreme court of the state of New York, at general term, in the sixth district, in January, 1865, in Steere v. Miller, 28 How. Pr. 266, and by the court of appeals of that state, in the same case, in June, 1865 (30 How. Pr. 7), upon a section (section 311) of the Code of Procedure of the state of New York, not differing in substance from the provision above referred to in the 3d section of the act of 1853, I do not think that the claimants, in this case, can recover from the libellant, as part of the taxable costs on the dismissal of the libel, witness' fees or mileage for the attendance of one of the claimants as a witness in the cause. The deduction of $104.40, made by that account from the bill of costs, by the clerk, on taxation, was, therefore, proper, and the taxation is affirmed.

Case No. 4,355.

The ELIZABETH AND JANE.

[2 Mason, 407.][2]

Circuit Court, D. Massachusetts. May Term, 1822.

REVENUE—PERMIT TO LAND—"GOODS, WARES AND MERCHANDIZE"—SILVER DOLLARS.

Silver dollars are "goods, wares, and merchandize," within the 50th section of the reve-

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

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

nue act of 2d March, 1799, c. 128 [1 Stat. 665], for the landing of which a permit from the custom house is necessary.

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

In admiralty. This was an information of seizure for an alleged forfeiture for landing goods exceeding $400 in value, from the schooner Elizabeth and Jane, without a permit, against the 50th section of the revenue act of 1799, c. 128.

Merrill & Hubbard, for claimant.

G. Blake, Dist. Atty., for the United States.

STORY, Circuit Justice. It is clear from the evidence in the case, that a quantity of tortoise shell of about $120 in value, and several bags of dollars were landed from the schooner without a permit; and as no account is offered of the number of dollars by the claimant, whose property they were, and under whose authority they were landed, there is no reason to doubt, that they, together with the tortoise shell, exceeded the value necessary by the statute to inflict a forfeiture upon the vessel. The only question is, whether the dollars are "goods, wares, and merchandize" within the prohibitory clause of the statute, those being the descriptive words of the enactment. It has been often asserted in this court, that the clause is not confined to goods, &c. liable to duties; but extends to all goods, &c. whether taxed or free.

It cannot be doubted, that money, and of course foreign coin, falls within the description of "goods" at common law; and a legacy of "goods," would ex vi termini carry money, or coin, unless that construction were repelled by the context. And coin, dollars and bullion are considered in commercial transactions as "goods and merchandize," and may be insured as such in a policy of insurance. 1 Marsh. Ins. bk. 1, c. 8, § 3; Da Costa v. Firth, 4 Burrows, 1966; Wesk. Ins. tit. "Goods," § 3; Roccus. Ins. note 17; Id. note 67. In point of fact, too, dollars are often imported as "wares and merchandize," that is to say, as property, not to pass merely as currency, but to be bought and sold as a marketable commodity at varying prices. Unless, therefore, there is something in the context of the statute from which it can be inferred that the legislature did not use the words in their ordinary import, I think I am bound to interpret them in that sense. Nothing of this nature has been attempted to be shown in the argument; and it is not for the court to act upon mere private conjecture. If the practice had uniformly been to allow the landing of dollars without an entry and permit at the custom house, that practice would have gone a great way towards giving a narrower construction to the act. But no general practice to this effect has prevailed; and of late years the custom house officers are understood uniformly to require an entry and permit. And there seems sound reason for the requisition. The leading object of the legislature was to suppress smuggling; and it is easy to perceive, that there is just as much danger of imposition and fraud in allowing a portion of the cargo consisting of dollars to be removed without the inspection and direction of the officers of the customs, as any other goods not liable to duties. I feel myself constrained therefore to adhere to the letter of the statute, and to pronounce that the forfeiture is established in evidence.

The decree of the district court is affirmed with costs.

Case No. 4,356.

The ELIZABETH AND JANE.

[1 Ware (35) 27.] [1]

District Court, D. Maine. June Term, 1823.

SALVAGE—SALVORS AS WITNESSES—DERELICT—ALLOWANCE.

1. In cases of salvage, the salvors, though interested, are admitted as witnesses, from necessity.

2. In cases of derelict, the usual allowance of salvage is one moiety of the property saved. But the rule is not inflexible, and a greater or less proportion may be allowed, according to the case.

[Cited in Davis v. Leslie, Case No. 3,639; Harley v. Gawley, Id. 6,069; The Mayflower v. The Sabine, 101 U. S. 386; M'Carty v. The City of New Bedford, 4 Fed. 823; The Eliza Lines, 61 Fed. 331; Sewell v. Nine Bales of Cotton, Case No. 12,683; The W. D. B., Id. 17,306. Distinguished in Hanson v. Rowell, Id. 6,043. Applied in The Massasoit, Id. 9,260.]

This was a libel [in admiralty] for salvage, by John Sylvester, master of the schooner Merit, for himself and the crew, against the wreck of the brig Elizabeth and Jane and her cargo, found derelict at sea, and with considerable labor and some danger brought by the libellants into Harpswell. The material facts proved were, that the Merit, on her return passage from Tortola to Bath, fell in with the wreck of the Elizabeth and Jane, about twenty leagues, as they supposed, to the south-east of Seguin light, at the mouth of the Kennebec river. Upon going on board, they found her loaded with a cargo of mahogany; her foremast was gone, her mainmast cut half off, her sails and rigging in a ruinous condition, and the brig herself perfectly filled with water. On finding her in this hopeless condition, the crew of the Merit at first doubted their ability to get her into port, and therefore they proceeded to strip her of such of her remaining rigging as was most valuable and least injured, and transfer it to the Merit. After being about six hours employed in this labor, they determined to make the attempt to tow the wreck into port. She was accordingly taken in tow. There being a fresh breeze, and a pretty

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

heavy swell of the sea, the towing was attended with considerable difficulty. From the swell, and the consequent yawing of the wreck, the fasts were several times parted. At one time the Merit, with the wreck, were in imminent danger of being driven on a reef of rocks, and the salvors had nearly come to the determination of abandoning the wreck, for their own safety. Fortunately they persevered, and in a little short of four days from the time the wreck was taken in tow they arrived safe at Harpswell. During the whole period, by night and by day, the salvors were obliged frequently to pass and repass from the wreck, a service that was attended with more difficulty in consequence of the leaky condition of their own vessel. The wind was fresh, but the navigation was not represented as attended with unusual dangers.

Mr. Ames, for libellants.
Mr. Whitman, for respondents.

WARE, District Judge. As the whole proof in this case is derived from the testimony of the salvors themselves, being interested testimony, and that of the actors in the transaction, it is upon general principles, fairly open to the remarks of the respondents' counsel, as being liable to receive a coloring from the interest or feelings of the witnesses. They have a direct interest in magnifying the difficulties and dangers of the service, because it is well understood by them that these are always taken into consideration in determining the amount of the salvage; and it is contended that in this case the story of the witnesses bears evident marks of exaggeration. It is said that the wreck could not have been twenty leagues from Seguin, when found by the salvors, as well from the ascertained situation of the Merit the day before, as from the fact that in six hours' towing with an unfavorable wind part of the time, they brought Seguin light in sight, at a distance not exceeding five leagues. The entry in the log-book, stating the supposed situation of the wreck, is an interlineation, and this, it is contended, is an after-thought, interpolated after the regular entry of the events of the day. It must be admitted that the appearance of the log-book favors the supposition, and if the place where the wreck was found formed a material ingredient in the case, the argument drawn from it would deserve careful consideration. At any rate, if it were an interpolation, made with a fraudulent view of enhancing the salvage, it deserves severe reprehension. But there is no reason for believing that all the salvors participated in the act.

In cases of salvage, it usually happens that the salvors are the only persons by whom the most important and material facts which go to determine the rate of salvage can be proved, as no others are present. They are therefore admitted, from the necessity of the case, as witnesses, in order that services entitled to a generous remuneration, as well upon principles of public policy as private justice, may not go unrewarded. As the law admits their testimony in their own case, by a special exception to the general rule of evidence in their favor, they are bound to disclose the facts in all fairness and candor. And it ought to be an inducement to this, that it is the known habit of courts of admiralty to allow on these occasions a liberal and generous reward. It is not simply a compensation graduated by the amount of labor, and the degree of danger attending the service, but looking to the general interest and security of commerce, the courts allow such a reward as will operate as a bounty to induce men who are fearless of danger, and familiar with the perils of the sea, to adventure on these hazardous enterprises. And there is another consideration which enters into these cases as a motive for compensating these services with a free and liberal hand, which applies to the matter now under consideration. It is to take from the salvors the temptation to fraud, dishonesty, and embezzlement. It is to reward their honesty and integrity, as well as their enterprise and courage. With this known liberality of practice, every court would witness with great regret any attempt on the part of the salvors to enhance the rate of salvage by false pretensions and exaggerated accounts of the dangers and difficulties of the service. Positive fraud, as embezzlement, is punished by a forfeiture of salvage. And should it be found that the salvors, by false pretences and fraudulent misrepresentations, endeavored to impose a belief of imaginary dangers, and hardships which had never been encountered, if the court should not think itself bound to visit such disingenuousness with an absolute forfeiture of all salvage, it might feel it to be a duty to admonish the salvors of the obligation of truth and fairness, by the allowance of a diminished salvage. For while courts of admiralty are habitually liberal in awarding a generous compensation, they require of the salvors the utmost honesty and good faith.

In the present case, however, except the suspicious appearance of the log-book, and, supposing it to be a fraudulent interpolation, as the counsel for the claimants contends, there is no ground for imputing the act to all the salvors, I see nothing in the evidence that wears the appearance of an attempt to enhance the merits of the service by an overcharged representation of dangers and hardships. The whole story appears exceedingly natural and probable, and in a just view of the case it is quite immaterial whether the wreck, when found, was at a distance of twenty leagues from Seguin, or not. The rate of salvage depends not so much upon the distance from land at which the property is found, as upon the risk and labor in saving it.

The facts which stand on evidence not easy to be disbelieved, are, that the salvors were employed nearly four days, in severe and continued labor, both by night and by day, in bringing the wreck to a place of safety. The amount of property put at hazard by the salvors, including the Merit and her cargo, was, at the lowest estimate, 3,600 dollars, one half of which was insured. The insurance on the cargo was certainly lost; for, though a deviation to save life will not discharge the underwriters, a deviation to save property will. The insurance on the vessel being on time, and not for the voyage, whether the benefit of the policy was lost or not, may not perhaps be so certain. There may be some difficulty in applying precisely the doctrine of deviation to a vessel insured on time, yet it is, to say the least, a grave question whether, under such a policy, she is authorized to engage in an enterprise so unusual, and of such extraordinary hazard, and if she were lost while engaged in this service, it is not by any means certain that the insurers would be liable for the loss.

With respect to the rate of salvage, the general rule is that it shall be a liberal reward, and not limited to a mere quantum meruit for the labor and service performed. And this is the only general rule of universal obligation which can be extracted from the practice of nations, or from the cases decided by our own courts. The cases of salvage are so various in their circumstances and degrees of merit, that every case, subject to the rule that has been mentioned, must stand upon its own facts, independent of any positive rule, and free from the authority of precedent absolutely binding on the judgment of the court. But though precedents are not conclusively binding, they present analogies which afford some light to the judgment and fix some limits to judicial discretion. Such a general guide the practice affords in cases of derelict. Anciently it was a positive rule of the admiralty, in these cases, to allow one half to the salvors. But this, as a binding rule, is now supposed to be obsolete. The Aquila, 1 C. Rob. Adm. 37. It is, however, in this country still held to be a general rule, limiting in some degree the discretion of the court, but yielding to the peculiar reason of particular cases. In cases where the value of the property saved is very large, and the danger and labor of saving it not great, less than a moiety may be considered as an ample reward; while in others, where the amount of property saved is small, and the risk and labor great, one half might be a very inadequate compensation. The rule, therefore, still considered in force as a general guide of judicial discretion, bends to the reason and equity of particular cases. In the case of Row v. The Brig [Case No. 12,093], in which the subject was learnedly discussed, and all the authorities examined, the court say that prima facie the salvors are entitled to a moiety, and it is incumbent on the claimant to show, in any particular case, that a different measure ought to be applied. Or if the salvors claim a larger share, it belongs to them to extract the case from the general rule, and show that a larger share ought to be allowed. The present is clearly a case of derelict, and under all its circumstances I do not feel warranted in giving less than one half of the gross proceeds of the sales. The amount of property saved is not large, and is considerably less than that put at hazard; while on the other hand, the peril was not great, and the labor, though severe for the time, was not of long duration. I can see no sufficient reason for departing from the general rule.

The gross amount of sales is $2,617.37, one half of which is allowed to the salvors, amounting to $1,308.68. Of this, two-fifths are allowed to the owner of the Merit and her cargo. The residue I shall divide into nine shares, and distribute as follows:—

To John Sylvester, master,	4	shares.....	$	332 31
——— ———, mate,	2	"		166 16
Israel Snow, seaman,	1	"		83 07
William Pearsley, "	1	"		83 07
Isaac McCobb, "	1	"		83 07
John Sylvester, the amount paid to David Manson, a passenger,.....				37 50
John Sylvester, owner of the Merit and her cargo,.....				523 50
				$1,308 68

[For proceedings in a suit for wages against the proceeds of the brig Elizabeth and Jane, see Case No. 8,321.]

ELIZABETH AND JANE, The (LEWIS v.). See Case No. 8,321.

Case No. 4,357.

The ELIZABETH ANN.

[18 Leg. Int. 308.][1]

District Court, E. D. Pennsylvania. Aug. 7, 1861.

PRIZE—ENEMIES' PROPERTY—WHO ARE ENEMIES.

[The claimants of a vessel taken as prize were inhabitants of Chincoteague island. This island is separated from the coast of Virginia by a ship channel which may be commanded by the naval forces of the United States. It appeared that a lighthouse was maintained upon it, under the flag of the United States, by a keeper who recognized the authority thereof, and that the inhabitants remained loyal, so that the federal laws could be peaceably executed there. *Held*, that these facts enabled the court to make a distinction in favor of the claimants, and to award them restitution.]

Mr. Harrison, for complainants, moves that a monition be awarded, requiring the captors, or the attorney of the United States, to proceed to adjudication on the question of prize or no prize.

Mr. Coffey, the attorney of the United States, and advocate of the naval captors, states that on behalf of the captors, and of the United States, he waives the monition,

[1] [Reprinted by permission.]

and states further, that, if the claimants are willing to accept the restitution of the captured property, it is not intended to oppose its restitution to them, or to institute proceedings for its condemnation as prize.

Whereupon THE COURT said: It appears that the laws of the United States may at present be peacefully executed in the small island of Chincoteague, off the coast of Virginia, where these claimants reside. The lighthouse of the United States, which is the principal structure on the island, is maintained under the flag of the United States by a superintendent appointed by the proper department of their government, who recognizes, and acts under, the authority of that department. The inhabitants of the island are few in number, and from the information received by the court, through the district attorney of the United States, have been loyal during the revolutionary contest in other parts of Virginia. Their insular position, and the fact that the ship channel inside of the island may be commanded by the naval forces of the United States, enables the court to make, in their favor, a distinction which, in the present hostile relation of eastern Virginia, might be impossible in the case of a resident of the state on the other side of this channel.

These views take the case of the claimants out of the rule of decision in the late case of The Parkhill [Case No. 10,755a]. The advocate and proctor of the claimants will, therefore, say, whether they are disposed to accept restitution of the captured property without further proceedings. In so doing they will waive all claim upon the captors, and all complaint of the capture as having been made without probable cause.

Mr. Harrison thereupon stating, on behalf of the claimants, that they were willing to accept restitution of the property, and that the proceedings be terminated, THE COURT order that a decree be entered liberating the vessel and her contents from custody, and directing restitution to the claimants.

Case No. 4,358.

The ELIZABETH BRUCE.

REED et al. v. The ELIZABETH BRUCE.

[5 Adm. Rec. 162.]

District Court, S. D. Florida. Feb. 22, 1854.

SALVAGE—AMOUNT.

[Three vessels, carrying 28 men, took out an anchor, and worked five days, in boisterous and windy weather, trying to get a vessel off a part of Carrysfoot reef,—lightening the vessel, and taking the cargo off by boats and alongside,—and succeeded in saving materials and cargo of the value of $8,276. *Held*, that the salvors were entitled to 45 per cent. and 50 per cent. upon the net value of the saved property.]

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[In admiralty. Libel by William Reed and others against the cargo and materials of the ship Elizabeth Bruce, for salvage service. Decree for libelants.]

W. W. McCall, for libelants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This ship, bound from Liverpool to Mobile, on the night of the tenth of January last, ran ashore on that part of Carrysfoot reef known as "Elbow Key." The next morning she was boarded by the masters of the wrecking vessels, the Col. De Russey, the Champlin and the Parallel, carrying in all twenty-eight men. Their assistance was accepted to get the ship off. The ship lay in seven and ten feet water, she drawing fourteen feet. The wreckers carried out an anchor, lightened the ship, by boating a considerable part of the cargo, to their vessels, and discharging the residue alongside. She had but little cargo in. The ship leaked badly, and they performed considerable labor at the pumps. They labored at the ship five days in making efforts to get off, during the greater part of which time the weather was boisterous and windy. The ship finally bilged and became a total loss. The materials saved from the ship have been sold for $1,088.34, and the cargo has been appraised at $7,187.76. Forty-five per cent. upon the net value of the property saved by the principal salvors, and fifty per cent. upon the net value of that saved by the boat Union, will, in my judgment, be a reasonable salvage. It is therefore ordered, adjudged, and decreed, that the costs and expenses of this suit, the wharfage, storage, labor bills, notary public fees, merchants' commissions, and all other charges upon the cargo and materials up to the time and including the reshipping of the cargo (except the proctor's fee for defending this suit) be first ascertained and allowed by the court, and paid to the parties entitled thereto, and that forty-five per cent. of the residue be allowed to the principal salvors, on the property saved by them, and fifty per cent. be allowed to the boat Union on the net amount saved by that boat, in full compensation for their salvage. That the clerk apportion the costs, expenses, and salvage between the materials and cargo, so as to show the amount properly chargeable to each. That he also apportion the costs and expenses between the different interests of the salvors, so that each interest shall contribute its proper proportion of the said costs and expenses. And that it be referred to Mr. Baldwin, as commissioner, to make the division of the salvage according to their respective interests, and that upon his reports being confirmed the clerk pay the salvage accordingly. That the commissioner, in making division of the salvage, deduct one-fifth from the shares of Wm. I. Roberts, John Pierce, George Demeritt and Patrick Carey, seamen belonging to the schooner Col. De Russey, on account of their refusal to

return in the vessel to the reef, to get an anchor that had been left there at the time of rendering the salvage service, and that the sums so deducted be added to the shares of the residue of the crew that did go for the anchor.

Case No. 4,359.

The ELIZABETH ENGLISH.

[2 Ben. 365;[1] 1 Am. Law T. Rep. U. S. Cts. 43.]

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

COLLISION OFF BARNEGAT — VESSEL CLOSE-HAULED AND VESSEL FREE—LOOKOUT—LIGHTS.

1. Where the schooner E. was bound south from New York, heading S. W. by W., one point to windward of her proper course, and the schooner E. E. was bound to New York, heading N. E. by N., and the vessels came together, the E. E. striking the E. on her port bow, and each vessel claimed to have been close-hauled, and that the other had the wind free, and neither vessel showed a light, but the E. E. was seen from the E. at much greater distance than the E. was seen, and the E. claimed that the E. E. luffed on seeing her, and thus caused the collision: *Held*, that, on the evidence, the E. E. was close-hauled, while the E. had the wind free, and that it was, therefore, the duty of the E. E. to keep her course, and the duty of the E. to avoid her.

2. As no light was shown by the E. till just before the collision, and the luff, which it was claimed the E. E. made, was sworn to have taken place before the light was shown, while the evidence was, that, owing to a heavy cloud rising behind the E., she was not seen at all by the E. E. till the light was shown, the alleged luff was not established.

3. The E. E. was not in fault in not seeing the E. sooner, under the circumstances.

In admiralty.

C. Donohue and W. J. Haskett, for libellant.
Benedict & Benedict, for claimant.

BLATCHFORD, District Judge. This is a libel for a collision which occurred on the 16th of February, 1858, between eight and nine o'clock p. m., about three miles southeast from Absecom light, in the Atlantic ocean, off the coast of New Jersey, between the schooner Ella, bound from New York to Chincoteague, in Virginia, and the schooner Elizabeth English, bound from Wilmington, in North Carolina, to New York. The proper course of the Ella, at the place of collision, was southwest, and she was heading, by compass, about southwest by west, or one point to the windward of her proper course. The proper course of the Elizabeth English was northeast, and she was heading about northeast by north, or one point to the windward of that course. It is contended by the Ella that the wind was west northwest, and that she was close-hauled, heading within five points of the wind on her starboard tack, and that the Elizabeth English had the wind at least two points free; while it is claimed by the Elizabeth English, that the wind was north northwest, or a little farther to the north than that, and that she was close-hauled, heading within five points of the wind on her port tack, and that the Ella had the wind at least three points free. The Ella was struck on her port bow by the Elizabeth English, and sank very soon, the mate of the Ella being killed or lost in the collision. The horizon was very dark toward the northward and eastward, as seen from the Elizabeth English, while it was lighter toward the southward and westward, as seen from the Ella. The Elizabeth English had no light, but she was seen from the Ella at some distance off, her master says, at two hundred to three hundred yards off. When the persons on board of the Ella caught sight of the Elizabeth English, the Ella had no light. She had previously been exhibiting a light, but it had gone out, and the steward was in the cabin at the time putting the light in order. The master of the Ella was at the wheel of the Ella when he first saw the Elizabeth English. To his eye, and in his judgment, the Elizabeth English was then to the leeward of the Ella, for he says that he then thought that, if the Elizabeth English kept her course, she would go clear of the Ella, to the leeward of her. He also says, that when the Elizabeth English was within one hundred and fifty yards of the Ella, he, the master, noticed that the Elizabeth English was luffing toward the Ella; that he then began to think there was danger of a collision; that he then immediately called into the cabin to the steward, and directed him to hurry on deck with the light; and that the steward then came up on deck with the light, and took it forward, where it could be seen. He also says that he kept the Ella on her course from the time he first sighted the Elizabeth English until the collision. Now, it is fully established by the evidence of those on board of the Elizabeth English, that nothing was, or could be seen, by them, of the Ella, until her light was discerned, which was almost at the moment of collision, and was so short a time before it, that although the instant the light was seen, an order was given and obeyed, to port the helm of the Elizabeth English, her helm was not got over, nor was her course at all changed, before the crash came. This clearly shows that the Elizabeth English did not luff. Yet, to the master of the Ella, the other vessel presented the appearance of luffing. This appearance, I am satisfied, on the evidence, arose from the fact that the Ella was not kept on her course, but was suffered by her master to fall off, with the wind, toward the Elizabeth English. This appearance of luffing on the part of the latter vessel presented itself before the Ella or her light was seen, and before the Elizabeth English had any motive to make, or did make, any movement to alter her course. A good lookout was kept on the Elizabeth English, and the light on

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

[2] [Affirmed in Case No. 4,360.]

the Ella was seen as soon as it possibly could be, and when it was too late for the Elizabeth English to do any thing to avoid the collision. She was, therefore, not at all in fault. Her not showing a light did not at all contribute to the collision, for she was plainly seen by the Ella, in season for the Ella to have exhibited her own light, or to have insured an avoidance of the collision by keeping her course. The Ella failed to show a light. Such failure prevented her position from being made known to the Elizabeth English, in season for her to have ported her helm sooner than she did. According to the testimony of the master of the Ella, the Elizabeth English being to the leeward when first seen, if her helm had been ported sooner than it was (and the presumption, from what was, in fact, done, is, that it would have been, if the light of the Ella had been sooner seen), she would have gone still further to the leeward, and there would have been no collision, even with the change of course to the leeward which the Ella made by falling off. The Ella was in fault in falling off with the wind, when her master clearly saw that, if he kept his course, the Elizabeth English would go clear of him to the leeward.

The view thus taken is entirely independent of the question as to whether the wind was west northwest, as claimed by the Ella, or north northwest, as claimed by the Elizabeth English, and of the question as to which of the two vessels had the wind free. But I am satisfied that the weight of the evidence is, that the Elizabeth English was close-hauled, and that the Ella had the wind from two to three points free. This being so, the Elizabeth English was entitled to the right of way, and to keep her course, even though she was on the port tack, and it was the duty of the Ella, seeing the other vessel nearly ahead, and having herself the wind free, to put her helm a-port, even though she was on the starboard tack. The George, 5 Notes Cas. 368. Instead of doing this, the Ella did the very opposite, and bore down against the other vessel, and brought upon herself the calamity which ensued. The collision occurred wholly from the incompetence and mismanagement of the master of the Ella.

There must be a decree dismissing the libel, with costs.

[Affirmed in Case No. 4,360, following.]

Case No. 4,360.

The ELIZABETH ENGLISH.

[7 Blatchf. 180.] [1]

Circuit Court, S. D. New York. March 19, 1870.[2]

COLLISION BETWEEN SAILING VESSELS—LIGHTS.

Where, at night, and with a strong wind from the northwest, the true course of one vessel was northeast by north, but she was in fact running northeast, close-hauled on the wind, and the true course of another vessel was southwest, but, to prevent lee-way, she was in fact headed southwest by west, and it was so dark towards the northeast that a vessel without a light could not be seen at a greater distance than 50 or 60 feet, and it was so light towards the southwest that a vessel without a light could be seen from 300 to 500 yards distant, and the latter vessel saw the former vessel about one point on her lee-bow, and about 300 yards distant, and the former did not see the latter, but suddenly a light was seen by the former, over her lee-bow, to flash from the latter, at a distance of 50 or 60 feet off, and the two vessels came into collision, the stem of the former striking the latter on the port side, forward, and the owners of the latter sued the former for the damage: *Held*, that the former was not in fault.

This was an appeal in admiralty from the decree of the district court [Case No. 4,359] dismissing the libel, in a case of collision.

Charles Donohue, for libellants.

Erastus C. Benedict and Robert D. Benedict, for claimant.

WOODRUFF, Circuit Judge. On the night of the 16th of February, 1858, shortly before nine o'clock, at sea, a few miles southeasterly from Absecom light, the schooner Ella, belonging to the libellants, and the schooner Elizabeth English came into collision, the stem of the latter coming in contact with the former on the port side, just abaft the fore-rigging. The Ella was sailing on a course or bearing southwest by west, with a strong wind from a northwesterly direction, and such bearing was kept, as alleged by the libellants, although one point to the westerly of her true course, because of the leeway of the schooner, her true course being southwest; and such lee-way is testified by all of the libellants' witnesses to have been about one point. The officers and men on board of the Ella saw the Elizabeth English when about 300 yards distant, and she appeared to be about one point on the lee or port bow of the Ella, and they testified that they supposed she would pass them on the port or leeward side. The night was not clear, but, towards the south and west, it was sufficiently light to enable them to see a vessel without a light, as these witnesses, with some variance among them, testify, from three hundred to five hundred yards distant.

The Elizabeth English was on a voyage to New York, and her true course was northeast by north. Her master, who had been at the wheel, testifies that the vessel could not get within one point of her course, and, therefore, was running northeast. When he left the wheel, he gave the course to the man who took his place, northeast by north, by the wind, that is, as close to the wind as she would lie without shaking. The man at the wheel also testifies to those instructions, and that he obeyed them.

It is, I think, established by the evidence, that, to the north and east, the clouds were very black, and that, in the direction the Eliz-

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

[2] [Affirming Case No. 4,359.]

abeth English was sailing, it was so dark that a vesel without a light could not be seen at more than a few feet distance—fifty or sixty feet—or, as inferrible from the testimony of one of the witnesses, not the length of the schooner. At a distance of fifty or sixty feet from the Elizabeth English, a light was suddenly seen to flash upon the eye, indicating the proximity of a vessel; and her mate and two of her seamen testify, without contradiction from any other witness, that the light was seen off the lee-bow.

How these vessels came together and through whose fault, if either was in fault, is certainly in great doubt, upon the testimony. But it must be borne in mind that the libellants have the burthen of proof, and must establish fault on the part of the Elizabeth English, or they can have no decree condemning her for the damages sustained. They insist, therefore, that, after they saw the Elizabeth English over their port bow, and had concluded she would pass clear on their port side, she luffed, and that this caused the collision; and so several of their witnesses testify. I am satisfied that, as to this, the preponderance of the evidence is to the contrary, and I think so without at all imputing to these witnesses wilful misstatement. Seeing her off the port bow they had concluded she would pass them, and thereafter, in the darkness of the night, seeing her coming nearer and actually coming in contact, it seemed to their eyes certain that, after they first saw her and formed their judgment of her course, she must have changed and did change. But, at the time of her alleged luffing, she had no motive for luffing. She had not seen the Ella. On the contrary, it would have been wholly in departure from her course and without any cause whatever; and all the witnesses on board of her testify to the contrary. It is far more probable that the witnesses who were on the Ella, misled by their previous judgment, ascribed the near approach of the Elizabeth English to a luff, without which they thought she would have cleared them, than that the witnesses on the Elizabeth English have testified falsely, or are mistaken in denying that she made a manoeuvre which she had no motive to make, and which would have delayed and hindered her in her voyage. It is, however, not improbable, and, indeed, I think it rather the reverse, that, under the instructions of her master, to keep her "up by the wind," and "full and by," she may, in the endeavor to keep her true course, northeast by north, have drawn closer to the wind. It is obvious that she must have made some lee-way, and so her bearing and her motion through the water were not precisely coincident.

The next alleged fault imputed to the Elizabeth English, the want of a proper lookout, is not proved. True, the man at the lookout was not produced, and his absence somewhere in Ohio is given as the reason. But the testimony of the claimant's witnesses, who alone can testify on that point, is uniform, that one Bird was on the lookout; and the only circumstance of any importance proved, that is supposed to show that he was not attending to his duty, is, that five or ten minutes before the collision, he passed the schooner's light, which the wind had extinguished, to the steward. The Ella had already seen the Elizabeth English, the darkness at the north was such that the Ella could not then be seen, the libellants' proof shows that the light exhibited from the Ella was not shown until almost the moment of collision, and the other proofs show that the instant it was exhibited it was seen on board of the Elizabeth English.

Nor is it to be charged that the Elizabeth English was in fault in sailing, on such a night, at the rate of five or six knots an hour, in an open sea. The darkness ahead would no doubt suggest that the exhibition of a light would tend to her own safety, and, incidentally, to that of any vessel approaching her. She had shown such light, and. when it was extinguished by the wind, she was active in relighting it for the purpose of continued exhibition. It is obvious that even that temporary absence of her light did not prevent the Ella from seeing her when some three hundred yards distant.

I am not able to discover any sufficient proof that the Elizabeth English was in fault, and this discussion might here close my consideration of the case. But it is proper also to say, that, in my judgment, the collision resulted from the mistake of those on board of the Ella, in supposing that the other schooner would clear them; from their failure to observe the darkness toward the north and east, by reason of which they no doubt assumed that the Ella was seen by the other vessel as soon as such other vessel was seen by the Ella, and by reason of which, in part, they failed to show a light till it was too late to be of any use; and, also, from their failure to notice the gradual change of the wind towards the north, which, so far as it gave freedom to their course, imposed on them the more stringent duty to be vigilant to avoid the approaching vessel.

On the question as to how, in fact, the vessels were brought in contact, it seems to me that the proofs are not so precise as to relieve either theory suggested from the character of conjecture. That the luffing of the Elizabeth English, while the Ella kept her course, might have brought the vessels together, is, undoubtedly, true. It is charged by the libellants as the fact; but, as already said, I think it is not established.

That the falling off of the Ella from her course, just before the collision, might have caused it, and, probably, did cause it, was the conclusion of the court below, in the face of the denials of the witnesses on the Ella, and of the fact that she received the blow on her port or lee side instead of on her windward

side, which is argued to be inconsistent with that theory.

Having concluded that the Elizabeth English is not proved to have been in fault, it is not very important that I should suggest a possible explanation of the disaster, quite consistent with the view I have taken of the proofs. The bearing of the compass of the Ella was southwest by west. Her actual movement, by reason of her lee-way, was at least one point further south. It was her whole endeavor to keep her true course, southwest, and she was headed southwest by west, in order to keep it. She saw the Elizabeth English one point on her lee bow, that is, she saw the Elizabeth English in the line of her own motion through the water. And yet her master and men, who did not appear, when under examination, to be very skilful or intelligent, assumed that, because the approaching vessel was seen over their lee or port bow, her position was then to the leeward of their actual course. This was not necessarily true, and, as I think, was not true. The Elizabeth English, then, was seen by the Ella directly ahead, in the line of her progress, but not in the line of her keel. As she approached, she would, of course, come nearer and nearer to the Ella, and the men on that vessel, after the consultation at which they, judging by mere appearances, had concluded that the Elizabeth English would clear, suddenly discovering her very near approach, still on the lee bow, would naturally conclude that she had luffed.

For illustration, place two vessels on the same line of actual progress through the water, one moving southwest or thereabouts, and the other northeast or thereabouts, the former, in striving to keep her true course, bearing a little to the westward of such line, and the latter, in like manner liable to lee-way, bearing a little to the northward of her line of progress, each, keeping her own course, would see the other when such view became possible, over her own lee bow. The testimony on this point is unequivocal and clear. The witnesses on the Ella all agree that they saw the Elizabeth English at the distance of about three hundred yards, about one point on their lee bow; and the witnesses on the Elizabeth English all agree that, when they did discover the light on the Ella, they saw it a little over their lee bow. On this point the witnesses must have known the truth of their statements. It was testimony of a fact, independent of any manoeuvre of either vessel, and I regard it as reliable. Now, this fact indicates just the state of things I have suggested, and that the actual movement of the vessels was on the same line, or on lines very nearly coincident, in reverse directions. This necessarily brought the vessels together, and, when the light was shown on the Ella, it was too late for the other vessel to avoid her. She ported her helm, but there was no time for her to fall off and pass the Ella. The fact that the actual blow was received by the Ella not on her stem but a little to port, is not inconsistent, but is in harmony, with this view; and if, in the very jaws of the peril, and in the manifest alarm caused thereby, she came, however slightly, into the wind, all of the appearances are fully explained. Even the statement of one of the witnesses from the Elizabeth English, that the light seen on the Ella appeared to be coming west, does not materially affect this view. Its motion just before the collision would present the appearance of a light moving westerly.

It is not necessary to this view that the courses and bearings of the vessels should be precisely such as the foregoing illustration assumes. The observations made at such a time are, probably, not so precise that exact mathematical accuracy of the witnesses must be assumed. A slight variation in that respect would be consistent with the result I have stated, but I am brought to the conclusion that the collision occurred substantially in the manner indicated.

I have thus far said nothing upon the question as to which one of the two schooners had the wind free. That question has some influence on the imputation of fault to the Ella herself; but, if the Elizabeth English is not proved to have been in fault, the fault of the Ella will not affect the decree, there being no cross libel. In my judgment, the preponderance of the evidence, irrespective of the log of the Wabash, offered in evidence, supports the allegation that the wind, although from west northwest during a part of the day, and for most of the time during the passage of the Ella to the place of collision, had, during the evening, gradually changed to the northward, and that the Elizabeth English was close hauled, while the Ella had the wind two or three points free, at least. This imposed upon the Ella the duty of greater diligence, when she saw the Elizabeth English, to avoid her.

The decree must be affirmed.

Case No. 4,361.

The ELIZABETH FRITH.

[Blatchf. & H. 195.] [1]

District Court, S. D. New York. Jan. 25, 1831.[2]

PLEADING IN ADMIRALTY—EXCEPTION ON GROUND OF RELEVANCY— INSUFFICIENT ANSWER — SEAMAN'S WAGES — SHORT ALLOWANCE — ABSENCE FROM SHIP—DISOBEDIENCE—INTEREST.

1. An exception for irrelevancy taken to a pleading which is not irrelevant, but is only insufficient, will be overruled.

2. An answer which neither admits nor denies a material averment in the libel, is insufficient, and may be excepted to on that ground.

3. Where a libel claims extra wages, in satisfaction of a short allowance of provisions, un-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

[2] [Modified and affirmed in Case No. 4,353.]

der the 9th section of the act of July 20, 1790 (1 Stat. 135), the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions required by the statute, or an exception will lie for insufficiency.

[Cited in The John Martin, Case No. 7,357.]

4. The case of The Cadmus [Case No. 2,280] commented on and explained.

5. Whether an unauthorized absence of a sailor from his ship in her home port, after the voyage is terminated in a nautical sense, but before he is entitled to demand his discharge, is a desertion which works a forfeiture of his wages, quere.

[Cited in The Union, Case No. 14,347; Gifford v. Kollock, Id. 5,409.]

6. Facts and circumstances considered, which were *held* to have constituted an authorized absence of seamen from their vessel, and not a wilful desertion.

7. In a case ot disobedience by a seaman to the master, his wages for one-half of a month were deducted by the court from his pay, and, in a case of insolence, wages for one month were deducted, as mulcts for misconduct.

[Cited in Granon v. Hartshorne, Case No. 5,689; The Moslem, Id. 9,875; Banta v. McNeil, Id. 966.]

8. If a master degrades a cook for incompetency or misconduct, his decision will, in ordinary cases, be considered as final.

[Cited in Allen v. Hallet, Case No. 223; The Shawnee, 45 Fed 771.]

9. It is the duty of a master to see personally that his crew are provided with a sufficient quantity of provisions. In an action by seamen for compensation because of a short allowance of provisions, if the fact of short allowance is proved, the burden of proof is on the owner of the vessel, to show that she had on board the quantity of provisions required by statute.

10. In actions for seamen's wages, interest will, as a general rule, be allowed from the time the wages were due, until a tender or payment under the decree of the court.

[Cited in The Swallow, Case No. 13,665.]

11. Interest will be allowed only upon regular wages, and not upon extra wages recovered by way of compensation for short allowance.

12. In actions for seamen's wages, counsel fees will not be allowed as costs, unless the defence is merely vexatious, or there are special reasons for the allowance.

This was a libel in rem, by the crew of the ship Elizabeth Frith, against that vessel, to recover their regular wages, and also extra wages, under the 9th section of the act of congress of July 20, 1790 (1 Stat. 135) on account of their having been put on a short allowance of food, and also the value of small stores, under an allegation in the libel that the master had expressly contracted to furnish such stores, but had failed to do so. Part of the libellants shipped at Portsmouth, New Hampshire, for a voyage to Charleston, thence to London, and back to a port of discharge in the United States. Others shipped at Charleston, and others at London, for the residue of the voyage.

The master, who was part owner of the vessel, put in a claim and answer for himself and his co-owners, setting up various defences as to the different libellants. To this answer, two exceptions were interposed. First, for irrelevancy in one of the articles, in stating that the proceedings before the justice "were had on the —— day of June, and before the ten days after the said ship had been safely moored, or the said libellants had in any otner manner become entitled to take proceedings to recover the aforesaid wages." Second, for insufficiency in the answer, in neither admitting nor denying that the libellants were put on short allowance, and in not stating with certainty the quantity and quality of their allowance, nor the quantity and quality of provisions secured under deck, according to the act of congress, but only that such quantity and quality of provisions was secured, &c., as is required in and by said act, "according to the true intent and meaning of said act." On the hearing of the exceptions it was contended, on the part of the claimants, as to the exception for irrelevancy, that it sufficiently appeared what day in June was intended; that it was distinctly averred that ten days had not elapsed, and that the libellants were not entitled to institute a suit; and that the article, if at all exceptionable, could not be excepted to for irrelevancy, but only for insufficiency; and, as to the other exception, that the answer set forth the amount of provisions secured under deck, with the same degree of certainty as the libel.

Edwin Burr and Erastus C. Benedict, for libellants.

Gerardus Clark and Henry M. Western, for claimants.

BETTS, District Judge. This case comes up on exceptions to the answer. The points raised by the exceptions are: 1. Whether an averment in the answer that proceedings were taken by the seamen before a justice of the peace, preparatory to the formal commencement of this action, prior to the expiration of ten days after the arrival of the vessel, is irrelevant. I do not propose now to enter into a discussion as to the pertinency of this averment, as the point is substantially before me for adjudication in another cause. As that case may be decided upon other grounds, I am disposed to leave the present one in such situation that the subject may be properly brought before the court, and directly determined, either in this or in an appellate court. The counsel for the libellants is in error in supposing that this point was decided on exceptions in another case. I have looked into the papers in the case referred to, and find that the matter there ruled to be irrelevant was an averment that in the proceedings before a justice of the peace an offer was made by the owner to pay the wages claimed, and a statement of the reasons why that offer was not fulfilled. The distinct point was not raised, that the justice had proceeded in the case without jurisdiction. Had the present exception been taken for insufficiency, I

should have sustained it, as the answer does not set forth enough to negative the jurisdiction of the justice in the matter, even though the proceedings before him may have been taken within ten days after the arrival of the vessel. Disposing of the point upon the exception as taken, I shall not rule this averment out of the answer for irrelevancy, although it is imperfectly pleaded.

2. The other exception must prevail. The libel charges that the seamen were put upon short allowance, and that the quantity of provisions required by statute had not been shipped previous to the sailing of the vessel. The answer neither admits nor denies the allegation as to short allowance. It asserts that the crew were supplied with "such a reasonable and proper quantity of good and wholesome provisions for their support, as was consistent with a prudent regard to the probable length of the voyage, and the safety of their lives and those of one hundred and forty passengers on board, and that there is no just cause of complaint as to the allowance of bread and other provisions." This averment is too loose and indistinct to supply the evidence for which the libellants called, nor does it comport with the principles of good pleading, independent of its inadequacy as a discovery and as proof to be used on the hearing, for it does not set forth the facts which it claims to amount to a compliance with the statute, and avers that the acts of the master were a sufficient justification, without stating what those acts were, and without submitting them to the judgment of this court. This would be palpably bad as a plea, and, when an answer is used as a bar to an action, it should contain the substantial ingredients of a plea in bar.

The other branch of this exception is equally well taken. The claimants must answer precisely whether they had shipped the quantity and quality of provisions required by the statute. Their answer is coupled with a qualification which renders it indefinite and uncertain.

The first exception is disallowed, and the second is allowed, with costs.

The answer of the claimants, upon the merits, did not deny the balance of wages claimed by the libellants to be due, but set up various matters of defence constituting a forfeiture of wages by portions of the crew, namely, that the cook, one of the libellants had been turned out of his post for ignorance and intemperance; that Rickers, another of the libellants, pretended to be sick during the voyage, for the purpose of escaping work, and did avoid work under that pretence; and that all the other libellants, except Anderson, but especially Foy and Davis, had been guilty of various acts of insubordination, amounting to mutiny. It also averred that all the libellants had incurred a forfeiture of their wages, by deserting the vessel before her cargo was unladen, and denied the fact of short allowance, and that there was any contract to furnish the crew with small stores. The facts, as proved, are sufficiently set forth in the opinion of the court.

BETTS, District Judge. The answer in this case is drawn very inartificially and indistinctly, and is so wanting in precision that it would not, in any event, be entitled to operate as evidence for the claimants, if, under the rules of admiralty pleading, it could become so. It amounts to no more than a plea putting in issue the demands of the libellants. Exceptions were originally taken to it, and were most of them sustained by the court, but it seems that, to avoid the delay of perfecting the answer, the proctors for the libellants have waived the decree upon the exceptions, and both parties have consented to go to hearing upon the answer as it stands. "Valeat quantum valere debet."

The defence set up with regard to the whole crew, namely, that they have incurred a forfeiture of their wages by desertion, will be first considered. The libellants allege that the vessel arrived at this port, and was safely moored, on the 1st day of June last, and that they were all discharged on the third day thereafter. The answer admits the arrival, but denies that the vessel was moored until the 3d day of June, and also denies that the libellants were discharged on the 3d day of June, or before, or since, and avers that they wilfully deserted before the cargo was unladen, and before ten days had elapsed after the vessel was moored, and that, by force of the laws of the United States, and of the shipping articles, and of certain entries in the log, their wages had become forfeited.

The course of decision obtaining in this court upon the subject of desertion has been, that the desertion by a seaman in the merchant service which produces a forfeiture of wages as the necessary and inevitable consequence, being an offence specifically defined by statute,—Act July 20, 1790, § 5 (1 Stat. 133), —and the mode of proof being also prescribed by statute, the party setting up such offence is bound to make it out in conformity to the act of congress; and that, accordingly, neither by the usages of maritime law nor in consequence of stipulations by seamen in their shipping articles, can a desertion in the sense of the statute exist, so as to carry an absolute forfeiture of wages, unless the act is brought within the terms of the statute and is proved as therein directed. The Martha [Case No. 9,144]; The Cadmus, supra. So, with respect to the various engagements of seamen in their contracts, that if they do or refuse to do certain acts, they shall forfeit their wages, this court has always held such stipulations to be in the nature of penalties; and therefore subject to the discretion of the court as to the degree and extent to which they will be enforced. This doctrine has

been frequently applied to the case of seamen leaving their vessel, or refusing to unload her in her port of discharge, after the nautical voyage is terminated. If the service terminates at that port, I have held that the provisions of the act do not apply, as desertion can occur only during the continuance of a voyage, and the voyage is ended, within the intendment of the maritime law, when the vessel is safely moored in the port of discharge and is ready for unlading, although the seaman may be bound by his contract to unload the cargo, or perform other labor, or remain on board for a fixed period of time afterwards. The Martha, supra; The Cadmus, supra. See, also, The Baltic Merchant, Edw. Adm. 86; Brown v. Jones [Case No. 2,017]. The refusal of the mariner to fulfil such an engagement might be punished by withholding the full amount of his wages; yet this penalty rests in the discretion of the court, and is not that absolute forfeiture of wages which is prescribed by the statute, and which, when incurred, must be pronounced without regard to the demerits of the seaman or to the injury suffered by the owner. Act July 20, 1790, § 5 (1 Stat. 133).

So, also, it has been decided by this court, that if a vessel makes this her port of discharge, and the seamen go on shore without leave, but return within forty-eight hours, and are within the control of the master, although they refuse to assist in unloading the vessel or in doing duty, such unauthorized absence or violation of duty, though a misfeasance, and subject to punishment by abstraction of wages, is not the desertion which necessarily works a forfeiture of wages. The Cadmus, supra. On appeal to the circuit court, this point was ruled otherwise, and it was held that an absence without leave, or a refusal to remain on board or to do duty, was a desertion according to the principles of maritime law, and carried with it an absolute forfeiture of wages, and need not be proved in the mode pointed out by the statute. If that decision is to be understood, as was urged on the part of the claimants on the argument, as laying down the doctrine that every absence of a seaman, which, in the maritime sense, may be termed desertion, and be punished as such, has now necessarily the statutory punishment affixed to it, the operation of the rule upon seamen who may have done their duty faithfully during an absence of years, however severe and out of just proportion to the offence, cannot now be regarded by this court. The rule declared by the court to whose decisions it is both the wish and the duty of this court to submit, will be conformed to implicitly, and will be in no way disregarded in this case, because, in my opinion, this case stands upon ground not touched by the judgment of the circuit court in the case of The Cadmus. The distinction between that case and the present one is, that in the former the term for which the seamen had shipped did not expire at this port. They were bound to continue with the vessel either until her return to one of the eastern states, or for a fixed period extending several months beyond the time of her arrival here. This port was accordingly one of transit in the voyage, and the seamen were under the same obligations to the ship here as in a foreign port. Desertion during the course of the voyage may carry with it, according to the doctrines of the law maritime, a forfeiture of wages, which may be exacted to the utmost extent, although it is understood that it is not imperative upon the court to pronounce that judgment alone. The error of this court in The Cadmus, which was corrected by the decision of the circuit court, seems to have been in construing the act of congress as superseding, in this particular, the law maritime, and as supplying the entire rule by which a statutory desertion, authorizing a forfeiture of wages, could be established, and in holding that, to constitute such desertion, there must be a continued and actual absence from the vessel, and that, if the sailor was on board, or within the control of the officers, his refusal to do duty could not be treated as a desertion which carried a forfeiture of wages as the specific punishment to be inflicted. But, supposing the rule to be carried further by the circuit court, and to be now settled by the decision referred to, that any unjustifiable absence of a seaman from his vessel in a home port, before the voyage is ended, amounts to a desertion, which, without regard to the statutory proofs, must be visited with a forfeiture of wages under the law maritime, it would yet remain an open question, not covered by that decision, whether a mariner, leaving his vessel after the voyage was ended, would be deemed guilty of desertion.

Moreover, if that decision embraces the latter position, and an unauthorized absence of the sailor from his ship in her home port after the voyage is terminated, but before he is entitled to demand his discharge under his contract, is a desertion which forfeits his wages, yet, in my judgment, sufficient proof has been offered by the libellants that their absence in this case was not unauthorized by the master. The vessel had no cargo. She brought passengers only. She arrived in this port on the 1st of June, and was made fast to the wharf on the 3d. The mate permitted the crew to go ashore and procure dinner, with orders to them to return. Most of them returned that afternoon, and worked until six o'clock in clearing decks. On the following Friday, they took their effects, in the presence of the master, had them all examined, and left the vessel with his knowledge. He told the men he would pay their wages the next week, and neither he nor the mate made any objection to their going on shore, nor gave any command or request that they should return. There was nothing more to be done on board. The ballast was not to be discharged, and the passengers had all, ex-

cept one, left the ship. It appears to me that the absence of the libellants, under such circumstances, cannot, with any propriety, be declared a wilful desertion. They could not have maintained a right to continue with the vessel, and to render her liable for wages, after the voyage had ended, and after all occasion for their services was determined. The attempt to turn their act into a criminal offence, subjecting them to the loss of all their wages, rests upon mere technicalities, and is destitute of all color of equity. Indeed, it appears to me that this claim of a forfeiture of wages is an afterthought, got up since the seamen undertook to collect them by process of law. I shall overrule this branch of the defence.

The payment of wages is also resisted on the ground of larceny, and disorderly and mutinous conduct by the crew on the homeward voyage. The answer upon this point is exceedingly ambiguous and indefinite, and, as to all the crew except Rickers, Foy and Davis, is clearly so defective in substance as to debar the claimants from offering any evidence under it. Indeed, there would be good ground for excluding all testimony in relation to the misconduct of any of them except Davis, because of the loose and indistinct manner in which the claimants have alleged these matters in their answer. The observations of Judge Story upon this subject, in Orne v. Townsend [Case No. 10,583], are replete with sound legal criticisms, and I should have felt well sustained by authority if I had refused to hear the proofs read. But, as this course would probably only have led to procrastination, and to a petition for leave to amend, and as the libellants appeared to have apprehended what the claimants meant to charge against them, and had produced all the evidence they wished to offer upon that subject, I conceive it to be better to allow the proofs to be read, and, if practicable under the pleadings, to settle the whole controversy between the parties in conformity to the facts presented by them.

The charges specified against Rickers, Davis and Foy are, that Rickers feigned indisposition, and thus avoided doing his duty during the whole passage from London to this port, and encouraged a spirit of mutiny in the crew; that Davis disobeyed the master's orders, and struck or kicked him; and that Foy used insolent and mutinous language to the master. The weight of evidence is decidedly against the imputations made by the answer on Rickers. His indisposition was real, and he is proved to have been unable to perform his duties on board the vessel. There is no shadow of evidence in support of the loose suggestions that he gave countenance to a mutinous disposition in the crew; nor do I perceive any evidence that such disposition existed among the crew, other than that the men freely expressed their dissatisfaction at being put on short allowance. This was not accompanied by any threats or disrespectful language, or by any act of insubordination on the part of the crew generally.

The master received a blow from Davis, and, though one witness states it was given deliberately by Davis, whilst lying in his berth, yet the clear preponderance of proof is, that it was given by a kick whilst the master, the mate and a passenger were hauling him by force up the forecastle in the dark; and the circumstances render it as probable that it was given at random in the struggle in which the parties were engaged, as that it was designed against the master. The evidence with regard both to Davis' acts and to the conduct of the master, is exceedingly contradictory. The master does not seem to have considered the blow at the time in the light he would now have the court view it. After being overpowered, Davis went submissively to his duty, and no further notice was ever taken of the occurrence, until it was set up in this action in bar of wages. The master appears to have thought that Davis had received an adequate correction at the time; for, after it was over, he admonished him, that though it was in his power to confine him in irons for what had been done, yet he should not do it. Davis, before and after that, conducted himself unexceptionably. His actual offence was, that he disobeyed the positive orders of the master to come on deck. This was a plain violation of his duty, and the court cannot permit it to pass without animadversion. Seamen can never be permitted to debate the reasonableness and propriety of the orders given by their officers. Their duty is, to obey implicitly every lawful command. The court will see them properly recompensed for any unnecessary oppression or severity in the conduct of their officers; but it will not tolerate any hesitation in a prompt and active obedience to orders on board. Davis, having performed his watch and retired, was called into another watch before his regular turn. The master alleges that this was done for the purpose of a new organization of the watch. The court does not go into an examination of the testimony offered to prove that the order was unnecessary, or oppressive upon Davis. The master could, at his discretion, re-organize the police and service of the ship, and the seamen were bound to obey his orders without resistance or murmuring. The court cannot uphold the notion with sailors, that they can refuse to obey an order of the master because they suppose he requires a duty not necessary at the time, and will, accordingly, in this case, mark the impropriety of Davis' conduct by an abatement of his wages. In regarding all the circumstances of the case, I should have been better satisfied if, the discipline of the vessel having been established, and the sailor having fully submitted, the master had adhered to what was evidently his first intention, and had considered the difficulty terminated at the time by the slight punishment of Davis

for disobeying the orders of his officers. But as the master did not distinctly pardon the offence, I shall, upon the ground that an offence has been committed by Davis, which is not justified or condoned, direct a deduction from his wages of his pay for one-half of a month.

Foy, in his remonstrance with the master against the short allowance, conducted himself improperly and insolently. He had a right to make known the wants of himself and of the crew, but it should have been done in a manner and in language more respectful. His deportment tended to promote insubordination and disorder; and, as a punishment for this misconduct, I shall direct his wages for one month to be deducted from his pay. I adopt this mild punishment because I am satisfied the altercation was unpremeditated, and because the chastisement shortly after inflicted on him, and which, the mate says, was for this same impertinence, and which he submitted to unresistingly, seemed then to be regarded on all sides as ending the affair, so far as the vindication of the master's authority was concerned. Foy performed his duty unexceptionably from that time, and no recollection of any misconduct seems to have been cherished by the master. He consented that all the men should leave the vessel, and promised that all, without exception, should be paid the next week. The offence had, in effect, been forgiven, and it is now too late for the master to recall such an instance of irregular and insubordinate conduct in the course of the voyage, in order to make it the foundation of a forfeiture of wages. Under these circumstances, I do not think justice demands, in any of these cases, more than that degree of punishment which shall serve to admonish the seamen that the court will not, except in cases of most imminent and irresistible necessity, countenance any act of insubordination from the crew towards their officers, at sea and in the discharge of their duties.

The imputations thrown out by the answer, that the crew had embezzled property belonging to the passengers, and that a spirit of mutiny was fomented amongst them, are unsupported by proof.

I shall accordingly decree in favor of all the libellants for the wages in arrear; and, indeed, except as to Rickers and Foy, I do not perceive any ground for a denial of full wages to the crew.

The cook was properly degraded, and can only recover wages for the duties he performed, namely, those of an ordinary seaman. His competency and conduct in the station of cook were matters for the master to decide upon, in the first instance; and, where he has decided without partiality and upon the evidence before him, I should look for a very strong case, to justify a disregard of his determination. There seems to have been strong proof before the master that the cook was intemperate, and ignorant of his business; and, whether the charge was established by the kind of evidence given or not, the master was justified, under the exigencies of the case, in degrading him from his place, on reasonable grounds for belief that he was intoxicated when employed in cooking, or was an incompetent or unsafe man to entrust with that situation.

With regard to the claim for extra wages, on the ground of a short allowance of provisions, the testimony of the libellants is explicit, that the crew were kept on a short allowance of bread during most of the passage from London here. Rickers and Anderson have no interest in this question, and, whatever distrust might be felt as to the evidence given by the other witnesses, there is no legal reason for not giving full credit to those two. There was great remissness on the part of the master. He contented himself with ordering the men to have one pound of bread each daily, and the mate, after seeing it weighed once, left the matter to the steward, who furnished the quantity by guess, and in a manner, as proved by Rickers, which must necessarily have given a deficient quantity. As the master knew, at an early day, that the men complained of the want of bread, he was bound to see personally that the proper supply was furnished them. The court will not determine what that quantity should be by weight. The navy ration of bread is fourteen ounces, together with a fair supply of other stores. Without such stores, that quantity of bread might be inadequate. Whether the pound ordered to be furnished consisted of twelve or sixteen ounces is not shown; but if of either, and insufficient for the comfortable provision of the crew, the master should have seen that it was increased, or other proper provisions furnished in its place.

Judge Peters has construed the act of July 20, 1790 (1 Stat. 131), which gives a day's extra wages to a seaman for each day he is kept on short allowance, as authorizing the increase of wages only in case the required quantity of provisions is not on board the vessel. He held, that if the vessel had the complement of stores, it rested in the discretion of the master how they should be distributed, and that, in such a case, the remedy for being put on short allowance must be by an action for damages. Mariners v. The Washington [Case No. 9,086]. It does not now become necessary to consider whether the act may not justly bear a more enlarged interpretation, because the fact that the crew were on short allowance being proved, it is necessary for the master, in order to bring himself within the privilege of the construction referred to, to prove that his vessel had on board the legal quantity of provision. This has not been done in the present case. I shall consider the short allowance as commencing on the 20th April. and continuing through the voyage. The exact period is not fixed by the testimony, the witnesses differ-

ing among themselves upon this point. I adopt the evidence of Graves, as referring to a fact which he would be very apt to recollect. He says the short allowance began four or five days after he was removed as cook. He thinks he was removed on the 10th of April, but other evidence shows it was on the 15th. The uncertainty as to the commencement must operate to the disadvantage of the libellants, and they can only have an allowance for the shortest of the various periods named.

There is no foundation in the proofs for the claim on the part of some of the libellants, in regard to small stores. No contract to furnish them is shown; and, if such a contract existed, it is exceedingly doubtful whether recompense for a breach of it could be had in this way. This branch of the claim is disallowed.

Decree accordingly.

The cause afterwards came up again on a motion of the proctor for the libellants, that interest be allowed on all the sums decreed to the libellants from the time payment was demanded, and that a counsel fee be included in the costs. The motion for interest was resisted on the ground that the amount due the libellants was not a liquidated sum, until fixed by a decree of the court, and because the libellants connected with their claim for wages one for compensation for short allowance, which must of court be litigated, and which was only in part sanctioned by the court.

BETTS, District Judge. Interest is usually allowed upon seamen's wages from the time a demand of them is made. Here was a fixed period for payment, which had elapsed before suit was brought, and also an actual demand. Without such positive demand, the commencement of the suit would have been an adequate demand, in construction of law, to entitle the party to interest. Gammell v. Skinner [Case No. 5,210].

There is great fitness in such allowances to seamen, as the master, being their account-keeper, always knows precisely the sum due them, and ought to tender them payment when their right to demand it has become perfect. In ordinary dealings, the creditor holds the evidence of his demand in his own hands, and, if he delays presenting it to the debtor, equity might infer that he was willing the matter should continue upon the footing already existing, and there would be a fair ground for denying him the right to charge interest. No such reason can apply to the case of seamen's wages, and the court will be inclined, as a general rule, when the seamen are so situated that the master can offer them payment, to allow interest from the time the wages were due, until a tender or payment under the decree of the court. This principle does not apply to wages decreed because of short allowance. That is in the nature of a penalty; or, put in its most favorable light, is an unliquidated claim, and one usually to be adjusted on contestation, when probably the court may, in proper cases, make an augmentation of damages equivalent to interest. The compensation is, by statute, made a matter of right to the seaman; but the right to any allowance, and the amount due, must generally be subject to the adjudication of the court. Interest is denied, in this case, upon that part of the decree.

I am inclined to allow a small counsel fee to the libellants. I should not do it in the case of Foy, Davis and the cook, if they prosecuted alone, as there is shown to have been fair probable cause for resisting their demands in toto. But, with respect to the other libellants, their monthly wages were due, and there is nothing shown, on the part of the master, throwing a reasonable doubt upon their right of recovery. The litigation they have been driven to, has necessarily been protracted and expensive. This should have been avoided as to them, by an offer of their wages. I shall, therefore, order that there be taxed in favor of the libellants $25, as a counsel fee in this case. The sum is stated so low, to avoid charging the vessel to an unreasonable extent. The taxed costs must be heavy, and I contemplate, in this allowance, nothing more than what may about cover the disbursements of the libellants in conducting their cause. It is not designed to mark the compensation their counsel ought to receive in this case, or to operate as a precedent in other cases. As a general rule, I have refused to allow counsel fees in suits for wages, and shall probably adhere to that course of practice where the case seems to present no special reasons for departing from it. The unsuccessful litigant ought not always to be subjected, of course, to more than the current charges of the suit. The court does not intend to render the apprehension of expense so urgent, as to deter owners and masters from resisting claims for wages, which there is reasonable ground for believing cannot be supported.

NOTE. This case was affirmed on appeal by the circuit court, December 25th, 1831, with some modification of details [Case No. 4,353.]

ELIZABETH FRITH, The, v. RICKERS. See Case No. 4,353.

ELIZABETH, The MARY. See Case No. 9,206.

Case No. 4,362.

ELIZABETHPORT & N. Y. FERRY CO. v. UNITED STATES.

[5 Blatchf. 198.][1]

Circuit Court, S. D. New York. Nov. 24, 1863.

SHIPPING—ENROLLMENT OF STEAM VESSELS — LICENSE—PENALTY—ACT OF JULY 7, 1838.

The penalties imposed by the 2d section of the act of July 7, 1838 (5 Stat. 304), referred to and adopted by the act of August 30, 1852 (10 Stat. 61), do not apply to steam vessels used on the ferry between New York City and Elizabethport, New Jersey, which was established more than eighty years ago, it being declared, by the 42d section of the act of 1852, that that act shall not apply to steamers used as ferry boats.

This was a writ of error to the district court. The action was brought to recover from the Elizabethport and New York Ferry Company certain penalties, under the 2d section of the act of July 7, 1838 (5 Stat. 304), referred to and adopted by the act of August 30, 1852 (10 Stat. 61). After a judgment for the plaintiffs, the defendants brought a writ of error.

Washington Q. Morton and Charles Donohue, for plaintiffs in error.

E. Delafield Smith, Dist. Atty., for the United States.

NELSON, Circuit Justice. The 42d section of the act of August 30th, 1852, provides "that this act shall not apply * * * to steamers used as ferry boats, tug boats, towing boats, nor to steamers not exceeding one hundred and fifty tons burthen, and used in whole or in part for navigating canals." The steamers charged in this case with having violated the requisition of the Acts of 1838 and 1852, were used on the ferry between New York City and Elizabethport, New Jersey, touching at Bergen Point, New Jersey, and Mariners' Harbor, New York. This ferry, according to the evidence, was established more than eighty years ago, and has been continued ever since. It is older than the present government, and I think it rather late to institute the inquiry whether or not the proprietors possess all the rights and privileges belonging to a ferry franchise. I shall assume that they do, and that they were so invested under and by virtue of the municipal law of the states of New York and New Jersey. According to the doctrine of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 214, and numerous other cases following it, both in the federal and state courts, the grant of a ferry franchise belongs exclusively to the state governments, and is among the mass of reserved powers never granted by the states. And hence congress, when dealing with the equipment and regulation of vessels engaged in navigation, under the commercial power conferred upon it by the constitution, usually, if not always, in express terms, exempts this class of vessels, as they are engaged in a navigation under the authority and direction of the municipal laws of the states, and are subject to their regulation. The case of Conway v. Taylor's Ex'rs, 1 Black [66 U. S.] 604, recently before the supreme court of the United States, will illustrate this distinction. The extensive and very full examination of the subject of ferries, and ferry rights, under state laws and state jurisdiction, in that case, makes it unnecessary for me, in this, to do more than refer to it. I am satisfied that the exemption clause, already referred to, in the act of 1852, covers the vessels proceeded against in this case.

Judgment reversed.

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

Case No. 4,363.

The ELIZA JANE.

[1 Spr. 152.][1]

District Court, D. Massachusetts. June, 1847.

MARITIME LIENS — SUPPLIES FURNISHED BY CONSIGNEE TO FOREIGN VESSEL — RIGHTS OF BONA FIDE PURCHASERS WITHOUT NOTICE.

1. The consignee of a vessel, in a foreign port, who furnishes necessary supplies on credit, not having funds of the owner in his hands, may have a lien therefor upon the vessel, notwithstanding his being consignee.

2. No lien arises by the maritime law, for supplies furnished to a vessel, in her home port, although the furnisher have his residence in a foreign country.

[Cited in The Washington Irving, Case No. 17,244; The Rapid Transit, 11 Fed. 326; The Charlotte Vanderbilt, 19 Fed. 219; The Brantford City, 29 Fed. 386; The Scotia, 35 Fed. 909.]

3. As against bona fide purchasers, without notice, tacit liens for necessaries must be enforced with reasonable diligence.

[Cited in Griswold v. The Nevada, Case No. 5,839; The Bristol, 11 Fed. 163.]

4. Such liens will be valid, even against bona fide purchasers, if there has been no want of diligence in enforcing them.

[Cited in The D. M. French, Case No. 3,938; The Bristol, 11 Fed. 162; The Lyndhurst, 48 Fed. 840.]

In admiralty. This was a libel in rem, promoted by Samuel Cleland, a resident of Boston, to obtain payment for certain supplies, furnished by him to the schooner Eliza Jane, of St. John, New Brunswick. A part of the supplies were furnished by the libellant, at Boston, in January, 1846; and another portion, in September of the same year; and the remainder, by one Crane, as the agent of the libellant, at St. John, where the schooner then was, being her home port. The libellant was, during the above named period, a ship chandler, in Boston, and consignee of the Eliza Jane. In October, 1846,

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

the Eliza Jane was conveyed by her then owners, to a bona fide purchaser.

L. H. Chandler and S. C. Maine, for libellant.

C. T. & T. H. Russell, for claimant.

SPRAGUE, District Judge. There are two classes of supplies sued for,—those furnished in Boston, and those furnished at St. John. And it is insisted, that no lien ever existed for either. I will first consider those furnished in Boston.

The only ground upon which it is urged that no lien originally arose is, that the libellant was consignee of the vessel. Is this sufficient to repel the lien which would otherwise attach? This was a foreign vessel, in need of repairs and supplies, to enable her to proceed on her voyage. The libellant furnished them at the request of the master, and was not paid therefor. These facts, by the general maritime law, were sufficient to create a lien; that is, a tacit hypothecation, following as a legal consequence of those facts. There need be no express stipulation for such hypothecation; credit must, indeed, be given to the vessel, but it need not be proved that there was any special agreement to that effect. Where such supplies are obtained, on credit, it is presumed that credit was given to the vessel, as well as the owners, unless there is something in the circumstances of the case to repel such presumption. These resulting, or tacit, hypothecations, are founded upon justice and policy. It is consonant to natural equity, that one who has transferred property to another, upon a promise of payment therefor, should, as against the purchaser, hold security upon the property, until payment is made; that he should not be deemed to have relinquished all claim to it, until he shall have received the consideration for which it was agreed to make the transfer. This is strictly true as to repairs, which are incorporated into, and enhance the value of, the vessel. The lien is necessarily upon the whole, but is limited, in amount, to that portion which has become a part of the vessel.

It is consonant with the soundest principles of policy that liens should be given, not only for repairs, but for all necessary supplies; and that such liens should tacitly, and by implication, result from the giving credit for such supplies. It is for the benefit of the furnisher, as it gives him better security. It is for the benefit of the owner of the vessel, as he makes his purchases upon better terms; for it is the known law of trade, the higher the security, the lower the price, or the better the conditions upon which credit is given. One of the inconveniences arising from giving a mortgage, or any instrument of express hypothecation, is, that it may create suspicion of the owner's pecuniary ability, or cast a shade upon his general credit. This is sometimes felt as a serious evil, and a seller often hesitates to demand express security, although it would have a material influence upon his conditions of sale. These tacit and resulting liens are subject to no such inconvenience; not being demanded by the creditor, but following only as a legal consequence of the credit, they indicate no distrust, and create no suspicion. These liens, so accruing, existed under the Roman law, and are recognized and enforced in the jurisprudence of our own country, and by that of every maritime nation, excepting England; and there these liens, although highly just and salutary, have been ignored, and their enforcement prevented, because the admiralty, the only jurisdiction which could enforce them, has been stricken down by its enemies, the courts of common law, wielding the power of prohibition, against which the courts of admiralty have no defence. This enmity and warfare of the common law judges, arose mainly from their desire to monopolize all judicial authority. "Est boni judicis ampliare jurisdictionem," was a current maxim of the day. The better reading, however, is justitiam, instead of jurisdictionem. But the English common law judges of former days, acted toward other tribunals under the worst reading of this maxim, and the cause of justice and sound jurisprudence suffered accordingly. But the admiralty and maritime jurisdiction given by the constitution of the United States, is that legitimate jurisdiction known and recognized by the general maritime world, and not that jurisdiction as it has been maimed and crippled, and almost crushed, by the common law courts of England. Such being the tacit hypothecations under our law, the question is, whether the libellant's having been the consignee of this vessel, prevented any lien from arising for the repairs and supplies, which he furnished. There seems to be no good reason for its having that effect. If, indeed, the consignee have funds, which ought to be applied to the necessities of the vessel, or if he knows that the master has such funds, he has no right to furnish her upon credit; or, if from his mode of dealing with the owner, or other circumstances, it appears that the credit was given solely to the owners, and not to the vessel, then the lien would be repelled; but there is no evidence, or reasonable ground of presumption, that the libellant had funds of the owner, or that the master had such, or that the credit given was personal merely.

I am not aware of any authority directly in point. In Davis v. Child [Case No. 3,628], the doctrine that material men have an accruing lien upon foreign vessels, is laid down without exception.

The most analogous case to the one at issue, is that where a consignee secures himself for supplies furnished by him, by taking a bottomry bond. The question has arisen in this form several times, in the courts of admiralty and common law, in this country and England.

In the case of The Hero, 2 Dod. 139, Lord Stowell held, that though the taking of bottomry bonds by the agent, or consignee, of a ship, was a practice not to be encouraged; yet, that cases might arise in which an agent would be justified in so doing. In this country, some of the earlier cases took the ground, that a master could not hypothecate to an agent (Liebart v. The Emperor [Case No. 8,340]; Reade v. Commercial Ins. Co., 3 Johns. 352); but the later decisions have not sustained this position; and the law now seems to be generally conceded to be as stated by Lord Stowell (The Lavinia v. Barclay [Case No. 8,125]; Abb. Shipp. 159, note; 3 Kent, Comm. 172; The Oriental, 3 W. Rob. Adm. 243; The Royal Stuart, 33 Eng. Law & Eq. 602). So, a bottomry bond has been sustained in favor of the owner of the cargo, who was on board the vessel, at the time the necessity arose, and furnished supplies; the court ruling that the owner of the cargo in that position, was under no peculiar obligation to advance the necessary supplies, without the usual security and compensation. Ross v. The Active [Case No. 12,070].

The present case, however, is not one of hypothecation by bottomry bond, and the great objection urged against a consignee's being permitted to take an instrument carrying maritime interest, does not apply to a resulting lien upon the ship. Against bottomry bonds it is urged, that a consignee holds a fiduciary relation toward the owner, and that allowing him to take such security, might tempt him to violate his duty, and take advantage of the necessities of the ship, in order to obtain heavy maritime interest. As the ordinary maritime lien carries with it no such interest, this objection has no application to it.

The arguments in favor of allowing such a lien to the consignee, are stronger than those in favor of allowing it to the master of a vessel. The consignee does not stand in equally confidential relations toward the owner; neither does he derive the same advantage from the supplies when furnished; yet a lien has repeatedly been sustained in this country, and in this court, in favor of the master, for supplies furnished his ship, under proper circumstances. The New Jersey [Case No. 5,233]; The Packet [Id. 10,654]; Ex parte Clark [Id. 2,796]. I see no sufficient reason, why a consignee, without funds of the owner in his hands, should be made an exception to a rule so general, as that allowing a lien to foreign furnishers or lenders. Upon the principles of maritime law, and the analogies of decided cases, I am of opinion that a consignee, in a foreign port, furnishing supplies to a vessel, without having funds of his principal in his hands, is not deprived by his character of consignee, of the ordinary maritime lien of material men.

The second class of supplies was furnished by the libellant, through his agent at St. John, while the vessel was there, in her home port. It has been held by the supreme court of the United States, and must be deemed the settled law of this country, that these maritime liens do not arise, when the vessel is in a place, or state, where the owners reside. The General Smith, 4 Wheat. [17 U. S.] 438; Davis v. Child [Case No. 3,628]. A vessel, however, in a port of a state to which she does not belong, is not deemed to be in her home port, but so far foreign, that these tacit hypothecations attach to her. It is the residence of the owners, and not that of the furnisher, that is to be looked to, in determining whether the vessel is a domestic one, so as to exclude the lien. In this case, the owners lived at St. John. The vessel was there when the supplies were furnished; and by the maritime law, as understood in this country, no tacit hypothecation arose, and it is not contended that the local law gave any lien. This class of supplies, therefore, must be disallowed. It is contended for the claimant, that if a lien ever existed for the supplies furnished at Boston, it has been lost by neglect. A part of them were furnished in January, and the residue in September, 1846. This vessel was in Boston in July of that year,—six months after the first supplies. There had been abundant time for the libellant to have demanded payment of the owners, at St. John, and for the latter to have transmitted funds in discharge of this debt; and the libellant well knowing this, and that the vessel was in Boston, should have enforced his lien in July, if he meant to rely upon it. The omission to do so was a want of reasonable diligence, and the lien cannot now be set up against the claimant, who is a bona fide purchaser, without notice.

The claim for the supplies furnished in September, stands on different ground. It does not appear, that from that time, until the filing of this libel, this vessel was within the reach of the libellants, or that they have been guilty of any neglect in asserting their right. It has not, therefore, been lost, for want of reasonable diligence in pursuing it. The transfer under which the present claimant holds the vessel, was made in October, 1846, and within one month after the supplies in September. The purchaser could easily have ascertained whether this lien existed; and if he omitted that precaution, it cannot defeat the claim which the libellant has in no manner relinquished or forfeited. The Eastern Star [Case No. 4,254]; The Chusan [Id. 2,717].

Decree for the libellant for the amount of the supplies furnished in September, 1846.

Case No. 4,364.

The ELIZA LADD.

[3 Sawy. 519; 1 N. Y. Wkly. Dig. 517; 8 Chi. Leg. News, 98; 21 Int. Rev. Rec. 48; 2 Cent. Law J. 822; 1 Law & Eq. Rep. 28; 7 Leg. Gaz. 414.] [1]

District Court, D. Oregon. Nov. 24, 1875.

VESSEL—WHEN MATERIALS BECOME—MARITIME CONTRACT.

1. The materials which constitute a ship become one as soon as she leaves the ways and her keel strikes the element for which she was originally designed.

[Cited in The Manhattan, 46 Fed. 800.]

2. A contract to furnish a ship with the means of propulsion or to change the mode of her propulsion, after she is launched and afloat, is not a contract to build a ship, and is a maritime one.

[Cited in The City of Salem, 10 Fed. 844; The Rapid Transit, 11 Fed. 325; Re Glenmont, 32 Fed. 704.]

In admiralty. Suit for labor and materials.

John W. Whalley, for libellant.

E. C. Bronaugh, for claimant.

DEADY, District Judge. The amended libel in this case was filed October 18, 1875, and alleges substantially that the Eliza Ladd is a domestic vessel, propelled by steam, of the burden of 118.47 tons, and was enrolled at Portland on August 31, 1875, and is employed in navigating the waters of the Willamette; that she was launched at Portland near Smith's mill, in October, 1874, and on May 28, 1875, she made a voyage in tow of another vessel to the foot of Stark street, and there took on her boilers, engines and machinery, the same having been in the ferryboat Portland No. 1, and from thence, on June 1, 1875, made a voyage in like manner to the libellant's works at Albina on said Willamette river; that on June 1, 1875, the libellant, the Oregon Iron Works, a corporation duly formed under the laws of Oregon, and engaged in business at Albina, was employed by the owner and claimant of said vessel, Joseph Knott, to furnish the material in addition to the boilers, engines and machinery aforesaid, and perform the labor necessary to fit, equip and furnish said vessel for such sum as the same should be reasonably worth; that between said last-mentioned date and August 18, 1875, said libellant performed said contract, and that the reasonable value of the materials and labor furnished by libellant in so doing is $1,498, in lawful money of the United States, and that no part of said sum, except $13.84, in old iron, has been paid libellant.

The claimant excepts to the libel, that the contract described therein is not a maritime one, and that this court has no jurisdiction to enforce the supposed lien incident thereto. It is admitted that according to the ruling of the supreme court in People's Ferryboat v. Beers, 20 How. [61 U. S.] 393, and Roach v. Chapman, 22 How. [63 U. S.] 129, a contract to build or construct a ship, is not a maritime one, and therefore not within the admiralty jurisdiction of the United States. This rule is founded upon the assumption that such a contract is one "made on land to be performed on land." On the other hand it is admitted that, by the general maritime law of the civilized world, a contract to build a ship is a maritime contract, because it has relation to a ship as the agent or vehicle of commerce upon a navigable water. Ben. Adm. §§ 213, 264.

Under the law of the cases above cited, it is not always easy to determine what is a maritime contract. In the case in 20 How. [61 U. S.] the contract was for "work done and materials employed in constructing the hull of a new steam ferryboat," while the case in 22 How. [63 U. S.] was for furnishing "boilers and engines" to be placed in a steamboat at the time and place of the construction of the hull. It is well established that a contract to furnish work and materials to be employed in making repairs on a vessel is a maritime contract. The St. Lawrence, 1 Black. [66 U. S.] 522; Peyroux v. Howard, 7 Pet. [32 U. S.] 324. And in such cases, even if the vessel is a domestic one, if the local law gives the material-man a lien, it may be enforced in the admiralty. The General Smith, 4 Wheat. [17 U. S.] 438; The Lottawana, 21 Wall. [88 U. S.] 579. Now, repairs include all alterations and additions made to a vessel, short of destroying her identity. "A ship is always the same ship, although the original materials of which it was composed may, by successive repairs and alterations, have been in the course of time entirely changed." Ben. Adm. § 223.

Suppose the Eliza Ladd to have been built and used as a barge, and that afterwards her owner had concluded to use her as a steam ferry or tug boat, and for this purpose should make a contract with A. B. to put the necessary boilers and machinery into her, such an agreement would doubtless be a maritime contract. And yet a contract to build a steam ferry or tug boat outright would not be, under the decisions cited, a maritime contract. My own impression is that any contract made to equip, fit or furnish a vessel after she is launched and afloat, is a maritime contract. It is not in the language of 20 How. [61 U. S.] supra, "a contract made on land to be performed on land," but one made with reference to a ship already in existence and floating upon the element for which she was originally designed. Such a contract is to be performed on water as much as an ordinary contract of affreightment or repairs. When the contract to build includes the fitting, furnishing, and equipping also, it may be said, that as it is an entirety and not divisible, and the

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 517, contains only a partial report.]

principal feature of it—the building and launching the hull—being non-maritime, it gives character to the whole of it.

When the contract set up in the libel was made, the Eliza Ladd had been launched eight months, and for aught that appears was in the same condition she is now, as to her capacity for changing place or carrying freight and passengers, less the machinery necessary to propel her by steam. She was then, it appears to me, a ship, within the definition in Ben. Adm. § 215: "A locomotive machine adapted to transportation over rivers, seas, and oceans." She was certainly a machine—an artificial contrivance, and one capable of locomotion or change of place, as is shown by the two short voyages she made before the performance of this contract; nor does it make any difference whether she was "propelled by the wind, the tide or paddles, by steam, by animals, or by the human arm, or towed by another vessel" (Id. § 217), so that she floated in and moved through the water. Being of one hundred and eighteen tons burden, she was also adapted to the transportation of freight and passengers so far as she had capacity for locomotion. Separate pieces of timber or iron, or both, being put together in a certain form, so as to float upon the water and transport or bear up freight or passengers, may become a ship. At what point of time is this change accomplished? I am inclined to think that the correct answer to this question is suggested in the brief for the libellant, and that it is "at the moment when she leaves the ways, and her keel strikes the element for which she was originally designed." That is the moment of her birth as a ship, and the occasion when a name is usually bestowed on her. Thereafter all contracts to equip, furnish or repair this machine have direct reference to a vessel in esse, with capacity for locomotion and transportation on navigable waters, and are, therefore, maritime.

Although a contract to build a ship is in fact a maritime one, yet under the rule laid down in 20 and 22 How. [61 and 63 U. S.] supra, it is to be otherwise regarded in this court. The difficulty is to determine what is included in building a ship—the contract for which, says the court, is not maritime, because it is "made on land to be performed on land." But, even under that rule, it seems safe to say, that a contract made after a vessel is launched and afloat, to furnish her with a particular means of propulsion, as sails or steam paddles, or to change the mode of her propulsion, is a maritime contract. Certainly it is not a contract to be performed on land; neither is it a contract to build any more than any contract for repairs.

Although this is a domestic vessel, and this work and materials were furnished in her home port, yet the libellant has a lien for the amount of his claim under section 17, p. 656, of the Oregon Code, and the contract being a maritime one, the lien may be enforced in admiralty.

The exception is overruled.

Case No. 4,365.

The ELIZA MALLORY.

[6 Adm. Rec. 428.]

District Court, S. D. Florida. Feb. 2, 1860.

SALVAGE COMPENSATION—SAVING CARGO FROM WRECK—DIVING.

[$16,241 allowed for saving a cargo of cotton valued at $56,445 from a vessel totally wrecked on the coast of Florida, part of the salvage being effected by diving, and the whole service employing 12 vessels, carrying 145 men, for periods varying from one to five weeks. Also 30 per cent. allowed upon materials saved from the ship and sold for $1,826.38.]

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

[Libel for salvage by John H. Geiger and others against the cargo and materials of the ship Eliza Mallory.]

Winer Bethel, S. J. Douglas, and W. C. Maloney, for libellants.

MARVIN, District Judge. This ship, Barrett, master, bound from New Orleans to San Blas, on the western coast of Mexico, laden with 4,923 bales of cotton, weighing 180 pounds each, on the morning of the 4th of November last, ran ashore on the eastern coast of Florida, about sixty-five miles north of Cape Florida, where she bilged, filled with water, and became a total wreck. On the 11th the ship was visited by Geiger, master of the wrecking schooner Champion, and a few days afterwards by several other wrecking vessels, and crews, numbering in all 12 vessels, of the aggregate burthen of 981 tons, carrying 145 men. These vessels and crews, were employed various and different lengths of time, from one week to five weeks, in getting out the cargo and bringing it to this port. Some of the vessels made four and five trips. The lower hold of the ship was full of water, and the water was several feet deep over the lower deck. All the cotton saved from the lower hold was saved by diving, but the diving was attended with much less difficulty than in most other cases, owing to the smallness of the bales. The loosening of one bale would often loosen others, which would then float to the surface. They saved the entire cargo. The value of the cargo saved has been estimated at $56,445, and the ship's materials have been sold for $1,826.38. I think the sum of $16,241 is a reasonable salvage on the cargo, and thirty per cent. of the value is a reasonable salvage on the materials. It is ordered, adjudged, and decreed that the libellants have and recover in full compensation for their services in saving the cargo of the said ship Eliza Mallory, the sum of $16,241, to be divided among them according to the schedule hereunto annexed; and that they also recover the sum

of thirty per cent. upon the value of the materials of the said ship, to be paid to the persons saving the same; and also their costs of suit; and that upon the payment thereof, and the costs and expenses of this suit, the marshal restore said cargo and proceeds to the master of said ship.

ELKINS (DENNEY v.). See Case No. 3,790.

ELKINS (DURYEE v.). See Case No. 4,197.

ELKINTON (STAINTHORP v.). See Case No. 13,278.

Case No. 4,366.

ELKISON v. DELIESSELINE.

[Brunner, Col. Cas. 431;[1] 2 Wheeler, Cr. Cas. 56.]

Circuit Court, D. South Carolina. Aug., 1823.

CONSTITUTIONAL LAW — STATE LAW AFFECTING COMMERCE, VALIDITY OF — WRIT DE HOMINE REPLEGIANDO.

1. A state law authorizing the seizure and imprisonment of free negroes brought into the state on board of any foreign vessel is unconstitutional.

2. The writ de homine replegiando, having for its object the discharge of the prisoner on bail, with a view to try the question of the validity of the law under which he is held in confinement, is of common right, and may be issued as of course; it will not, however, lie against a sheriff who has the party in custody under process.

This was a case of an arrest of a British seaman, under the third section of an act of the state of South Carolina, entitled "An act for the better regulation of free negroes and persons of color, and for other purposes," passed in December, 1822.

JOHNSON, Circuit Justice. The motion submitted by Mr. King in behalf of the prisoner is for the writ of habeas corpus ad subjiciendum; and if he should fail in this motion then for the writ de homine replegiando; the one regarding the prisoner in a criminal, the other in a civil aspect; the first motion having for its object his discharge from confinement absolutely, the other his discharge on bail, with a view to try the question of the validity of the law under which he is held in confinement. A document in nature of a return, under the hand and seal of the sheriff, has been laid on my table by the gentlemen who conduct the opposition, from which it appears that the prisoner is in the sheriff's custody under an act of this state, passed in December last; and, indeed, the whole cause has been argued under the admission that he is in confinement under the third section of that act, as he states in his petition. The act is entitled "An act for the better regulation of free negroes and persons of color, and for other purposes." And the third section is in these words: "That if any vessel shall come into any port or harbor of this state, from any other state or foreign port, having on board any free negroes or persons of color, as cooks, stewards, or mariners, or in any other employment on board said vessel, such free negroes or persons of color shall be seized and confined in gaol until such vessel shall clear out and depart from this state; and that when said vessel is ready to sail the captain of said vessel shall be bound to carry away the said free negro, or free person of color, and to pay the expenses of his detention; and, in case of his neglect or refusal so to do, he shall be liable to be indicted, and on conviction thereof shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes, or persons of color, shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the 20th December, 1820, aforesaid." As to the description or character of this individual, it was admitted that he was taken by the sheriff under this act out of the ship Homer, a British ship trading from Liverpool to this place. From the shipping articles it appears that he was shipped in Liverpool; from the captain's affidavit that he had known him several years in Liverpool as a British subject; and from his own affidavit that he is a native subject of Great Britain, born in Jamaica.

In support of this demand on the protection of the United States, the British consul has also presented the claim of this individual as a British subject, and with it a copy of a letter from Mr. Adams to Mr. Canning, of June 17th last, written in answer to a remonstrance of Mr. Canning against this law. Mr. Adams' letter contains these words: "With reference to your letter of the 15th February last, and its enclosure, I have the honor of informing you that immediately after its reception measures were taken by the government of the United States for effecting the removal of the cause of complaint set forth in it, which, it is not doubted, have been successful, and will prevent the recurrence of it in future." This communication is considered by the consul as a pledge, which this court is supposed bound to redeem. It has its origin thus: Certain seizures under this act were made in January last, some on board of American vessels and others in British vessels; and among the latter one very remarkable for not having left a single man on board the vessel to guard her in the captain's absence.

Applications were immediately made to me in both classes of cases for the protection of the United States authority, in consequence of which I called upon the district attorney for his official services. Several reasons concurred to induce me to instruct him to bring the subject before the state judiciary. I felt confident that the act had been passed hastily, and without due consideration, and knowing the unfavorable feeling that it was calculated to excite abroad, it was obviously best that relief should come from the quarter

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

from which proceeded the act complained of. Whether I possessed the power or not to issue the writ of habeas corpus, it was unquestionable that the state judges could give this summary relief, and I therefore instructed Mr. Gladsden to make application to the state authorities, and to do it in the manner most respectful to them. In the mean time I prevailed on the British consul, the late Mr. Moody, and the northern captains to suppress their complaints, fully confident that when the subject came to be investigated they would be no more molested. The application was made to the state authority, and the men were relieved; but the ground of relief not being in its nature general or permanent, Mr. Moody made his representations to Mr. Canning, and the northern captains, I am informed, did the same to congress, or to the executive. What passed afterwards came to my knowledge in such a mode that after what has publicly transpired on this argument I do not think proper, as it certainly is not necessary, to declare it. A gentleman in this place (Col. Hunt) has declared that he is authorized to deny that Mr. Adams was sanctioned by anything that transpired between himself and any member of the state delegation to give such a pledge. Certain, however, it is that from that time the prosecutions under this act were discontinued, until lately revived by a voluntary association of gentlemen, who have organized themselves into a society to see the laws carried into effect. And here, as I well know the discussion that this occurrence will give rise to, I think it due to the state officers to remark that from the time that they have understood that this law has been complained of on the ground of its unconstitutionality and injurious effects upon our commerce and foreign relations, they have shown every disposition to let it sleep. On the present occasion the attorney-general has not appeared in its defense. The opposition to the discharge of the prisoner has been conducted by Mr. Holmes, the solicitor of the association, and by Col. Hunt. As there is nothing done clandestinely or disavowed, there can be no offense given by a suggestion which means no more than to show that pressing the execution of the law at this time is rather a private than a state act, and to furnish an explanation that may eventually prove necessary to excuse Mr. Adams to Mr. Canning, and perhaps to excuse some member of the state delegation to Mr. Adams. Certain it is, that I cannot officially take notice of Mr. Adams' letter. However sufficient for Mr. Canning to rely on, it is not legally sufficient to regulate my conduct, or vest in me any judicial powers. The facts which I have communicated will, I hope, be sufficient to show that our administration has acted in good faith with that of Great Britain.

Two questions have now been made in argument; the first on the law of the case, the second on the remedy. On the unconstitutionality of the law under which this man is confined, it is not too much to say, that it will not bear argument; and I feel myself sanctioned in using this strong language, from considering the course of reasoning by which it has been defended. Neither of the gentlemen has attempted to prove that the power therein assumed by the state can be exercised without clashing with the general powers of the United States to regulate commerce; but they have both strenuously contended, that ex necessitate it was a power which the state must and would exercise, and, indeed, Mr. Holmes concluded his argument with the declaration, that, if a dissolution of the Union must be the alternative, he was ready to meet it. Nor did the argument of Col. Hunt deviate at all from the same course. Giving it in the language of his own summary, it was this: South Carolina was a sovereign state when she adopted the constitution; a sovereign state cannot surrender a right of vital importance; South Carolina, therefore, either did not surrender this right, or still possesses the power to resume it, and whether it is necessary, or when it is necessary, to resume it, she is herself the sovereign judge. But it was not necessary to give this candid expose of the grounds which this law assumes; for it is a subject of positive proof, that it is altogether irreconcilable with the powers of the general government; that it necessarily compromits the public peace, and tends to embroil us with, if not separate us from, our sister states; in short, that it leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States.

Let it be observed that the law is, "if any vessel (not even the vessels of the United States excepted) shall come into any port or harbor of this state," etc., bringing in free colored persons, such persons are to become "absolute slaves," and that, without even a form of trial, as I understand the act, they are to be sold. By the next clause the sheriff is vested with absolute power, and expressly enjoined to carry the law into effect, and is to receive the one half of the proceeds of the sale. The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port employing colored seamen, whether citizens or subjects of their own government or not. But if this state can prohibit Great Britain from employing her colored subjects (and she has them of all colors on the globe), or if at liberty to prohibit the employment of her subjects of the African race, why not prohibit her from using those of Irish or of Scottish nativity? If the color of his skin is to preclude the Lascar or the Sierra Leone seaman, why not the color of his eye or his hair exclude from our ports the inhabitants of her other territories? In fact it amounts to the assertion of the power to exclude the seamen of the territories of Great Britain, or any other nation, altogether. With regard to various friendly nations it amounts to an actual exclusion in its present

form. Why may not the shipping of Morocco or of Algiers cover the commerce of France with this country, even at the present crisis? Their seamen are all colored, and even the state of Massachusetts might lately, and may perhaps now, expedite to this port a vessel with her officers black, and her crew composed of Nantucket Indians, known to be among the best seamen in our service. These might all become slaves under this act. If this law were enforced upon such vessels, retaliation would follow; and the commerce of this city, feeble and sickly, comparatively, as it already is, might be fatally injured. Charleston seamen, Charleston owners, Charleston vessels, might, eo nomine, be excluded from their commerce, or the United States involved in war and confusion. I am far from thinking that this power would ever be wantonly exercised, but these considerations show its utter incompatibility with the power delegated to congress to regulate commerce with foreign nations and our sister states.

Apply the law to the particular case before us, and the incongruity will be glaring. The offense, it will be observed, for which this individual is supposed to forfeit his freedom, is that of coming into this port in the ship Homer, in the capacity of a seaman. I say this is the whole of his offense; for I will not admit the supposition that he is to be burdened with the offense of the captain in not carrying him out of the state. He is himself shut up, he cannot go off; his removal depends upon another. It is true the sale of him is suspended upon the conviction of the captain, and the captain has the power to rescue him from slavery. But suppose the captain, as is very frequently the case, may find it his interest or his pleasure to get rid of him, and of the wages due him, his fate is suspended on the captain's caprice in this particular; but it is the exercise of the dispensing power in the captain, and nothing more. The seaman's crime is complete, and the forfeiture incurred by the single act of coming into port; and this even though driven into port by stress of weather, or forced by a power which he cannot control into a port for which he did not ship himself; the law contains no exception to meet such contingencies. The seaman's offense, therefore, is coming into the state in a ship or vessel; that of the captain consists in bringing him in, and not taking him out of the state, and paying all expenses. Now, according to the laws and treaties of the United States, it was both lawful for this seaman to come into this port, in this vessel, and for the captain to bring him in the capacity of a seaman; and yet these are the very acts for which the state law imposes these heavy penalties. Is there no clashing in this? It is in effect a repeal of the laws of the United States, pro tanto, converting a right into a crime.

And here it is proper to notice that part of the argument against the motion, in which it was insisted on that this law was passed by the state in exercise of a concurrent right. "Concurrent" does not mean "paramount," and yet, in order to divest a right conferred by the general government, it is very clear that the state right must be more than concurrent. But the right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right; and this conclusion we arrive at, whether we examine it with reference to the words of the constitution, or the nature of the grant. That this has been the received and universal construction from the first day of the organization of the general government is unquestionable; and the right admits not of a question any more than the fact. In the constitution of the United States, the most wonderful instrument ever drawn by the hand of man, there is a comprehension and precision that is unparalleled; and I can truly say, that after spending my life in studying it, I still daily find in it some new excellence. It is true that it contains no prohibition on the states to regulate foreign commerce. Nor was such a prohibition necessary, for the words of the grant sweep away the whole subject, and leave nothing for the states to act upon. Wherever this is the case, there is no prohibitory clause interposed in the constitution. Thus, the states are not prohibited from regulating the value of foreign coins or fixing a standard of weights and measures, for the very words imply a total, unlimited grant. The words in the present case are, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." If congress can regulate commerce, what commerce can it not regulate? And the navigation of ships has always been held, by all nations, to appertain to commercial regulations.

But the case does not rest here. In order to sustain this law, the state must also possess a power paramount to the treaty-making power of the United States, expressly declared to be a part of the supreme legislative power of the land; for the seizure of this man, on board a British ship, is an express violation of the commercial convention with Great Britain of 1815. Our commerce with that nation does not depend upon the mere negative sanction of not being prohibited. A reciprocal liberty of commerce is expressly stipulated for and conceded by that treaty; to this the right of navigating their ships in their own way, and particularly by their own subjects, is necessarily incident. If policy requires any restriction of this right, with regard to a particular class of subjects of either contracting party, it must be introduced by treaty. The opposite party cannot introduce it by a legislative act of his own. Such a law as this could not be passed even by the general government, without furnishing a just cause of war.

But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand. But I deny that the state surrendered a single power necessary to its security, against this species of property. What is to prevent their being confined to their ships, if it is dangerous for them to go abroad? This power may be lawfully exercised. To land their cargoes, take in others, and depart, is all that is necessary to ordinary commerce, and is all that is properly stipulated for in the convention of 1815, so far as relates to seamen. If our fears extend also to the British merchant, the supercargo, or master, being persons of color, I acknowledge that, as to them, the treaty precludes us from abridging their rights to free ingress and egress, and occupying houses and warehouses for the purposes of commerce. As to them, this law is an express infraction of the treaty. No such law can be passed consistently with the treaty, and unless sanctioned by diplomatic arrangement, the passing of such a law is tantamount to a declaration of war. But if the policy of this law was to keep foreign free persons of color from holding communion with our slaves, it certainly pursues a course altogether inconsistent with its object. One gentleman likened the importation of such persons to that of clothes infected with the plague, or of wild beasts from Africa; the other to that of fire-brands set to our own houses only to escape by the light. But surely if the penalty inflicted for coming here is in its effect that of being domesticated, by being sold here, then we ourselves inoculate our community with the plague, we ourselves turn loose the wild beast in our streets, and we put the fire-brand under our own houses. If there are evil persons abroad who would steal to this place in order to do us this mischief (and the whole provisions of this act are founded in that supposition), then this method of disposing of offenders by detaining them here presents the finest facilities in the world for introducing themselves lawfully into the very situation in which they would enjoy the best opportunities of pursuing their designs. Now, if this plea of necessity could avail at all against the constitution and laws of the United States, certainly that law cannot be pronounced necessary which may defeat its own ends; much less when other provisions of unexceptionable legality might be resorted to, which would operate solely to the end proposed, viz., the effectual exclusion of dangerous characters. On the fact of the necessity for all this exhibition of legislation and zeal, I say nothing; I neither admit nor deny it. In common with every other citizen, I am entitled to my own opinion; but when I express it, it shall be done in my private capacity.

But what shall we say to the provisions of this act as they operate on our vessels of war? Send your sheriff on board one of them, and would the spirited young men of the navy submit to have a man taken? It would be a repetition of the affair of the Chesapeake. The public mind would revolt at the idea of such an attempt; and yet it is perfectly clear that there is nothing in this act which admits of any exception in their favor.

Upon the whole, I am decidedly of the opinion that the third section of the state act now under consideration is unconstitutional and void, and that every arrest made under it subjects the parties making it to an action of trespass.

Whether I possess the power to administer a more speedy and efficacious remedy comes next to be considered. That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery; but it is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom. I am firmly persuaded that the legislature of South Carolina must have been surprised into the passing of this act. Either I misapprehend its purport, or it is studiously calculated to hurry through its own execution, so as to leave the objects of it remediless. By giving it the form of a state prosecution the prisoner is to be deprived of the summary interference of the United States authority; and by passing it through the sheriff's hands without the intervention of any court of justice, he is to be deprived of the benefit of the twenty-fifth section of the judiciary act, by which an appeal might be had to the supreme court. Thus circumstanced, it is impossible to conceal the hardships of his case, or deny his claim to some remedy. The opposition to issuing the writ of habeas corpus is founded altogether on the ground that he is in custody under state authority, and the proviso to the fourteenth section of the judiciary act of 1789 is relied on. That proviso is in these words: "Provided that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into some court to testify." Mr. King admits that this proviso is fatal to his motion, unless his case be taken out of it by one or both of the following considerations: First. That so far as it abridges the right of habeas corpus it is inconsistent with that provision of the constitution which declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it," a state of facts which cannot

possibly be predicted of the present; or, Second. That the prisoner cannot be said to be in confinement under state authority, if the state law be void under which he is arrested. And being by his national character entitled to the protection of this court,—in other words a constitutional suitor of the United States courts,—this, which is the only adequate remedy, should be extended to him. These views of the subject certainly merit much consideration. Arguments in favor of this cherished right are not lightly to be passed over. But what are the courts of the United States to do? We cannot undertake to judge when that crisis has arrived which the constitution contemplates; nor are we to undertake to define and limit that meaning of those words, "the privilege of the writ of habeas corpus." Every state in the Union may have had different provisions limiting and defining the extent of this privilege; some, perhaps, confining themselves to the privilege as it stood at common law, others adopting some or all of those statute provisions which have wrought such a change in its practical utility. It can, then, only be left to congress to give an uniform and national operation to this provision of the constitution. In legislating on this subject they have confined us to those cases in which the party is confined under United States authority, or is necessary to be introduced into its courts as a witness. On the second point, it is to be observed that the proviso to the fourteenth section of the judiciary act imposes on the petitioner the necessity of maintaining the affirmative of his being confined under United States authority; so that it is not enough to negative his being in custody under state authority, for the consequence is only that he is confined arbitrarily and without authority by a state officer, a case to which our power to issue this writ does not extend. As far as congress can extend and shall extend the power to afford relief by this writ, I trust I shall never be found backward to grant it. At present I am satisfied that I am not vested with that power in this case.

We come next to consider the motion for the writ de homine replegiando. And here the question appears to me to be "what right I have to refuse it." As well might I interpose to prevent the petitioner from suing out his writ for trespass and false imprisonment, or the captain his writ for trespass in taking the seaman from his vessel, or the ordinary writ of replevin on distress for rent, as to refuse this writ de homine replegiando. If it is not the proper writ for his case he must take the consequence; but this is not the time and mode to try that question. It is a writ of common right, and contains upon the face of it its own death warrant, if it be not legally grantable in any particular case. If the return of the party to whom it issues shows that it is not a case proper for the remedy intended to be given, there it ends. If the return be false it may be contested; if true, and it presents a proper case, then another writ issues, which brings in question the right of personal freedom. The whole of this is set forth in the registrum brevium, and in Fitzherbert, which is nearly copied from it. If my opinion extrajudicially be asked, I would express the most serious doubt whether this writ could avail the party as against the sheriff; but as against his vendee there is not a question that it will well lie at common law.

But gentlemen contend that this writ is obsolete; that "it is not to be raked up from the ashes of the common law to be now first used against the state of South Carolina"; that it cannot issue when the habeas corpus cannot issue; and finally, that the writ of ravishment of ward is the only writ established by a law of the state as the proper writ to try the question of freedom of a person of color, and no other can be substituted without changing the law respecting slaves. There is not one of these arguments that can be sustained either in law or fact. The writ de homine replegiando is ingrafted by law into the jurisprudence of South Carolina; nor is it unknown in actual practice in cases to which it is applicable. In the state of New York it is familiarly used. It is true that the writ of ravishment of ward is expressly given by a state law; but it is given in favor of those who are by law declared to be prima facie held to be slaves. It curtails no right of a freeman previously existing, and only operates to give an action to one whose condition or situation places him in absolute duress, or to any other who shall charitably volunteer in his behalf as guardian. But the act under consideration furnishes itself the distinction between ordinary cases and the present. This act operates only as to freemen—free persons of color—and not as to slaves; so that a whole crew of slaves entering this port would be free from its provisions. It is an indispensable attribute of the individual affected by it that he should be free. If he is not, the sheriff is not authorized by it to touch him; and although forbid by other laws to remain here, his coming here does not expose him to seizure and imprisonment under the provision of this law, whether it be constitutional or not. The negro act of '47 supposes him a slave; the present act supposes him a freeman. Several other answers might be given to the argument, but this one is sufficient. We do not pretend to a right to encroach on the power of the state over its slave population. The power remains unimpaired. But under a state law this man is recognized as a freeman, and in that view if in no other we are fully authorized to treat him as such. As to the argument that this writ cannot issue where the writ of habeas corpus cannot issue, it was fully answered by the petitioner's counsel. If the argument proves anything it leads to the contrary conclusion.

Upon the whole I am led to the conclusion that the third clause of the act under consideration is unconstitutional and void, and the party petitioner, as well as the shipmaster, is entitled to actions as in ordinary cases. That I possess no power to issue the writ of habeas corpus; but for that remedy he must have recourse to the state authorities. That as to the writ de homine replegiando I have no right to refuse it; but although it will unquestionably lie to a vendee under the sheriff, I doubt whether it can avail the party against the sheriff himself. The counsel will then consider whether he will sue it out.

Case No. 4,367.

The ELLA.

[2 Int. Rev. Rec. 117.]

District Court, D. Massachusetts. 1865.

PRIZE—DISTRIBUTION—VESSELS WITHIN SIGNAL DISTANCE.

[A vessel claiming to share with the actual captor must show her position to have been such that the usual signals, if made from the actual captor in the usual way, could have been read and understood from the deck or top-gallant forecastle. The Ella & Anna, Case No. 4,368, followed.]

This vessel was captured off Wilmington a day or two after the capture of the Ella & Anna for breach of blockade. No claimants interposed, and she was condemned as prize. The Daylight, Tuscarora, Iron Age and Shenandoah, United States war vessels, all claimed to share in the prize, as being within signal distance. The Houqua was actual captor.

R. H. Dana, Jr., for United States and actual captor.

W. A. Field, for the Shenandoah.

C. C. Dame, for the Tuscarora.

The chief principles of law involved in the case were accepted by THE COURT as settled by Judge Sprague's decision in the case of The Ella & Anna [Case No. 4,368], particularly as to the meaning of being "within signal distance," in our prize act. THE COURT says it is decided that under our statutes "a vessel claiming to share with the actual captor must show her position to have been such, at the time of the capture, that the usual signals, if such had been made in the usual way, from the actual captor, could have been read and understood from the deck or top-gallant forecastle of the vessel so claiming to share." THE COURT also adopted the conclusion of Judge Sprague that the Coston lights cannot, under the most favorable circumstances, be seen more than eight miles.

After a careful examination of the facts in evidence, THE COURT disallowed the claims of the Tuscarora and Iron Age, and decreed the Houqua to be actual captor, and the Daylight and Shenandoah to be joint captors, as within signal distance.

Case No. 4,368.

The ELLA & ANNA.

[2 Spr. 267;[1] 26 Law Rep. 669.]

District Court, D. Massachusetts. April, 1864.

PRIZE—DISTRIBUTION OF PROCEEDS—PARTICIPATION OF VESSELS WITHIN SIGNAL DISTANCE.

Where a prize is made by one vessel alone, other vessels who claim to participate in the proceeds solely on the ground that they were within signal distance, have the burden of proof upon them to establish all the facts necessary to sustain their claim. To give such vessels a right to participate in the proceeds, it must appear that they were within a distance at which signals could have been seen in the state of atmosphere and other circumstances existing at the time; and it is not enough to place them within a distance at which signals might have been seen under other circumstances. Where signals were not actually seen from the mast-head and answered, and the answers seen, it is not enough to show that they might have been seen from the mast-head, but not from the deck. At the time of this capture, November, 1863, there was no system established by which guns or rockets can be held to be the kind of signals referred to by the statute for distributing prize money, supposing that such a system can be carried into effect. Within signal distance means within a distance at which signals can be so made out that communications to and from can be intelligently exchanged. Upon the evidence in this cause, it is not established that Coston's night signals can, under the most favorable circumstances, be intelligently read at a distance of eight miles.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the Niphon.

W. A. Field, for the Shenandoah.

C. C. Dame, for the Tuscarora.

SPRAGUE, District Judge. This vessel and cargo have been condemned as lawful prize, and I am now called upon to determine to what vessels of the navy the proceeds shall be decreed.

The capture was made by the steamer Niphon, commanded by Lieutenant Breck. Four other vessels, the Shenandoah, Houqua, Daylight, and Tuscarora, have severally presented applications to be admitted to share in the proceeds. The petitioners rest their claims solely on the allegation that they were respectively "within signal distance of the vessel making the prize."

Prizes belong primarily to the government. The policy and propriety of giving the proceeds wholly or in part to the captor are manifest; but why should others, who did not even aid in making the capture, share equally with those who actually made it? A glance at the history of the law on this subject may be of use in discovering the reason. In England, from an early period, prizes have been granted by statute to "the takers." This language, in its natural import, embraces only those who actually make the capture. But

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

the judicial tribunals introduced what they denominated constructive captors, and of these there were two classes. One of these was admitted to share by reason of being in sight at the time of the capture, and the other because of being intimately associated in a common enterprise. The doctrine that vessels in sight should be admitted as constructive joint captors was established prior to the year 1799. At that time this doctrine was adopted by an act of congress, which remained in force one year. Act 1799, c. 24, § 6 (1 Stat. 715). But this provision was reenacted by St. 1800, c. 33, by which one-half of the proceeds of prizes, when of inferior force, were, in the first place, by section 5, given to the captors, and then, by section 6, vessels of the navy in sight at the time were entitled to share equally with the captors. Act 1800, c. 33 (2 Stat. 52, 53). This continued to be the law of the United States until the year 1862, when, by Act 1862, c. 204, § 3 (12 Stat. 606), "signal distance" was substituted for the being in sight. Thus our enactments respecting being in sight and within signal distance seem to have had their origin in the doctrine of the English courts. Upon what reason was that doctrine founded? The statute, as we have seen, gave the prize to "the takers." But who were to be deemed the takers? If there was a battle, all those who took part in the conflict were clearly actual captors. But then there was another class of vessels, perhaps of superior force, who were in such immediate proximity, and took such positions to prevent the escape of the enemy, as actually and materially to contribute to the result. Then came another class, whose mere presence constituted such an overwhelming force at hand, that it might be presumed to have contributed to the capture, by intimidating the enemy and encouraging the friend; but what should be deemed such presence, and under what circumstances would such a presumption arise? The line must be drawn somewhere, and the courts prescribed the rule as follows: In the first place, that none but king's ships could share by reason of being in sight. Privateers were excluded, because, not being bound to render assistance, there was no sufficient presumption that they would do so. And, in the next place, to entitle king's ships to share, it was necessary that they should be actually in sight both of the capturing and captured vessels, under such circumstances as would give encouragement to the captors, and cause intimidation to the enemy. If the king's ship was utterly disabled, or prevented by other duties from rendering aid, as, for example, if she was engaged as convoy, or if she continued on a course which was carrying her away from the scene of the capture, making it manifest that she did not intend to co-operate, she was not admitted as a constructive joint captor. Thus the doctrine of the courts, by which vessels in sight were permitted to share, was founded on the presumption that their presence contributed to the result, at least by encouragement to the one party and intimidation to the other. This doctrine was modified or guarded by stringent rules respecting the kind and degree of evidence that should be required. In the first place, as already stated, direct evidence of being in sight was indispensable. In the second place, testimony coming only from the asserted joint captors, however strong, was not sufficient; and Sir William Scott, in The Robert, 3 C. Rob. Adm. 201, speaking of the asserted joint captors, says: "On this proof it is impossible to say that they have performed the task which the law imposes on them of bringing unequivocal, direct, and unsuspicious evidence of their claim." Again, in the same case, (page 195), he says, "Where no actual assistance is alleged, the presumption of law leans in favor of the actual captor."

The doctrine of constructive capture, limited and guarded as it was by these rules, still appears not to have found favor with the legal profession; and the courts themselves sometimes admit that it had not been sufficiently restricted and guarded. The Vryheid, 2 C. Rob. Adm. 16; The Financier, 1 Dods. 67; The Odin, 4 C. Rob. Adm. 325; La Furieuse, Stewart, Vice Adm. 179; Le Niemen, 1 Dods. 16; The Arthur, Id. 425; L'Etoile, 2 Dods. 107.

The change made by substituting signal distance for being in sight, by our statute of 1862, is far from being immaterial; and English decisions are not authorities to be implicitly followed. But when the reasons upon which they are founded are applicable, and commend themselves to our understanding, they are entitled to consideration, not only for their intrinsic force, but as having been adopted and acted upon by judicial tribunals of very great experience and intelligence.

Without going as far as the English courts, we may at least say that those who claim to share equally with the actual captors should be required to produce evidence of such character and weight as to satisfy the mind of the court, and render it reasonably certain that they were within signal distance. Reason and policy dictate that no part of the prize should be taken from those whose vigilance, energy, skill, or courage achieved the capture, to be given to others who contributed no assistance, and were so remote as to render it very doubtful whether a request for aid could have reached them, if aid had been desired.

Questions have heretofore arisen in this court upon the provisions of the statute respecting signal distance, but none in which the evidence was so multifarious and conflicting, or which required so close a scrutiny into the principles by which the court should be guided in analyzing, weighing and applying the evidence, and giving

a true construction and proper effect to this new provision of the law.

The first question that presents itself is, what signals are sufficient? It has been contended in this case, and in prior cases, that signals by guns or rockets answer the requirement of the statute. Without undertaking to decide that a code or system of such signals may not be invented and adopted, so as to answer the purposes of the law, it is sufficient to say that the evidence does not show that any such system has been established. This capture was made by one of the blockading squadron off Wilmington, N. C. It appears that the commanding officer on that station had given instruction to the vessels of the squadron, that, upon discovering a blockade-runner, a rocket should be thrown up in the direction in which she was going, and a gun fired to attract attention. This is the extent to which any particular meaning was attached to those acts. The direction of a rocket indicated the course of a blockade-runner. A gun was to be fired, but without any special significance, and having only its natural effect of arresting attention. The most that can be said is, that by these means notice was given that there was a blockade-runner going in a certain direction, but they were not signals by which there could be any intercommunication. There was no recognized mode by which a vessel, seeing a rocket and hearing a gun, could return any answer, even to the extent of making known the fact that they were observed. If a vessel should throw up a rocket or fire a gun under these instructions, it could not be construed into an acknowledgment of the notice; but the meaning would be that such vessel had discovered a blockade-runner taking a certain course, and wished to attract attention.

In the case of The Aries [Case No. 529], it appeared that the commander of the blockading squadron off Charleston, S. C., had given orders that a rocket should be thrown to indicate the direction in which a blockade-runner was going, and that, if two guns were heard in quick succession, it was the duty of the vessel hearing them to go immediately and ascertain the cause of the firing. This went somewhat farther than the instructions to the squadron off Wilmington. Yet, in that case, I held that no such system of signals by guns or rockets had been established as would meet the requirements of the statute.

Lanterns have been spoken of by several of the witnesses as being frequently used. But it is admitted that they cannot be seen as far as the Coston lights. It is unnecessary, therefore, to make any remarks respecting them. This capture was made at night, and the result is that the only signals which can be regarded in the present case are those denominated "Naval Night Signals," that is, the Coston lights.

The next inquiry is, from what part of the vessel must the signals be visible? Is it sufficient if they might be seen from the mast-head, and not from the deck? It is a great privilege to any vessel to be allowed to share in a prize which she has not actually aided in capturing. Such indulgence is not to be granted without good reason. It ought not to be enjoyed by any vessel, unless she is within such distance as gives assurance that she would render actual assistance if called upon, and could afford encouragement to the captors, by their knowing that such assistance was at hand.

On board of a vessel at sea, there is at all times kept a watch on deck, composed of some of the officers and a considerable part of the crew, some of whom are specially designated as the look-out, and all are required to be vigilant. In a well-ordered ship, a light exhibited in any part of the horizon would be immediately discovered and attended to. A man may indeed be sent aloft, and stationed there as a look-out, but this at night is exceptional; and if by such means a signal should be discovered, which could not be seen from the deck, still it would not avail unless there should also happen to be a man at the mast-head of the capturing vessel, who should see the signals made in response. The possibility that signals might be interchanged in such manner does not answer the purpose of the statute. It does not give adequate assurance that, if the capturing vessel had shown the usual Coston lights, they would have been seen and read, or, if seen, that the answering signals, made in the usual manner, would have been discovered and understood by the capturing vessel so as to give her that encouragement and confidence which the knowledge that assistance was at hand might inspire.

I am not speaking of a case in which signals are actually interchanged, and seen and understood by means of persons at the mast-head of both vessels. I have no occasion to consider and express an opinion upon such a state of facts. In the present case, no signals were made. In England, a vessel being visible from the mast-head only, although actually seen from that position, is not deemed to be in sight so as to be entitled to share in the prize.

Another question has been presented. Some of the witnesses from the petitioning ships say that, under the most favorable circumstances, the Coston lights may be seen nine miles, and thence infer that signal distance always means that number of miles.

This is founded on the assumption that signal distance is a certain number of miles, and is applicable to all cases, without regard to the state of the atmosphere or other obstructions in the particular instance. This is an error. The statute confers the right of sharing in the proceeds upon any vessel of the navy which "shall be within signal

distance of another making a prize;" that is, if she be within signal distance of that vessel at that time. If the state of the atmosphere, from fog or haze, for example, is such as to prevent signals being seen, neither the language nor the reason of the statute is satisfied. Of what benefit would it be to a capturing vessel that another should, without her knowledge, be within a certain number of miles, but to which she could make no communication, and from which she could receive no encouragement, by promise of assistance or otherwise?

The question, then, is reduced to this: If, at the time of making this capture, the Niphon had made signals by the Coston lights in the usual manner, were these petitioning vessels, or was either of them, within such distance that such signals could then have been seen and read from her deck or top-gallant-forecastle?

The Niphon was one of the blockading squadron off Wilmington. The line of the coast there lies nearly north and south, the sea being to the eastward.

On the morning of the 9th of November last, the Niphon was a short distance from the shore; and at about twenty-five minutes past five o'clock, when it was so dark that a ship could be seen but a short distance, she discovered a vessel running down the coast, that is, from north to south, very near to the beach. The Niphon immediately steered toward the shore, in a direction that would cut her off, and fired at her from the bow, and, when quite near, from the broadside also. Very soon after the Niphon had taken a direction to cut off the strange vessel, it was discovered that the latter had altered her course to the eastward, and was aiming to run the Niphon down, by striking her amidships. Both vessels were at full speed. The commander of the Niphon immediately ordered her helm hard to starboard, by which her course was changed so as to be nearly in the same direction as that of the other vessel. They struck each other at the bows. A portion of the Niphon's crew immediately jumped on board the other vessel, and carried her by boarding. This was from ten to fifteen minutes only from the time she had been first discovered. She proved to be the Ella & Anna, an iron steamer of about a thousand tons burden, with a full cargo. She had forty pounds of steam on, and several hundred pounds weight on her safety valve, and must have been going at her utmost speed. The Niphon was a steamer of five hundred tons burden, with an iron frame and wood planking. If she had been struck on her side, nearly at right angles, as the enemy had intended, she must have been so seriously injured that she would probably have gone down in a few minutes, and there was but little chance for any of her crew to have survived.

As before stated, this capture was made at night. No signals were made; and it is not contended that either of the petitioning ships was in sight, or that there is any direct evidence in support of their claims. They rely wholly upon circumstantial evidence. They undertake to establish certain facts, and from them to deduce the conclusion that their vessel was in the requisite proximity.

They have attempted to do this in two modes. First, by ascertaining the position of each vessel at the time of the capture in relation to certain monuments or landmarks on the coast, and then the distance between such monuments, and thence to infer the distance of the vessels from each other. The other mode is by first ascertaining the time of the capture, and then the time when the capturing vessel was afterwards first seen, and at what distance, and how far and in what direction each vessel had moved in the interval between the capture and their first coming in sight, and, from these premises, to infer the distance between the vessels at the time of the capture.

The learned judge then proceeded to a minute and careful analysis of the evidence of forty witnesses and of the charts. He pronounced the testimony very conflicting in many respects, especially in respect to the exact time when the chief events occurred, and the estimated distances at which objects were seen. The result to which he arrived on the chief points of fact may be stated thus: The capture was made before daylight, on the 9th November, at 5.35 a. m. The place of the capture was off Masonborough inlet, or, perhaps, a little to the north of it. The distance from Masonborough inlet to New inlet is at least fifteen and one-quarter miles. The wrecks of the Venus and Hebe were seven and one-quarter miles south of Masonborough inlet, and, of course, eight miles north of New inlet. Fort Fisher is on the site of the old light-house; at the north entrance of New inlet. The day rendezvous of the fleet was at a buoy which was five miles S. E. by E. ½ E. from Fort Fisher, and fifteen miles south of Masonborough inlet. As to the Shenandoah, the result of all the testimony is, that she was five miles from the shore, and, on the most favorable view to her, at least eight miles south from Masonborough inlet, at the time of the capture. None of the petitioning vessels were as near as the Shenandoah. None of the petitioning vessels knew of the capture until they saw the Niphon and her prize at daylight. The Niphon fired seven guns at the chase, before the capture. These were thirty-two-pounders and a rifled twenty-pounder. There was a fresh breeze from the north; yet the reports of none of these guns were heard by any of the petitioning vessels, nor were their flashes seen. The steamer Daylight seems to have been as far south as New Inlet bar, and the Tuscarora at least two miles south of the buoy, and the Houqua a

considerable distance south of the Shenandoah, at daybreak. If, therefore, the Shenandoah was not within signal distance, none of them were.

(The remaining question was, how far the Coston signals can be seen at a time like this. On that point, each party selected three officers of the navy, as experts, and the testimony of the six was before the court, and fully considered. The important question put was, "Suppose the signals given to consist of two or three colors, and to report several numbers in succession: please to state how far, under the most favorable circumstances, such signals can be read and understood with satisfactory exactness." The learned judge said the experts differed as much as the parties. Three of them limited the distance to between four and five miles. One put it at six miles, and two at between eight and ten miles. The three who had had the most experience of the Coston signals, put the distance at four and one-half, five, and six miles, as the extreme. On the whole, the judge was of opinion that it was not satisfactorily established that the Coston signals could be read and understood, under the most favorable circumstances, at a distance of eight miles, and that was the least distance at which any of the petitioning vessels was proved to have been. He gave no opinion at what less distance they could be read.)

The result of the testimony is that the Shenandoah, the nearest of the petitioning vessels, was at least eight miles distant. No signals were in fact made. It is not established that the Coston signals can be intelligently read at that distance under the most favorable circumstances. Moreover, the circumstances were not favorable. The witnesses from the Shenandoah, as well as the Niphon, show that there was a haze along the horizon, which the experts say contracts the distance for intelligent vision of colored lights.

The petitions of the Shenandoah, Daylight, Tuscarora, and Houqua to share in the prize are rejected; and the net proceeds are adjudged one-half to the Niphon, and one-half to the United States.

NOTE. See The Anglia [Case No. 391]; The Cherokee [Id. 2,640]; The Aries [Id. 529]; The St. John [Id. 12,225].

The construction put upon the act of 1862 by the decision in this case has been adopted by the act of 1864, c. 174, § 10 (13 Stat. 309). This provides as follows: "All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize; and, in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture."

ELLA FRANKLIN, The. See Case No. 2,160.

Case No. 4,369.

The ELLA HAND.

SMITH et al. v. The ELLA HAND.

[2 Adm. Rec. 24.]

Superior Court, S. D. Florida. July 8, 1837.

SALVAGE.

[The question whether the crew of a grounded vessel could have got her off without assistance is important as tending to show the degree of peril she was in, and the proper amount to be awarded as salvage.]

[In admiralty. Libel for salvage by Elliot Smith and others against the bark Ella Hand and cargo, S. H. Pillsbury claimant. Decree for libellants.]

Wm. Marvin, for libellants.

Adam Gordon, for respondents.

WEBB, J. The only question presented in this cause about which there is an entire disagreement in opinion between the parties, is whether or not the respondent, unassisted by others, could with his own company have saved his ship, and part of her cargo, by throwing overboard the residue. This is a question of much importance in a case like this, because it is only in its correct solution that we can acquire a knowledge of the actual danger to which the property was exposed, and consequently the real value of the services rendered in preserving it. On the part of the actors the witnesses are apparently of the opinion that, from the roughness of the sea and the difficulty of getting out and planting large anchors, in a proper position, Captain Pillsbury could not have saved his ship or any part of her cargo, without assistance, or if by possibility, he could have gotten his ship off the rocks before she had bilged, it must have been done at a sacrifice of the greater portion of her cargo, if not of the whole.

On the other hand the respondent and his mate (both of whom were sworn as witnesses in the cause) are decidedly of the opinion, that the ship's company could have relieved her by throwing overboard a part of the cargo, in a shorter time than was occupied by the salvors; and that in doing so it would not have been necessary to have sacrificed a greater portion of her cargo than was taken out by them. Whether or not the ship could have been gotten off the rocks by her own company without sacrificing a larger portion of her cargo than was taken out by the libellants, is a question which cannot now be determined. The witnesses who saw the transaction cannot agree about it, and it is therefore impossible for the court to form any correct opinion on the subject. Or whether the respondent would have commenced throwing overboard his cargo in sufficient time to have saved his ship, had he not received assistance, is also a question which this court cannot decide. But of one thing it is fully satisfied; and that is that Captain Pillsbury

with his own crew and the assistance of his passengers might have carried out anchors, and lightened his ship in time by throwing over cargo, to have enabled him to haul her off the rocks, before the weather was such as materially to have endangered her. To this opinion the court would have arrived from the testimony of the witnesses on the part of the libellants, even had there been no contrariety of evidence coming from the other side; for notwithstanding they all stated that they did not believe she could or would have been gotten off had no assistance been afforded, still the reasons assigned for this belief and the details of the circumstances which led to it produced on the mind of the court a contrary impression. They admitted that but one of the ship's hatchways was used by the sailors in taking out the cargo—that the ship's company was sufficiently large to have worked that one hatch—that the cargo was of a character not difficult to handle, either from bulk or weight, and might have been handled by the crew, and that it would not have occupied more time in taking cargo out and throwing it overboard than in putting it on the decks of the vessels employed to receive it.

They allege however that it would have been impossible for the ship's company to have worked at the hatchway, and at the same time to have carried out the anchors, which were necessary to prevent her going further on the reef as she was lightened, even if they could have carried out the anchors at all, which some of them doubted. But admitting that they could not have carried on both these operations at the same time, they still had sufficient time to have performed them singly and to have relieved the ship before the weather became bad; for it will be recollected that the weather did not change for the worse until about 18 hours after the ship first floated; and that according to all their opinions six hours would have been ample time for them to have taken out their anchors, provided it could have been done by them at all; and that with proper management any anchor belonging to the ship might have been taken out in her long-boat, the court is perfectly satisfied.

The court is aware that masters of vessels are generally not disposed to sacrifice any portion of their cargoes by throwing them overboard so long as a slight expectation or even hope exists of saving the property without; and hence it is they very often delay this operation until it is too late, to be available to them. This might have been the case with Captain Pillsbury. He might have put off a resort to this last and unpleasant alternative, under the hope of extricating himself by other means, until the time had passed by when it would have been of any service to him; and in that way (without assistance) might have lost his ship. But the court repeats that it is fully satisfied, had he resorted to this means of preservation in time, he might have saved his ship and a part of his cargo, without the assistance of the salvors; and therefore, without that assistance, it was not, as is most frequently the case with vessels stranded upon this reef, necessarily doomed to destruction.

The services rendered by the libellants, however, in this case have been of much importance, for it is conceded that had their assistance not been given much of the cargo must have been thrown overboard, and would have been totally lost. To the entire extent of the value of that portion of the cargo, therefore, have they rendered services to its owners, even if it were known that the ship and residue of the cargo were not in danger. What proportion of it must have been thrown over for the preservation of the rest is not known, but it is admitted by all that at least the quantity taken out by the salvors must have been sacrificed, if not a larger proportion. Under all the circumstances therefore the court is of the opinion that the sum of $7,500 should be decreed to them as a compensation for their services. That sum is less than the appraised value of the goods which were taken out, and which viewed in the most favorable light must have been lost to the owners but for their assistance, independent of the relief which their presence and exertions afforded from the anxiety which must necessarily have been felt, growing out of the exposed condition of the entire property and the responsibility which existed of its total loss; and independent also of the probability that a large portion must have been sacrificed had Captain Pillsbury been left to his own resources for its preservation.

The ship and cargo have been appraised at $33,200. This appraisement has been made in reference to the extraordinary pressure which operates in the money market, and is even deemed low under these circumstances; and yet the salvage and expenses decreed in the case will be less than 25 per centum upon that appraisement, a sum which the court believes not too high for the services rendered and the value of the property involved.

Wherefore it is considered, adjudged and decreed, that after giving due notice of the time and place of sale, the marshal proceed to sell on Tuesday, the 11th instant, at the warehouse of F. A. Browne in Key West, for cash, at public outcry, to the highest bidder, so much of the cargo of the bark Ella Hand as will be sufficient to raise the sum of seven thousand five hundred dollars and the costs of this suit, and that he pay the same into the registry of the court; and that he then restore the said bark and the residue of her cargo to the respondent Pillsbury, for and on account of

all concerned and interested in the same. And it is further ordered that the clerk, after receiving the said money, pay it over to those interested in the same as salvors in this case in full compensation for their services rendered to the said bark and cargo and to others entitled thereto for the costs of this suit.

Case No. 4,370.

The ELLA WARLEY.

[Blatchf. Pr. Cas. 204.][1]

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

PRIZE — PROPERTY TAKEN FOR THE USE OF GOVERNMENT—APPRAISAL.

1. The practice of this court is settled, that where the captors desire to take to their own use the property captured as prize, its value is to be ascertained by sworn appraisal, and deposited in court, or in the treasury, subject to the order of the court.

2. The court prefers this method to that of taking bail, and regards a sworn appraisal as a more satisfactory mode of ascertaining the value of prize property than an auction sale.

[In admiralty. The steamer Ella Warley was captured April 24, 1862, by the United States steamer Santiago de Cuba, and was libeled as prize June 4, 1862. The cause is now heard upon the prayer of the district attorney for an order that certain property found in the captured vessel, consisting of arms and munitions of war, be transferred to the captors, as representatives of and for the use of the government, on deposit of a sum fixed by sworn appraisal as the value of such property.]

BETTS, District Judge. This case embraces the exceptions raised in the last case to the authority of the court to order an appraisal of prize property, and its transfer to the libellants. The decision of that point, is, accordingly, controlled by the previous case of The Memphis [Case No. 9,412].

A further question is made and discussed, relating to the powers of the court to act upon the final disposal of the property otherwise than by means of a judgment of forfeiture, and a sale thereof by execution. It is insisted that the claimants are entitled to have the value of the property tested and ascertained by the form of a judicial and public sale. The prerogative right of the captors to take the property seized to their own use is modified only insubserviency to the modern law of war, that, in case a judicial confiscation of it is not secured, the captors are responsible over for its value to the lawful proprietor. That responsibility may be secured to the claimant by bail, in court, for its worth, or other equivalent protection to such contingent right. The usage of this court is, to place the value in deposit in the registry of the court, or in the United States treasury, subject to the authority of the court, to be restored and paid to the claimant in case of the acquittal of the property, in place of relying upon individual undertakings or responsibilities therefor. The court is not convinced of the greater propriety or certainty of resorting to an auction sale of property as a means of ascertaining its reasonable value, particularly when both parties stand in court alike asserting a legal ownership to it. That method may approach nearer to the worth of an article which possesses no steady mercantile value, and is subject to sudden fluctuations, under speculative excitements or emergencies, the condition of a state of peace or war, in general trade or local transactions, producing, at times, sudden alterations in the demand and supply. We have witnessed such changes in the progress of the present war; but the fitful state of the market at any of these periods would measure but imperfectly the worth of the commodity, as an article of trade and merchandise. Particularly, the salableness at auction may readily, by dishonest collusions, be augmented or depressed, so as to take from such a sale all just evidence of the transaction being one between vendor and purchaser, calculated to determine the value of the article between them. It appears to me that, in such a condition of things, the general judgment would confide in the honest valuation of discreet individuals, well acquainted with the subject, rather than the result of palpitating excitement at a public sale, in fixing the price which should be paid to the claimant, provided the government should be proved not to be the lawful owner of the property. There is high authority in support of the expediency of an auction sale to effect that end (The Euphrates [Case No. 4,546]; The Diana [Id. 3,876], and this preference, it is understood, is concurred in by the practice of the prize court in Pennsylvania. But all the decisions must rest on the same principle,—that it is competent to the government, through the agency of the courts, to take immediate possession and use of captured property, on guaranteeing, by bail or deposit, at its worth, the restoration of its value to its lawful claimants. It is, therefore, a question of expediency, addressed to the sound discretion of the court, whether that value shall be ascertained by auction sale, or by the appraisal of individual appraisers. In many instances, as where the prize cannot be brought into port, or the public necessities compel its instant appropriation or arrest, an appraisal affords the only method of fixing its value. That course has been repeatedly adopted by this court during the war, and I perceive no reasons for directing a public sale to that end, when an appraisal is feasible.

The method, therefore, of guaranteeing the interests of the claimants, through the pledge, by deposit, of a sum fixed by a sworn appraisal, I regard as superior to one by bail or col-

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

lateral security only, and to be preferred to an auction sale, as a criterion of the worth of the property taken.

The order prayed for by the district attorney is, therefore, granted.

[NOTE. Subsequently counsel for the claimants objected to the authority of the court to appraise the property seized prior to its condemnation, but this objection was overruled in Case No. 4,371. Afterwards, it appeared that the captured vessel was in such condition as to require constant pumping and precautions to preserve her from total loss, whereupon she was ordered sold. Case No. 4,372. At a hearing on the merits the vessel and cargo were condemned by the district court (Case No. 4,373), which decree was affirmed by the circuit court (Case No. 4,374).]

Case No. 4,371.

The ELLA WARLEY.

[Blatchf. Pr. Cas. 207.] [1]

District Court, S. D. New York. Sept. 4, 1862.

PRIZE — APPRAISAL AND TRANSFER OF CAPTURED PROPERTY TO GOVERNMENT PRIOR TO CONDEMNATION—AUTHORITY OF COURT.

The authority of the court to appraise property captured as prize, and to transfer it to the use of the government before condemnation, at its appraised value, maintained.

[In admiralty. The steamer Ella Warley and cargo were captured as prize, and libeled June 4, 1862. At a preliminary hearing the court ordered that the property, consisting of arms and munitions of war, be appraised, and that the same be turned over to the government on deposit of the appraised value prior to the decree of condemnation. The cause is now heard on objections to the authority of the court to make this order.]

BETTS, District Judge. In this case an order for the appraisal of the cargo of arms had been given in behalf of the United States, but the appraisal made by the appraisers having been withdrawn, the United States attorney gave notice to the proctor for the claimants that he would move for the appointment of new appraisers.

The objections taken by the counsel for the claimants to the authority of the court to appraise the property seized, and to transfer it to the United States at the appraised value, were renewed on this motion; and the position was restated that the property could only be properly disposed of by the court by public auction.

By strict law, enemy property captured by a belligerent in time of war becomes the property of the capturing power, and may be appropriated by it to its own use. Wheat. Int. Law, c. 2, § 5. But, in relation to property captured as prize, there has been universally and immemorially recognized by the maritime law of nations, an established method of determining, through the agency of courts of justice created by the capturing power, whether the capture be or be not lawful prize. Chit. Law Nat. c. 3. The courts of the United States adopt the law of nations in its modern state of purity. Ware v. Hylton, 3 Dall. [3 U. S.] 199, 281. The prize law is administered in the United States conformably to principles recognized in the English jurisprudence at the time of the adoption of the constitution. Jennings v. Carson, 4 Cranch [8 U. S.] 23, 24, note; Brown v. U. S., 8 Cranch [12 U. S.] per Story, J., 137, 139. The practice in the United States courts under the confederation, and in the tribunals of most maritime nations, is of similar purport and effect. 5 Wheat. Append. [18 U. S.] 52; Brown v. U. S., 8 Cranch [12 U. S.] 130, 131, per Story, J. In England, the prize vests in the lord high admiral, and not in the crown. 2 Brown's Civ. & Adm. Law, 56. In the United States it becomes the property of the government (The Dos Hermanos, 10 Wheat. [23 U. S.] 306), but in each country there are special regulations, under the prize acts, qualifying the public interest in prizes, and regulating the distribution of their proceeds.

Both parties are substantially actors in prize suits, both demanding from the court the thing in contest (Jennings v. Carson, 4 Cranch [8 U. S.] 2), and each has power, after an issue, to carry out the procedure to final judgment. Yet the captors are effectively the parties coming before the court, primarily, as owners and possessors of the property. They demand a judgment, confirming the incipient right acquired by seizure, and rendering it an absolute ownership at law. The decree would thus become one of transfer and conveyance to the captors, of the property arrested, by confiscation; but, with a view to ulterior rights in the value seized, it being partible among the captors, the property is not assigned, by judgment, to the captors in kind, but, under the rules of procedure in this court, is converted into money, and the money is distributed in aliquot shares.

Judge Story, in his summary of the law of prize, seems to have given to the decision in The Copenhagen, 3 C. Rob. Adm. 178, an operation beyond the range of that case. The case only related to the legal rights of a claimant, and had no reference to those of the captors (1 Wheat. Append. 502, note); and in two decisions rendered by the circuit court of the United States in Massachusetts (The Argo [Case No. 516]; The Diana [Id. 3,876]) the denial of the right to bail captured property was made only as against the claimants, and the ruling was based upon the case of The Copenhagen, which was supposed to be so limited by Sir William Scott. The privileges or restrictions as to captors are not mentioned in that case, and it appears that both by the English and American practice, a delivery of prize property by sale and bail is permitted in cases of reasonable necessity. The Falcon, 6 C. Rob. Adm. 194; The Ara-

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

bella [Case No. 501]; 2 Wheat. Append. 51–53. It is not material to this proceeding which interpretation of the rule of bailing prevails, only so far as it touches the rights of parties prosecuting as lawful possessors and owners of property under arrest. No decision questions the competency of a prize court to bail or sell prize property before condemnation, which is in a perishing or perishable state, reserving the proceeds to be adjudicated to the true owner. Such power is just as absolute as that of a direct appropriation of it by the captors, subject to like conditions, and it must necessarily result that it is to be executed by the court under advisement, according to its judgment of the most expedient method of performing the duty. In numerous cases which have already occurred, and been heretofore acted upon by this court, property captured in the Gulf of Mexico, and otherwise distant from this port, has been adjudged to the use of the United States, on report of the naval commander making the capture, and of a sworn appraisement of its value; and in those instances it would be physically impracticable to subject the property to an auction sale, or to delivery on bail.

I retain the conviction that the government possesses the legal right of claiming a direct appropriation to public use of captured property, and that the courts are bound to carry such demand into execution, according to the usual course of procedure before it, and that the course proposed by the order moved for in this suit is allowable and proper.

Order accordingly.

[NOTE. Afterwards it appeared that the captured vessel was in such condition as to require constant pumping, and precautions to preserve her from total loss, whereupon she was ordered sold. Case No. 4,372. At a hearing on the merits the vessel and cargo were condemned by the district court (Case No. 4,373), which decree was affirmed by the circuit court (Case No. 4,374).]

Case No. 4,372.

The ELLA WARLEY.

[Blatchf. Pr. Cas. 213.] [1]

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

PRIZE—SALE OF VESSEL IN PERISHING CONDITION.

[A sale of the prize will be ordered when it appears that her condition is such as to expose her to great injury, if not immediate total loss, and when the claimant's proofs and objections only lead to the belief that she may be protected or wholly saved by a more vigilant care, and particularly by pumping her watchfully, which would require expenditures not within the authority or means of the marshal or prize commissioners.]

[In admiralty. The Ella Warley and cargo were libeled as prize, and an interlocutory decree rendered, ordering that the captured property, consisting of arms and munitions of war, be transferred to the government on deposit of the appraised value. Case No. 4,370. The authority of the court to make this order was sustained in Case No. 4,371, and the cause is now heard on motion by the district attorney for the sale of the vessel on the ground that she is in a perishing condition, and liable to a total loss if not cared for constantly.]

BETTS, District Judge. The motion by the United States district attorney to sell the vessel, because she is in a perishing condition, must, on the evidence before the court, be granted, for that shows her condition to be one eminently exposing her to great injury, if not to immediate total loss. The claimant's proofs and objections only lead to a belief that she may be protected, if not wholly saved, by a more vigilant care bestowed upon her by her keepers, and particularly by pumping her watchfully, and perhaps by other acts of precaution. These must necessarily require expenditures, and the marshal or the prize commissioners, as legal custodians of the prize, pending her keeping in court, are supplied with no means or authority to cause such expenditures to be made. Justice to both parties claiming the vessel demands that a sale of her be ordered. If the claimants were to intervene and offer bail for her value, the objection to her sale would rest upon sounder grounds, but all proffers of such extraneous aid to her preservation by either party leaves the case open for an application, by one claiming a legal right in her, to require a sale of the perishable thing, and have its proceeds put in safety. This is consonant to the ordinary practice in admiralty in suits in rem. Sale ordered accordingly.

[NOTE. At a hearing on the merits, the vessel and cargo were condemned by the district court (Case No. 4,373), which decree was affirmed by the circuit court (Case No. 4,374).]

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

Case No. 4,373.

The ELLA WARLEY.

[Blatchf. Pr. Cas. 288.] [1]

District Court, S. D. New York. Dec. 24, 1862.[2]

PRIZE—VIOLATION OF BLOCKADE—MUTILATION OF LOG-BOOK.

1. The mutilation of the log-book of a vessel is sufficient cause for her condemnation as prize if she was seized under circumstances which placed it in her power to violate a blockade, unless the mutilation is clearly and satisfactorily explained by the proofs.

2. The vessel attempted to violate the blockade. She was running without any log. No bona fide purchase of the vessel by her neutral claimant from her enemy owner is shown. She violated the blockade on the voyage next preceding the one on which she was captured. She was captured while attempting to violate the blockade. Vessel and cargo condemned.

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

[2] [Affirmed in Case No. 4,374.]

[In admiralty. The steamer Ella Warley and cargo were libeled as prize, and upon preliminary motion an order was made that the cargo, consisting of arms and munitions of war, be transferred to the government upon deposit of the appraised value. Case No. 4,370. The authority of the court to make this order was confirmed in Case No. 4,371, and afterwards an order for the sale of the vessel was made on the ground that she could only be preserved by constant watchfulness on the part of the officers in charge of her. The cause is now heard upon the merits, being proceedings for condemnation and forfeiture.]

BETTS, District Judge. This steamer was captured April 24, 1862, at sea, by the United States steamer Santiago de Cuba, and was sent to this port for adjudication, and was here libelled June 4, 1862. A claim was interposed June 17, by the British acting consul at this port, in behalf of British subjects as owners of the vessel and cargo, and the claim was supported by the test oath of that officer. Various intermediate proceedings and interlocutory orders, not now necessary to be detailed, were subsequently had in the suit, respecting the sale of the vessel and the delivery of the military stores and equipments on board of her to the use of the United States. The cause was brought to hearing on its merits before the court at the close of this term, and was argued by counsel for the libellants. The counsel for the official claimant objected to the maintenance of this action, on the ground that the case is not within the jurisdiction of the court, and that the vessel is not liable for misconduct in any antecedent voyage. The counsel for the libellants excepted to the legal right of the claimant to contest the cause in court, and insisted that the suit on trial was without lawful defence by any party in interest.

A provisional register of the vessel, which was built at Baltimore, was issued to Edwin Charles Adderly, at Nassau, N. P., December 18, 1861, and was found on the vessel when captured. There were also found a clearance for St. John, April 24, 1862, stating the cargo on board; bills of lading and letters of instructions to their agents, by Adderly & Co., in respect to portions of the cargo, and by other shippers in respect to other portions of it, addressed to the port of St. John; and a roll of the ship's company and shipping articles, from Charleston, S. C., to Nassau, for a voyage from the former port to the latter, apparently in the months of March and April, 1862, preceding the present voyage; and those papers were produced in proof from the prize.

Numerous leaves and pages of the log were found to have been cut or torn from the front part of the book, leaving no other entry than an obscure heading to the second remaining leaf, seeming to import "Str. Ella, from Nassau, bound to St. John." The front face or binding of the book is marked, in handwriting and print, "Nassau, N. P.—Log-book of Str. Ella Warley, Capt. Alexander Swasey." This condition of the log-book, evidently a designed mutilation, in fraud of the rights of the libellants, under the law of nations, will of itself afford adequate cause for the condemnation of the vessel and cargo, if the vessel was seized under circumstances which placed it in her power to violate a blockaded port, unless those suspicious appearances are clearly and satisfactorily explained by the proofs. The Two Brothers, 1 C. Rob. Adm. 131; The Pizarro, 2 Wheat. [15 U. S.] 227.

Swasey, the master of the vessel, was a citizen of Charleston, S. C., and resided there with his family. The vessel was captured about the 25th of April, and about in latitude 27° 40′ north, and longitude 76° 50′ west, as the master testifies, according to his recollection. He says, on his examination, that the vessel under his command sailed with a cargo of cotton, in December or January last, from Charleston to Nassau; there took in a return cargo and carried it to Charleston; discharged it there, then took in another cargo of cotton and went again to Nassau, and discharged it there; and received on board at Havana, part of the lading, and afterwards filled up at Nassau, making up the cargo seized with the vessel, that this cargo was consigned to W. R. Wright, at St. John, whom he, the master, does not know; that the cargo taken by the vessel from Nassau to Charleston was also consigned to Wright, but was taken possession of in Charleston by Lafitte, who said that Wright was his agent; that he, the master, does not know that this cargo was to be delivered to Lafitte in the same way, and cannot swear it was not to be; and that he knew that the port of Charleston and other southern ports were blockaded, and also knew so on the former voyages he made to and from the same. The mate testifies that he heard on shore at Nassau, before commencing the voyage, that the vessel was to run the blockade of the southern ports, and he believes that the vessel would have run into a blockaded port if she could have prosecuted her voyage. The chief engineer is of the same impression. He does not know where the vessel was bound, but he understood she was cleared for St. John. The first assistant engineer testifies to the same effect. He says that the master told him the vessel was bound for St. John, but that all on board had good reason to believe they were going to Charleston. The second assistant engineer says that, on the previous voyage to Charleston from Nassau, the steamer was cleared and bound, as in this instance, for St. John, N. B. Harrison, a fireman, testifies that he was told by the master and others that the vessel was bound to St. John; that that was the only reason

he had for thinking her destination was for St. John; that the vessel was laden with cargo much needed in the southern states; and men were talking about their families in Charleston, and from that he sometimes thought she was going to a southern port.

From a review of the evidence, written and oral, I think there results a violent suspicion that the voyage in question was set on foot and prosecuted mala fide, with intent to make a return voyage directly to the port of Charleston, and that the vessel was, when captured, making the attempt to fulfill that purpose. She was running without any log, leaving the coverings of the book to show its mutilation and her destination, after the voyage had commenced. The preparatory surroundings were in exact similitude to those employed by the same owner and master on a previous voyage of this vessel to Charleston from Nassau. The evidence does not establish a bona fide purchase of the vessel by the neutral claimant. He shows no valid bill of sale given in support of the title, and he replaced the title in the hands of the vendor's agent, with power to resell, under conditions indicating that the consideration money stipulated on this purchase was not to pass from the present claimant, but was to remain substantially with the alleged purchaser, and might be reclaimed by him on returning the vessel to the assumed vendor. I think, also, that this voyage on which the capture was made was designed to be, and was substantially, the next voyage after the one on which the vessel escaped by violating the blockade of Charleston, as this voyage did not begin from Havana, where the vessel touched, but at Nassau. This case, therefore, is fairly within prior decisions of this court (Upton, Prize Law, 288–291), founded on doctrines sanctioned by Sir William Scott (The Christiansberg, 6 C. Rob. Adm. 376; The Randers Bye, Id. 382, note).

A decree of condemnation and forfeiture of the vessel and cargo is ordered.

This decree was affirmed. on appeal, by the circuit court, Case No. 4,374.

Case No. 4,374.

The ELLA WARLEY.

[Blatchf. Pr. Cas. 648.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—VIOLATION OF BLOCKADE—MUTILATION OF LOG-BOOK — FALSE DESTINATION ON VESSEL'S PAPERS.

1. Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

2. Mutilation of the log-book and destruction of papers.

3. False destination on the papers of the vessel.

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

[In admiralty. The steamer Ella Warley and cargo were libeled as prize, and upon preliminary motion an order was made that the cargo, consisting of arms and munitions of war, be transferred to the government upon deposit of the appraised value. Case No. 4,370. The authority of the court to make this order was confirmed in Case No. 4,371, and afterwards an order for the sale of the vessel was made, on the ground that she could only be preserved by constant watchfulness on the part of the officers in charge of her. At a hearing on the merits a decree of condemnation and forfeiture of the vessel and cargo was entered by the district court (Case No. 4,373), and is now heard on appeal from that decree.]

NELSON, Circuit Justice. This vessel was captured about one hundred miles north of the island of Abaco, one of the Bahamas, east of the Gulf Stream, on the 24th of April, 1862, by the war steamer Santiago de Cuba. The cargo consisted principally of arms, Enfield rifles, Austrian rifled muskets, and other muskets, lead, saltpetre, &c. The vessel belongs to E. Adderly, of Nassau, a British subject, and, probably, the cargo also, although this is left in some uncertainty. The vessel had been recently purchased from a citizen of Charleston, South Carolina, after running the blockade of Charleston two or three times, between that city and Nassau, N. P. She left the latter place in ballast, for Havana, where she took in a part of her cargo. She then returned to Nassau, completed it there, and then sailed, according to her papers, for St. John's, N. B., and was captured some twenty-four hours out, as above stated.

The master, A. G. Swasey, states that the vessel was cleared at Nassau for St. John's, and that the cargo was consigned to W. B. Wright, of that place, in the same way that previous cargoes had been consigned, when he ran the blockade of the port of Charleston. R. W. Lockwood, the pilot, says that he cannot say where the vessel was bound after leaving Nassau, and that he does not know where she was bound. He further says: "I never heard nor asked any question as to where we were bound. The master, to the best of my knowledge, was the only one who knew where we were bound." He also says: "I think the last voyage began at Nassau, N. P., but I don't know where it was to have ended." And again: "At the time we were taken we were steering our course about north half west, in order to get into the Gulf Stream, and we were not steering to any particular place." Again: "I don't know whether or not we were bound to that port, (Charleston, South Carolina,) on the voyage during which we were captured."

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

[2] [Affirming Case No. 4,373.]

It is remarkable that the pilot should be thus in doubt and uncertainty as to the course of the vessel in her voyage from Nassau, and as to her destination. If her course and destination were for St. John's, he was, of all persons on board the vessel, the most likely to have been advised of it. The uncertainty leads to strong suspicion as to the ostensible voyage. The log-book was mutilated after the capture, or about that time, together with other papers. It is urged, that the only part destroyed was that which related to the former voyages in violation of the blockade of Charleston. But the only evidence of this is that of the master, who gave the order to burn the papers. His testimony on this subject is not entitled to full credit.

The whole of the proofs in the case, which I have attentively studied, appear to me to lead to the conclusion that the port of St. John's, N. B., as in former voyages of the vessel from Nassau, was used, simply, as a pretext to cover a voyage to Charleston, in violation of the blockade of that port, and that the destination of the vessel was in reality to that port at the time of the capture. I affirm the decree condemning the vessel and cargo.

Case No. 4,375.

The ELLEN.

[4 Blatchf. 107.][1]

Circuit Court, S. D. New York. Sept. 25, 1857.

APPEAL IN ADMIRALTY — NOTICE TO PROCTOR OF ADVERSE PARTY—PRACTICE — ACT OF MARCH 3, 1803.

1. On an appeal to this court from a decree of the district court, in admiralty, no citation is necessary, but only a written notice by the proctor to the proctor of the adverse party.

2. The 2d section of the act of March 3, 1803 (2 Stat. 244), made no change as to the mode of practice in bringing such an appeal.

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

In admiralty. This was a libel in rem, filed in the district court, by the United States, against the brig Ellen. There was a decree by that court and an appeal to this court. No citation was issued on the taking of the appeal, and a motion was now made to dismiss the appeal for want of such citation.

Philip J. Joachimssen, Asst. Dist. Atty., for libellants.

Charles Donohue, for claimants.

NELSON, Circuit Justice. The question presented, in this case, is whether, on an appeal to the circuit court from a decree of the district court, in admiralty, a citation is necessary, as is required in the case of a writ of error. The appeal is regulated by the rules and practice of the two courts, which do not require a citation in the usual form, but only a written notice by the proctor to the proctor of the adverse party.

The 21st section of the judiciary act of 1789 (1 Stat. 83), provided for appeals in admiralty from the district court, but made no provision for a citation. This section was amended by the 2d section of the act of March 3, 1803 (2 Stat. 244), which reduced the amount necessary to the right of appeal, but made no change as to the mode of practice in bringing it. On a careful examination of that act, I am satisfied this is the true construction of the 2d section, so far as it applies to an appeal from the decree of the district court. There are other clauses applicable to an appeal from a decree of the circuit court to the supreme court, which require the usual citation.

The motion to dismiss the appeal is denied.

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

ELLEN, The (CLARK v.). See Case No. 2,819.

ELLEN E. BORKER, The. See Case No. 6,330.

ELLEN HARDY, The (SANDERS v.). See Case No. 12,293.

Case No. 4,375a.

The ELLEN HOLGATE.

[8 Leg. Gaz. 44.]

District Court, D. Delaware. Nov. 12, 1875.

SALVAGE—ASSENT TO TERMS OF SALVORS — RATIFICATION — CONTRACT FOR SALVAGE SERVICE—VALUE OF VESSEL—ELEMENTS OF A MERITORIOUS SALVAGE SERVICE.

1. Where the master of a vessel in distress accepts the services of salvors, and permits them to render assistance under the impression that their terms have been assented to by him, he cannot afterwards repudiate those terms, in the absence of evidence that they were compulsory or unconscionable.

2. Where there is doubt whether an offer to render a salvage service upon certain terms was accepted, that doubt is removed by subsequent assent, ratification, and acquiescence.

3. Where it appears that a contract for a salvage service was entered into fairly, without any compulsion or taking undue advantage to make an unconscionable bargain, it should not be disturbed, especially if the amount agreed to be paid does not materially vary from what the court would have awarded, had there been no contract.

4. In estimating the value of a salved vessel for the purpose of fixing a salvage award, the court will adopt as the standard the value of the vessel to the owners for the purposes of repair. A true result is reached by deducting from the value of the vessel, just before the collision, the cost of repair.

5. What constitutes elements in a meritorious salvage service.

In admiralty.

Charles G. Rumford and Henry Flanders, for libellants.

Benjamin Neilds and J. Warren Coulston, for respondents.

BRADFORD, District Judge. On the third of March, 1875, the schooner Ellen Holgate,

of about two hundred and fifty tons burthen, was run into and sunk in the Delaware bay, about two miles below Reedy Island light-house, by the steamer Illinois, both vessels coming up the bay at the time. The injury received was a very severe one, the schooner sinking almost immediately from the effect of the opening made in her hull by the bow of the Illinois. At this time the weather was very inclement, heavy ice running in parts of the bay and near the schooner at the time of the collision. There was a stiff breeze, with rain and sleet. At the time of the collision, the steam tugs Col. S. L. Brown, Daniel C. Boyer, of Philadelphia, master and part owner, and the Young America, William Minford, of Philadelphia, master and part owner, were within from three to four hundred yards of the Holgate and saw the accident. The master and crew of the Holgate were taken on board the Illinois. The master, Joseph Golding, and one deck hand, Richard Banks, afterwards, shortly after the collision, had an interview with the two captains of the tug boats in the pilot house of the tug Col. S. L. Brown. The statements of the respective parties, the libellants and respondents, differ as to the arrangement then entered into, as to the towage of the sunk schooner to Philadelphia, but the result certainly was that the captains of the two tug boats engaged in the service of saving the vessel, and of delivering her at Philadelphia, had the distinct understanding that they were to receive two thousand dollars if their work was successfully performed, and that Captain Golding knew that they were acting with that understanding; and whatever may have been his unwillingness in the beginning to accept that offer, he did accept, acquiesce in and approve of all the work done for a period of eleven days, under that contract or understanding. We think the weight of the evidence shows conclusively that there was, before the work commenced, a contract, clear and definite in its character, both as to what was to be done, and the price for which it was to be done, that is, that this wreck was to be saved and towed to Philadelphia for the sum of two thousand dollars; and secondly, if there was any doubt as to Golding's then and there accepting the offer, that difficulty is completely removed by his subsequent assent, ratification and acquiescence. The court thinks there is nothing in the evidence to show any unfairness or advantage taken by the captains of the tugs.

As this was especially a salvage service there must be a reward measured by the rules that apply to salvage cases, and no contract can be permitted to stand which would compensate the salvors to a great degree more than they would be entitled to for a salvage service were there no contract; but when it does appear that the contract was entered into fairly, without any compulsion or taking undue advantage to make an unconscionable bargain, and in point of fact in the judgment of the court the price agreed to be paid did not much vary in amount from what the libellants would have been entitled to for a salvage reward, then in our judgment the contract should not be disturbed. What then was the value of the service performed as a salvage service? And this will depend first, on the value to the owners of the thing salved; second, on the degree of merit in the salvors.

What was the value of the property saved by the steam tugs on the third of March last, and the subsequent days of their labor and exertions? On this point the testimony is so widely divergent that it would seem there was no mode of reaching any conclusion based on the evidence in the cause. Yet, upon the evidence we have, we must reach such a conclusion as seems most in accordance with it. But, before we enter on the discussion of the question of the value of this vessel just before the collision, we must say that the value meant in this connection is its worth to the owners for all the purposes of repair, so as to make her available for that for which she was originally intended. A ship without a rudder is useless as a ship; her machinery may be taken out and sold, and her hull broken to pieces, and her masts and rigging dismantled and sold, and something may be obtained by way of sale for these "disjecta membra" of a ship without her rudder; but she is worth much more when you add the cost of a new rudder, and restore her to that state of efficiency as a ship for which she was intended; and a person purchasing would look at the value of a ship without the rudder and calculate the cost of a new one, and her value would be to him just the value of the ship after placing in her a new rudder, less its cost, provided, when the new rudder was procured, she was as serviceable as before. So, in this case, the value of this vessel was, supposing she was as good after her repairs as before the collision, as was declared on oath by her owners, her value after she had been repaired, less the cost of repairs and the other expenses attendant on bringing her to Wilmington other than the service of the salvors. What then was the value of the schooner after the collision for the purposes of repair? Now there are some points in the testimony which must serve as a means of arriving at an opinion on this question. She was as sound, as good, as seaworthy, as valuable after her repair as before the collision, and she was in perfect order and condition at the time she was struck; she was a well-built vessel of one hundred and sixty-eight registered tonnage, built of white oak, with locust treenails; she was, by the testimony of Captain Monroe, a first-rate vessel of her class, and she cost about twenty thousand four hundred dollars (and about twenty-one

thousand dollars by the testimony of McNaughten, one of her owners, page 42). The respondents introduced into the cause evidence of a character which they claimed to be, in the absence of appraisement, a reliable test of the value of vessel property, and it is not proper that they should shrink from the application of that test.

Captain Thomas G. Monroe, surveyor for the Board of Philadelphia Marine Underwriters, was produced as a witness, and propounded and explained the theory by which he tested the value of vessel property. He stated that the average period of the life of a vessel was about ten years; that in averaging their risks on vessel property they struck off ten per cent. from the cost value for the first year after she was built, and five per cent. for every year after for the period of nine years. After that no insurance could be effected unless the vessel was thoroughly repaired, when the underwriters would continue the insurance, striking off five per cent. of her value every year afterwards for five years; when the vessel comes to the age of fifteen years underwriters decline any further insurance. Captain Monroe assumed the Holgate to cost sixteen thousand eight hundred dollars, on the supposition that she was registered one hundred and sixty-eight tons burthen, and he thought one hundred dollars per ton was the proper average allowance for the cost of building such vessels. But she, by the testimony of Golding, cost about twenty thousand four hundred dollars, and by that of Mr. McNaughten, about twenty-one thousand dollars; and she was a well-built vessel, staunch and strong, by Captain Monroe's testimony; had not been injured till the time of the collision, and was, before that accident, in excellent condition. Nor is the price of twenty-one thousand dollars intimated by any witness to have been an unreasonable one for the original cost of the Holgate. Captain Monroe, though seeing her while being built, does not suggest that she was not worth that sum originally. In pursuance of the underwriters' theory of valuing vessels in such manner as will make the risks as small as practicable, he, to use his own language, "starts her" at sixteen thousand eight hundred dollars, having no actual knowledge of her cost, but placing his estimate wholly on the general cost of the building of such vessels at one hundred dollars per ton, and then he applies his theory of decreasing values of such vessel property. Assuming that the evidence shows that this vessel cost about twenty-one thousand dollars, on the scale referred to, she would have been worth ten thousand five hundred dollars at the time of the collision (fifty per cent. off of the twenty-one thousand dollars at the end of nine years from the time of her construction having been stricken off). Now, allowing for the lowness of this valuation, arising from the fact that the rule of computation is one in the interest of the underwriters, and remembering that the owners are, as liable for salvage money, pecuniarily interested in depreciating the value of their vessel, and considering the uncontradicted testimony that the Holgate was in admirable condition in all respects when the collision took place, and was an excellent ship of her class, the court thinks that ten thousand five hundred dollars is a low estimate to place on her value just before the collision, and that between eleven and twelve thousand is a more correct one. We will assume, however, for the purposes of the case, that ten thousand five hundred is the proper value to place on the Holgate just before the collision. The loose opinion of witnesses in reference to the value of this vessel lying in the water, or on the ways in her crippled condition, with no adequate idea on their part of the amount of the injury inflicted, or the amount of money necessary, completely to repair her, will not be considered as deciding the value of this vessel before the collision. The circumstances were not favorable for most of the witnesses to form a correct opinion, and the court prefers to take the rule of valuation as laid down by Captain Monroe, and insisted by the respondents as the proper one; to which there can be but one objection, and that is that the valuation is too low. Mr. Moore, a practical ship-wright, says it would be worth about twenty-two thousand dollars to build such a vessel, and when put on the ways before she was repaired, he thought she was worth from ten to twelve thousand dollars, and he thought she would have brought that sum under the hammer. Now, considering that Mr. Moore did not know the age of the vessel, and did not, therefore, apply any rule of depreciation arising from the lapse of time, the court thinks his testimony was not much out of the way; at the other extreme, Mr. Morrison, shipper of grain and farmer, seeing the vessel at New Castle, while in her damaged condition, thought that she would not have brought more than two thousand dollars; so Captain Monroe valued her in Wilmington before repairs at fifteen hundred dollars. On what principle he arrived at that conclusion the court cannot discover, unless he considered her worthless for repairs, for on his own theory she was worth ten thousand five hundred dollars before she was struck, and allowing that six thousand dollars had been spent for repairs (the utmost claimed by the respondents), she must have been worth four thousand five hundred dollars. As before said, it is in proof that after she was repaired she was in as good condition as ever; so testified her owners and her captain. This is not denied by any one. Indeed, if the hull had been so repaired as to render the vessel equally strong and seaworthy, when we take into consideration the new spars, new rigging, new chains, new painting and furnishing, she must have been worth more

to her owners than before the accident, by the increased value of the new materials and articles over that of the old and damaged ones. However this may be, it is not controverted that she was as valuable to the owners as before the collision.

The next question to be considered is, what was the expense of putting the vessel fully repaired afloat, exclusive of the amount claimed by the salvors? Upon this point the testimony is uncertain and conflicting. Captain Golding, of the Holgate, says, "The costs of her repairs caused by the collision with the Illinois, on third of March, was nearly six thousand dollars, I think." Mr. McNaughten says, "The cost of all the repairs and labor at Wilmington was fifty-three hundred and twelve dollars, and all of that was caused by the collision." On the other hand it has been proven that the work of Jackson & Sharp, embracing the complete repair of the hull, including iron work, chains, carpenter and joiner work, and painting, cost two thousand five hundred and forty-one dollars and sixty-three cents. The rigger's bill was two hundred and sixty-seven dollars and sixty-nine cents, and there is no evidence to show that there was any money expended for material for the rigger outside of that furnished by him. The bill for sails was one hundred and ten dollars, and for spars two hundred and sixty dollars, all amounting to three thousand one hundred and seventy-nine dollars and thirty-two cents. It is difficult to see what could have been the source of expenditure after these repairs had been made, with the exception of the cost for the services of the divers, the hire of the small schooner for the purpose of carrying the chains and anchor, spars and rigging of the dismantled vessel, and some further expense for injury to the furniture of the schooner, and for the services of extra men in pumping out the vessel. The bold declaration that the expenses were "about six thousand dollars, I think," and "in the neighborhood of five thousand five hundred dollars," specifying the amount spent in Wilmington at five thousand three hundred and twelve dollars, without any vouchers to support such allegations, should not be conclusive as against the proof that only such an amount was really expended, and that in the nature of the case there was no room for a further expenditure up to the amount of five thousand five hundred dollars, or anywhere near it. In the absence of any direct evidence as to the value of the services performed, we think, for the assistance of the small schooner, one hundred and seventy-five dollars for seven days is a liberal allowance; for the two divers one hundred and fifty dollars for one and one-half days' work is a reasonable allowance; fifteen dollars was the exact sum paid by Mr. McNaughten for the services of the five negroes in pumping out the vessel; and, although there was no evidence as to any loss of furniture, allow fifty dollars for repairing damaged furniture, and we have the sum of three hundred and ninety dollars to add to that of three thousand one hundred and seventy-nine dollars, the amount of the proven bills in Wilmington, making, as far as we can see, the whole cost of repairs and expenses (outside of the salvage services) to put the schooner Holgate afloat, in as good condition as before she was sunk, about three thousand five hundred and sixty-nine dollars. Where was the subject-matter to be the cause of any other expense? We are unable to see it. If there had been such it might have been proven before or during the course of the trial. The result of the investigation thus far leads the court to fix the sum of about three thousand five hundred dollars as the amount actually expended in putting the Holgate afloat, and that the value of the property saved was the value of the vessel just before the collision (ten thousand five hundred dollars less three thousand five hundred dollars, the cost of repairs), to wit, the sum of seven thousand dollars. To what proportion of that sum are the salvors entitled? If the two thousand dollars claimed as due under the contract exceeds in any considerable degree what the court would have awarded without such contract, as a salvage service, then the contract should be set aside. If not, it will be sustained; so that the question really is, what are the tugs entitled to as a salvage reward?

We have no hesitation in saying that this is a case of great merit. There are prominent features in it which are always estimated as elements of merit: 1. The Holgate was rescued from great peril; so great was that peril that, in all probability, had she not been rescued then and there by those tugs, she would have been wholly lost. 2. This service was performed at some personal risk to some of the salvors, and great risk of valuable property in the salving vessels. 3. The salvors were entitled to credit, and it was a source of merit, that they were well and powerfully equipped for the service on which they entered. 4. It was a service of some eleven days, the first few in tempestuous weather, with heavy running ice, hail and sleet, in an exposed part of the Delaware bay, when navigation under such circumstances is proverbially dangerous, and the balance of the time was spent in continuous labor and care, rendering all the assistance in their power. The work was arduous, faithful, continuous and altogether efficient and successful, and was so considered by the captain of the Holgate. 5. These tugs were deprived, at a busy season of the year for them, of a large and remunerative employment by reason of their faithful, continual and exclusive attention to the Holgate, and while the loss of supposed and probable future gains will not be considered as a ground of damage in gen-

eral, it is proper for the court, in estimating the value of the services of these tugs, to take into consideration their almost certain loss of highly remunerative employment from other quarters.

It is no answer to the higher claim of salvage that the tugs could not have earned an equal amount from towage; admitting it to be true, that is no reason for refusing the higher salvage reward proportioned to the merit of the salvage services.

There is no need of entering into detail as to the meritorious conduct of the salvors; the evidence is spread on the record. Considering all the circumstances, the court thinks it is a case where one-third of the value of the property saved might, with propriety, be allowed, were there no contract. On the valuation placed by the court of the property saved, that sum would be two thousand three hundred and thirty-three dollars. But the salvors must stand by their contract, inasmuch as they cannot take more, even if it be a losing bargain, and the sum of two thousand dollars varies but little from what the court thinks a fair salvage compensation.

We shall order a decree entered that the respondents pay to the libellants the sum of two thousand dollars due them on a contract entered into with them on the third of March, 1875, by the captain of the Ellen Holgate to pay that sum of money for towing the said Holgate, then in a sunken and dismantled condition, from the Delaware bay, about two miles below Reedy island, to Philadelphia (afterwards altered by consent to Wilmington, Delaware). and that the respondents pay to the said libellants the further sum of seventy dollars for board and lodging furnished the crew of the Holgate while the tugs were engaged in the salvage service, and that the respondents pay the costs of this suit. The court will reserve the apportionment of the sum decreed to be paid among the salvors to some future session of this court at an early day.

Case No. 4,376.

The ELLEN HOLGATE v. The ILLINOIS.

[35 Leg. Int. 194;[1] 13 Phila. 470; 6 Reporter, 40; 6 Wkly. Notes Cas. 353; 24 Int. Rev. Rec. 159; 25 Pittsb. Leg. J. 157.]

Circuit Court, E. D. Pennsylvania. April 10, 1878.[2]

COLLISION—DUTY OF STEAMER OVERTAKING SAILING VESSEL, AND DUTY OF THE SAILING VESSEL—TACKING—THE STEAMER HAVING SUFFICIENT LOOKOUT, NEGLIGENCE IS NOT PREDICABLE OF HER FAILURE TO ANTICIPATE A CHANGE OF COURSE BY THE SAILING VESSEL, MADE WITHOUT ANY APPARENT NECESSITY.

1. Although it is the duty of a vessel overtaking another to keep clear of the vessel ahead, the preceding vessel is not without correlative obligations; she is bound to maintain a proper lookout, and not to change her course unnecessarily.

[See note at end of case.]

2. A sailing vessel ahead has no right to change her course or alter her tack without reference to the position of a steamer or other overtaking vessel, so as to permit the risk of a collision; and will be liable for the consequences of a collision occasioned by an attempt to cross the bows of the steamship under such circumstances.

[See note at end of case.]

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

In admiralty. On the 13th of March, 1875, the steamship Illinois, a large vessel, about 360 feet in length, and of about 3000 tons register, was coming up the Delaware bay, at a speed of about ten knots an hour, and had rounded Dan Baker's shoal with the port-wheel, and had "straightened up" in about mid-channel. She was preceded by the schooner Ellen Holgate, a little on the port bow of the steamer, bound to New Castle, Delaware. The wind was from the northeastward; the schooner was by the wind heading about north by west, or north-northwest, and "pointing" for Reedy Island piers. The vessels were moving upon slightly diverging lines, which were about one hundred yards apart. The western or Reedy Island side of the bay was obstructed by ice, while the eastern side was free from such obstruction. When the vessels were probably three or four hundred yards apart, the schooner went into stays, and then tacked to the eastward to avoid the ice, which was ahead of and close under the port bow. There was no lookout astern on the schooner, and, until after she had changed her course, no one on board of her observed the steamer. On the steamer there was a sufficient lookout, the master and pilot were on the bridge looking ahead and saw the schooner some time before she tacked, and so directed the steamer's course that she would pass the schooner on the latter's starboard side and some three hundred feet away from her, if she had kept on her original course. As soon as the manoeuvre of the schooner was observed on the steamer, orders were given to put her helm hard a-starboard, to stop her engine, then to back at full speed and let go the anchor, with a view to pass under the schooner's stern. But these orders were ineffectual to prevent the collision, the steamer striking the schooner just abaft the main rigging, causing her to sink and capsize.

[The district court rendered a decree for libellant (case not reported), from which the claimants appeal.]

Morton P. Henry and Henry R. Edmunds, for respondents and appellants.

J. Warren Coulston, for libellant and appellee.

McKENNAN, Circuit Judge. It is the duty of a vessel overtaking another to keep clear of the vessel ahead; and this duty is especial-

[1] [Reprinted from 35 Leg. Int. 194, by permission.]

[2] [Affirmed in 103 U. S. 298.]

ly imperative upon a steamer, which has the control of her own motive power, and can therefore more promptly and accurately govern her own movements. Hence she must carefully observe the course and conditions of the vessel in advance of her, and, in view of these adapt her own rate of speed and line of movement to the avoidance of danger of collision with such vessel; and if a collision occurs she is regarded as prima facie in fault, unless it appears to have been inevitable. But the preceding vessel is not without correlative obligations. She is bound to maintain a proper lookout, to keep her course, and not to change it, at a time and under circumstances which would involve danger of collision with a vessel approaching from either direction, except under the pressure of an imminent greater peril.

Now, it is apparent that if both vessels had kept their course, the collision complained of could not have occurred. The steamer would then have given the schooner so wide a berth in passing her as to involve no risk of collision. The steamer did not violate her duty to keep out of the schooner's way, in adopting and pursuing a line of movement which was, in the first instance, attended with no danger to either of them, but was only rendered unsafe by a change of the schooner's course. She had a right to assume that the schooner would keep her course, or, at least, would not attempt to change it when the vessels were in such close proximity to each other as to create a peril which could not otherwise exist. As was said by Mr Justice Strong, in The Scotia, 14 Wall. [81 U. S.] 181: "Nor is a steamer called to act, except when she is approaching a vessel in such direction as to involve risk of collision. She is required to take no precautions when there is no apparent danger." While, therefore, the steamer selected a line of movement, which seemed to be, and really was, safe for both vessels, she might rightfully follow it, and was not called upon to act further in the way of precaution, "until danger of collision should have been apprehended." And when this danger became imminent—not by any act of hers—such precautions were promptly taken by her as seem to have been adapted to the emergency. In the moment of peril she did all that could be done to avert it, or to mitigate its consequences. Under such circumstances no fault is imputable to her, unless the schooner had an absolute right to change her course, as she did, and the steamer was bound to anticipate it.

However rigidly a steamer is, and ought to be, held to the duty of keeping out of the way of a sailing vessel which she is approaching, it is only justly enforcible by regarding the conduct of both vessels, in its contributory connection, with the emergency in which the steamer is suddenly called upon to act. The ultimate test of the steamer's liability is, whether, under subsisting conditions, she did any thing which she ought not to have done, or omitted any precaution which she ought to have taken. Accordingly it was determined in The Scotia, supra, that where a steamer and a sailing vessel were approaching each other, and the steamer took a course which would carry her at a safe distance, in passing, from that apparently pursued by the other, and the latter changed her direction and a collision resulted, the steamer was not responsible, when she had not "failed to adopt such precautions as were in her power, and were necessary to avoid a collision," as soon as that peril arose. Why should a different rule of accountability be applied, when the only difference in the circumstances consists in this, that both vessels were proceeding in the same direction, and the steamer sought to go ahead of the sailing vessel? A steamer may rightfully avail herself of the superior speed which she derives from her special motive power; and, if she keeps a proper lookout, and, in view of the apparent course of the vessel ahead of her, takes a direction unattended with risk of collision, does she not, in this regard, observe all the precaution which the law exacts from her? But it was argued, that the tacking of the schooner was rendered necessary by the ice, and that this necessity ought to have been perceived by the steamer and her movements have been determined accordingly.

It is fully proved, that there was a sufficient lookout on the steamer, that the master and pilot were on the bridge looking ahead, that the movements of the schooner were carefully noted, and that no immediate necessity for a change of the schooner's course was discerned by those in charge of the steamer. It is difficult to determine how near the schooner was to the field of ice when she tacked. None of the witnesses, who were on board of her, state the distance. That a change in her course was necessary to avoid it is undoubted, but whether she was in such close proximity to it as to make such change imperative at the time when it was made, does not satisfactorily appear from the libellant's proofs. It did not seem so to those on board the steamer, for, as her master testified "the water was clear for a mile ahead, and a quarter to a half mile to leeward;" and the testimony of the other witnesses for the respondent is not inconsistent with this aspect of the situation. With a sufficient lookout, then, on the steamer, if no immediate necessity for the schooner's going about was observed by those engaged in this duty, as is fairly inferrible from the proofs, negligence is not predicable of the steamer's failure to anticipate the schooner's variation. We must therefore seek elsewhere for the fault which the collision involved. I think it resulted from the unquestionable negligence of the schooner.

It is evident that the steamer was not seen by the schooner until the latter had changed her course. The testimony of her captain is decisive on this point. He says: "I first

discovered the steamer after our vessel filled off and started ahead," and the steamer was then at a distance of, "I should think between two and three hundred yards somewhere." This ignorance of the proximity of the steamer was doubtless the result of a failure of observation. Although, while the schooner kept her course, this omission was excusable, because it would have been harmless, yet it is undeniable that, when she was about to change her course, she was bound to look out astern, so as to avoid peril to herself or others, if the surrounding circumstances might induce an apprehension of it. Can it be doubted that she would not have executed such a movement, if she had observed the steamer when she resolved upon it? It would have been apparent to her, as it was to all others who were in the vicinity at the time, that to tack then was either recklessly to invite a collision, or to increase the immediate danger of it. By executing it a few minutes before she did, she could have crossed the course of the steamer with entire safety, or by holding her luff for a minute or two longer the steamer could have passed her without risk of injury to either. Pretermitting, however, the precaution she was bound to observe, she put herself in the way of the steamer, at a time when the latter could not avoid her, and thus rendered the collision inevitable. She, therefore, is alone responsible, and so all the libels must be dismissed with costs.

[NOTE. From this decree, dismissing the libel with costs, Joseph Golding, master of the schooner Ellen Holgate, appealed to the supreme court. The decree of the circuit court was affirmed, and in the opinion by Mr. Chief Justice Waite reference is made to the fact that the schooner did not discover the steamer until after the former's course was changed. The learned justice remarked that "no vessel should change her course materially without first having made such an observation in all directions as will enable her to know how what she is about to do will affect others in her immediate vicinity." The facts found are referred to at length, and Mr. Justice Waite, in speaking for the court, said: "It seems to us the court below was right, on these facts, in holding the steamer free from blame. The responsibility of avoiding a collision with a sailing vessel is put by the act of congress and the sailing rules primarily on a steamer. But the sailing vessel is under just the same responsibility to keep her course, if she can, and not embarrass the steamer, while passing, by any new movement. A steamer has the right to rely on this as an imperative rule for a sailing vessel, and govern herself accordingly. Otherwise it would at times be impossible for a steamer to get ahead at all in the thoroughfares of navigation." The Illinois, 103 U. S. 298.]

Case No. 4,377.

The ELLEN HOOD.

BAKER et al. v. The ELLEN HOOD.

[5 Adm. Rec. 347.]

District Court, S. D. Florida. June 11, 1855.

SALVAGE—DEGREE OF PERIL—COMPENSATION.

[Salvors of a grounded ship, which was in no great peril, and could have been got off without assistance by jettison of a part of her cargo, are entitled to only moderate compensation.]

[Cited in Pent v. The Ocean Belle, Case No. 10,961.]

[In admiralty. Libel for salvage by Philip I. Baker and others against the ship Ellen Hood and cargo; Kilby, master.]

Wm. R. Hackley, for libellants.

S. R. Mallory, for respondent.

MARVIN, District Judge. This ship, Kilby, master, bound on a voyage from Apalachicola to Liverpool, laden with three thousand and thirty-nine bales of cotton, on the sixteenth of May last was driven ashore in bad weather about twelve miles to the northward of Cape Florida light. The next day she was boarded by Baker and others, whose assistance was accepted to lighten and get the ship off. The ship lay in fifteen and thirteen feet water, at high water, she drawing sixteen feet. She was upon an exposed and perilous coast, where she must inevitably have become a total wreck in a short time, had the weather continued boisterous. But soon after the ship struck, the weather moderated and continued mild until she was got off, and for several days afterwards. Baker and his associates, in all eighty men, with ten vessels, some of them however of the smaller class of licensed wreckers, lightened the ship of nine hundred and sixty-one bales of cotton, and carried out her anchors and heaved the ship off. They arrived in this port with the ship, on the first of June. The ship is injured, but does not leak, and is supposed to be in a fit condition to proceed on her voyage without repairs. The value of the ship and cargo exceeds that of any other ever attached for salvage in this court. The value of The Lucy and cargo [unreported] was $159,769; The America [Case No. 279], $151,464; The Courier [Id. 3,283], $140,000. In this case the ship is valued at $45,000, and the cargo at $147,391, making the value of the ship and cargo $192,391.

It is very clear, judging from all established facts in the case, that the master of this ship could not, unassisted, have got his ship off, without throwing overboard at least nine hundred and sixty-one bales of cotton, worth $46,608. By a jettison of this portion of the cargo I think the master could have saved the ship and the residue of her cargo. He had an able and efficient crew; boats capable of carrying out anchors; the weather proved good while the ship was on shore, and for several days afterwards. The salvage in the case of The America [supra] was $17,971, but in that case the ship was lost, and a very large number of salvors were employed for several weeks in saving the cargo, a considerable portion of which was saved by diving. The salvage on The Lucy and cargo was $30,400. Here, too, a large number of salvors were employed, in very bad weather, and with considerable risk of life, and peril to the

salving vessels. The case of The Courier [supra] was more like the present case. In that case $19,101 was allowed for salvage. In the present case I think that eleven per cent. upon the net value of the property is a reasonable salvage. This rate will give about $20,500 salvage. It is therefore ordered, adjudged, and decreed that the costs and expenses of this suit, the wharfage, storage, commissions, labor bills in storing and reshipping the cotton, and all other costs and charges upon the property incurred in this port up to the time of the ship's being ready to sail, be first ascertained and allowed by the court, and, except the respondent's proctor fee, deducted from the aforesaid valuation of one hundred and ninety-two thousand three hundred and ninety-one dollars, and that eleven per cent. upon the residue be allowed the libellants for and in full compensation for their services in saving said ship and cargo, and that upon the payment of said salvage, costs and charges the marshal restore said ship and cargo to the master thereof, for and on account of whom it may concern. That the clerk apportion the salvage and expenses between the ship and cargo according to their respective values, taking the value of the ship to be $45,000 and the value of the cargo to be $147,391, and that he also apportion the salvage and expenses between the separate parts of the cargo, according as they may appear to be insured in the city of New York or elsewhere, or uninsured, according to the respective values of such parts, calculating the value of the cotton to be forty-eight dollars and a half per bale, and that the respective owners or underwriters have leave to pay the salvage and expenses upon the ship and the separate parts of the cargo so ascertained as aforesaid; and that the clerk make full report of said apportionments. That the amount of the salvage and expenses being ascertained, that it be referred to Commissioner Baldwin to divide the salvage among the several salvors according to their respective interests, and according to their consortships, and that he make report accordingly; and that all other questions be reserved.

Case No. 4,378.

The ELLEN S. TERRY.

[7 Ben. 401.] [1]

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

COLLISION IN HATTERAS INLET—VESSEL AGROUND—FREIGHT—CUSTOM.

1. A schooner going through the channel leading from Hatteras inlet, got aground at a turn of the channel where it was only 100 or 150 feet wide, and lay rather across the channel. While she lay there, a steamer coming in, attempted to pass her. The pilot of the steamer had sounded the day before, and found, as he supposed, water enough to enable him to take the steamer by the bows of the schooner. The steamer came up slowly, but failed to mind her helm because her keel was scraping the ground. Her engine was stopped and backed as soon as this was seen, but she ran into the schooner, cutting a hole in her. The steamer set up in defence that the collision was inevitable; that the schooner was in fault in lying aground in that narrow place, instead of lightening herself and getting over the shallow place; that her crew were negligent in not putting out fenders and in not taking measures to stop the leak caused by the blow; that part of the cargo was wasted by the crew; and that there was a custom that vessels injured, while lying aground there, by other vessels attempting to pass, should bear their own loss. *Held*, that the collision was not caused by inevitable accident, because the steamer saw the schooner and knew her position, and could have refrained from passing her or have attempted it at a speed which would have enabled her to stop.

2. Although the schooner might have got out of the shallow place by lightening herself, this was no defence to the steamer.

3. The schooner did not have such warning as to make the failure to put out fenders a fault contributing to the damage.

4. She was not in fault because her crew did not, under the circumstances, take prompt measures to stop the leak and save the cargo, such a failure being attributable to the fault of the steamer.

5. If any cargo was destroyed or wasted by the crew after the collision, it must be excluded from the recovery.

6. The alleged custom could not vary an otherwise existing liability.

In admiralty.

John P. Crosby, for libellant.

Erastus C. Benedict, for claimants.

BLATCHFORD, District Judge. On the 27th of December, 1865, the schooner Vesta was aground in the channel leading in from Hatteras inlet. The channel was only 100 or 150 feet wide. The place where the Vesta was lying was at a turn in the channel. The general direction of the channel was north and south, but where the Vesta was it ran more east and west. The Vesta was lying rather across the channel, occupying a considerable portion of its width. The steamer Ellen S. Terry came in from sea, under the charge of an experienced pilot. He had sounded, the day before, to the westward of the bows of the Vesta, which was lying with her bows rather to the westward, and had found, as he believed, sufficient depth of water to enable a vessel of the draught of the Terry to pass safely the bows of the Vesta. The Terry proceeded on slowly, and attempted to go around the bows of the Vesta, but it was found she was not minding her helm, because her keel was scraping the ground. Her engine was then reversed, and the effect of the wind and the tide, and other concurring circumstances, was such that her stem struck the port side of the Vesta, and crushed it in, and the Vesta sank. This suit is brought to recover for the damages caused to the Vesta and her cargo.

The Terry, in her answer, sets up, that the

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

collision and the damages were caused by negligence and bad management on the part of the Vesta, "in endeavoring, with a vessel of her draft, to pass the Swash with such water"—"in getting aground in the main channel and across the same"—"in not making any effort to procure assistance to lighten her, or to raise or lift her, to remove a portion of her cargo, or to tow her off"—"in not getting out fenders"—"in not making any efforts to stop the leak and save the cargo" —and in "destroying and wasting portions of said cargo." The answer also avers, that, as to the Terry, the collision was, under the circumstances, unavoidable, and the accident inevitable.

This collision occurred in the day time, in clear weather. The Vesta was aground, and it was the duty of the Terry to avoid her. The pilot of the Terry supposed there was water enough for the Terry to pass. He was mistaken in his judgment. The wind and the tide, after the Terry touched bottom, carried her against the Vesta. Because the Terry, at the speed she had, and in the predicament she was in, could not resist, although she backed strongly, the forces which carried her against the Vesta, it is contended, that she was inevitably borne against the Vesta by irresistible force. This may be true, but this does not make the collision an inevitable accident, in the sense of the law which excuses an accident which is inevitable. The Terry plainly saw the Vesta, and could easily have refrained from attempting at all to pass her, or could have attempted to do so at a speed so slow as would have enabled her, by backing, to stop herself before hitting the Vesta. There was nothing unsteady in the wind or the tide. Their forces were seen and known and capable of being measured in advance. The Vesta had, to the knowledge of the pilot of the Terry, been aground for two days in the same place, and the actual depth of water at the place where the Terry attempted to pass, at the time of her attempt, could have been ascertained by other means than by measuring it by the passage of the Terry herself.

Even if the Vesta might have avoided grounding when and where she did, and even if she might have sooner relieved herself, by lightening her cargo, or being towed away, this did not justify the Terry in running into her, or make the Vesta responsible, in fault, for the actual collision of the Terry with her. The duty of the Terry towards the Vesta arose out of the fact that the Vesta was, at the time, aground and helpless, and was not modified or qualified, in any degree, by any consideration as to how the Vesta came to be there or not to have gone from there.

As to the failure of the Vesta to use a fender to ward off the blow, there is nothing to show that she had such warning that she would probably be hit by the Terry, as to make the failure to use a fender a fault contributing to the damage. The Terry took a direction to clear the Vesta, and then suddenly came upon her.

So, as to the alleged failure of those on the Vesta to take measures to stop the leak and save the cargo by careening the Vesta to starboard or stopping up the wound, leniency of judgment is always extended to the movements of a vessel in the situation of the Vesta, about to be struck by a steamer, or which has been struck and crushed in. Fright and alarm ensue, presence of mind disappears, attention to the safety of life and immediate personal property becomes, naturally, the first consideration on the part of the crew, and a failure to exercise calm judgment, and to do those things which retrospection from a place of safety may suggest as obvious, is regarded as attributable to the fault of the faulty vessel, and is not imputed as contributory negligence to the other vessel. I see nothing in the evidence in this case, to make this general rule inapplicable here.

If any part of the cargo was destroyed or wasted, after the collision, by the crew of the Vesta, its value must be excluded from the recovery.

It was urged, in argument, on the evidence, that there was a custom, at the place of this collision, for a vessel injured while aground, by another vessel, in the attempt of the latter, carefully made, to pass by her, to bear her own loss. No such defence is set up in the answer. The evidence does not show any such custom in regard to a sailing vessel run into by a steamer. Nor is the question one of custom or usage, which can vary an otherwise existing liability. Any vessel which has a right of action may waive it. The fact that any number of vessels so waive it for themselves, creates nothing like a custom or usage, binding another vessel to make such waiver.

There must be a decree for the libellant, with costs, with a reference to ascertain the damages.

ELLEN STEWART, The (RAYMOND v.). See Case No. 11,594.

Case No. 4,379.

The ELLEN TOBIN.

[8 Ben. 446.][1]

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

COLLISION OFF THE JERSEY COAST — SCHOONERS CROSSING—MISTAKE OF LIGHTS.

1. On the night of May 7th, 1875, a collision occurred between two schooners, the T. and the W., in which the W. was sunk. The night was such that lights could be seen without difficulty. On behalf of the W. it was alleged that the wind was about east half-south, and the W. was sailing north-east, by the wind, close-hauled; that the red light of the T. was seen on the port bow of the W.; and

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

that, when the vessels were very near, the T. luffed and attempted to cross the bows of the W. but struck her on the port bow. On behalf of the T. it was alleged that the wind was from east-south-east to south-east and hauling to the southward, and she was heading south-south-west, sailing two points free; that she made out the green light of the W. about two points on her starboard bow, and hauled up to the wind half a point to show her own green light more clearly; that the W. had no port light burning; and that, when the vessels were near together, the W., being under the lee of the T., ported and threw herself across the bows of the T. and caused the collision: *Held*, that it was the duty of the T., having the wind on her port side and sailing free, to keep out of the way of the W.

2. The stories of the two vessels were utterly irreconcilable. That the appearance presented by the lights on the T. to those on the W., first the red light being seen, then both lights for a short time, and then only the green light till the collision, indicated a change of course of the T., by starboarding. If there had been such a change by the W. by porting, the W. being to leeward of the T., there would have been seen on the W. first the green light, then both, and then the red light till the collision.

3. On the evidence, the W. had a red light set and burning brightly, and that this light was mistaken by those on the T. for a green light.

4. The W. did not change her course and that the T. was solely responsible for the collision.

W. G. Choate, for libellants.

D. McMahon, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the owners of the schooner S. T. Wines and one of her crew, and the owners of the cargo she was carrying, to recover against the schooner Ellen Tobin the damages sustained by the libellants through a collision which took place between the two vessels shortly after midnight of the 7th of May, 1875, in the Atlantic ocean, off the coast of New Jersey, whereby the Wines and her cargo were sunk and totally lost. The Tobin was bound down the coast and the Wines was bound up. The night was such that lights could be seen without difficulty.

The libel avers, that, at the time of the collision, the wind was about east half-south, a fresh breeze; that, at and before the collision, the Wines was heading about north-east, sailing by the wind, close-hauled, with her lights set and burning, and a good look-out kept, and going about four knots an hour; that the Tobin's port-light was first observed from the Wines on her lee bow, the Tobin having the wind free and going at the rate of 8 or 9 knots an hour; that, when very near to the Wines and still to the leeward of her, the Tobin luffed and attempted to cross the bows of the Wines, and immediately after her stem struck the Wines on the lee bow forward of the foreriging; and that the collision was caused by the negligence of those in charge of the Tobin, in luffing and attempting to pass on the starboard side of the Wines, and in not porting and passing on the port side of the Wines, and in not keeping a good lookout, and in not keeping out of the way of the Wines.

The answer avers, that the Tobin had her lights set and burning brightly; that, just before the collision, she was heading south-south-west, with all her sails set and her main boom swinging to starboard, and was going about 8 knots an hour, the wind being from east-south-east to south-east and gradually hauling to the southward; that it was nearer to south-east at the time of the collision; that she was sailing with the wind about two points free; that her lookout forward signalled a vessel about two points off her lee bow; that the mate took his glasses and made out a green light burning dimly in that direction; that the port light of the vessel, which proved to be the Wines, could not be observed at that time, nor up to the time of the collision; that none was burning on the Wines; that the mate then ordered the man at the wheel of the Tobin to haul to the wind half a point and exhibit more clearly the green light of the Tobin; that this was done and was the proper course; that, as the vessels approached each other, the Wines suddenly put her wheel down hard to port, when they were about 100 yards apart, and while she was under the lee of the Tobin, and threw herself directly across the bows of the Tobin, and made the collision unavoidable; that the Wines was not close-hauled but had the wind fully as free as the Tobin; and that the collision was caused by the negligence of those on the Wines, (1) in not having a proper lookout stationed forward; (2) in not properly watching the lights of the Tobin, which vessel exhibited to the Wines her green light prior to and up to the time of the collision, and at no time exhibited to the Wines her red light; (3) in a hard-a-porting her helm just before the collision, and throwing herself square across the Tobin's bow; (4) in attempting, when off the lee bow of the Tobin, to cross the Tobin's bows; (5) in general negligence of those on the Wines, in not keeping a proper watch, in bad seamanship and lack of proper judgment just before the collision, and poor green light, and no port light.

As the Tobin confessedly had the wind on her port side and was not close-hauled but was running free, it was her duty to keep out of the way of the Wines. Such was her duty, whether the Wines was running close-hauled or free. It was, of course, under such circumstances, the duty of the Wines to keep her course, and not to change it in the presence of the Tobin and thus embarrass the Tobin in the discharge of her duty of avoiding the Wines. It is claimed for the Tobin that she did what was necessary to avoid the Wines and that the Wines changed her course and brought about the collision. The stories of the libel and the answer, as narrated therein, are irreconcilable. If the

Tobin was heading south-south-west and the Wines was heading north-east, and the green light of the Wines was seen from the Tobin two points off the starboard bow of the Tobin, it was impossible for the red light of the Tobin to have been seen from the Wines off the port bow of the Wines; and, if the red light of the Tobin was seen from the Wines off the port bow of the Wines, it was impossible for the green light of the Wines to have been seen from the Tobin two points off the starboard bow of the Tobin. If the story of the libel is true, and the Tobin was to the leeward of the Wines, showing only her red light to the Wines, the collision could have happened as it did, the stem of the Tobin striking the port bow of the Wines, only by the movement of the Tobin, by starboarding, towards and across the course of the Wines. It is admitted by the answer that the Tobin did starboard, and those on the Wines testify that, just before the collision, the red light of the Tobin was shut in and her green light came into view, and then the vessels struck. If the Wines had been porting, and, from being to the leeward of the Tobin, had run across her bows, the appearance to those on the Wines would have been that the green light of the Tobin would have gone out of view and her red light would have come into view. Where a light of one color is in view, and the vessel bearing it is on a swing towards another vessel, the time comes when both lights are in view for a moment, and their colors are contrasted, and the color first in view disappears, and the other color remains in view. Under such circumstances, there is not much probability of a mistake in color, or of a mistake as to what the vessel bearing the lights is doing. Not only is the contrast of colors sharply presented, but the motions of the two lights in coming into and going out of view indicate clearly the motion of the vessel. On the testimony of those on the Wines, such a view of the lights of the Tobin was presented to them. They, for some time before the collision, saw only her red light, then her green light came into view and was visible with her red light for a brief time, and then her red light disappeared and her green light remained in view, and then the vessels struck. Such an appearance could not have resulted from any porting by the Wines but could have resulted from the starboarding of the Tobin. No such swinging of the lights of the Wines is testified to by those on the Tobin. They say they saw only the green light of the Wines. They do not say that the red light of the Wines then came into view, and that both lights were visible for a time, and that then the green light of the Wines disappeared, leaving the red light in view. If the Wines ported when to the leeward of the Tobin, that must have been the appearance to the Tobin if the Wines had a red light as well as a green one. To meet this difficulty, it is contended for the Tobin that the Wines had no red light. I am satisfied, on the evidence, that the wines had a red light as well as a green one, both of them properly set and burning. The only possible explanation of how this collision occurred, is, that the Tobin was to the leeward of the Wines; that the Wines saw the red light of the Tobin off the port bow of the Wines; that the light on the Wines which the Tobin saw was not the green light of the Wines, but was the red light of the Wines; that its position was mistaken and it was not seen at all on the starboard bow of the Tobin, but was seen nearly ahead or on the port bow of the Tobin; that the actual circumstances were such as to make porting by the Tobin the proper movement, and not starboarding; that the starboarding of the Tobin threw her towards the Wines; that their mutual approach was aided by the leeway made by the Wines, resulting from her being close hauled; and that those on the Tobin, resting on the conclusion that it was the green light of the Wines they saw, and having starboarded, paid no attention to the light, until suddenly, when the vessels were close together, it was seen that the Tobin was running into the Wines, and then the conclusion was jumped at, on the Tobin, that the Wines must have ported and changed her course.

Much criticism was made on the character and seamanship and nautical attainments of those on the Wines, and on the place where the lookout was stationed, and on the efficiency of the lookout kept; but it is sufficient to say that it is satisfactorily shown that the red light of the Tobin was seen from the Wines for some time before the collision, and was kept in view, and that, in reference to it, the course of the Wines was kept and was not changed. Indeed, the change alleged is that the Wines ported; and it was elaborately argued, that the Wines was steering by the wind and not by the compass, and that the wind was hauling more to the southward all the time, and that the Wines followed it, and kept porting more and more. The only consequence of this would have been, that, with the red light of the Tobin off the port bow of the Wines, that red light would have opened more and more, and a collision would have been impossible.

With the duty imposed on the Tobin of keeping out of the way of the Wines, the burden of proof is on her to show an excuse for not doing so, and to show that the Wines changed her course. The great preponderance of proof is with the Wines. In addition to this, the lookout and the man at the wheel on the Tobin are not called as witnesses for her. Though their absence may be excusable, it cannot be assumed that, if present, they would confirm the story of the Tobin.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them.

Case No. 4,380.

In re ELLERHORST et al.

[2 Sawy. 219;[1] 7 N. B. R. 49.]

Circuit Court, D. California. June 24, 1872.

COST OF ENFORCING MORTGAGE IN BANKRUPTCY.

A mortgagee of real estate of a bankrupt offered to take the mortgaged property in satisfaction of his debt. The assignee in bankruptcy and the court declined the proposition with the hope of realizing a larger amount. The court then ordered the mortgaged property to be sold, and the mortgage debt to be paid out of the proceeds, giving the mortgagee a right to bid at the sale. The mortgagee bid in the property at a sum less than the mortgage debt and interest. *Held*, that the district court did not err in requiring the mortgagee to pay the costs and expenses of the sale out of the amount bid.

[Cited in Re Mead, 58 Fed. 312.]

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

Ellerhorst was adjudged a bankrupt in proceedings duly taken. Appellant Himmelmann held notes of Ellerhorst for a large sum of money, secured by a valid mortgage upon certain real estate of the bankrupt. Himmelmann, at the request of the assignees in bankruptcy, consented that said assignees might advertise the mortgaged premises for sale, with a view to realize more than the mortgage debt, and agreed to unite in the sale on terms of credit for the purchase money. The assignees thereupon advertised said property for sale for six weeks in the newspapers of San Francisco, and by hand-bills, and made diligent efforts to procure an offer for the same equal to the amount of the mortgage debt, but failed to obtain one. Said Himmelmann then offered to said assignees to take the mortgaged premises in satisfaction of his said mortgage debt, and to make no claim against the estate of said bankrupt for any deficiency, but said offer was declined by said assignees in the hope that the premises would bring a sum larger than said mortgage debt, and all these facts were made to appear to the district court, before making the order of sale hereinafter mentioned. After the foregoing transactions took place, on the ninth of November, 1869, the said Himmelmann filed his petition in the bankrupt proceedings, stating the fact of the existence of his said demand and mortgage; that no part of it had been paid; that he had not proved the said debt nor any part thereof, in the proceedings in bankruptcy, and prayed permission to commence and prosecute an action to foreclose said mortgage, and sell the mortgaged premises to satisfy his said debt, and for leave to make the assignees in bankruptcy parties to said proceedings. The court, upon the hearing of said petition, instead of granting the prayer, made an order January 6, 1870, reciting the making of said mortgage; that it was valid, and that the full amount of principal and interest was justly due said Himmelmann, and directing said assignees and mortgagee to unite in a sale of said mortgaged premises upon certain terms specified, and further, "that said Himmelmann, or his assignee, may become the purchaser at said sale, and in case he does so, that he be credited on his bid the amount due him on said mortgage debt, paying any overplus to said assignees;" and that, upon completion and approval of said sale by the court, the assignees execute and deliver a deed to the purchaser. It does not appear that any exception was taken to this order by appellant. In pursuance of said order, after duly advertising, the assignees employing certain auctioneers to make the sale, sold the mortgaged premises to said Himmelmann, he being the highest bidder, for the sum of twenty-nine thousand five hundred dollars, which sum is less than the mortgage debt, by one thousand dollars and upwards. The expenses of said sale, including commissions of auctioneers and assignees, amounted to $731.85, of which sum $295 seems to be commissions of the assignees, and $436.85 commissions allowed the auctioneers and other expenses of sale. The report of sale having been made, the court, April 26, 1870, made an order confirming said sale, which order provides, that "the proper and legal conveyance of said real estate is hereby directed to be executed to said purchaser upon receipting to said assignees for the net amount of the proceeds of said sale on account of the mortgage debt of said purchaser, and upon payment in gold coin by said purchaser of the expenses of the said sale and the assignees' commissions, at the rate of one per cent. upon the net proceeds, amounting in all to $731.85, and that said sum be paid into court, there to remain until the further order of the court." It appears in the record also, that in addition to the amount due Himmelmann for principal and interest on his said demand, the said mortgage contained a covenant in case of a foreclosure, to pay a counsel fee of ten per cent., and that the counsel fee at that rate would have amounted to about $3,000. It also appears that the lawful sheriff's commissions on a sale made under a decree of foreclosure would have amounted to about $600.

Wm. H. Patterson, for appellant.
H. C. Hyde, for appellee.

SAWYER, Circuit Judge. The appellant claims that the order confirming the sale is erroneous in requiring him to pay the expenses of the sale, to wit: $436.85 commissions of the auctioneers, and $295 commissions of the assignees, amounting in the aggregate to $731.85, as a condition of obtaining his conveyance. He insists that his lien being prior to all other claims must be first satisfied; that he afforded every facility in his power to enable the assignees to realize

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

something over his demand, and, failing in this, he offered to take the property in satisfaction, without presenting a claim against the bankrupt's estate for any deficiency, which offer was declined; that he then asked leave to proceed and foreclose his mortgage in the usual way, making the assignees parties; that this was refused by the court, and the order then made under which the sale was had; that this was an unnecessary proceeding by way of experiment for the benefit of the estate; that the court and assignees having experimented for the benefit of the estate it ought to be at the cost and risk of the estate, and not at his cost and risk.

There seems to be great force in this position. But is it a question of legal right, or is it only a matter addressed to the sound discretion of the court, in the apportionment of the costs incident to the administration of the assets of the bankrupt? The fourteenth section of the bankrupt act [of 1867 (14 Stat. 522)] expressly provides that "no mortgage" of the kind in question "shall be invalidated or affected hereby." So far as the right is concerned, then, the appellant stands in the same position with reference to the property, that he would occupy if no act of bankruptcy had been committed. But the remedy under the provisions of the bankrupt act has now been modified, and it is to be either sought in, or pursued under, the supervision of a new jurisdiction. Section 1 of the said act extends the jurisdiction of the district courts "to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors," etc. These powers are very broad, and extend to the whole subject matter of the bankrupt's property, and the claims against, and liens upon, it. It authorizes the district court to adjust the rights of the various creditors, liquidate the liens upon the assets, and this necessarily includes power to ascertain what liens there are, their amount, and to pay them off, and as incident to payment and distribution a power of sale for their conversion into cash in order that the liens may be liquidated or paid, and the surplus carried into the general fund.

Section 20 also provides that, "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon, for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This provision recognizes the power of the court to order a sale of property mortgaged "to be made in such manner as the court shall direct," as a test of the value of the property in order to allow the lien-holder to prove the balance of his debt when he desires to do so. In this case Himmelmann did not ask leave to prove his debt as a general creditor, but he did ask leave to enforce his lien by suit to foreclose his mortgage in the usual way. Had the court granted leave, the expenses of the foreclosure and sale would have been deducted from the proceeds of the sale, and he would only have received the balance; or, had he been the purchaser himself, and the property had failed to bring the amount of his debt, he would have been required to pay the expenses of foreclosure and sale, in the same manner as he is now required to do by the order of the court of which complaint is made.

The record shows that the sheriff's commissions alone on a sale would have been about six hundred dollars, and there would have been other costs and charges in a foreclosure suit, so that the expenses of a foreclosure and sale in the ordinary mode would have been nearly, if not quite, as large as they were in the proceedings had. It also appears, that under the covenants in the mortgage, by such foreclosure the demand would have been increased by the addition of some $3,000 as counsel fees; thus by that mode largely increasing the lien, to the injury of other creditors, in case the property should bring more than the principal, interest, and ordinary costs of foreclosure.

I do not think the appellant could demand, as a matter of right, that the assignees should convey to him upon his offer the premises, on condition of his agreeing not to present a claim for any part of the debt against the other assets of the bankrupt. Nor do I think their refusal to accede to his proposition, or the refusal of the court to permit them to accept, must be at the peril of throwing the costs of any effort to secure a better price upon the other creditors. It was the duty of the assignees and of the court to take that course in the premises, within their jurisdiction, which, in their judgment, having due reference to the rights of the mort-

gagee, would be most beneficial to all the parties interested.

After a careful examination of the bankrupt act, I have reached the conclusion that the district court was authorized, either to grant leave to the appellant to proceed in the usual way to foreclose his mortgage, making the assignees parties, or to take upon itself the duty of ascertaining and liquidating the lien by a sale of the property mortgaged, and applying the proceeds in payment. It might also under the provisions of the seventeenth or twentieth sections have sold the mortgaged premises subject to the lien, and left the mortgagee to proceed to a foreclosure against the purchaser, or even to have released the equity of redemption to the mortgagee in satisfaction of his debt, as was proposed by him. The court had jurisdiction to pursue either of these courses, as it should judge best for the interest of all concerned. It is not claimed by appellant that the court exceeded its authority in adopting the mode pursued. No question of this kind has been raised. The only point made is that the court, under the circumstances should have charged the expenses of the proceeding on the other assets of the bankrupt, and not have taken them out of the proceeds of the mortgaged property, thereby diminishing the amount received by the mortgagee on his debt. The court having acted judicially according to its best judgment, I do not think the appellant has any just legal ground of complaint at the course pursued. It was a matter of judicial discretion, and I am not prepared to say that the discretion of the court was not soundly exercised upon the facts as they were at the time presented. So, also, the apportionment of the costs was a matter to some extent of judicial discretion. The items of cost directed to be deducted from the purchase money were not costs of the general administration of the bankrupt's estate, but only the costs resulting from the ascertainment, enforcement and liquidation of the specific lien of the appellant in the form of proceeding adopted. This proceeding was substantially one mode of foreclosing the mortgage. A very nearly similar amount of costs would have accrued to be deducted from the purchase money, had the appellant been permitted to foreclose and sell in the manner requested in his petition. Besides this a sum of about three thousand dollars more would, in that mode have been added to his demand as counsel fees, under the covenants in the mortgage.

The district court as incident to its power to adjust and liquidate the lien, was authorized to adjust the costs of the proceedings necessary to give effect to the specific lien, and I am not satisfied that it exceeded the bounds of sound discretion in charging upon the proceeds of the mortgaged property the costs of the proceedings adopted to enforce and liquidate the specific lien in question, and especially so, as the costs varied but little in amount from what they would have been, had the ordinary proceedings of foreclosure been allowed. I find nothing to justify a reversal or modification of the order appealed from. It must, therefore, be affirmed, and it is so ordered.

[See Case No. 4,381.]

Case No. 4,381.

In re ELLERHORST et al.

[5 N. B. R. 144;[1] 6 Am. Law Rev. 162.]

District Court, D. California. 1871.

BANKRUPTCY — PROOF OF DEBT—NOTE ON WHICH PARTIAL PAYMENTS HAVE BEEN MADE BY ENDORSER.

Where the holder of a note receives part of the amount of the same from the endorser, he is entitled to prove for the whole amount against the estate of the bankrupt maker, and holds any surplus he may receive over and above the amount of the note in trust for the endorser. If the creditor omits to prove his debt, thus showing he looks to the endorser alone for payment, the endorser is entitled to come in and prove the note against the bankrupt's estate, and receive dividends upon its whole amount.

[Cited in Re Jaycox, Case No. 7,240; Re Morse, Id. 9,853; Re Broich, Id. 1,921; Re Hollister, 3 Fed. 455; Re Pulsifer, 14 Fed. 249; Stewart v. Armstrong, 56 Fed. 171.]

HOFFMAN, District Judge. A debt was proved in this case by the Bank of British North America against the estate of the above bankrupts, on a note made by the bankrupts and endorsed by Sheldon, Davis & Co. At the time the proof was made, no part of the note had been paid by either the makers or endorsers. Subsequently, however, the endorsers paid to the holder sixty-two per cent. of the amount due, and were released by the holder from the further liability.

It is contended by the assignee that the holder is entitled to be paid a dividend, not on the whole debt proved by him, but only on the balance due after deducting the sixty-two per cent. already received. As the estate is confessedly indebted in the whole amount of the debt and must pay dividends thereon, it is evident that if the holder is not allowed to prove for more than the unpaid balance due him, the endorser must be permitted to prove for the sum paid by him to the holder; for in no other way can the whole debt be represented. But the endorser is not permitted to make this proof by the terms of the bankrupt act [of 1867 (14 Stat. 517)], nor on general principles should he be allowed to do so in a case like the present. The provisions of the act, with regard to "persons liable for the bankrupt, as bail, surety, guarantor or otherwise," contemplate two cases. First—Where the whole debt has been paid and the creditor satisfied

[1] [Reprinted from 5 N. B. R. 144, by permission.]

by the surety, the latter may prove the debt, or, if it has already been proved by the creditor, the surety may stand in the place of the latter. Second—Where the surety has not paid the whole debt but is still liable for the same or any part thereof, he may "if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules," etc.

It is evident that the debt to be proved by the surety in this case is not the indebtedness of the bankrupt to him for the amount which may have been paid by him, but the whole indebtedness of the bankrupt to the creditor; and he can make this proof only in case the creditor has omitted to prove. The proof must also be "in the name of the creditor," or otherwise, as provided by the rules which shows even if the preceding language was less explicit, that the debt to be proved is the original debt due the creditor. This provision is the necessary consequence of the preceding clause, and indispensable for the protection of the surety. For not having satisfied the whole debt, he cannot prove under the first clause; and if the creditor who has been in part satisfied should choose not to prove the surety who has paid part and is liable for the balance, would be deprived of all share in the bankrupt's estate. The two clauses together secure the attainment of justice in all cases. By the first, the surety who has discharged the debt is subrogated to the rights of the creditor whom he has paid. By the second, the creditor may prove the whole debt. The surety cannot in such case prove, for that would be to allow the same debt to be proved, in part, twice. But the creditor, after receiving in dividends satisfaction of the balance due him, will hold, as trustee for the surety, any dividends received by him in excess. But if the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor. The estate will thus have paid dividends only on the true amount of the indebtedness. The creditor who has the double security of the bankrupt's liability and that of the surety will have been satisfied, while the surety will have been reimbursed either through the creditor who has proved, or directly by himself proving the debt in the creditor's name, that proportion of the debt he has paid or is liable for, to which, as a creditor of the bankrupt, he is entitled. But this result can be attained only by allowing the creditor, who has been partly paid by the surety, to prove and receive dividends on the whole debt, or the surety, who, in case of omission by the creditor, proves in his name, to make like proof and receive like dividends. By refusing to allow a surety who has made a part payment, to prove, except where the creditor omits to do so, the statute does him no wrong. Whatever the creditor receives in dividends diminishes pro tanto the surety's liability, and is equivalent to a payment made on his account and for his benefit. Even if he were permitted to prove, he would have no right to appropriate the dividends—for his duty would be to turn them over at once to the creditor for whose debt he is surety—and he would no more be at liberty to withhold such payment than he would have been at liberty, had there been no such bankruptcy, to refuse to pay over to the holder any sums which the maker might pay him on account of the debt. As thus he has no right to receive any dividends from the estate until the creditor is satisfied, the statute very properly denies him the right to prove against it, unless the creditor by omitting to prove has impliedly consented that he should do so, and by renouncing any claim against the estate has been content to look exclusively to the surety's liability. But when the creditor has insisted on the double liability he has secured, the surety has no right to intercept any sums which the creditor can collect from the bankrupt's estate, or to diminish the fund to which he has a right to look for satisfaction. It is only when the holder is fully satisfied that the surety can urge any claim to dividends payable on the original debt of the bankrupt. Nor does the creditor, even though he should be paid in full, obtain any "preference." The estate being liable for the whole debt pays in dividends only the proper pro rata share of the assets. The creditor is paid in full, because, by reason of the relations between himself and the surety, he has a right to intercept and appropriate the dividends which otherwise would go to the latter.

In the case at bar the surety had not satisfied the debt, nor had the creditor omitted to prove. The former was, therefore, not entitled to prove and the proof was properly made by the creditor, who must receive dividends on the whole amount, holding any excess of dividends above the sum necessary to satisfy the unpaid balance due him, in trust for the surety. These conclusions, apparently so agreeable to reason, are abundantly sustained by authority. In Ex parte Wildman, Lord Hardwicke said: "The petitioner had received nothing under the composition at the time he proved his debt under the commission of bankruptcy, and was therefore admitted a creditor for the whole. But before a dividend he receives two shillings and six pence in the pound under the composition of the acceptors of the bills. * * * The assignees say he shall be paid a dividend only on the sum left after deducting the two shillings and sixpence. But this would be taking away from a man the double security he had, and which he may make use of in law and equity till he has satisfied his whole debt." 1 Atk. 110. See, too, Ex parte Dyer, 6 Ves. 9; Ex parte Adam, 2 Rose, 36; Ex parte Royal Bank of Scotland, Id. 197; Ex parte Turner, 3 Ves. 243;

Ex parte De Tastet, 1 Rose, 10; In re Babcock [Case No. 696]. The decision of the register is therefore sustained.

[See Case No. 4,380.]

Case No. 4,382.

ELLERMAN v. NEW ORLEANS, ETC., R. CO. et al.

[2 Woods, 120.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.[2]

REMOVAL OF CAUSES—SUSPENSION OF POWERS OF STATE COURT—ORDER OF REMOVAL — APPEAL—CITIZENSHIP—WARRANTY PARTIES — WHARFAGE DUES—EXCLUSIVE RIGHT TO COLLECT.

1. In a case which can be removed from the state to a federal court under the act of congress of March 3, 1875 [18 Stat. 470], the timely presentation of the petition and bond for removal is effectual to suspend all the powers of the state court in which the suit is pending.

[Cited in Dennis v. Alachua County, Case No. 3,791.]

2. An appeal does not lie to an order of a state court for the removal of a cause to a federal court, and although the requirements necessary to a suspensive appeal from such an order may have been observed, they are not effectual to prevent a removal.

3. The fact that defendants, in a cause pending in a Louisiana state court, have called in warranty parties who are citizens of the same state with the plaintiffs, furnishes no good ground against the removal of that part of the cause which concerns the original parties, notwithstanding the fact that the statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue.

[Cited in Taylor v. Rockefeller, Case No. 13,802.]

4. The joint resolution of the legislature of Louisiana of March 6, 1869, does not confer upon the railroad company or those claiming under it the right to collect wharfage dues from vessels, etc., landing at the levee front of its riparian property.

[See note at end of case.]

In equity. This cause was commenced on the 11th of September, 1875 [by Henry Ellerman against the New Orleans, Mobile & Texas Railroad Company and others], in the superior district court for the parish of Orleans. It appears from the petition, that on the 29th day of June, 1875, the city of New Orleans, by contract of that date, transferred to the plaintiff all the revenues to be derived from the wharfage and levee dues, belonging to the city of New Orleans. The plaintiff claims that by virtue of said contract, he was subrogated to all the rights and privileges of the city in relation to the collection and receipt of said revenues. By virtue of the ordinance which authorized said contract, a certain amount of wharfage and levee dues was assessed against every vessel using wharfs, according to her size and capacity, to which sum plaintiff claimed to be entitled. The defendant railroad company had taken possession of the wharves and levee on the Mississippi river in front of the city of New Orleans for the distance of three hundred and fifty feet immediately below Calliope street, and claimed the right to collect wharfage and levee dues from vessels landing or mooring at the said wharf, whether said vessels were connected with the business of the railroad company or not, and had actually contracted with certain lines of steamers in no way concerned with the business of said railroad company to allow them to land at said levee for a certain amount of wharfage to be paid. The railroad company claimed this right to collect wharfage from all vessels using its wharf, by virtue of the fact that it was the riparian proprietor of the said three hundred and fifty feet next below Calliope street, and by virtue of a joint resolution of the legislature of the state of Louisiana, approved March 6, 1869. This resolution gave the railroad company the right to inclose and occupy for its purposes and uses that portion of the levee batture and wharf in front of the riparian property which the company owned, and exempted from the payment of wharfage and levee dues vessels, etc., landing at said wharf with the consent of the company, and imposed the obligation upon the company to keep said wharf in repair. The plaintiff claimed that the city of New Orleans had a vested right in the wharves and levees, and in the revenues derived therefrom, which had been transferred to him by the contract aforesaid. He therefore brought his suit against the defendant railroad company, and against the city of New Orleans, and in his petition, set forth the facts above stated, and prayed for an injunction restraining the railroad company from granting permission to any steamships or vessels to land or moor at the wharves or levees aforesaid, except such vessels as were immediately connected with the business of said railroad company, and further, that said company be prohibited from collecting wharfage or levee dues upon any vessels landing at said wharf. On September 11, 1875, the injunction prayed for was allowed. Soon after, the railroad company filed its exception to the petition, in which it was alleged that at the date of filing of the petition, and at the date of the said contract of the plaintiff with the city of New Orleans, and at the date of filing the exception it had not, and has not now any control, occupation, management, or power over the wharf property mentioned in the petition, wherefore the suit ought not to be maintained against the said company, but ought to be dismissed. In support of this exception, the defendant company answered, that it was an Alabama corporation; that on January 1, 1869, it had conveyed all its property to trustees to secure the payment of 4,000 bonds of $1,000 each; that upon default in payment of interest, the trustees took possession of all

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

[2] [Reversed in 105 U. S. 166.]

the defendant company's property, including the said wharves, as they were authorized to do by said deed of conveyance, and they were afterwards appointed by the United States circuit court for the district of Louisiana, trustees and receivers of said railroad company's property, and were required to administer and manage the same to the exclusion of the defendant railroad company. After the filing of their answer, a supplemental petition was filed, in which it was alleged that J. M. Witherspoon and A. K. Roberts did cause and direct vessels to be landed at the wharves aforesaid, and the same relief was prayed against them as against the railroad company. These persons having been served with process, filed their answer, in which they disclaimed any right or interest in the wharf property, and alleged that they acted in the premises under a license from the said trustees, Edwin D. Morgan and James A. Raynor, who had title and were in possession of said property under the orders of the United States circuit court. And they prayed to be discharged from the case after citation to the said trustees, Morgan and Raynor, whom they called in warranty to come into court and assume the defense of the same. Morgan and Raynor were then cited, and filed their answer, admitting they were in possession of said wharf, admitting that they had allowed the vessels mentioned in the petition to lie at said wharf, and to receive and discharge cargo, and claimed to have the right so to do by virtue of the joint resolution above mentioned, and of their estate as riparian proprietors. Afterwards the plaintiff filed another supplemental petition, whereby he made Morgan and Raynor, trustees, parties defendant to the action, and they were enjoined in the same terms as the railroad company had been. After all these proceedings, the said trustees, Morgan and Raynor, and the railroad company, filed their petition for a removal of the cause from the state court, in which it was pending, to this court. The petition stated that Morgan and Raynor were citizens of New York, and the railroad company a citizen of the state of Alabama, and that Henry Ellerman, the plaintiff, was a citizen of the state of Louisiana, and that the controversy between the plaintiff and said petitioners, the defendants, could be fully determined without the presence of any other party to the suit. The petitioners for removal at the same time filed the bond required by the act of congress, and the court in which the cause was pending made an order for its removal to this court. From this order of removal the plaintiff Ellerman took what is called a suspensive appeal to the supreme court of the state of Louisiana, the effect of which he claimed was to supersede the order of removal, until the appeal had been heard and determined by the appellate court. Notwithstanding the appeal, the defendants filed the record of the case in this court as required by the statute, and moved to dissolve the injunction allowed by the state court.

John A. Campbell, for the motion.

W. W. King, contra.

WOODS, Circuit Judge. The counsel for Ellerman, the plaintiff, as one reason why this court should not dissolve the injunction issued by the state court, says that the case has not been in fact removed to this court, and therefore we are without jurisdiction to entertain the motion. This preliminary question must therefore be first disposed of.

The first reason assigned by counsel for plaintiff why the case is not properly before this court is, because an order for removal was necessary to be made by the state court, and being made, was superseded by the suspensive appeal to the supreme court of the state. There is nothing in the acts of congress of the United States on the subject of the removal of suits from the state courts to the United States courts, to give support to the idea that the United States court is dependent upon the state supreme court for a judgment or an opinion on the order of removal. The presentation of a proper petition and bond is, by the acts of congress, as well as by the decisions of the supreme court of the United States, effectual to suspend all the powers of the state court in which the suit is. The acts of congress have no reference to the appellate court. Under the act of 1789 (1 Stat. 79, § 12), the application to remove was to be made at the appearance term; by the act of March 3, 1875 (18 Stat. 470, § 3), the application may be made at the term at which the cause could be first tried, and before trial. The state court is required to proceed no further when the affidavit and bond have been made and filed. The allowance of an appeal is not a compliance with the act of congress. It is true, a number of the state courts have adopted a different rule. State v. Judge, 23 La. Ann. 29; Bryant v. Rich, 106 Mass. 180; Whiton v. Chicago & N. W. Ry. Co., 25 Wis. 424; Darst v. Bates, 51 Ill. 439. But in considering the cases in the reports of the supreme court of the United States, I am unable to find anything to support the practice. In the case of Insurance Co. v. Dunn, 19 Wall. [86 U. S.] 214, it was held that after petition had been filed and bond given for the removal of a cause to the federal court, no power of action thereafter remained to the state court, and that every question necessarily including that of its own jurisdiction must be decided in the federal court. In a still later case the same court says that "the suitor making the application has an unqualified and unrestrained right to a removal, on complying with the requirements of the act of congress." Insurance Co. v. Morse, 20 Wall. [87 U. S.] 445. See, also, Kanouse v. Martin, 15 How. [56 U. S.] 198; Gordon v. Longest, 16 Pet. [41 U. S.] 97. The New York courts have decided that an

appeal does not lie to an order of removal from the inferior to the superior courts of the state. Stevens v. Phoenix Ins. Co., 41 N. Y. 149; Bell v. Dix, 49 N. Y. 232. See, also, Matthews v. Lyall [Case No. 9,285]. It is probable that the practice of allowing an appeal arose out of the silence of the statutes in respect to the method of making a removal and of enforcing the order. The early acts provided: 1st, for an affidavit from the applicant, showing his right to remove; 2d, a bond to secure a return of the record to the court of the United States. This being done, the statute declared the effect. This was that the state court should proceed no further. One would suppose this was clear enough, but it was not. The act of March, 1875 (18 Stat. 470), is more explicit: 1st, the same affidavit is required; 2d, the condition of the bond is materially enlarged; it provides for the payment of costs and damages in case the suit is improperly removed; 3d, it gives a power to the circuit court to remand the case, which resulted before only by construction; 4th, it compels the clerk of the court to furnish a copy of the record, by a penal section in the act (section 7); 5th, it empowers the circuit court to send a certiorari to the state court to obtain it (section 7). The writ of certiorari is a very ancient writ of the common law. In the Natura Brevium it is described as the writ whereby to remove records out of one court to another. Fitzh. Nat. Brev. 554, A; 2 Comyn, Dig. tit. "Certiorari," 332. The mandatory part of the writ is: "We command you that you send the record and proceedings aforesaid, with all things touching them, to us under your seal, distinctly and openly, and this writ, so that having inspected the record and proceedings, we may cause further to be done thereupon," etc. Clearly, an appeal to the state supreme court would be no proper return to this writ, nor stay action in this court. The case of Insurance Co. v. Morse, supra, establishes this. The fact that the railroad company was required to keep an agent in this state, upon whom process might be served, does not prevent a removal of the case to this court. Morton v. Mutual Life Ins. Co., 105 Mass. 141. I am therefore of opinion that the suspensive appeal taken from the order of removal was not effectual to prevent the removal of the case to this court.

The next reason given why the cause has not been effectually removed is, because this court has not jurisdiction over the necessary parties. This idea is based on what is called the call in warranty, by Witherspoon and Roberts on Morgan and Raynor. Witherspoon and Roberts are citizens of Louisiana, and, as according to the law of Louisiana (Acts 1868, p. 28, c. 12, § 1), the trial of the case as against Morgan and Raynor, the persons called in warranty, cannot be separated from the trial against Witherspoon and Roberts, it is claimed that the jurisdiction of this court is ousted—in other words, that Witherspoon and Roberts are parties to the controversy in this court, and, being citizens of the same state as plaintiff, the court is without jurisdiction. It is a sufficient reply to this to refer to the act of March 3, 1875, § 2, supra, which declares that "when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district." This case falls within this provision of the statute, and the law of the United States, and not of the state of Louisiana, must control. This court may try the case as between Ellerman, plaintiff, on the one hand, and Morgan and Raynor and the railroad company, on the other, and leave the state court to take such action as it may be advised as to the case between Ellerman, and Witherspoon and Roberts.

I am therefore of opinion that the case is properly on the docket of this court, and that the court has jurisdiction thereof.

The merits of the motion to dissolve the injunction next require attention. This turns upon the joint resolution of the legislature of March 6, 1869, heretofore referred to. See Acts 1869, p. 67. If the railroad company, or those claiming under it, have the right to collect wharfage, it is by virtue of that joint resolution, and not otherwise. In the case of City of New Orleans v. New Orleans, M. & C. R. Co. [27 La. Ann. 414], this joint resolution was considered by the supreme court of this state. The suit was brought to recover the sum of $764, for wharf dues charged by the city against the railroad company for the barges and flats of the company lying at the wharves referred to in the joint resolution. The defense was, that under the joint resolution, the railroad company was exempt from the payment of wharfage dues for barges, etc., which landed at said wharf. To this the city replied, that the joint resolution was unconstitutional, among other reasons, because the legislature transcended legislative powers in passing said resolution, donating public revenues to a private purpose. In passing upon this objection to the joint resolution, the supreme court of this state says [supra]: "The grant was not a donation of public revenue to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes; to wit, to facilitate the transaction of its business with the public. It was the control by the legislature of a public servitude." This construction of the resolution is inconsistent with the idea that the right was granted to it by the railroad company to charge wharfage dues against vessels landing at said wharf, which were in no way connected with

the business of the railroad company, or that the railroad company might maintain a free wharf for such vessels. The railroad company owned the banks of the river at the place where the wharves in question are, subject to the public servitude. The legislature granted the company the right to inclose this strip of land along the river bank, and use it, in the language of the supreme court, "for public purposes; to wit, to facilitate the transaction of its business with the public." Under this grant, the railroad company claims the right to use the wharves precisely as if they were the private property of a private person, and to collect wharfage from all water craft using them, whether they have any connection with the business of the railroad company or not. This construction of the grant is clearly opposed to the views of the supreme court of the state. Those views are binding on this court, and, in accordance with them, I must hold that the injunction in this case rightfully issued, and the motion to dissolve it must be overruled.

[NOTE. On defendant's appeal this decision was reversed by the supreme court, Mr. Justice Matthews delivering the opinion. It was pointed out that the decision of the supreme court of Louisiana in the case of City of New Orleans v. New Orleans, M. & C. R. Co., 27 La. Ann. 414, which was relied upon in the principal case, did not hold that the rights of the railroad company under the joint resolution of March 6, 1859, were limited to the use of the wharf for railroad purposes merely; but that that decision did affirm that the disposal of the public right in the wharf was "in the state, to the exclusion of the city," so that, if the joint resolution had been a cession to a natural person as riparian proprietor, it would have been conclusive upon the city, and those claiming in its right. It was held that, even if the grant to the railroad company limited the use of the property to purposes incident to its corporate business, it must, in order to be beneficial, be essential that the railroad company should have the right to exclude all other uses which would effectually withdraw it from the jurisdiction of the city authorities over the general subject of the public wharves. Mr. Justice Matthews said that "The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the railroad company from using its wharf as a public wharf beyond the limits of such using as defined by that construction of the resolution." In deciding this question it was held that the legal interest which qualifies a complainant, other than the state itself, to sue in such a case, is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty, e. g. "A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The state has a legal interest in preventing the usurpation and perversion of its franchise, because it is trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard, in a judicial tribunal, to complain, is an invasion of some legal or equitable right." New Orleans, M. & T. R. v. Ellerman, 105 U. S. 166.]

Case No. 4,383.

ELLERY et al. v. BROWN et al.

[2 Woods, 156.][1]

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

PRESCRIPTION IN LOUISIANA—SERVICE OF CITATION ON ONE OF TWO DEBTORS BOUND IN SOLIDO—SUSPENSION AS TO OTHER DEBTOR.

When suit is brought against two debtors bound in solido, and service of citation made on one only, prescription in favor of the other is suspended during the pendency of the action against the one who is served, and is not merely interrupted by the service.

[This was an action at law by Ellery, Wendt & Hoffbauer against A. Brown & Co., and is now] heard on plaintiffs' motion for new trial.

Joseph P. Hornor and W. S. Benedict, for plaintiffs.

Thomas Allen Clarke, Thomas L. Bayne, and Henry Renshaw, Jr., for defendants.

WOODS, Circuit Judge. The facts were these: The plaintiffs, on October 14, 1865, brought this suit against the commercial firm of A. Brown & Co., domiciled in the city of New Orleans, and composed of Andrew Brown and W. S. Key. The suit was predicated upon two drafts, dated December 4, 1860, for $2,364 each, payable three days after sight, drawn by T. S. Powell & Co., and indorsed by the firm of A. Brown & Co., and on two other drafts, one for $2,365 and the other for $2,419, drawn also by T. S. Powell & Co., dated January 3, 1861, payable in sixty days, and accepted by A. Brown & Co. On October 16, 1865, citation was served on Key, one of the members of the firm of A. Brown & Co. There was no service upon Brown, who was a citizen of Mississippi, and could not be found in this district. The cause remained pending in this condition for some years, until the death of Key, against whom no judgment was rendered. After the death of Key, Brown also died, and on the 25th of March, 1872, a supplemental petition was filed, in which the facts of the death of Brown, and of the opening of his succession, and the appointment and qualification of Hugh Watt Brown as his executor, were stated, and the averments of the original petition reiterated. Upon this supplemental petition, citation was issued against Hugh Watt Brown, executor, and served on the 28th day of February, 1872. Brown, the executor, pleaded the prescription of five years on commercial paper, and claimed that it was effectual to bar a recovery in this case. To this the plaintiffs replied that the prescription was interrupted by the service of citation on Key on the 25th of October, 1865, and that the prescription was suspended from that time as long as the action was pending against Key, which was until his death, and that de-

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ducting the time of the suspension, the action was not prescribed against Brown's executor. The counsel of Brown admitted that if prescription was suspended during all the time the suit against Key was pending, the action was not prescribed. They claim, however, that the prescription was interrupted. not suspended, by the suit against Key, their view being that when citation was served on Key, the prescription began immediately to run again, and the five years of prescription should be computed from the date of service of citation on Key, not from the time when the suit was abated by the death of Key. If the view of the defendant was correct, it was clear the suit was prescribed. The court charged the jury according to the view of the defendant's counsel, and it is for the alleged error in so doing that the motion is made for a new trial.

The only question, therefore, presented for the decision of the court is, did the service of citation on Key interrupt merely, or did it suspend during the pendency of the suit against Key, prescription as to Brown, his copartner? The articles of the Civil Code which bear upon this subject are the following:

Art. 2872. * * * Commercial partners are bound in solido for the debts of the partnership.

Art. 2097. A suit brought against one of the debtors in solido interrupts prescription in regard to all.

Art. 3551. "The prescription releasing debts is interrupted by all such cases as interrupt the prescription by which property is acquired, and which have been explained in the first section of this chapter. It is also interrupted by the causes explained in the following articles."

Art. 3552. "A citation served upon one debtor in solido, or his acknowledgment of the debt, interrupts the prescription in regard to all the others, and even their heirs," etc.

Art. 3516. There are two ways of interrupting prescriptions; that is, by a natural interruption, or by a legal interruption.

Art. 3518. A legal interruption takes place when the possessor has been cited to appear before a court of justice on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not.

The counsel for defendant claim, that their view, namely, that the service of citation upon one of two debtors bound in solido, merely interrupts prescription, but does not suspend it as to the other debtor, during the pendency of such suit, is sustained by the French commentators and by the supreme court of Louisiana. In support of their view, they cite the following authorities: 2 Troplong, art. 2242, §§ 535, 536, 553; Id. 2250, § 687; Millaudon v. Beazley, 2 La. Ann. 916; Hite v. Vaught, Id. 970; Dwight v. Brashear, 5 La. Ann. 551; Richard v. Butman, 14 La. Ann. 144; Arrowsmith v. Durell, 21 La. Ann. 295; Walker v. Succession of Hays, 23 La. Ann. 176. I have examined all the cases cited from the Annual Reports and cannot see that they sustain the construction of the Code to which the commentary of Troplong seems to give some color, and which counsel for defendant have pressed upon the court. The supreme court of Louisiana does not seem to have distinguished between interruption and suspension of prescription in the construction of the Code. On the other hand, there are several cases cited in the brief of plaintiffs which show conclusively, that under the facts of this case, prescription was suspended during the pendency of the suit against Key. In Wilson v. Marshall, 10 La. Ann. 327, the court says: "If prescription be interrupted by suit, the interruption continues during the pendency of the suit." The court further says (page 331): "The effect of the former suit, then, was to interrupt in 1836, the prescription which commenced to run in 1831. And it was impossible for prescription to run whilst the suit was pending. 'Ce nest pas seulement pour tout le temps antérieur à la demande, que cette demande interrompt la prescription, c'est aussi pour tout le temps que durera l'instance; en soit qu une prescription nouvelle ne pourra pas recommencer coutre le demandeur avant le jour ou sera rendu le jugement par lequel cette instance se terminera.' Marcadé de la Prescription, 124. So, if a new prescription begins to run from the day of the dismissal of the former action in 1843, the requisite period of ten years had not elapsed when the plaintiff instituted her present demand in 1852." In Furguson v. Glaze, 12 La. Ann. 667, the suit against the principal on a bond, dated in 1837, was commenced in 1841, was litigated until 1850, when judgment was rendered. Suit was commenced against the surety in 1851. He plead the prescription of ten years. The court says (page 668): "Proceedings were commenced against the principal debtor within about three years of his appointment and interruptedly prosecuted until 1850. This interrupted the prescription as to the surety." In Barrow v. Shields, 13 La. Ann. 57, the court says: "Again, it is clear that prescription cannot be interrupted until it has begun to run. If, however, a suit be instituted upon a note before it is due, and pending the suit the note matures and is protested for nonpayment, prescription of that note is interrupted so long as the suit lasts, after maturity, even if the suit be ultimately dismissed upon an exception of prematurity. The rule is: 'Actiones quae tempore pereunt, semel inclusae judicio, salvae permanent.' Marcadé, Prescription, art. 2248." In Speake v. Barrett, 13 La. Ann. 479, the court says: "Defendant is sued upon a note signed by 'Barrett & Culbertson in liquidation.' There was judgment for defendants, and plaintiffs

have appealed. Plaintiff, in 1852, obtained judgment in another suit against Culbertson, and seeks now to hold Barrett liable. The plea of prescription for five years has been made. It cannot be sustained, because prescription was arrested by the suit against Culbertson. Barrett and Culbertson, being commercial partners, are bound in solido, and a suit brought against one of the debtors in solido interrupts prescription with regard to all." So in Richard v. Butman, 14 La. Ann. 144: "Where a suit is brought against the surety, who is bound in solido with the drawer of the draft for its payment, prescription is thereby interrupted as to the principal debtor; it will commence to run again from the date of the judgment against the surety."

These rulings of the supreme court of this state seem to be in accord with the spirit of the laws of prescription or limitation. The theory of these laws is, that the debt sued for has been paid and the evidence of its payment lost. Now, when two persons are jointly bound, and suit is brought against one to enforce the debt, no presumption ought to arise in favor of the other debtor that the debt has been paid. This very case affords a good illustration of this rule. The suit was actually brought against both Key and Brown. Key is sued, but Brown, the other solidary debtor, by keeping out of the jurisdiction of the court, manages to escape service of citation. Now, while the plaintiff is pressing his suit against one of the joint debtors, and is ready to serve citation on the other as soon as he comes within the jurisdiction of the court, ought the one not served to be allowed to claim that during all this time the prescription has been running, and when five years have elapsed, say that the presumption of law is, that the debt has been paid? Clearly this would not be in accordance with the spirit of the law of prescription. I am, therefore, of opinion that the court erred in charging the jury that the suit against Key merely interrupted, but did not suspend prescription as to Brown. For this error, the verdict and judgment must be set aside, and a new trial granted.

ELLERY (McLANAHAN v.). See Case No. 8,869.

Case No. 4,384.

ELLETT v. BUTT et al.

[1 Woods, 214.][1]

Circuit Court, D. Louisiana. Nov. Term, 1871.[2]

MORTGAGE OF GROWING CROPS — CROPS TO BE GROWN WITHIN FIFTEEN MONTHS.

1. The owner or lessee of land may give a valid mortgage upon his crop before it is raised.

[Cited in Calhoun v. Memphis & P. R. Co., Case No. 2,309.]

[See note at end of case.]

2. An act of the legislature of Mississippi provided that it should be lawful to convey by way of mortgage or deed of trust any crop of cotton, etc., being produced or to be produced within fifteen months. *Held*, that a mortgage executed before the passage of this act on a crop to be produced in the future was valid, the enactment being merely declaratory of what the law was before its passage, adding a limitation that the crop must be produced within a given time.

3. The transfer to the purchaser of land of a note given to the former owner for rent, and the transfer of a mortgage on the crop to secure the note invests such purchaser with the lien created by the mortgage.

[Cited in Myers v. Hazzard, 50 Fed. 157.]

[See note at end of case.]

This was a cause in equity, and was submitted for final decree upon the pleadings and evidence.

J. N. Lea, John Finney, and H. C. Miller, for complainant.

Thomas Allen Clarke, Henry L. Bayne, and Henry Renshaw, Jr., for defendants.

WOODS, Circuit Judge. The bill alleges in substance, that on September 4, 1866, William Sillers, of the state of Mississippi, was seized in fee of the "Asia" plantation, situated in Bolivar county in that state, and that on the 1st day of January, 1867, by a writing of that date he leased said plantation to one John H. Graham for one year for a rent reserved of $7,000, one-half to be paid on the first of October by a draft drawn by Graham in favor of Sillers on the defendants, who were commission merchants and factors in the city of New Orleans, and the other half on November 1st, to be evidenced by the note of Graham payable to Sillers and falling due on that day. Graham by the stipulations of the lease pledged and mortgaged the crops grown on the plantation during the year 1867, to the faithful performance of his covenants therein written, and authorized Sillers and his assigns on thirty days' notice to seize and sell the same for cash, the said sale to raise money sufficient to pay all arrearages of rent. That the lease was duly executed and recorded. That Sillers and Graham met in the city of New Orleans on the 8th of February, 1867, for the purpose of procuring the acceptance of defendants of the draft to be given by Graham on them by the terms of said lease, and the said lease and mortgage was then and there exhibited to the defendants, and was read and considered by them and the terms thereof fully understood and a counterpart thereof left with them. That with full notice that Sillers had the first lien on the crop of Graham, they accepted said draft, and the same has been paid and satisfied. That Graham also delivered to Sillers the note for $3,500 provided for by said lease, due Nov. 1, 1867. That said mortgage contained in said lease became by the laws of Mississippi, a lien upon Graham's crop supe-

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

[2] [Affirmed in 19 Wall. (86 U. S.) 544.]

rior to all claims of other creditors of Graham, and of any claim of defendants against him. That Graham cultivated the plantation under said lease during the year 1867, and planted, matured and gathered a crop of cotton amounting to 49 bales of 450 pounds each. That on the 4th day of September, 1866, the circuit court of Claiborne county, Mississippi, rendered a judgment against Sillers, in favor of the present complainant, for $10,103.89, which, being duly recorded on September 14, 1866, became a lien upon the "Asia" plantation. That on the 28th of April, 1867, an execution issued on said judgment was levied on said plantation, and the same was sold by the sheriff at public auction, to complainant, on the 3d day of June, 1867, by virtue of said execution, and the plantation was conveyed to him by the sheriff by deed of that date. That at the time of said sale, Graham was in possession of said plantation under said lease, and the effect of the sale was to substitute complainant in the place of Sillers as landlord of Graham, and to entitle complainant to the rent of the plantation which had not yet fallen due. That Sillers, knowing the legal effect of said sale and conveyance, indorsed and delivered the said note of Graham to complainant, who is now the holder and owner thereof, and entitled to pursue all remedies for its collection that Sillers might. That, in the fall of 1867, the defendants, through an agent sent for that purpose to the plantation, received from Graham 49 bales, the crop of cotton produced by him on said plantation during that year and shipped the same to New Orleans, and sold and disposed of the same to their own use, well knowing that the same was subject to the lien of complainant. The cotton was middling cotton, and worth at the time it was taken by defendants 25 cents per pound. That on the shipment of the first 27 bales complainant notified defendants by letter that he claimed the cotton, and should hold them responsible for its proceeds. The bill prays for an account of the amount for which said cotton sold, to be estimated at the highest price reached by cotton since the asportation thereof by defendants, and before final decree, and that defendants may be required to pay the value thereof so estimated to be applied on the amount due complainant on the note of Graham.

The answer of defendants admits that they saw and read, in February, 1867, the lease made by Sillers to Graham, but avers that Sillers stated that the part thereof by which he secured a lien on Graham's crop for the payment of rent was not valid and binding by the laws of Mississippi, and that he released the same so far as it affected them. They deny that the lease to Graham operated as a lien upon the crop. They deny that the cotton shipped by Graham was shipped through the intervention of their agent. They deny that they had any notice of complainant's claim on the cotton until the receipt of his letter dated November 25, 1867. They further say that, in February, 1867, they entered into a contract in writing with Graham, by which they agreed to advance to him $5,500 in supplies for his plantation, besides accepting the said draft for $3,500, and Graham agreed to ship to them the cotton grown on the Asia plantation to be sold, and that they should have a lien upon the same to repay the said advances. And that this agreement was recorded in Bolivar county, Mississippi, on February 20, 1867. Complainant files the general replication.

The first question presented by these pleadings is, did Sillers, by the document called a lease and mortgage, secure a lien upon the crop of Graham for the payment of the rent? The legislature of Mississippi by an act approved February 18, 1867, subsequent to the date of Sillers' lease, provided that it should be lawful to convey by way of mortgage or deed of trust, any crop of cotton, etc., being produced or to be produced within fifteen months from the date of such mortgage. The defendant draws the inference from this act that such a mortgage was not valid before the date of the act. We think the act to be merely declaratory of what the law was before its passage, adding a limitation that the crop mortgaged must be produced within fifteen months. If property not in esse or in the ownership of the mortgagor can be mortgaged, and that question we will consider presently, there surely can be no reason why a crop to be produced during the current year might not be mortgaged. Such a contract is not immoral, against public policy, or fraudulent. If the parties are capable of contracting, such a contract, if made on valuable consideration, has all the elements of a binding contract.

Can property to be acquired in futuro be incumbered by mortgage? The authorities answer this question in the affirmative. In Pennock v. Coe, 23 How. [64 U. S.] 117, the point was made that a person cannot grant what he has not got. But the court said "that the principle has no application to the case before us. The mortgage here does not undertake to grant in presenti property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired," and the court held that a grant can take effect upon the property when it is brought into existence and belongs to the grantor in fulfillment of an express agreement founded on a good and valid consideration, where no rule of law is infringed or the rights of a third party prejudiced. So in Mitchell v. Winslow [Case No. 9,673] Mr. Justice Story says: It seems to me a clear result of all the authorities, that whenever the parties by their contract intended to create a positive lien or charge ei

ther upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in esse or not, it attaches as a lien in equity or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice. See, also, 2 Story, Eq. Jur. § 1021; Cross, Liens, 187, 188, et seq.; Prebble v. Boghurst, 1 Swanst. 309; Needham v. Smith, 4 Russ. 318; 1 Pow. Mortg. 190; Metcalfe v. Archbishop of York, 1 Mylne & C. 553; Field v. Mayor, etc., of New York, 2 Seld. [6 N. Y.] 179. The doctrine is too well settled to be now questioned.

We have therefore reached the position that the contract by which Graham mortgaged his crop for 1867 to Sillers was a valid and binding contract between the parties. It was also binding against those who had notice of it. The sole purpose of the contract was to give Sillers a lien superior to the claims of others, for without the contract, Graham's crop would have been liable to be seized in payment of his debt to Sillers. It is unnecessary to decide what effect as to notice the recording of the mortgage had, for the fact is admitted by defendants' answer that in February, 1867, they had actual notice, having read the contract and being furnished with a counterpart of it. The evidence is also clear to the point that defendants had this actual notice before they contracted with Graham and before his execution of a mortgage to them upon the same crop.

The next question is one of fact. Did Sillers in his conference with the defendants on the 6th of February, 1867, agree to release his lien upon Graham's crop secured by his lease and mortgage? The defendants aver in their answer that he did. This is new matter, not responsive to any allegation of the bill, and it is incumbent on defendants to establish it by proof. They have offered no evidence to support this averment. On the contrary it is flatly contradicted by Sillers, and Graham testifies that in his conference with defendants in February, 1867, it seemed to be the understanding of all parties that Sillers would have a lien on the crop for his rent. The conclusion from the testimony is therefore inevitable that Sillers did not agree with defendants to waive his lien upon the crop of Graham.

We have then reached this further ground, that Sillers having a contract with Graham, giving him a lien on Graham's crop, gave actual notice thereof to defendants, and did not waive his rights under his contract. His lien being older than the lien of defendants is superior in equity, and as between Sillers and defendants, Sillers had the right to have the crop of Graham applied first to the payment of the debt, secured by his lien.

The next question is, have the rights of Sillers been transferred to Ellett, the complainant? Unquestionably Ellett, on his purchase at the sheriff's sale of the "Asia" plantation, became entitled to all the rent which fell due after the date of his deed, whether it had or had not accrued before the sale, even without the transfer of the note given by Graham for the rent. But Sillers indorsed and transferred the note of Graham, secured by the mortgage, and delivered the mortgage itself to the complainant. According to all the authorities this transfer vests in the transferee the rights of the mortgagor to the security. The assignment of a note secured by a mortgage is in equity an assignment of the mortgage, unless there is some special provision of the parties to the contrary. Johnson v. Hart, 3 Johns. Cas. 322; Lawrence v. Knap, 1 Root, 248. So that a mortgagee who has assigned absolutely the note secured by the mortgage, need not be made a party to a suit by the assignee for payment of the note out of the mortgaged premises. Kent, J., in Johnson v. Hart, 3 Johns. Cas. 322. The complainant then stood in Sillers' shoes. He was entitled to have Graham's crop first applied to the payment of the note assigned to him by Sillers. His lien was the elder and better one. The defendants through their agent Ruhl, as the testimony abundantly shows, carried off the entire crop and appropriated its proceeds to their own use. Having done this with full knowledge of the prior lien, they must account to complainant for the value of the crop at the time of its asportation, with interest from that date. This is the rule of damages in trover and trespass de bonis asportatis, and should be applied here as the measure of the complainant's claim. The decree must be for complainant. If the parties cannot agree upon the amount, the case must be referred to a master to report upon that matter.

[NOTE. The defendants, Cary W. Butt, William Flash, and Thomas T. A. Lyon, trading as Butt, Flash & Lyon, appealed from this decision to the supreme court. The decree of the circuit court was affirmed, and Mr. Justice Swayne, in delivering the opinion, held that, while the mortgage clause in the contract of lease of January 15, 1867, could not operate as a mortgage, because the crops to which it related were not then in existence, its lien would attach, and bind crops when grown. Continuing, the justice said: "Ellett, having bought the premises, became clothed with all the rights of Sillers touching the rent stipulated to be paid by Graham. The sheriff's deed conveyed the reversion, and the rent followed it as an incident. The lease passed by assignment to the grantee, and all its provisions in favor of the lessor inured to the benefit of the assignee. The appellants had full notice of the rights of Sillers. They read the lease a few days after its execution. Ellett also notified them of his rights and claim. The cotton went impressed with his lien into their hands. When they sold it, they took the proceeds in trust for his benefit, and became liable to him for the amount." Butt v. Ellett, 19 Wall. (86 U. S.) 544.]

ELLICK (UNITED STATES v.). See Case No. 15,042.

Case No. 4,385.

ELLICOTT et al. v. CHAPMAN.

[1 Cranch, C. C. 419.] [3]

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

EVIDENCE—BOOK OF ACCOUNT—ORIGINAL ENTRIES.

Original entries in the handwriting of a deceased clerk, must be produced. It is not sufficient to give a copy in evidence.

Assumpsit for money lent and advanced, had and received, goods sold, &c.

THE COURT refused to admit evidence that certain original entries in the books of the plaintiff, (a copy of which entries only in the handwriting of the witness was produced on the trial,) were in the handwriting of a deceased clerk, because the original entries were not produced. THE COURT refused to permit an account made out in the handwriting of a deceased clerk to be given in evidence, although it was said that the original entries were in the handwriting of the same deceased clerk. THE COURT said the original entries must be produced.

ELLICOTT (DILL v.). See Case No. 3,911.

ELLICOTT (GEORGIA INS. & TRUST CO. v.). See Case No. 5,354.

Case No. 4,386.

ELLICOTT et al. v. PEARL.

[1 McLean, 206.] [1]

Circuit Court, D. Kentucky. May Term, 1834.[2]

EVIDENCE OF BOUNDARIES—HEARSAY—CONTRADICTION OF WITNESS BY PROOF OF CONTRARY STATEMENTS MADE TO OTHERS—NOTES OF SURVEYOR—POSSESSION—WHOLE TRACT — ADVERSE POSSESSION—ACTUAL OCCUPANCY.

1. A witness was offered to prove, what an individual by the name of Moore, then deceased, had said in relation to the beginning corner of a survey, made many years before, he having been one of the chain men in making the survey. Rejected as incompetent.

2. Hearsay or reputation may in a proper case be evidence, but this is always of a matter known to the public, which may be rebutted by other witnesses.

3. In cases of pedigree, of necessity, hearsay as to a particular fact is admitted; but it is, in the general, limited to the connexions of the family. But a particular fact, as a corner of a survey, cannot be proved by what an individual, not under oath may have said.

4. Ancient boundaries may be proved by hearsay or reputation, known to the public, and not by hearsay as to a specific fact.

5. Kincaid was examined as a witness by demandants, his statements at other times being proved by defendant to have been different, from those sworn to. The demandants cannot strengthen his evidence, by showing that he made other statements corroborative of his evidence.

6. The notes of a surveyor, appointed to make the survey, of those objects which in the discharge of his duty, he must ascertain, are evidence, but no remarks on the plat beyond these, can be received as evidence.

7. Possession under a deed, extends to a whole tract, if there be no adverse possession.

8. A tenant put into possession by the grantee, without definite boundaries, will be held to be in possession to the extent of the tract.

9. Where there is an entry without claim of title, the possession is limited to the actual occupancy.

10. Possession may be held by other means than actual residence, or by a fence.

[This was a suit by Thomas Ellicott and Jonathan Meredith against William Pearl.]

Mr. Wickliffe, for demandants.

Mr. Ously, for defendant.

OPINION OF THE COURT. This is a writ of right brought to recover three thousand acres of land. The issue being joined, the plaintiff introduced a patent to James Kincaid for two thousand acres, and for one thousand acres, and deeds through various persons to the demandants. The survey of the two thousand acres is on the east fork of Rockcastle, in Lincoln county. The survey of the one thousand acres is on the waters of Rockcastle in the same county. The demandants' counsel also read certain surveys made by one McNeal, one of which was made out in this case, and the other in the action of ejectment lately pending in this court, between the same parties. A great number of depositions were read, and other evidence to prove the locality, surveys, &c., of the demandants' claim. The tenants claim under a patent from the state of Virginia to Jacob Remy of twenty thousand acres of land, dated the 15th of July, 1789, and lying on the waters of Rockcastle. Thirteen thousand four hundred acres of the same tract were conveyed by Remy on the 20th November, 1799, to William Edwards. And the 20th December following, Edwards conveyed seven thousand acres of the same tract, by metes and bounds to Pearl, under whom all the other tenants claim. This conveyance covers the land in controversy, and also includes the land covered by Kincaid's patent.

The evidence conduces to prove that in 1800 Pearl entered into the possession claiming the land conveyed to him, and he and others claiming under him, have held possession ever since. There is evidence conducing to prove that McCammon either in the year 1800 or 1801, entered on the land under a purchase from Pearl, and that afterwards McCammon exchanged his first pur-

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

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

[2] [Affirmed in 10 Pet. (35 U. S.) 412. See note at end of case.]

chase with Pearl for some other part of the same tract, and Pearl took possession of McCammon's first improvement. Witnesses have been examined to show that Remy's patent under which Pearl claims, should be located on Pond creek, and which would prevent any interference with Kincaid's patent. And the demandants offer to prove that one of the chain carriers, by the name of Moore, in making Remy's survey, was dead: and that he attended with the witness offered, about twenty-four or five years ago when a surveyor Charles Smith, Davis Caldwell and —— Moore, when said Moore, in the hearing of Camp Mullen, the witness, stated that he was one of the original chainmen; that they started at the mouth of Pond creek, and run south until the surveyor told them the distance called for in Remy's patent was out; and they then turned out to hunt for the corner; that he found a white oak standing near to where the course and distance ended plainly and anciently marked as a corner tree. That he recollected it was marked on the north and west sides, but could not say whether it was marked on the south side or not; that the white oak was of a common cabin log and that near to the tree lay the trunk of a white oak not quite so large, &c.; that they then run north, and on the course of Remy's patent saw line trees plainly marked, &c. This evidence is objected to and the question as to its competency is now to be considered.

The statement of Moore as detailed by the witness is mere hearsay. It was made a long time after the survey of Remy was executed, and relates to mere facts, such as that the beginning corner of Remy's survey was at a particular place, and that certain trees were marked, &c. This then is an attempt not to prove what exists in public reputation, but a fact known, perhaps, only to Moore, and his mere statement, not under oath, not made at the time the transaction occurred, but a long time afterwards, is to establish the fact. Now if this were a case in which hearsay would be admissible, still the testimony offered would be incompetent. In the case of Mima v. Hepburn, 7 Cranch [11 U. S.] 290, the supreme court say, "hearsay evidence is not competent to establish any specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge." This rule is founded in reason and propriety. Whatever is known to the public, as a matter of reputation, must be known to many persons besides the individual called to prove it; and consequently other witnesses may be called to contradict or explain his testimony. But if what a deceased person has said in regard to a particular fact, not under oath, shall be received as evidence, how is the party against whom the fact is to operate, to rebut it. If the deceased person were alive and should state the fact, under examination as a witness, he would make the statement under the solemnity of an oath, and would be responsible to the law, if he swore falsely; but his statements not under oath are made without responsibility of any kind, and they may have been drawn out by the person most interested in them. What security would there be against fraud and corruption, in procuring such evidence?

In cases of pedigree the remarks of persons intimately connected in the family, such as father, mother, brother, &c. are admissible to show the relationship of an individual. But this rule is established from the necessity of the case, and embraces only statements made prior to the controversy pending. It is true, hearsay is made up of remarks or statements of individuals, but when circulated abroad, and discussed as such matters usually are, in the community, if the facts stated be unfounded, the error will be likely to be exposed and corrected. There is therefore this security as to public reputation when it is received as evidence. In matters of public right this evidence is necessarily admitted. In England, where a vast number of rights are founded on prescription, this is the only evidence by which they can be sustained. The same may be said of particular customs, which in fact, depend upon prescription. In cases of pedigree above remarked, and also in the establishment of boundaries of counties, &c. in which the public are interested, where the matters proved extend beyond the memory of living witnesses, they must of course, if proved by parol, be proved by general reputation. But this is wholly different from the establishment of a private right, by hearsay proof of a particular fact. In this country reputation as to boundaries has been admitted, though such boundaries relate merely to private controversies. And this is undoubtedly an extension of the English rule. But, it is not believed that any court in this country has permitted a specific fact to be proved as hearsay, under the rule as extended. In no sense could such proof be called reputation, for the proof would not be what was known to the public, but what was said by an individual, and of which the public had no knowledge. A principle that would admit such evidence would break down the well established rule on the subject, and place the most important rights at the disposal of the vicious and unprincipled part of the community. There are cases in which the remarks of a surveyor, being employed to make a survey, made while thus engaged, as explanatory of what he is doing, may be proved as evidence. But these are received as a part of the res gestae, which tend to explain the survey. Barclay v. Howell's Lessee, 6 Pet. [31 U. S.] 504. We are clearly of opinion that the evidence offered is incompetent, and it cannot, therefore, be admitted.

The deposition of James Kincaid, having been read by the demandants, which proved

various facts, the defendant called Mershon, Smith, and others, to discredit Kincaid, and who state, there being no objection, that he declared Perry's survey was made by him at the mouth of Raccoon creek, when it was his interest to place it at Pond creek, &c. which is in contradiction to the facts stated in his deposition. And the demandants, with a view to sustain Kincaid, offered to prove his statements at other times, made subsequently to the statements proved by the defendant, and which would go to support the statements in his deposition; and the question is as to the competency of this proof. There are cases in which the statements of a witness may be proved to sustain his evidence; but this is never admitted except under peculiar circumstances: as where violence has been committed on a female, and she discloses the facts immediately afterwards. And in some cases the rule has been extended beyond this; but these cases are believed not to be sustained on principle or authority. The tenant has proved that the witness made statements which contradict his deposition, and it is proposed to show that subsequently he made other statements different from those proved by the defendant, and corroborative of those in his deposition. These statements are not evidence, except to discredit the witness. At best they are mere hearsay, and of course they are inadmissible. They are not offered or used by the defendant as evidence on the merits of the case, but merely to discredit the witness.

Now suppose the demandants could prove that subsequently the witness made different statements, would not this tend to show that no reliance could be placed in his statements? And how are such subsequent statements to weigh as evidence, or support the facts sworn to? Must his contradictory remarks on the subject be proved for years? and must we then strike the balance to ascertain the truth? This mode of arriving at the truth would be as novel as it would be dangerous. It would enable a party to manufacture evidence at pleasure, and to do away the effect of the truth confessed by a repetition of falsehoods. Where a witness is impeached by proving that he made statements contradictory of what he has sworn to, no witness can be called to prove other statements made by him, which go to support his evidence, except in the case named, or others which come within the rule applicable to that case. This is the rule observed in the Berkeley Peerage Case [4 Camp. 401], and is believed to be sustained by authority. 1 Phil. Ev. 307; 1 Starkie, Ev. 187.

The defendant has given in evidence the original survey of Remy's entry, as made by Kincaid, showing the lines, corners, &c. and to counteract this evidence the demandants offered in evidence a survey made by McNeal, in a case between the same parties, and of the making of which the defendant had due notice. On this plat the surveyor has noted that the "chops" are ancient, "John Forbes, Jun, states that he cut the same letters and figures," "on the east side, the chops appear to have been marked with a larger axe, than the chops on the beginning tree." To the introduction of this plat as evidence, the defendant objects on account of these remarks of the surveyor, and for other reasons. McNeal has been examined by the demandants as a witness in this case, and if this plat, with its notes be offered to support his evidence, it is clearly inadmissible under the rule, that the statements of a witness cannot be received to support his evidence. And if the object be to contradict and discredit the witness, it cannot be done by the demandants, he being their own witness, but they may prove that he was mistaken. The most decisive objection, however, to the plat as offered is, that the notes by the surveyor are not of facts, which he was required or authorized to ascertain in the discharge of his duty. So far as he noted the corner trees, the streams of water crossed, the courses and distances run, they are matters which he must know in making the survey, and which are evidence in proper cases. But whether the chops are ancient or modern, or whether they appear to have been made by a large axe or a small one, or what John Forbes, jun. may have said, is a matter of which the surveyor can know no more than any other witness; and consequently what he has stated on the plat respecting these things, is mere hearsay and not evidence. As the survey was made in another suit between the same parties, and on due notice, no objection is perceived to receiving the plat as evidence, so far as the objects noted come strictly within the duty of the surveyor. The plat shows a survey of the land in controversy, and may cast some light on some of the controverted points in the case. We will, therefore, admit it as evidence, after erasing the above objectionable notes by the surveyor.

The evidence being closed, the demandants moved the court to instruct the jury, that if they believe from the evidence that the survey of Jacob Remy, and the adjoining survey of George Thompson, were, in point of fact, made at the mouth of Pond creek, by beginning at or near the letter L, on the plat, that the law locates the patent on the ground where it was actually surveyed, notwithstanding the call or reference in said patents, or of either of them, to the mouth of Raccoon creek; and if they find that the patent of Remy, as surveyed, does not interfere with the claim of the plaintiffs, that they ought to find for the plaintiffs, unless they find that the defendants have had possession by an actual residence or fence, within the patent of plaintiffs thirty years or more next before the bringing of this and

the other suits. This instruction pre-supposes that there can be no possession of land, which shall enable a party to claim the benefit of the statute of limitations, except by actual residence or by a fence. It is admitted that the occasional occupancy of land for a temporary purpose, such as making sugar, may not amount to an adverse possession, within the statute, but it is clear that building an enclosure or fence, or actually residing on the land is not the only mode of possession which will enable the tenant to claim under the statute. A piece of ground may be so situated as to be cultivable without a fence or artificial enclosure. There are many improvements which give notice to the public of occupancy and ownership, as fully as a fence. The construction of a dwelling or other house connected with other improvements, may show as clearly an appropriation of the land as to enclose it by a fence. We therefore decline giving the instruction as asked; but will give it on striking out the word "fence," and inserting in lieu thereof the words, "improvements with intention of taking possession."

The demandants then moved the court to instruct the jury, that the settlement of William Pearl at or near the figure 11, as designated on the plat in 1800, outside of the patents under which the demandants claim, does not give any defence or limitation to the demandants' rights to recover, though he settled within what he supposed to be Remy's claim; unless they find that Remy's survey as actually made, and on which his patent issued, includes said settlement and the patent under which demandants claim. No objection is perceived to this instruction. A settlement outside of Remy's survey and patent, though believed at the time it was made to be within it, cannot limit the demandants' right beyond the actual occupancy. For in such case, there in nothing to show the extent of the adverse claim beyond the actual possession. Where an individual enters under a title, there being no adverse possession, he is in possession to the extent of his boundaries.

The demandants further requested the court to instruct the jury "that unless they find Remy's survey covers the patents under which the plaintiffs claim, that the settlement of McCammon within the two thousand acres, does not give a claim to a possession within the one thousand acre patent, nor does the possession within the one thousand acre patent give any possession within the two thousand acres." "That as to the two thousand acres, the statute runs as to that from the time a possession was taken by an actual residence, or by fencing, and the same as to the one thousand; consequently, that if they find that one has been thus possessed adversely for thirty years next before the bringing of this suit, and the other not; that as to the other not so held, they should find against such defendants as were within such patent at the date of the demandants' writ, provided their settlements are not included in Remy or Thompson's, as originally surveyed." This instruction is refused. There in no evidence to show the extent of McCammon's claim. Pearl had a conveyance for seven thousand acres, which covered the two thousand acre tract, and also the one thousand. His entry then under the rule above stated, there being no adverse possession, would be to the extent of his boundaries. And McCammon entered under Pearl, though the extent of his claim is not shown. If he purchased a part of the original tract, his entry would be limited by such purchase. But, if he entered under Pearl, without designation of limits, he would be in possession of the extent of Pearl's claim. These principles are well settled in this state, and it is believed that they give the correct rule on this subject.

Without then, some evidence of the limit of McCammon's claim, how can the court instruct the jury that his entry was limited by any thing short of the original boundaries of the seven thousand acres under which Pearl seems to have entered? If the facts existed in the case as assumed in the instruction, and the entry was limited to the tract specified, it might be given; but to give it in the face of other and contradictory facts, could only tend to embarrass and mislead the jury. The whole instruction is framed in reference to the limits of the demandants' claim, and not in reference to the title under which the entry was made. And the court instructed the jury on the motion of the demandants, "that if they find from the evidence that James Kincaid, the surveyor of Remy and Thompson did in point of fact make these surveys or cause them to be made, and the patents issued thereon, beginning at or near the mouth of Pond creek, as designated on the connected plat, and that after he returned the certificate of survey and patents issued thereon, marked or caused to be marked surveys with lines or corners to correspond with the calls of the patents at Raccoon creek, that such marking or surveying is utterly void and vests no title whatever in Remy, or his alienee; notwithstanding such surveys or marking may include the land in contest." And also, "that if they find Kincaid's beginning corner as represented on the plat, that then, as to this controversy, his surveys are properly laid down."

The defendant then moved the court to instruct the jury "that if they find, from the evidence that Remy's patent does not cover the land in contest, yet if they find that the tenants or any of them, or those claiming under them, or any of them, have had possession of the land in contest for thirty years next before the commencement of the demandants' suits they must find for the tenants." The general language of this

instruction was used under an agreement to embrace other suits pending, between the demandants and other tenants, involving the same title which should be determined by the decision in this case. The instruction might have been more definite as to the extent of possession by reference to the title under which the possession was held; but as this may be considered as included in the word possession, if it extend beyond the actual occupancy, agreeably to the rule laid down in this case, the instruction as asked is given. And the court instructed the jury also, "that to enable the demandants to recover, they must have proved to the satisfaction of the jury, that they, or those under whom they claim, have had seisin of the land in contest within thirty years next before the commencement of their suits." And also, "that if they find from the evidence that Remy's patent includes the land in contest, they must find for the tenants." The jury found that the tenants have better right than the demandants, to the land in controversy; on which verdict judgment is entered.

NOTE. This case was taken to the supreme court on various exceptions to the opinion and instructions of the court, and the judgment of the circuit court was affirmed. 10 Pet. [35 U. S.] 414.

Case No. 4,387.

ELLICOTT v. SMITH.

[2 Cranch, C. C. 543.][1]

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

GARNISHMENT—ACT MD. 1795, CH. 56.

If the garnishee in an attachment under the Maryland act of 1795, c. 56, is only one of the members of a mercantile company indebted to the defendants, he cannot be chargeable alone, as garnishee; nor can the garnishee be charged upon interrogatories, unless he admits that he is indebted to the defendant.

Attachment under the Maryland act of 1795, c. 56.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, doubting). The garnishee, in answer to interrogatories, says that he is one of the firm of "The Georgetown Importing and Exporting Company," and that by reason of certain losing and disadvantageous sales of the property of that company, by the defendants, Lanahan & Bogart, there then remained, on the books of the said defendants, a balance against the said company of $379.74, as he has been informed by the said defendants, and believes to be the fact; which balance they have claimed to have allowed them in the settlement of their accounts with the said company. He further says, that he has tendered to the defendants, L. & B., an equal proportion, with the other creditors of the said company, of such portion of the said company's funds as was held to secure his own individual claims. The question is, whether upon this answer the court can render judgment against Mr. Smith, the garnishee. We think we cannot. He is not individually and solely indebted to the defendants. If they had brought suit against him he might have pleaded in abatement that there were other partners not named in the writ. But his answer does not even admit that the company is indebted to the defendants; it only admits that they claimed to have the balance of accounts upon their books, allowed in the settlement. We are inclined to think that all the partners of the company should have been made garnishees. No one of the company should be charged unless upon his own oath or plea. However this may be, we think the answer does not admit a balance due by the company to the defendants.

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

Case No. 4,387a.

ELLINTHORP v. ROBERTSON.

[See Case No. 4,408.]

ELLIOT (AULT v.). See Case No. 655.

ELLIOT (BIGELOW v.). See Case No. 1,399.

ELLIOT (BRICE v.). See Case No. 1,854.

Case No. 4,388.

ELLIOT v. HAYMAN.

[2 Cranch, C. C. 678.][1]

Circuit Court, District of Columbia. May Term, 1826.

DEPOSITIONS—AFFIRMATION OF WITNESS—CERTIFICATE OF MAGISTRATE — HANDWRITING OF CERTIFICATE.

1. The certificate of a magistrate who takes a deposition of a witness, upon his affirmation, in Pennsylvania, that the witness was conscientiously scrupulous of taking an oath, is sufficient evidence of that fact to admit the deposition to be read in evidence in this court.

2. The court will not permit persons skilled in comparison of handwriting to prove that the body of the certificate of the magistrate, to a deposition, is not in his handwriting.

A deposition was offered, in evidence, by the plaintiff's counsel, which was taken upon the solemn affirmation of the witness, who, the magistrate certified, was "conscientiously scrupulous of taking an oath."

Mr. Marbury and R. S. Coxe, for defendant, objected that it did not sufficiently appear to the court, "by testimony," that the deponent "is one of those who profess to be conscientiously scrupulous of taking an oath," according to the provisions of the constitution of Maryland, as amended by the act of November, 1797, c. 118.

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

THE COURT (CRANCH, Chief Judge, contra), overruled the objection, being of opinion that the certificate of the magistrate was sufficient evidence of that fact. The defendant then offered to examine persons skilled in the comparison of handwriting, to prove that the body of the certificate of the magistrate was not in his handwriting. But THE COURT (nem. con.) refused to permit them to be examined.

ELLIOT (MILLER v.). See Case No. 9,568.

ELLIOT (PALMER v.). See Case No. 10,690.

ELLIOT (RINGGOLD v.). See Case No. 11,844.

ELLIOT (SMITH v.). See Case No. 13,040.

Case No. 4,389.

ELLIOT v. TEAL.

[5 Sawy. 188.][1]

Circuit Court, D. Oregon. May 31, 1878.

ABATEMENT OF ACTION — JURISDICTION — PARTIES.

1. The rule of the common law that an action abated by the termination or transfer of the plaintiff's interest therein, pendente lite, is abrogated by section 37 of the Oregon Civil Code, which declares that no action shall abate for any such cause; and section 27 of said Code which provides that "every action shall be prosecuted in the name of the real party in interest, must, in connection with said section 37, be taken to mean that every action shall be commenced in the name of the real party in interest."

2. The vendee of the plaintiff in an action to recover possession of real property is not a party thereto, and therefore his citizenship is an immaterial matter, and in no way affects the jurisdiction of the national courts.

Action [by Violet W. Elliot against Joseph Teal, substituted for Samuel Tillard] to recover possession of real property.

Addison C. Gibbs, for plaintiff.

W. Lair Hill, for defendant.

DEADY, District Judge. This action is brought against Samuel Tillard, to recover the south half of the donation of William and Violet W. Berry, the same being the wife's half of claim No. 53, in township 10 south, of range 5 west of the Wallamet meridian, and containing three hundred and nineteen and ninety-one hundredths acres. Tillard answered that he was in possession simply as the tenant of Joseph Teal, whereupon the latter on his own application was made defendant in place of the tenant. On September 3, 1877, the defendant Teal answered, denying the ownership of the plaintiff, and pleading title in himself. On April 29, 1878, the defendant applied for leave to file a supplemental answer, alleging that since the commencement of this action, and some time in November, 1877, the plaintiff had conveyed the premises to a citizen and resident of the state of Oregon; and that the plaintiff has now no interest in the event of this action and is not the real party in interest, and therefore "this court has no jurisdiction of this cause." The application is resisted by the plaintiff upon the ground that the facts sought to be pleaded are immaterial.

Section 105 of the Oregon Civil Code provides that the defendant may be allowed to make a supplemental answer alleging "facts material to the case" occurring after the former answer. At common law, any matter of defense, arising after a plea was pleaded as a matter arising puis darrein continuance, and might be either in abatement or bar of the action. But in either case such a plea was a waiver of any plea or defense which preceded it—at least when the former was inconsistent with the latter. 1 Chit. Pl. 695–697; 2 Wend. 300; 34 Barb. 200. Section 105, supra, is merely the common law rule upon this subject adapted to the Code practice and nomenclature. Therefore the allegation in the proposed answer to the effect that the defendant does not admit but still denies that the plaintiff is or was at the commencement of the action the owner of the premises in controversy, is not entitled to be considered. For the defense in the supplemental answer and the prior plea of ownership in the defendant are either consistent or inconsistent. If they are consistent the allegation is immaterial, but if inconsistent it is of no effect, because a party cannot impliedly admit that a former defense is untrue and at the same time allege that it is true—in other words, cannot waive such defense by pleading another contrary to it and also insist upon it. But is this matter "material"? At common law the death of a plaintiff or the termination of his interest in the subject-matter of the action might be pleaded in abatement of it. 1 Chit. Pl. 25, 482; 1 Bac. Abr. 22. To remedy the inconvenience resulting from the application of this rule in case of the death of a party, statutes were enacted providing for the continuation of the action by the personal representative of the deceased. Section 37 of the Oregon Civil Code goes farther and provides: "No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage or other disability of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest."

By this section it is expressly provided that the termination of the plaintiff's interest in the subject of the action shall not abate it; and this applies to and includes a case like this, where the termination of such interest is alleged to arise from a voluntary transfer thereof. The subject of this action is the right of possession of the premises mentioned in the complaint. Such right is not extin-

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

guished by the transfer, but passes to the plaintiff's alleged vendee. It may therefore be admitted that the plaintiff, if the fact be as alleged, is not now the real party in interest, and therefore not entitled to prosecute this action within section 27 of the Code, which provides that "every action shall be prosecuted in the name of the real party in interest." But the operation of section 27 is modified by section 37, supra, which in effect provides that when an action is commenced by the real party in interest his subsequent transfer of such interest "shall not abate the action or prevent his prosecuting it to final judgment, or its being so prosecuted in his name, for the benefit of whom it may concern." This question was thoroughly considered in Moss v. Shear, 30 Cal. 475, and in French v. Edwards [Case No. 5,097], and the conclusion reached that a conveyance of the premises pendente lite does not abate an action for the possession, or prevent its being further prosecuted in the name of the vendor. To the same effect is Camarillo v. Fenlon, 49 Cal. 203.

But it is said that the California statute (section 16, Prac. Act; section 385, Code Civ. Proc.) under which these rulings were made, contains a provision expressly authorizing the court, in the case of a voluntary transfer pendente lite, to allow the action to be continued in the name of the original party or the vendee. This provision is not in the Oregon Code, and it may therefore be admitted that under it there is no power to substitute the person to whom the transfer is made for the plaintiff. But what follows? Why, simply that the action must be prosecuted in the name of the original plaintiff, unless it is to abate, a result which section 37, supra, expressly provides shall not happen. It is plain, then, that both Codes having provided that an action shall not abate on account of the transfer of any interest therein, it follows, as a matter of course, that under either an action commenced by the real party in interest may be prosecuted to final judgment in his own name, notwithstanding a transfer of his interest therein. This right to continue the action in the name of the original party is not conferred by the provision in the California statute which permits it to be so continued, or in the name of the vendee, but necessarily results from the prior provision that the action shall not abate.

No decision of the supreme court of this state upon the point has been cited. So far as the question before the court is concerned, the statutes of Oregon and California are the same and the cases decided under the latter are directly in point. Upon the statute of this state there appears to be no room for argument. It is expressly provided that an action shall not abate by reason of any transfer of interest therein, and therefore it must continue and be prosecuted as though such transfer had not taken place. It follows that the facts set up in the proposed answer are not material in this action, and therefore the application is denied.

But probably this motion ought not to be disposed of without noticing the fact that the proposed answer not only alleges the transfer of the premises by the plaintiff, but that the person to whom such transfer was made is a citizen of the same state as the defendant, the state of Oregon, and that therefore "this court has no jurisdiction of the cause." It would seem from this and some phases of the argument for the motion that this supplemental answer was intended as a plea to the jurisdiction of the court on the point of the citizenship of the parties rather than in abatement of the action.

But the vendee of the plaintiff is not a party to this action, and therefore it is immaterial what is his citizenship. If it was sought to substitute him as a party to the action in place of the plaintiff, then the question of his citizenship would become material. But as it is, the matter is of no moment whatever. The transfer of the premises by the plaintiff to a third person, pendente lite, unless it operates, as at common law, to abate the action, can have no effect upon it whatever, and in this respect the citizenship of the party to whom the transfer is made is immaterial. But section 37, supra, having provided that such transfer shall not abate the action, it continues as though the alleged conveyance had never been made. The statute was made to promote utility and convenience in the prosecution of remedies by doing away with the unnecessary expense and delay of commencing a second action for the same cause, on account of the death of a party or the transfer of his interest during the progress of the action. The motion is denied.

[Upon a trial by the court upon an agreed state of facts, there was a finding for defendant. Case No. 4,396.]

ELLIOT (THOMAS v.). See Case No. 13,896.

ELLIOT (UNITED STATES v.). See Cases Nos. 15,043 and 15,044.

Case No. 4,390.

ELLIOT v. VAN VOORST et al.

[3 Wall. Jr. 299;[1] 18 Leg. Int. 396.]

Circuit Court, D. New Jersey. Oct. 30, 1860.

SOVEREIGNTY OF THE UNITED STATES AS AFFECTING ITS SUBJECTION TO SUIT.

1. The rights of the United States government, as a sovereign, and its prerogatives as such, are co-extensive with the functions of government committed to it.

[Cited in Lee v. Kaufman, Case No. 8,191; Meier v. Kansas Pac. Ry., Id. 9,394.]

2. When it purchases land within a state, not intended for forts, arsenals and other national

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

uses, but merely to secure a debt, it takes the land as any other corporation, and cannot claim any of the immunities or prerogatives of a sovereign.

3. Consequently, a mortgagee may have a valid decree in chancery for the sale of the mortgaged land, where the United States is owner of the equity of redemption, on a notice given in any manner the court may prescribe.

[Cited in Central Trust Co. v. Florida Ry. & Nav. Co., 43 Fed. 759.]

4. The jurisdiction of the chancellor to order such sale, depends on the locality of the land, and not on the domicile of the owner of the equity of redemption. The regularity of such a sale cannot be called in question in a collateral suit.

This was a bill for the redemption of a mortgage of a lot of land [near Hoboken].[2] The complainant claimed to be owner of the equity of redemption. The respondents claimed under a judicial sale of the property, under a decree of the court of chancery of New Jersey, in a bill to foreclose the same mortgage.

The history of the title was this: Van Voorst was the original owner of the lot [producing no immediate profits, but of some speculative value from anticipation of future demand for town lots. On the 15th of Oct., 1836] [2] he sold it to one Innis, who reconveyed it on the same day, by way of mortgage, to secure a balance of the purchase money. Innis conveyed his equity of redemption to one Swartwout, collector of the port of New York. [In 1839] [2] Swartwout becoming a defaulter to government, this lot was seized, sold and bid in for the United States, and a deed made to them by the marshal. [In 1847, the solicitor of the treasury conveyed it to one Corcoran, who, in 1858, conveyed it to the complainant.] [2] The complainant claimed under the United States, whose title he had bought. [The mortgage to Van Voorst was payable in five years from date, with lawful interest, payable semi annually, with provision that if at any time the interest should be behind and unpaid for the space of thirty days, then the whole principal and interest should become due and payable.] [2] Neither principal nor interest having been paid on the mortgage to Van Voorst, the mortgagee, for some time, and the land being vacant and unproductive, and the only remedy left to him being a sale of the land under his mortgage, he filed his bill in the court of chancery of New Jersey to have his mortgage foreclosed, and the land sold to satisfy the debt due on the mortgage. The bill set forth that the United States had become owner of the equity of redemption, and prayed that a notice or subpoena might issue to J. S. Green, Esq., attorney of the United States for New Jersey district, that he answer in behalf of the United States, and show any defence against the prayer of the bill. Accordingly, the district attorney appeared and filed an answer, admitting the charges of the bill, and submitting to the court to take care of the interests of the United States in the mortgaged premises. The court of chancery thereupon adjudged that the mortgage money and interest was due and unpaid, and ordered, "that so much of the mortgaged premises as will be sufficient to raise and satisfy the debt, interest and costs, be sold, and that a writ of fieri facias do issue for that purpose, and that defendants be debarred and foreclosed from all equity of redemption." On this decree a fi. fa. was issued, and the premises sold and conveyed by the sheriff to the defendant, Van Voorst [in November, 1840].[2] The land being wholly unproductive and without buildings or improvements, Van Voorst laid it out in town lots, and sold the same at different times to persons, nearly all respondents in this case, who had entered, built and made improvements greatly increasing the value of the land. Nearly twenty years had elapsed since the mortgage title was forfeited. The question now presented was, whether the judicial sale by the court of chancery of New Jersey, to satisfy or foreclose the mortgage, is valid or void; the complainants contending that it was void, because the United States, being a sovereign, could not be sued in the state court of New Jersey.

GRIER, Circuit Justice. It is undoubtedly true that no action can be sustained against the government of the United States for any supposed debt or claim unless by its own consent, or some special statute allowing it. [Reeside v. Walker] 11 How. [52 U. S.] 290. The sovereign himself being the source of justice and power, exercising the same through his courts, is always presumed to be ready to do justice. It is, therefore, part of his prerogative, that he cannot be sued in his own courts. Nevertheless, the subject was entitled, when he claims anything from the crown, to have his "petition of right." Upon such petition the crown ordinarily directs that right be done to the party; and the petition is then referred to the chancellor to be executed according to law, and directions are given that the attorney general be made a party to the suit. In other cases where the crown is not in possession, and its rights are only incidentally concerned, it is generally considered that the attorney general may be made a party in respect of these rights, and the practice has been accordingly. In the United States the proceeding by petition of right is unknown. The government of the United States, though limited in its powers, is supreme in its sphere of action. But its rights as a sovereign, and its prerogatives as such, are co-extensive with the functions of government committed to them, and extend no farther. Its position as to prerogative is anomalous, owing to our peculiar institutions.

It is part of the functions committed to

[2] [From 18 Leg. Int. 396.]

[2] [From 18 Leg. Int. 396.]

this government to build forts, arsenals, navy yards, &c., &c. It may purchase and hold land for these purposes, yet it cannot exercise exclusive legislation over such lands, although used for national purposes, without the consent of the legislature of the state where the land lies. A state has no power by taxation or otherwise, to retard, impede, burthen or control the operation of the constitutional laws passed by congress to carry into effect powers vested in the national government. Hence she may not have power to tax navy yards, or other property of the United States held within its bounds for public or national uses. But it does not follow that when the government officers purchase land in the name of the United States to secure a debt, as any individual or private corporation might do, that it thus ousts the jurisdiction of the state to tax it, or in any manner affects the liens or rights of mortgagees in such lands. In the mere exercise of a corporate right, the government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to congress to redeem. The courts of New Jersey cannot thus be ousted of their jurisdiction and duty to assist the mortgagee to have his mortgage satisfied, and the mortgaged premises sold for that purpose. When the government, in the exercise of the rights and functions of a civil corporation, purchases lands to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. Thus, when the government of the United States became a partner in a trading corporation, such as the United States Bank, it divested itself, so far as concerned the transactions of that company, of its sovereign character, and took that of a citizen; consequently, its property and interests were subject to the decrees and judgments of courts, equally with that of its copartners.

When Van Voorst came into the court of chancery, he had a clear right to have the mortgaged lands sold to satisfy his mortgage. The court was bound to furnish him a remedy. The land mortgaged was within the jurisdiction of the court. The only difficulty in the case was, that the title of the mortgagor, who should be made a party to the proceeding and have an opportunity to show that lien was paid or discharged, was vested in the United States, quoad hoc, a foreign corporation, and not within the jurisdiction of the court. It could not be compelled to appear or submit itself to such jurisdiction, so neither could any nonresident individual or corporation. The usual way to warn such absent parties is by advertisement. When such absentee does not choose to come in voluntarily and appear and make defence, he is made a party without his knowledge or consent. The jurisdiction of the court over the land decreed to be sold, is sufficient to justify the decree and validate the sale, as regards the property sold, but no decree could be made against the person not within the jurisdiction, that could bind him or be regarded as valid in another tribunal. In this case the court of chancery of New Jersey had jurisdiction over the thing or land mortgaged; it could not compel the United States government to appear and submit itself to the judgment, or render any judgment that it should pay money; but it can prescribe what notice should be given to the mortgagor or owner of the equity of redemption, and how it should be given. In analogy to the proceedings in the court of chancery in England, it was ordered that the subpoena be served on the representative of the government, who, quoad hoc, might be treated as the attorney general. The attorney appeared and answered on behalf of the government. The presumption is that he was duly authorized so to do. Through him the government had notice, and might redeem if it saw fit. The decree demanded nothing of the United States. It is only for a sale of the mortgaged premises, to satisfy a legal lien. After thus refusing to redeem, after full notice, the government ought to be estopped. Its vendee, with full notice of this judicial sale, has no equity—nor should he now be allowed to wrong bonâ fide purchasers under the cover of the sovereign prerogatives of the United States.

I am of opinion, therefore, that the court of chancery of New Jersey had jurisdiction to effect a sale of these mortgaged premises, in satisfaction of the lien; that its decree and the sale under it, are not void for want of jurisdiction—and that their regularity cannot be called in question in a collateral suit. If irregular and erroneous the decree might have been set aside on writ of error. Grignon v. Astor, 2 How. [43 U. S.] 319; Griffith v. Bogart, 18 How. [59 U. S.] 164.

It may be said there is no precedent in this country for precisely such a case as that before the chancellor. The answer to this may properly be, "It is time there was one."

Bill dismissed, with costs.

ELLIOT (WILKES v.). See Case No. 17,660.

Case No. 4,391.

In re ELLIOTT.

[2 N. B. R. 110 (Quarto, 44).][1]

District Court, S. D. New York. Sept. 22, 1868.

BANKRUPTCY—OBJECTION TO DISCHARGE—FIDUCIARY DEBT.

If the requirements of the act have been complied with, a discharge can only be refused on some ground set forth in section 29 [of the bankrupt act of 1867 (14 Stat. 531)]. Objection to discharge, based upon the fact that the

[1] [Reprinted by permission.]

debt was a fiduciary one, is not good, for such debts are unaffected by the discharge.

[Followed in Re Wright, Case No. 18,065.]

BLATCHFORD, District Judge. The specifications filed by Seely & Wolcott, show no legal ground for withholding a discharge. They do not specify any ground which is embraced in section 29 of the act, as a ground for refusing a discharge. It is clear, from the language of the act, and especially of section 34, that a discharge (if the formal requirements of the act have been complied with,) is to be refused only for some ground set forth in section 29. The only ground alleged in the present case is, that the debt to Seely & Wolcott was a fiduciary debt. If so, the discharge will, by its terms, and the express provision of the act, (sections 33 and 34) fail to affect it. But this is no ground for refusing a discharge to operate on such debts not excepted by section 33. A discharge will be granted in this case, when the register shall have certified conformity.

Case No. 4,392.

ELLIOTT et al. v. HOLMES et al.

[1 McLean, 466.][1]

Circuit Court, D. Illinois. June Term, 1839.

SERVICE OF WRIT ON PERSON NOT NAMED THEREIN —AMENDMENT BY CONSENT.

1. Where a writ is served on a person of a different name from the one against whom it was issued, and there is no appearance, the plaintiffs cannot proceed.

[Cited in Kelley v. Mississippi Cent. R. Co., 1 Fed. 568.]

2. In such a case the writ may be amended, by consent of parties, on the payment of costs.

OPINION OF THE COURT. The writ in this case was issued against Valentine B. Holmes, and it was served on Vivian B. Holmes, against whom the declaration was filed.

The defendant did not appear, but Mr. Baker, his counsel, suggested to the court, that the service of the writ, having been made on a person different from the one named in the writ, the plaintiffs could not proceed in the case. That if the defendant fail to appear, the writ must have been regularly served on him, before he can be considered in court, so as to authorize a judgment against him.

This motion was opposed by Davis & Forman, who appeared for the plaintiffs; but the court held that the proceedings were irregular, and that the question might be brought before the court, in the mode adopted, or by a plea in abatement, for a variance between the declaration and the writ. In England, a plea in abatement for such a variance cannot be filed, as a copy of the writ is refused.

On suggestion of the court, the plaintiffs, by consent, were permitted to amend the writ on the payment of all costs, and a continuance of the cause.

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

Case No. 4,393.

ELLIOTT et al. v. The JAMES NELSON.

[1 Pittsb. Rep. 6; 1 Pittsb. Leg. J. 5.]

District Court, W. D. Pennsylvania. 1853.

COLLISION — BURDEN OF PROOF — LIGHTS TO BE CARRIED BY STEAMBOATS—COAL BOATS.

1. In an action for collision, the libellant must prove not only negligence and misconduct in the respondent, but also ordinary care and diligence in himself.

2. Masters of steamboats must carry, between sunset and sunrise, one or more signal lights that may be seen by other boats navigating the same waters; but the act does not extend to coal boats.

3. But coal boats must have on board such signal lights as may be seen, and must show them in a reasonable time; and their owners must prove beyond a reasonable doubt that proper caution and diligence were used to avoid collision.

In admiralty.

IRWIN, District Judge. The decision of the question arising out of the petition, answer and evidence, may, it is supposed, in argument, establish a precedent as to what kind of a signal, and the time of its continuance, will be required by coal boats in navigating the Ohio river, to sustain or resist a claim for damages in cases of collision. But unless something material is omitted which the law requires to be done, it will rarely happen from a difference of facts that a rule applicable to one case can safely be applied to another; so that a decision resting upon particular facts in evidence can only be a precedent in cases where the facts are precisely similar.

The Nelson and the suffering boats were descending the river Ohio about midnight of the 10th of November, last, both occupying the middle of the channel; the night being dark and rainy, the water about twelve feet in depth, and the speed of the Nelson about ten miles an hour, when the coal boats were run down and totally lost.

It is alleged by the libellants, that this disaster was occasioned by the negligence of the officers of the Nelson, by disregarding the signal light of the boats; by its improper speed in such a night, in the vicinity of a number of coal boats, and by the lookout having left his post a few minutes before the collision took place. To this, it is answered by the respondents, that there was no signal light shown by the coal boats which could have been distinctly seen before or at the time of collision; that the light, called a signal, was in an old and battered lantern, emitting only feeble and fitful rays, and got up suddenly when there was not time to prevent a collision; that the speed of the Nelson

was only such as was usual at night, and that the lookout was only away from his post about a minute, not long enough to interfere with his duty. To enable the libellant to recover, he must not only show some negligence and misconduct on the part of the respondent, but ordinary care and diligence on his own part. The law makes it the duty of the master and owner of every steamboat, whether employed on the sea, or lakes, or rivers, to carry between sunset and sunrise one or more signal lights, that may be seen by other boats navigating the same waters. The Nelson was provided with such a light; and if there was any negligence or misconduct in navigating that boat, it was in disregarding what the libellants call the signal light of the coal boats. This is the material point to be considered; for if that light was insufficient, and not in proper time displayed, it will not be necessary to discuss the charges of negligence and misconduct made by the libellants.

The evidence is, that the signal of the coal boats was a candle, contained in an old and battered lantern, lighted when the steamboat was at a short distance and approaching the coal boats in the same channel, at a speed of ten miles an hour, but time enough (if the libellants are to be credited) to enable the steamer, by changing her course or reversing her engine, to avoid the collision. But some of the respondent's witnesses depose that this light was not seen, and could not be seen until it was too late to prevent the accident; others say that it could not be seen at all until the time of collision, while all concur in saying that it was insufficient, and that, if sufficient, it was exhibited too late for the boat to alter her course or reverse her engine. There is evidence that it has been customary for coal boats to use at night when navigating the Ohio, a candle, enclosed in a tin lantern, as a signal light, but whether occasionally, as steam vessels neared them, or during the whole night, we are not informed; but it is proved that the lights of other coal boats were distinctly seen all the night of the collision. The act of congress [Act July 7, 1838; 5 Stat. 306] which requires steamboats to keep a signal light or lights from sundown to sunrise cannot, by judicial decision, be extended to coal boats, but it serves to show a wise precaution against one cause of collision, which will strongly apply to other crafts navigating the Ohio at night. The same reasons which made this law expedient, strongly apply to coal boats floating on a river with a narrow channel, such as the Ohio, on a dark night. There is then obviously more danger of a coal boat descending that channel without a light, being run down by a steamer also descending and in proximity, than of a collision between two steamers navigating the same channel in proximity, one with and one without such a light.

But the court can do nothing more than adopt the spirit of the act referred to, so far as it may have a bearing upon the question of negligence, by requiring in all cases that a conspicuous signal light shall be exhibited by coal boats navigating the Ohio at night, so long before a collision as not to make the right of action and the award of damages to depend upon a controversy, as in this case, whether such a light was shown one minute, or ten or fifteen minutes, or any such brief time before the collision. Unless such a rule is established to govern future cases of this nature, libels for damages arising from such collisions must always involve conflicting and doubtful testimony, too unsafe for an opinion decisive of important rights. Whether a signal light was exhibited within a period of five or ten minutes before collision; and whether the colliding boats were a mile or a half or a quarter of a mile apart at the time, would generally depend upon the memories of men alarmed and excited by impending peril, and too apt to be influenced by feelings little calculated to elicit the truth, and lead the mind to a just conclusion. It may not be expedient to fix any time during night when it will be incumbent upon coal boats floating in the Ohio to be provided with signal lights, but it will always be required of the owners of them satisfactorily to prove beyond a reasonable doubt or dispute, in cases of alleged collisions, that they have taken precautions to avoid them by the diligence and care indicated. Believing that these precautions were not observed by the libellants in the case before the court, the libel must be dismissed, with costs.

Case No. 4,393a.

ELLIOTT v. The LEAH H. MILLER.

[3 Betts, D. C. MS. 74.]

District Court, S. D. New York. June, 1843.

PRACTICE IN ADMIRALTY—REARGUMENT—DISCRETION OF COURT.

[It rests within the discretion of a court of admiralty to entertain, after decree, a motion for a reargument on the question of costs.]

[In admiralty. Libel by John H. Elliott against the sloop Leah H. Miller. A decree was rendered for libellant, without costs. Heard on libellant's motion for a reargument as to costs.]

Before BETTS, District Judge.

PER CURIAM. On the 28th of March last the court decreed on the pleadings and proofs that the libellant should recover $120 for his services on board the vessel, but no costs were allowed him. The counsel for the libellant at the first opportunity thereafter, and during the term, moved a reargument of the case on the point of costs. The counsel for the claimants contended that the court had no power to grant a review of the former decisions, unless for error manifest upon the face of the decree, or because of

newly discovered evidence. Both counsel also discussed the subject of costs on the merits of the case. The application now before the court does not involve in any way the question whether a case can be opened and heard de novo after a final decision rendered, and at a term subsequent to the term in which the decision is given. The whole matter was still within the control of the court when this motion was made, and it is in consonance with the practice of all courts to hear re-arguments upon new or difficult questions at the instance of parties, or for the court itself to direct them ad libitum until the matter passes into final judgment. It is less usual to allow the privilege of a further argument after the opinion of the court has been pronounced, and for obvious reasons, for if the court had felt serious doubts it would have called for further discussion and the disadvantage of contending against the nature and declared opinion of the court on a point examined, is so palpable as that counsel will rarely be induced to solicit the undertaking. Still there is nothing in principle preventing a reconsideration of the subject by the court, and a modification or change of its opinion, during the term in which the proceedings are had.

The rehearing allowed in this case is not granted because of errors manifest on the face of the decree, nor on account of newly discovered evidence, but to examine under further lights a particular feature in the controversy, and accordingly the whole case is re-opened in so far as any particular in it can be made to bear upon the question of costs. Though costs do not appertain to decree in admiralty courts as necessary incidents ([Canter v. American & Ocean Ins. Co.] 3 Pet. [28 U. S.] 319), yet the usage of those courts unquestionably is, to award costs to the successful party pretty much as a matter of course (Betts, Pr. 123), particularly when the recovery is of a debt or pecuniary demand (1 Hopk. 344). The decision in his favor is accepted as satisfactory evidence that inequitable impediments were placed in the way of his recovering his rights, or demands of an inequitable character were pursued against him, and that accordingly he is entitled to be in part remunerated therefor by the recovery of costs. This is more especially so in respect to decisions on the merits where full contestation of suit has been had between the parties. But common law courts equally with chancery and civil law tribunals, exercise a broad discretion in allowing or denying costs, when the shape of the proceedings brings the court necessarily to weigh all the equities affecting the subject, and the party who substantially prevails will thus often be refused costs. 2 Wend. 631; 5 Wend. 78. And equity or admiralty tribunals, proceeding ex aequo et bono, regard costs as a substantial part of the equity of the case, and grant and withhold them without any necessary dependence upon the decision of the main subject of contestation. [Canter v. American & Ocean Ins. Co.] 3 Pet. [28 U. S.] 319; The Ulpiano [Case No. 14,326]; 1 Johns. Ch. 77; Id. 166; 12 Johns. 500; [Riddle v. Mandeville] 6 Cranch [10 U. S.] 86; 3 Johns. Ch. 69; Id. 147.

Case No. 4,394.

ELLIOTT v. NICHOLLS.

[Cited in Chaffraix v. Board of Liquidation, 11 Fed. 645. Nowhere reported; opinion not now accessible.]

Case No. 4,395.

ELLIOTT et al. v. PEIRSOLL et al.

[1 McLean, 11.][1]

Circuit Court, D. Kentucky. May Term, 1829.[2]

DEED—EXECUTION BY FEME COVERT—DEFECTIVE ACKNOWLEDGMENT—EQUITY JURISDICTION—CANCELLATION OF DEED VOID UPON ITS FACE.

1. To give validity to a deed, for the conveyance of land, executed by a feme covert, she must be privily examined as the statute requires.

2. A defective acknowledgment of a feme covert, cannot afterwards be amended by the court before whom it was taken, by parol proof of the facts.[2]

3. A court of chancery ought not to exercise its extraordinary powers, in directing a deed, void upon its face, to be surrendered and cancelled. This should be done where a deed is void, for matters wholly extrinsic.[2]

[See note at end of case.]

[This was a suit by James Elliott and others against William Peirsoll and others.]

Mr. Wickliffe, for complainants.

Mr. Haggin, for defendants.

OPINION OF THE COURT. In their bill the complainants represent themselves to be the heirs of Sarah E. Elliott, deceased; who during her coverture was induced by her husband, James Elliott, in the year 1813, to execute a deed for a valuable estate which

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

[2] [Affirmed in 6 Pet. (31 U. S.) 95. The opinion of the supreme court is cited in Boudereau v. Montgomery, Case No. 1,694; Thompkins v. Thompkins, Id. 14,091; Daviess v. Fairbairn, 3 How. (44 U. S.) 648; Lane v. Dolick, Case No. 8,049; Thompson v. Tolmie, 2 Pet. (27 U. S.) 168; Voorhees v. Jackson, 10 Pet. (35 U. S.) 478; Wilcox v. McConnel, 13 Pet. (38 U. S.) 511; Decatur v. Paulding, 14 Pet. (39 U. S.) 600; Lessee of Grignon v. Astor, 2 How. (43 U. S.) 343; Lessee of Hickey v. Stewart, 3 How. (44 U. S.) 762; Burnham v. Webster, Case No. 2,178; Bank of U. S. v. Moss, 6 How. (47 U. S.) 38; Williamson v. Berry, 8 How. (49 U. S.) 541; U. S. v. Stowell, Case No. 16,409; Beauregard v. New Orleans, 18 How. (59 U. S.) 503; Bell v. Ohio Life & Trust Co., Case No. 1,260; Derby v. Jacques, Id. 3,817; Cook v. Burnley, 11 Wall. (78 U. S.) 669; Amory v. Amory, Case No. 334; Otis v. The Rio Grande, Id. 10,613; Thompson v. Whitman, 18 Wall. (85 U. S.) 467.]

was vested in her, to one Benjamin Elliott; who immediately reconveyed the land to her husband. That the said Sarah supposed she only conveyed a life estate. The deed was recorded without any privy examination of the said Sarah, as the law requires. After her decease, the complainants brought an ejectment for the land, and during the pendency of this suit, the county court of Woodford were prevailed on to make the following order on the motion of Benjamin Elliott: "Woodford County, ss. November County Court, 1823. On motion of Benjamin Elliott, by his attorney, and its appearing to the satisfaction of the court, by the endorsement on the deed from James Elliott and wife to him, under date of the 12th of June, 1813; and by parol proof that the said deed was acknowledged in due form of law, by Sarah Elliott, before the clerk of this court on the 11th day of September, 1813, and that the certificate thereof was defectively made out, it is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate as amended be again recorded." Whereupon the said certificate was directed to be amended to read in the words and figures following, to wit: "Woodford County, sct. September 11th, 1813. This day the within named James Elliott and Sarah his wife, came before me, the clerk of the court for the county aforesaid and acknowledged the within indenture to be their act and deed; and the said Sarah being first examined privily and apart from her said husband, did declare that she freely and willingly sealed and delivered said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court and certificate as directed to be amended, are all duly recorded in my office. John McKinney, Jr., C. W. C. C."

At November term 1823, the plaintiffs in the ejectment obtained a judgment in their favor. During this term the bill was filed to stay waste, &c., and to have the above deed delivered up to be cancelled. A writ of error was prosecuted on the above judgment, and judgment was affirmed. 1 Pet. [26 U. S.] 328. In that case the court held that the acknowledgment of Sarah E. Elliott, was not in pursuance of the statute and that it did not divest her right. The defendants filed their answers, and insisted on the sufficiency of the acknowledgment. The other question being settled by the judgment in the ejectment, the surrender of the deed is the only point made by the bill which it becomes necessary to consider.

The complainants insist that they have a right to demand the surrender of this deed, as it casts a shade upon their title and may subject them to future litigation and expense. And it is insisted that to give relief under such circumstances, is the province of a court of equity. There would be much force in this argument, if the deed in question were not void upon its face. It has been solemnly adjudged by the supreme court to be void. The deed is therefore of no validity, and can be used in no form to sustain, against the complainants as the heirs of Sarah E. Elliott, any color of right either legal or equitable. If the deed were not void upon its face, but could be shown to be inoperative and void by matters extrinsic, there would seem to be much reason in ordering it to be cancelled, and it might subject a party to litigation and, perhaps, to some uncertainty in proving it to be void. The proof might not always be at the command of the party, or in its nature it might be perishable. There are contradictory decisions in the English authorities on this point. 3 Brown, Ch. 15, 18; 3 Ves. 368; 5 Ves. 286; 7 Ves. 3. And Chancellor Kent, 1 Johns. Ch. 517, inclines to think that "the weight of authority and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law; and whether it be void from matter appearing on its face or from proof taken in the cause; and that these assumed distinctions are not well founded."

We have not enumerated the conflicting decisions on this subject to ascertain on which side the majority is found; but we differ with Chancellor Kent, who thinks, in reason, these assumed distinctions between instruments void upon their face, or for matters wholly extrinsic, are not well founded. We think there is a clear distinction between the two instruments, both as it regards the parties in interest and the public, sustained by reason; and that an equitable jurisdiction may well be exercised in the one case and not in the other. The deed void upon its face, however it may be attempted to be used, carries its own condemnation. No want of notice can enable the grantee to convey a good title. But this is not the case where a deed may have been fraudulently obtained, and is consequently voidable. The grantee, in some cases may convey a good title to a bona fide purchaser without notice. And is not this a clear distinction between the two instruments, both as it regards the parties to the deed and the public?

To prevent the perpetration of frauds as far as possible, is as much the object of every well regulated government as to relieve against them. And here is a case where the fraudulent holder of a deed may convey a valid title to an innocent purchaser. The instrument then which may enable him to practice this fraud, should be surrendered to be cancelled; and a court of equity cannot well be called to exercise its peculiar jurisdiction in a case more appropriate. And even where the holder of an instrument which is void, though not void upon its face, may not convey a valid title to a bona fide

purchaser; still, the instrument being fair and valid upon its face, it may enable the holder to shift the effects of the fraud from the maker of the instrument, to the assignee or grantee. But whether the one or the other of these parties be likely to become the victims of the fraud, it is equally the duty of a court of equity to direct the instrument to be cancelled. The exercise of this jurisdiction may well be placed on the ground, in addition to the above consideration, that such an instrument may lead to expensive litigation, and casts suspicion upon a good title. But a deed void upon its face, is no more than a blank piece of paper. It may, by possibility, become an instrument of mischief, and so may a white sheet of paper. And to any one who investigates and comprehends his own transactions, the blank paper is more likely to deceive and defraud him, by being converted into a forged instrument, than a deed which upon its face is shown to be wholly inoperative.

Is there any reason or propriety then, in calling upon a court of chancery to direct, by the exercise of its extraordinary jurisdiction, a paper so utterly void and worthless, and which cannot become an instrument of fraud to any one who uses ordinary caution, to be surrendered and cancelled? It would seem to be as reasonable to require the interposition of the court to prevent some individual, who the complainant might suppose was inclined to injure him, from doing any act to his prejudice.

THE COURT think, that as the deed is void upon its face, and has been so pronounced, by the supreme court, which it is the object of the bill to have delivered up to be cancelled, it does not give a ground for the exercise of the powers of this court; and the bill is therefore dismissed at the costs of the complainants.

[NOTE. On the appeal of William Peirsoll and others, the defendants, this decree was affirmed by the supreme court, Mr. Chief Justice Marshall delivering the opinion, in so far as it relates to the propriety of the interference of a court of equity to require the surrender and cancellation of the deed, which is void upon its face, and is therefore "an unimportant paper, which cannot avail its possessor;" but inasmuch, says Mr. Chief Justice Marshall, as the defendants in their answer "insist upon their title, both in law and in equity, and on being left free to assert that title, if they shall choose so to do, a general dismission of the bill with costs * * * may be considered as a decree affirming the principles asserted in the answer, as leaving the defendants at full liberty to assert their tide in another ejectment, and as giving some countenance to that title." For this reason the supreme court held that the defendants are not entitled to costs, and that the decree of the circuit court ought to be so modified as to express the principles on which plaintiffs' bill is dismissed. Peirsoll v. Elliott, 6 Pet. (31 U. S.) 95.]

ELLIOTT (SCHUYLKILL NAV. CO. v.). See Case No. 12,497.

ELLIOTT (SMITH v.). See Case No. 13,041.

Case No. 4,396.

ELLIOTT v. TEAL.

[5 Sawy. 249;[1] 6 Reporter, 772; 11 Chi. Leg. News, 74.]

Circuit Court, D. Oregon. Aug. 30, 1878.

MARRIED WOMEN—HUSBAND'S INTEREST IN WIFE'S ESTATE.

1. At common law, a married woman could not convey her real property, except by matter of record, as by fine and recovery.

2. The common law rule is not changed in this respect by the statutes of Oregon, except that a married woman may convey her real property by joining with her husband in a conveyance thereof, and therefore a conveyance by her alone, or in pursuance of a power executed by her, is void.

3. At common law, by virtue of the marriage, the husband became seised of an estate in the inheritance of his wife for their joint lives; and this rule is not changed by the statutes of Oregon, which provide further that upon the death of the wife, the husband shall be tenant by the curtesy, whether they had issue born alive or not.

[Cited in Stubblefield v. Menzies, 11 Fed. 271.]

Action [by Violet W. Elliott against Joseph Teal, No. 2] to recover possession of real property. [The cause was first heard on defendant's objection to the jurisdiction, on the ground that the plaintiff had conveyed the premises to a citizen of Oregon, which objection was overruled. Case No. 4,389. It is now tried by the court on an agreed state of facts.]

Addison C. Gibbs, for plaintiff.

H. Y. Thompson and George H. Durham, for defendant.

DEADY, District Judge. This action is brought to recover the south half of the donation of William J. and Violet W. Berry, the same being the wife's half of claim No. 52, in township ten south, range five west, of the Wallamet meridian, and containing three hundred and nineteen and ninety one hundredths acres. The defendant, Teal, answered, denying the ownership of the plaintiff, or her right to the possession of the premises, and alleging title in himself.

The cause was tried by the court without the intervention of a jury, upon the following agreed state of facts: The plaintiff is a citizen of California, and the defendant a citizen of Oregon, and the premises in controversy are worth more than five thousand dollars; that said premises are the wife's half of the donation of the married persons, William J. and Violet W. Berry, for which a patent issued to them for their respective shares thereof, on October 8, 1866; that said William J. and Violet W. were duly divorced on August 9, 1865, and the plaintiff herein is the same person then so divorced, and known as Violet W. Berry, and that the said William J. Berry is still alive; that on December 14, 1854, the plaintiff executed a

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

power of attorney to William J. Berry, aforesaid, authorizing and empowering him to sell and convey the premises in controversy; that on February 5, 1855, said William J., in consideration of the sum of two thousand dollars, for himself, and as the agent in fact of the plaintiff, executed a conveyance of the said premises to Henry Fuller; that on July 22, 1855, the plaintiff, in consideration of the sum of fourteen hundred dollars, also executed a conveyance of the premises to said Fuller, and that the defendant, by means of sufficient conveyances, has succeeded to all the rights in the premises that said Fuller acquired by the two conveyances aforesaid. The plaintiff bases her right to recover the possession of the premises upon the ground that both the power of December 14, 1854, and the conveyance of July 22, 1855, executed by her, were contrary to law, and therefore void.

At common law, a married woman could not dispose of her freehold, except by some matter of record, as a fine and recovery. 1 Bl. Comm. 293; 2 Kent, Comm. 150; Bish. Mar. Wom. § 586; Washb. Real Prop. 581; Wythe v. Smith [Case No. 18,122]; Mott v. Smith, 16 Cal. 533; Dow v. Gould & C. S. M. Co., 31 Cal. 644.

It follows, then, that the separate conveyance of the premises by the plaintiff, during her coverture with Berry, is void, unless specially authorized by statute. The only statute of Oregon upon this subject is the "act relating to alienation by deed," etc., of January 13, 1854 (Laws Or. 515), the second section of which provides that the real property of the wife may be conveyed by the joint deed of the husband and wife. The deed of the wife, unless her husband assents to it, by joining in the execution of it, by becoming a party to it, is therefore unauthorized, and void; and so the conveyance of July 22, 1855, being the separate deed of the plaintiff, and not the joint one of herself and husband, was made without authority of law, and is therefore void, and of no effect.

The power of attorney to her then husband, Berry, is also void, because unauthorized by statute. In Mott v. Smith, supra, it was held that a married woman cannot invest another with power to sell her interest in real property without a statute to that effect; and Mr. Chief Justice Field, delivering the opinion of the court, gives the reason for the conclusion as follows: "To the efficacy of a conveyance by a married woman, it is essential that she join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him or compulsion, or under influence from him, and that she does not wish to retract its execution. This private examination, this determination of the will as to the retraction of the execution, are not matters which can be delegated to another." See, also, 1 Washb. Real Prop. 564; Dow v. Gould & C. S. M. Co., supra. The power and separate conveyance of the plaintiff being mere nullities, the plaintiff's interest in the premises is unaffected by them. Notwithstanding them, she is still the owner of the premises and entitled to the possession of the same.

But by the conveyance of February 5, 1855, Berry, the then husband of the plaintiff, conveyed all his interest in the premises to the defendant's grantor. Although this conveyance, so far as it purported to be the deed of the plaintiff, was void, yet so far as it was the deed of Berry in his individual capacity it was valid and operated to pass any interest which he then had in the land. This interest was an estate for his own life. By the common law upon the marriage of a man with a woman seised of an estate of inheritance he becomes seised of the freehold jure uxoris during their joint lives, and if he has issue by her born alive, then for his own life absolutely, in which latter case, if he survive the wife, he is styled tenant by the curtesy. 1 Bl. Comm. 126; 2 Kent, Comm. 108; Bish. Mar. Wom. § 529; Starr v. Hamilton [Case No. 13,314]; Wythe v. Smith, supra; Jackson v. Stevens, 16 Johns. 116. But by section 30 of the act of January 16, 1854, relating to estates by dowry and curtesy (Laws Or. 588), it is provided, that upon the death of the wife, the husband shall be tenant by the curtesy, whether they had issue born alive or not. So that in any event Berry, at the date of his conveyance to Fuller, by virtue of the common law and the statute, had an estate for his own life in the premises, which passed thereby to Fuller and is now vested in his grantee, the defendant.

The plaintiff is not entitled to the possession of the premises during the existence of the particular estate cast upon the husband, Berry, by the marriage. Her interest in the property is the estate in reversion after the termination of the freehold vested in the defendant, and therefore she can not maintain this action. She was not at the commencement of this action and is not now entitled to the possession of the premises. There must be a finding for the defendant accordingly.

ELLIOTT (UNITED STATES v.). See Case No. 15,045.

Case No. 4,397.

ELLIOTT v. UPTON.

[This case is published as a note to Hobart v. Upton, Case No. 6,547.]

Case No. 4,398.

ELLIOTT et al. v. The VOLUNTEER et al. [27 Leg. Int. 373;[1] 7 Phila. 568.]

Circuit Court, E. D. Pennsylvania. Nov. 7, 1870.

COLLISION IN DELAWARE RIVER—TUG AND STEAMER—LIGHTS.

[1. A steamship going up the eastern side of the Delaware river perceived the lights of a tug coming down on the western side, and, taking her for a vessel at anchor, starboarded her helm so as to cross the tug's course, but almost immediately slowed and backed, though not in time to avoid collision. *Held*, that she was in fault for changing her course, for failing to keep on the eastern side of the channel, and for failing to maintain a proper lookout.]

[2. A tug with tows which carries but one vertical light on the Delaware river at night, instead of the two required by the act of congress, must be *held* in fault in case of collision, without speculating as to whether the absence of the light increased the danger of collision.]

Appeal from the decree of the district court for the eastern district of Pennsylvania.

In admiralty.

J. Warren Coulston, for libellants.

M. P. Henry, for the Volunteer.

L. C. Cleeman, for the tug Massey.

McKENNAN, Circuit Judge. This is a case of the collision of vessels navigating the Delaware river in opposite directions. It is not distinguished from cases of its class, by the want of their usual concomitant, much contradictory and irreconcilable testimony. We, however, gather from the whole of it the following facts, which, in our judgment, are satisfactorily proved. On the evening of the 2d of December, 1868, just after dark, the steam tug Lizzie Massey, was proceeding down the Delaware river, having in tow two canal barges laden with coal, which were lashed to her on her starboard and larboard sides respectively, so that their bows projected beyond that of the tug. She carried a green light and a red light on either side of the top of her pilot-house, and a single white light aft on the top of her flag pole. The night was dark, and a mist or haze hung over the water. When she was near the mouth of the river Schuylkill, and on the side of the channel next the Pennsylvania shore, considerably west of the track usually taken by vessels, lights of an approaching steamship were discovered, which proved to be the Volunteer. The latter was "light," had just passed the Fort lighthouse, and was on the eastern side of the channel when she sighted the tug. She blew two whistles, starboarded her helm, changed her course and headed across the channel towards the Pennsylvania shore. The orders were then given in quick succession to slow the engine, hard starboard, stop and back, with a view to get further to the westward. The tug ported her helm, so as to give the approaching vessel the whole range of the river to the eastward, but finding that the Volunteer intended to go to the westward, she stopped her engine and backed, thus throwing her partly across the channel. Under these circumstances the collision occurred, the Volunteer first striking the barge on the port side of the tug, and then the one on the starboard side, cutting both down and sinking them immediately.

This statement of the facts is sufficient to show a culpable lack of prudence in the management of the Volunteer. That she had not a proper lookout, or that due vigilance was not observed to sight the tug, is apparent from the facts stated by her pilot, who says when he first saw the light of the tug it was nearly ahead, that he ordered the helm to starboard, which brought the light about a point or a point and a half on the starboard bow, and that he then ordered to slow the engine, hard starboard, stop and back. These orders were given in such quick succession as to show that they must have been almost concurrent with the collision. The light of the tug could not, therefore, have been sighted until the peril of collision was imminent, and, as the result proved, too late to avoid it. In this she was guilty of culpable negligence. The failure to observe the three lights of the tug is no mitigation of this culpability, because, with proper vigilance, they ought to have been seen when the vessels were at such a distance from each other as to enable them to keep out of each other's way, although the Volunteer's witnesses testify, that but one light, indicating a vessel at anchor, was seen by them; even that ought to have been sighted when the vessels were so far from each other, as, with the abundant sea room on the eastern side of the channel which the Volunteer had, to render a collision easily avoidable on her part. But if there was a timely observation of the tug's lights, why was the course of the Volunteer changed? The location of the sunken barges conclusively shows that the tug was on the western side of the channel, and she was pursuing her course, slightly towards the Pennsylvania shore. The Volunteer was light, and the tug encumbered with a tow, and it was clearly the duty of the former to keep out of the way of the latter. The channel was a fourth of a mile wide, and the Volunteer was on the eastern side of it. It is demonstrable then, that if both vessels had kept their course a collision would not have occurred. Joseph B. Moore, a witness for the Volunteer, who saw the barges after they were raised, testifies that the site of the collision was a good deal to the westward of where vessels usually pass. The Volunteer must, therefore, have changed her course across the channel, and have sought to go still further to the westward of the usual track of vessels at that point. To accomplish this her helm was starboarded, which brought her directly across the course the tug was rightfully pursuing, and thus the collision was proximately

[1] [Reprinted from 27 Leg. Int. 373, by permission.]

caused. For this violation of the sailing regulations prescribed by the act of congress, and for failing to keep on the eastern side of the channel, as well as for not maintaining a proper lookout, she is chargeable with gross fault, and must be held accountable accordingly.

In behalf of the tug it has been earnestly urged, that as she was pursuing a direct course, leaving ample sea room to the east of her for the Volunteer to perform any evolution, and did all that could be done on her part to avoid collision, she ought not to be subjected to any of its penal consequences. But it is conceded she was derelict in carrying two vertical lights, instead of but one, as the act of congress requires; and, as the learned judge of the district court forcibly said, "we cannot with any safety, speculate upon doubts, whether the absence of one of the lights increased the danger of collision." The presumption is, that it did, because, as the duty is imposed by statute as a suitable security for the safety of vessels, it is not an unreasonable inference that congress intended a disregard of it to be considered as contributing to the injury resulting from collision. Certainly, however, the burden of acquitting himself of all responsible censure is upon the delinquent party. How can we say, under the evidence, that the owners of the tug have discharged themselves from this burden? She was in motion, encumbered with a tow, and was bound to inform all vessels navigating the river of this, by the signal prescribed to indicate it, that they might observe the extraordinary caution to avoid collision which the law exacts of them under such circumstances. That the Volunteer was thrown off her guard and fell into the mistake of supposing the tug to be a vessel at anchor, by her exhibition of a single white light, is not at all improbable; indeed, such is the significance of the proofs. This mistake led to the blameworthy attempt of the Volunteer to pass the tug on the starboard side of her, which was followed by the collision. Participation in the Volunteer's fault is therefore imputable to the tug, and she must share in the loss resulting from it.

A decree will be entered against both respondents for the damages adjudged by the district court, and interest from December 2d, 1868, and full costs; the said damages, interest and costs to be divided equally between them, and with leave to apply to the court if occasion should require, touching the enforcement of the decree.

ELLIOTT FELTING MILLS, In re. See Case No. 789.

Case No. 4,399.

In re ELLIS et al.

[5 Ben. 421.] [1]

District Court, S. D. New York. Dec., 1871.

DIVIDEND—INDIVIDUAL ESTATE.

Where it appeared that E., one of the bankrupts, was a member of the firm of E., B. & E., on whose petition the bankrupts, who composed the firm of E. & J., had been adjudged bankrupts, and a dividend had been declared in the bankruptcy proceedings, no individual debts having been proved against E., although such existed: *Held*, that the share of the dividend which E. would be entitled to, as a member of the firm of petitioning creditors, should be retained by the assignee, to await the action of the individual creditors of E.

In this case the firm of Ellis & Jaquays was adjudged bankrupt, on the petition of the firm of Ellis, Britton & Eaton. Joel A. H. Ellis was a member of both firms. An assignee having been appointed, a dividend of twenty-five per cent. was declared, under which the firm of Ellis, Britton & Eaton would receive $2,945 45, of which the share of Joel A. H. Ellis would be $474 44. There were individual creditors of Ellis, but no such claims had been proved. The register, on the request of the assignee, certified the facts to the court, with the two following questions: 1. Is the whole of the dividend property payable by the assignee to the firm of Ellis, Britton & Eaton? 2. If not, may not the proportion of the dividend, to which Ellis would be entitled, be retained in the hands of the assignee, to await the action of his individual creditors, and the rest of it be paid to the other members of the firm?

BLATCHFORD, District Judge. The first question is answered in the negative, and the second question in the affirmative.

Case No. 4,399a.

In re ELLIS.

[Hempst. 10.] [2]

Superior Court, Territory of Arkansas. Oct., 1821.

A grand juror may be fined and discharged for intemperance.

On motion of the prosecuting attorney, the court imposed a fine of thirty dollars on Radford Ellis, foreman of the grand jury, for intemperance, discharged him from the jury, and ordered execution to issue for the fine, and the court appointed Samuel McCall foreman of the grand jury in his place, and administered the proper oath to him, in presence of the grand jury.

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

[2] [Reported by Samuel H. Hempstead, Esq.]

Case No. 4,400.

In re ELLIS.

[1 N. B. R. 555 (Quarto, 154).][1]

District Court, E. D. Missouri. 1868.

BANKRUPTCY — PRIOR ATTACHMENTS IN STATE COURT—MONEY ARISING FROM SALE OF PROPERTY PENDENTE LITE.

1. Attachments in state courts, brought within four months, before a commencement of proceedings in bankruptcy, are dissolved.

[Cited in Re Dey, Case No. 3,870; Hatfield v. Moller, 4 Fed. 719.]

2. Moneys arising from sale, pendente lite, of property attached, represent the property. Moneys arising from sale of household furniture sold under process of attachment, belong to the bankrupt.

[Cited in Re Stevens, Case No. 13,392.]

Under a writ of atachment against Ellis, issuing from the St. Louis circuit court, the sheriff had levied upon personal property of the defendant, consisting of household furniture; and under an order of court, the property was sold, pendente lite, producing the sum of $140. Upon proceedings in bankruptcy commenced within four months, Ellis was adjudged a bankrupt, and upon the appearance and motion of the assignee, the attachment was quashed and the proceeds of sale paid over to the assignee. The bankrupt claimed the $140, as property exempt from the assignment in the proceedings in bankruptcy.

TREAT, District Judge. By the proceedings in bankruptcy, the attachment of the goods and property of the bankrupt was dissolved. The sale under the suit in the state court, pendente lite, did not transmute or change the character of the property, nor give to the creditors any greater interest than they would have had, had the property remained in specie. The money arising from the sale, represents the property attached, and remains the property of the debtor, until disposed of by virtue of an execution upon a judgment rendered in the attachment suit. As the proceeds of the furniture sold by the sheriff have come into the hands of the assignee, the proceeds represent the property attached, and as that property is by the terms of the bankrupt act [of 1867 (14 Stat. 517)] exempt from the assignment the proceeds retain the character of the property itself, as the conversion was not made by the debtor, but was made by process in invitum, while still belonging to the debtor. By the law of this state, some property may be liable to be attached which would be exempt from execution upon a judgment; but in this case there was no judgment, and by virtue of the proceedings in bankruptcy the property passed into the hands of the assignee, and remains subject to the provision of the bankrupt act, and not those of the attachment statute of the state.

This court will not inquire into, nor pass upon the merits of the attachment. It may be very true, that but for these proceedings in bankruptcy the plaintiff could have maintained his suit by attachment, and have applied the proceeds of this property to the payment of his debt; but with that matter, this court has nothing to do; it sits here to administer the provisions of the act of congress, and by that act, the property attached, which is now represented by the money in the hands of the assignee, received by him from the sheriff, was exempt from the assignment. It must therefore be declared that the bankrupt is entitled to this money as representing his property, the title to which did not pass to the assignee. After the commencement of the proceedings in bankruptcy all proceedings in the state court under the attachment would have been void; it ceased to have jurisdiction over the property, and the jurisdiction vested in this court.

The bankrupt is entitled to claim this money, as property, without waiting to learn if the assignee will be able to collect enough, from the assets assigned, to pay the expenses of the proceedings. The proceedings in this case were commenced by creditors, and the expenses are to be paid from the assets of the bankrupt, when collected, but not from property which is exempt from the assignment. The same property which is exempted from the assignment upon a petition filed by the debtor himself, is also exempted, when proceedings are commenced by the creditors.

[1] [Reprinted by permission.]

Case No. 4,401.

The ELLIS.

[Blatchf. Pr. Cas. 248.][1]

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

PRIZE—CONDEMNATION OF VESSELS IN SERVICE OF THE ENEMY.

1. An enemy vessel in the naval service of the enemy as a gun-boat, condemned.

2. Other vessels condemned as enemy property.

In admiralty.

BETTS, District Judge. The first named vessel, the Ellis, with her armament, was seized February 10, 1862, by the United States steamer Ceres, at the capture of Elizabeth City, in North Carolina, and was, directly thereafter, upon due appraisal, appropriated to the United States, and used in the conduct of the war, being appraised at the sum of $18,000. A libel was filed in this court against the said vessel and armament September 20, 1862, and, to a monition issued thereon, the marshal made return, in October thereafter, "that the vessel and armament had been attached and delivered to the libellants, at the appraised valuation of $18,000." On due proclamation made in court upon that return, no person appearing or intervening in the suit, the district at-

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

torney moved for and obtained a default against all persons having any interest in the property captured, and submitted to the consideration of the court the preparatory proofs taken in the suit, and prayed a decree of condemnation and forfeiture of the said vessel and armament.

The testimony given by Commodore Rowan, who commanded the squadron by which the vessel was captured, proves that she was an armed vessel, mounting one piece of artillery (an eighty-pounder cannon) and a howitzer, and that, at the time of her capture, she was an enemy vessel of war, in the naval service of the enemy, as a gunboat. These facts are conclusive as to her character, and determine her confiscability.

A decree of condemnation and forfeiture of the vessel and her armament is, therefore, ordered.

On the same day, and at the same place, with the capture of the Ellis, a small schooner, owned by the enemy, (whose name is unknown) laden with goods consisting of furniture, was captured by the United States steamer Commodore Perry, and was, on due appraisal at the sum of $2,000, appropriated to the use of the United States, and employed to their use in conducting the war.

The evidence in preparatorio proves that this schooner was rebel property, and was, after capture, sunk, by order of the commander of the United States naval forces there at the time, as an obstruction at the mouth of the Chesapeake and Albemarle canal, as a warlike measure, and for the prevention of the navigation of that canal. Another enemy vessel, loaded with corn, was sunk at the same time and place by the said United States forces, and for the same purposes. These vessels are seized while in possession of the enemy.

The evidence sufficiently identifies the schooner appraised and taken to the use of the United States, and the proceeds of which are proceeded against in this suit, and entitles the libellants to a decree condemning and confiscating the same as lawful prize. There must, accordingly, be a decree for the above amount.

The remaining four vessels referred to, the steamer Albemarle, the steamer Old North State, the schooner Susan Anne Howard, and the sloop Jefferson Davis, were captured as prize on the 14th of March, 1862, by a United States steamer, at the time of the capture of Newbern, North Carolina.

The testimony and proceedings in respect to the above specified vessels are to the same effect as in the case of the unknown schooner, and the libellants are, therefore, entitled to a decree of condemnation and forfeiture of them accordingly.

ELLIS (BANK OF BRITISH NORTH AMERICA v.). See Case No. 859.

ELLIS (CULBERTSON v.). See Case No. 3,461.

Case No. 4,402.

ELLIS et al. v. DAVIS.

[4 Woods, 6.][1]

Circuit Court, D. Louisiana. Nov. Term, 1879.[2]

JURISDICTION OF CIRCUIT COURTS AS COURTS OF EQUITY—SETTING ASIDE DECREE OF PROBATE.

1. The circuit court of the United States for the district of Louisiana has not original jurisdiction of a bill filed by the heirs at law of a testator, to set aside a decree of the probate court of the parish of Orleans, admitting a will to probate and record, and recognizing the legatee therein named as the testator's sole and universal legatee.

2. The case of Broderick's Will, 21 Wall. [88 U. S.] 503, followed, and the case of Gaines v. Fuentes, 92 U. S. 10, distinguished.

In equity. Heard on demurrer to the bill.

The bill was filed by the complainants [Stephen Percy Ellis and others], as heirs at law of Mrs. Sarah Ann Dorsey, against Jefferson Davis. The case stated by it was substantially as follows: The defendant Davis was a citizen of the state of Mississippi, the complainants were citizens of other states Mrs. Dorsey died on July 4, 1879, seized and possessed of lands and tenements situate in the states of Mississippi, Louisiana and Arkansas, and on her death her entire estate, movable and immovable, became vested in the complainants and J. Adolphe Dahlgren and Mary Ellis as her sole heirs at law. On May 10, 1879, Mrs. Dorsey by notarial act had constituted the defendant, Jefferson Davis, her agent and attorney in fact for the management of her estate and property, with full power to sue and be sued in her name, to lease, alienate and encumber her real estate, and to purchase real estate and to borrow money and execute notes in her name. The defendant, by virtue of said procuration, had taken possession and control of all the estate and property, deeds and account books of Mrs. Dorsey, and managed the same until her death; and since her death, and up to the time of the filing of the bill, had continued such possession and control, and had refused, and still refuses, to render to complainants any account of his agency. In order to wrong and injure the complainants heirs of Mrs. Dorsey, and prevent them from obtaining possession of said property so in his possession and control, the defendant pretends that Mrs. Dorsey, by her last will, devised and bequeathed to him all of her said property, and threatens to set up said will in any suit at law or in equity which complainants may bring for the recovery of said property.

The bill then sets out in haec verba the alleged will of Mrs. Dorsey, which purported to give and bequeath all her property real, personal and mixed, wherever located, wholly and entirely, without hindrance or qualification, to the defendant, who is described as "my most honored and esteemed friend, Jef-

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

[2] [Affirmed in 109 U. S. 485, 3 Sup. Ct. 327.]

ferson Davis, ex-president of the Confederate States, for his own sole use and benefit in fee simple forever." The will contained the following clause: "I do not intend to share the ingratitude of my country towards the man who is in my eyes the highest and noblest in existence." The bill denied that said instrument was the last will and testament of Mrs. Dorsey, and alleged that the same was null and void for the following reasons: 1. That previous to and at the time of writing and signing the same, said Sarah Ann Dorsey was not of sound and disposing mind. 2. That the same was written and signed by her when under the undue influence of said defendant, and which said undue influence excited and aggravated the causes depriving her of a sound and disposing mind, rendering her more susceptible to such undue influences. "3. That the motive and objects inducing and controlling said testatrix to make said bequest to defendant, as well as said bequest itself, were, under the law of the land, illegal, null and void." "Under the circumstances aforesaid" the complainants insisted "said pretended will, and especially the bequests therein to defendant, are and should be held null and void, on account of the testatrix being, at the time of writing and signing the same, not of sound and disposing mind, and under said undue influence, and the illegality of said bequests."

The bill further averred that the defendant, by an ex parte proceeding before the second district court of the parish of Orleans, in the hope of making said pretended will more effective as a muniment of title and bar to the rights of complainants, had procured the probate and record of the same as the true and valid last will and testament of the said Sarah Ann Dorsey, and obtained an order that, as sole and universal legatee of the said Sarah Ann Dorsey, he be put in possession of all the property, real, personal, and mixed, left by her, and wherever situated; that upon the conclusion of said proceedings the second district court ceased to have any further jurisdiction over said succession; that said proceedings and orders of the second district court, though not res adjudicata against complainants, yet so long as said will and the probate thereof should remain unannulled, would constitute a muniment of title in defendant to the estate of Mrs. Dorsey; that the testimony submitted to second district court to prove that Mrs. Dorsey, at the time of the execution of said pretended will, was of sound mind, was untrue, and if true, insufficient; that the defendant claims title to the property of Mrs. Dorsey, known as "Beauvoir," in Harrison county, Mississippi, by virtue of a deed for the same, executed and delivered to him by Mrs. Dorsey on February 19, 1879. The bill charged that said deed was null and void, because at the time of its execution Mrs. Dorsey was not of sound mind; that it was executed by her when under the undue influence of the defendant; and that the motives which induced her to make said conveyance were illegal; and that under said agency of May 10, 1878, the defendant had no legal right to purchase any part of the property over which his agency extended; that his consent to the sale of the property to himself without security for the payment of the purchase price, and at a sum below its value, was a violation of the trust assumed by him as agent; and for these reasons the act of sale should be canceled and annulled.

The bill further charged that owing to the complicated character of the agency created as aforesaid by the act of May 10, 1878, an account of the same could not be properly taken except in a court of equity.

The prayer of the bill was that the alleged will of Sarah Ann Dorsey be canceled and annulled as absolutely void; that the decree of probate thereof, and the decree recognizing the defendant as sole and universal legatee of Mrs. Dorsey, and ordering him to be put in possession of all her property, be canceled and recalled as absolutely null and void; that the alleged sale and conveyance to the defendant by Mrs. Dorsey, of the property known as "Beauvoir," in Harrison county, Mississippi, of February 19, 1879, be canceled and annulled as absolutely null and void, in so far as either said will, decree of probate, decree of possession, or said sale could "in any manner be pleaded by defendant as recognizing him as testamentary heir and universal legatee of said Sarah Ann Dorsey, or as a muniment of title or legal bar against complainants or their co-heirs as her legal and sole heirs, and as such entitled to the ownership and possession of all the property belonging to her estate, and which in any manner has come into possession of defendant either as agent or trustee," and that the defendant be decreed to come to a full and fair account of all his actions and doings under said act of procuration of May 10, 1878, and that he furnish the court with a statement of all the property lately belonging to the said Sarah Ann Dorsey which had come into his possession as her agent or by virtue of said alleged will of decrees of said probate court; that he be decreed to surrender to complainants, and if so desired by them, jointly with their co-heirs, the possession of all said property, including all books, papers, title deeds, etc., belonging to said estate, which have come into his possession since May 10, 1878, and that he be enjoined from setting up and pleading said alleged will or said decrees of the probate court as against the complainants as next of kin and legal heirs of said Sarah Ann Dorsey.

The defendant demurred to the bill because the cause of complaint therein set forth was within the exclusive jurisdiction of the second district court for the parish of Orleans, and not within the jurisdiction of this court. The defendant also demurred to so much of the bill as sought to have said will,

and the decrees of second district court admitting the same to probate, canceled and annulled on the ground of undue influence, or of mental unsoundness, and of the illegal motives which induced the testatrix to execute said will; and to so much of the bill as sought, on the grounds set out in the bill, to set aside the conveyance by Mrs. Dorsey, to defendant, of the property known as Beauvoir.

Wm. Reed Mills, for complainants.
Charles E. Fenner, Edgar H. Farrar, and C. L. Walker, for defendant.

WOODS, Circuit Judge. It is clear that unless the will of Mrs. Dorsey, and the decrees of the second district court of the parish of Orleans admitting it to probate and declaring the defendant to be the sole and universal legatee of Mrs. Dorsey, can be successfully attacked in this court, the court cannot grant any of relief prayed for by the bill. For as long as the will and decrees referred to remain in force, the complainants cannot call upon the defendant for an account touching property of which the will makes him the absolute owner, and deprives them of any interest therein or in its proceeds, nor are they in any position to demand the revocation of the deed made by Mrs. Dorsey, to defendant for the property known as "Beauvoir;" for if the deed is not good, the property belongs to the defendant by virtue of the will. In a word, the will, as long as it remains in force, strips them of all interest in the affairs and property of the testator. It is no concern of theirs how the defendant has managed the property, or whether the deed to Beauvoir be valid or invalid. Therefore the demurrer based on the ground that this court had no jurisdiction of the matters set forth in relation to the will and its probate reaches the whole case.

The statement of the averments of the bill above given shows that the suit is brought by the heirs at law of Sarah Ann Dorsey in this court, against Jefferson Davis, to annul a decree of the probate court of the parish of Orleans establishing the will, and declaring the defendant, under its provisions, to be the testamentary heir and universal legatee of the testator. The grounds on which this relief is prayed are, that said testator was not of sound mind, and was under the undue influence of the defendant when she made her will, and that the motives which induced her to make her will in favor of defendant were illegal and against public policy. The case made by the bill, so far as the question of jurisdiction is concerned, is in all material respects the case made by complainants in the case of Broderick's Will, 21 Wall. [88 U. S.] 503. In that case the bill was filed by persons who claimed to be the heirs at law of Broderick. It was filed on December 16, 1869, and stated that Broderick died September 16, 1859, intestate, seized of real estate and possessed of personal property of large value, and that on February 20, 1860, the defendant McGlynn presented to the probate court of San Francisco, a paper writing purporting to be the last will and testament of Broderick, but which was in fact a forgery, and that the person presenting it, and the persons on whose behalf it was presented, knew it to be a forgery, and that by means of false and perjured testimony, the said court was induced to admit to probate and record the said paper writing as the genuine last will and testament of said Broderick. The bill prayed that the will might be declared a forgery; that the probate and all subsequent proceedings might be set aside; that the defendants who had purchased lands under order of sale made by the court on the application of the executor of said pretended will might be declared trustees for the complainants and might be compelled to convey to them.

The complainants alleged that they never resided in California or the United States; never heard or had any opportunity of hearing of Broderick's death, or of the probate of his pretended will, until more than eight years after it had been filed for probate, they being illiterate and residing in a remote and secluded region of Australia. The bill was demurred to and dismissed by the circuit court. Upon appeal to the supreme court it was held that a court of equity has no jurisdiction to avoid a will, or to set aside the probate thereof, on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate court. Mr. Justice Bradley, in delivering the opinion of the court, after stating the provisions of the law of California for the probate of wills, and for the contesting of the same within one year by any person interested, said: "In view of these provisions it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. The question recurs, do the facts stated in the present bill lay a sufficient ground for equitable interference with the probate of Broderick's will, or for establishing a trust as against the purchasers of the estate in favor of the complainants? It needs no argument to show, as it is perfectly apparent, that every objection to the will, or the probate thereof, could have been raised, if it was not raised in the probate court, during the proceedings instituted for proving the will, or at any time within a year after probate was granted, and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the par-

ties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief."

The laws of Louisiana with regard to the probate of wills, and the review of decrees admitting wills to probate, are quite as favorable to the attainment of justice as those of California. In the case under consideration there was no obstacle to prevent the complainants from appearing in the probate court and contesting the probate of the will of Mrs. Dorsey, or, if the will had been probated without their knowledge or information, which is not averred, from appealing to the supreme court of the state. The law allowed them one year in which to contest the probate of the will. Instead of resorting to the courts which had exclusive jurisdiction of the subject, they come into this court, and, within less than a year from the probate of the will, file the bill in this case. The proceeding in the probate court was in the nature of a proceeding in rem, and was binding upon all the world unless appealed from and reversed in a direct proceeding. See case of Broderick's Will, ubi supra. But the complainants, entirely ignoring the decree in the probate court, which bound them as well as all others interested, apply to this court to set aside that decree, made by a court which was not only competent, but had the exclusive jurisdiction to make it. If this court could, upon the case made by the present bill, revoke the probate of the will, it might, on the application of Davis, who was a citizen of Mississippi, and upon service upon the heirs, who were citizens of other states, have entertained jurisdiction of an original proceeding to probate the will. But this court has no probate jurisdiction. Gaines v. Chew, 2 How. [43 U. S.] 619; Fouvergne v. New Orleans, 18 How. [59 U. S.] 470; Gaines v. New Orleans, 6 Wall. [73 U. S.] 642; Case of Broderick's Will, 21 Wall. [88 U. S.] 503.

It is claimed, however, that the case of Gaines v. Fuentes, 92 U. S. 10, is authority for this bill. There are general expressions in the opinion in that case which would seem to sustain this claim, but those expressions must be interpreted by the light of the case then before the court. It is to be observed that the case of Broderick's Will is not overruled, but approved, by the case of Gaines v. Fuentes. There must, therefore, be material differences of fact between the two cases by which the decisions can be reconciled. These differences are apparent. In the case of Gaines v. Fuentes, the court, in describing the character of the suit, says: "The action is in form to annul the alleged will of 1813, of Daniel Clark, and to recall the decree by which it was probated; but as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in the place of the plaintiff in error, the action cannot be properly treated as for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate, to annul the will as a muniment of title, and to restrain the enforcement of the decree, by which its validity was established, so far as it affects their property." The petition in that case to revoke the probate of the will was originally filed in the second district court of the parish of Orleans, invested with probate jurisdiction. The statement of facts in that case, on which the opinion of the court is founded, shows that the plaintiff in error (Mrs. Gaines) applied on January 18, 1855, to the second district (probate) court of the parish of Orleans, for the probate of the alleged will of Daniel Clark; that by the decree of the state supreme court the will was recognized as the last will and testament of Daniel Clark; that this decree was obtained ex parte, and by its terms authorized any person at any time, who might desire to do so, to contest the will and the probate in a direct action, or as a means of defense, by way of answer or exception, whenever the will should be set up as a muniment of title; that the plaintiff in error subsequently commenced several suits against the petitioners (Fuentes and others) in the circuit court of the United States, to recover sundry tracts of land, situate in the parish of Orleans, in which they were interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator.

From this it appears (1) that the suit to revoke the probate of the will of Daniel Clark was originally begun in the state court, by which the decree of probate complained of was in the first instance rendered; (2) that the decree expressly reserved the right to persons interested to contest the will and its probate either by direct action or by way of exception, whenever the will should be set up as a muniment of title; (3) that suits had been commenced by Mrs. Gaines, claiming title under said will, to recover property in which the petitioners were interested; and (4) that the suit to annul the will and revoke its probate was brought by persons who were not heirs or devisees or next of kin, and did not ask to be substituted in place of the devisee, but was brought by strangers to the estate and blood of the testator, to annul the will as a muniment of title so far as it affected their property, but no further. In these material respects the case of Gaines v. Fuentes differs from the case of Broderick's Will and the case under consideration. This case of Gaines v. Fuentes is therefore not a precedent to control this case, but Broderick's case is.

These complainants were bound by the

decree rendered by the probate court of the parish of Orleans. No fraud is alleged on the part of the defendant in procuring that decree, and complainants had notice of its rendition, and could have taken steps in the probate court to reverse it. They cannot ignore that decree and come into this court to annul it. I am therefore of opinion that this court has no jurisdiction of so much of the case presented by the bill as seeks to annul the will of Mrs. Dorsey and set aside the probate thereof. This is decisive of the whole case, for the right of the complainants to an account from the defendant depends upon the success of their efforts to set aside the will of Mrs. Dorsey and the probate thereof. As long as the decree of the second district court admitting the will to probate, and recognizing the defendant as the sole and universal legatee of Mrs. Dorsey, remains in force, the complainants have no standing which authorizes them to demand an account of the defendant. So if the deed of February 19, 1879, conveying Beauvoir to the defendant, should, for the reasons stated in the bill, be declared void, still the title of defendant to the same would be good and indefeasible under the will of Mrs. Dorsey as long as the will remains of force and the probate thereof unrevoked. In a word, if this court has not jurisdiction to set aside the will of Mrs. Dorsey and revoke its probate, it cannot grant any of the relief prayed for by the bill. Demurrer sustained.

[NOTE. An appeal was prosecuted to the supreme court of the United States by Stephen Percy Ellis, Inez Ruth Ellis, and her husband, Edward Peckham, et al. from this decision, which was, upon due consideration, affirmed in all respects, Mr. Justice Matthews delivering the opinion, in the course of which it was held that the circuit courts of the United States, as courts of equity, have no jurisdiction for the purpose of decreeing the invalidity of a will, and annulling the probate thereof. It was further held that as the defendant, Jefferson Davis, did not at any time sustain any relation of trust or confidence towards the complainants, he was not their agent, and any right which they can assert against him for the rents and profits of the estate is altogether dependent upon their title to that estate, and cannot arise until that has been established. "The title which they assert to that is not an equitable, but a legal, title, as heirs at law and next of kin of Sarah Ann Dorsey, and is to be established and enforced by direct proceeding at law for the recovery of the possession which they allege the appellee illegally withheld. There is no ground, therefore, on which the bill can be supported for the account as prayed for." In discussing the Louisiana state decisions bearing upon the subject, Mr. Justice Matthews remarked that the "claim, as has been shown, is properly the subject of an action of revendication, which furnishes a plain, adequate, and complete remedy at law, and consequently constitutes a bar to the prosecution of a bill in chancery." Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327.]

ELLIS (FOSTER v.). See Case No. 4,968.

ELLIS (FURNISS v.). See Case No. 5,162.

Case No. 4,403.

ELLIS v. JARVIS.

[3 Mason, 457.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

REMOVAL OF CAUSES—RECOVERY LESS THAN $500—COSTS—LIMITATIONS—MUTUAL UNLIQUIDATED ACCOUNTS.

1. Where a cause is removed from a state court into the circuit court, under the act of congress, the plaintiff is entitled to recover his costs, although he has a verdict for less than 500 dollars.

[Cited in Burnham v. Rangeley, Case No. 2,177; Coggill v. Lawrence, Id. 2,957; Wolff v. Connecticut Mut. Life Ins. Co., Id. 17,929; Scripps v. Campbell, Id. 12,562; Kreager v. Judd, 5 Fed. 28.]

2. An admission of mutual, unliquidated accounts, on which each party claims a balance to be now due to him, takes a case out of the statute of limitations.

At law. This was an action of assumpsit [by Jonathan Ellis against Charles Jarvis] brought in the state court, and removed from thence into the circuit court on the application of the defendant, under the provision of the 12th section of the judiciary act of 1789 [1 Stat. 79]. On the trial the plaintiff recovered a sum less than five hundred dollars; and thereupon Harrington, for the defendant, objected, that under the 20th section of the act of 1789, the plaintiff was not entitled to any costs.

W. Sullivan, for plaintiff, è contra, contended, that the statute did not apply, this not being an original, but a removed suit in the circuit court.

STORY, Circuit Justice. I am of opinion, that the present case is not within the judiciary act of 1789. The 20th section declares, that "where, in a circuit court, a plaintiff, in an action originally brought there, &c. recovers less than the sum or value of 500 dollars, &c. he shall not be allowed, but at the discretion of the court, may be adjudged to pay costs." The present suit was originally brought in the state court, and removed into the circuit court by the defendant. It is not therefore within the words, or the reason of the act. In the state court, the plaintiff, upon the recovery, would have been entitled to his full costs; and I think, that this court in this suit is bound to administer the same law, as the party was entitled to in the state court. Costs for the plaintiff.

In the same case one plea was the statute of limitations; but it appearing, that the parties had admitted, that there was an unliquidated account between them, on which each claimed a balance to be due to him, THE COURT ruled, that this took the case out of the statute of limitations within the equity of the case of Catling v. Skoulding, 6 Term R. 189.

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

Case No. 4,404.

ELLIS v. The KATY WISE.

[3 Hughes, 589.][1]

District Court, E. D. Virginia. Oct. 3, 1879.

COLLISION IN FOG—BETWEEN STEAM VESSEL AND TUG WITH TOW—INEVITABLE ACCIDENT—SPEED—FAULT.

Where a steamtug running free with the current and tide, down a river in a deep channel two hundred and fifty yards wide, at the rate of eight miles an hour, in a fog, fails, within a distance of thirty to sixty yards, to avoid collision with another tug, having six vessels in tow, coming up the stream, at the rate of two miles an hour: *Held*, that the tug which was running free was at fault in moving with such speed and such want of caution as to have failed to clear the approaching vessels, and that the plea of inevitable accident was inadmissible.

[Cited in The Anne E. Valentine, 22 Fed. 623.]

In admiralty. Libel for damages by a collision which happened in the Potomac river, on the 30th of April, 1879, in the middle of the channel above Hatton's point, abreast of Tenth landing, on the line of latitude 38° 44'. (See sheet No. 4, United States Coast Survey, chart of Potomac river.) The steamtug Kate was steaming up the Potomac river on the morning of April 30th, 1879, having six vessels in tow, four of them upon a tow line, and two of them lashed upon her bows; the schooner Martha Washington upon her port bow, and the schooner Lynnhaven upon her starboard. The tide was in ebb and going out at the rate of about three miles an hour. The tug was making about four and a half or five miles through the water, or about two miles or less over the ground. She was in or near the middle of the channel, which is two hundred and fifty to three hundred yards wide and upwards of thirty feet deep. The channel from Hatton's point to Alexandria is nearly straight. There was a thick fog; but the tops of trees could be seen upon the bank, the light at Alexandria was distinct, and large objects were visible at a distance of forty to sixty yards. The tug sounded her fog-whistle diligently as she proceeded. There were proper lights upon the Kate, but not upon the vessels in tow. About five o'clock in the morning, when she was abreast of Tenth landing, she heard the fog-signal of a vessel meeting her. She blew one long whistle as a signal to pass to the right, and heard no answering signal. She ported her helm and slowed her engine, which changed her course from due N. to N. by E. She very soon saw an approaching steamtug (which proved to be the Katy Wise), at a distance not less than thirty yards off. (The testimony varied between thirty and sixty yards.) This vessel did not seem to port her helm but came on in the contrary direction, and soon ran into the port bow of the schooner Martha Washington, cutting into and disabling her, so that she had to be supported from sinking and tugged to the flats of Georgetown, where she now lies abandoned and nearly or quite valueless. The libel is brought by Ellis, the owner and master of the Martha Washington, for the damaged thus occasioned. As to the Katy Wise, the testimony of her master was, that she was coming down the channel free, moving over the ground at the speed of eight or nine miles with the tide; that she blew fog-signals as required by the regulations; that her course was S. by E.; that when he first heard the fog-signal of the Kate, that vessel was on his starboard bow; that the Katy Wise ported her helm, to pass to the right, and at the same time slowed down and reversed her engine; that the manoeuvre proved ineffectual; that the Martha Washington ran into her; and that the collision was the result of inevitable accident. There was conflict of testimony as to when the Katy Wise reversed her engine, some of the witnesses saying that it was just after the collision, but the master, Graham, stating positively that it was before that event.

S. F. Beach and J. M. Johnson, for libellant.

G. A. Mushbach, for claimant.

HUGHES, District Judge. This collision happened in a broad, deep, straight channel, much frequented, accurately surveyed and charted, well known, and within a few miles of the ports of Alexandria, Washington city, and Georgetown. It occured in broad daylight, an hour after daybreak. There was a thick fog, but not a very dense one. Otherwise there was no vis major, and the collision ought not to have happened. If this collision was inevitable, then a total interdict would have to be put upon the navigation of the great river Potomac during every one of the frequent fogs that come over it. Undoubtedly the collision was not through inevitable accident; it occurred through fault; and the question is, where was the fault?

Much was said in the evidence and the argument about the want of regulation lights on the Martha Washington and the other vessels in tow of the Kate. But the libel, the answer, and the testimony concur in stating that the collision happened at five o'clock in the morning, and on the 30th of April. The almanac shows that this was just three minutes before sunrise, and was consequently nearly an hour after daylight. As the regulations do not require lights to be kept up in daylight, I dismiss that subject from consideration.

My own conclusion concurs with the statement of Captain Graham, master of the Katy Wise, who was at the wheel at the time, as to the manner in which the collision occurred. The Katy Wise was coming down the river with the tide at the rate of eight

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

miles an hour. On hearing the Kate's fog-signal, or certainly on coming in sight of her, which was from thirty to sixty yards off, he ported his helm in compliance with the eighteenth (American) rule of navigation. But he did not content himself with that manoeuvre, which would, in a distance of thirty to sixty yards, have certainly turned his prow to the right, and cleared the approaching vessels; the momentum of the Katy Wise and the propelling force of the engine giving effect to the movement of the rudder. But he did more. He did just what paralyzed the action of the rudder. He stopped his engine; indeed, his own testimony is that he reversed it. This additional action neutralized that designed to be secured by porting his helm; and the tug losing its impulsion forward, could obtain no help from the rudder to change its course; while the rudder, caught by the tide, bore the prow of the vessel to the left instead of the right, and helped to insure, if it did not cause, the collision which ensued. This is Captain Graham's own explanation of the manner in which the collision occurred. If this case depended upon rule 18, the Katy Wise was in fault; not, indeed, by omitting to port her helm as required, but in doing what was not required by that rule, and what defeated its purpose; that is to say, in stopping and probably reversing the engine which the rule implies must be kept in action. I say if this case turned upon rule 18 the Katy Wise was in fault in doing what was not required by that rule, and what defeated its purpose. The rule not only requires that the helm shall be ported but ported effectually.

There is another rule of navigation which might be claimed to govern this case, if the fog was not dense, the accident having occurred in the daytime. Though the rule is not in the schedule of statutory regulations, it is nevertheless universally recognized by mariners, especially among navigators of rivers. Where a vessel moving down with the curent meets a vessel coming up, the vessel moving slowest is less bound to precaution than the other. Waring v. Clarke, 5 How. [46 U. S.] 502; The Chester, 3 Hagg. Adm. 316. It is a universal rule that where a vessel incumbered with tows, or otherwise deprived of capacity to manoeuvre at will, is met by a vessel having no vessels in tow and moving free as to wind and tide, the vessel moving free must keep out of the way of the vessel incumbered and trammelled. Especially is this the case when a steamer is approaching a tug and her tows. The Syracuse, 9 Wall. [76 U. S.] 676, and cases there cited.

But while the two principles thus referred to undoubtedly bear upon the case at bar, I do not think that they entirely control it. I think that the public interests require that I should base my decision in the present case upon a principle of more direct importance to the navigation of the Potomac river, liable as that river is to the frequent recurrence of such fogs as that which prevailed on the morning of this collision. I hold that the Katy Wise was in fault in moving in such a manner, as to speed and incaution down the river on that morning, that she could not be diverted from colliding with a vessel which she was meeting, and which she saw, at a distance of thirty or sixty yards. This collision happened in consequence of the fact that the Katy Wise did not, within that distance of thirty to sixty yards, pass far enough to the right to avoid running into the Martha Washington. If she is to be excused for doing so on the score of inevitable accident, then it will be unsafe hereafter for vessels to move at all in the Potomac river during such fogs as that not extraordinary one which prevailed on the morning of the 30th of April last. A steamer moving in a fog is required by law to go at such a moderate rate of speed as will place her headway under such easy and ready command that she can be stopped within any distance within which other vessels may be seen by her lookout; and, going at a greater rate of speed than this, is a fault on her part. The Colorado [Case No. 3,028]; McCready v. Goldsmith, 18 How. [59 U. S.] 89; The Bridgeport [Case No. 1,861]; The Pennsylvania, [Id. 10,950]; and numerous other cases.

The event proved that the Katy Wise was moving without the caution required by law, and was in fault therein.

I will sign a decree of condemnation, and referring it to the commissioner to make report of the amount of damages sustained by the libellant.

Case No. 4,405.

ELLIS v. PATTERSON.

[Cited in Southern Pac. R. Co. v. Doyle, 11 Fed. 268. Nowhere reported; opinion not now accessible.]

ELLIS (UNITED STATES v.). See Cases Nos. 15,046 and 15,047.

ELLIS (WICKS v.). See Case No. 17,614.

Case No. 4,406.

ELLISON et al. v. The BELLONA.

[Bee, 106.] [1]

District Court, D. South Carolina. Sept., 1798.

SEAMEN—ARTICLES — DEVIATION — ADMIRALTY — STRICT CONSTRUCTION OF MARITIME CONTRACTS.

1. Courts of admiralty cannot properly apply to maritime contracts the same strictness that prevails at common law.

[Cited in The Bee, Case No. 1,219; The Betsy and Rhoda, Id. 1,366; Davis v. Leslie, Case

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

No. 3,639; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 390.]

[See Waring v. Clarke, 5 How. (46 U. S.) 500.]

2. If a vessel be intended to cruize as well as trade, the seamen's articles must be construed with reference to this double object.

[Cited in Packard v. The Louisa, Case No. 10,652.]

In admiralty.

BEE, District Judge. This is a cause of considerable importance between foreigners in a neutral court; and as it may lead to the establishment of a precedent, I have considered it with great attention. The libel is exhibited by twenty-four seamen of this ship for wages from the 20th May to the 27th of August. The causes of complaint are: 1st. A deviation from the voyage specified in the articles, and a prolongation of it by continuing twenty-three days off the coast of La Vera Cruz, instead of a few days, as agreed on. 2d. Severity on the part of the captain towards some of the crew. 3d. A discharge of part of the crew, since their arrival in this port. To this libel the captain interposes a claim, answer, and plea, on behalf of himself and the owners of the Bellona, a private ship of war belonging to subjects of Great Britain, and acting under letters of marque against France, Spain, and Holland. The plea (to the jurisdiction) has already been set aside; it remains for me to decide upon the answer and claim. These state two sets of articles, by one of which the crew are bound to proceed to the coast of La Vera Cruz, there to lie off and on for a few days, till the cargo should be landed; from thence on a cruize for six weeks, after which they were to return to Jamaica, as the master should direct. By another set of articles signed the same day the libellants shipped themselves as seamen on board the Bellona, as a private ship of war, letter of marque and reprisal, on a cruize from the harbour of Port-Royal against the ships and vessels of France, Spain, and the United Provinces. The answer denies that all the seamen behaved as they were bound to do, some of them having been disorderly and disobedient: some, who entered as able seamen were but ordinary; and others who knew and could perform their duty, neglected it on various occasions. It is denied that the voyage was prolonged on the coast of La Vera Cruz contrary to the true meaning and intent of the articles. Severity towards some of the libellants is admitted, as proceeding necessarily from their disobedience, disorderly, insolent, and mutinous, temper and conduct. Ill treatment beyond this exercise of discipline is denied. The answer admits that four of the libellants were allowed by the mate, in the captain's absence, to go on shore for one hour. They did not return in twenty-four hours; whereupon the captain refused them permission to go on board: he is now, however, ready to receive them. It is admitted that the clothes and wages of others of the libellants, who are named, were detained because they deserted, and were not entitled to wages until their return to Jamaica. The captain, nevertheless offers to take these men, also, on board, and to pay their wages in Jamaica, if they do their duty according to the articles. As to five seamen, who behaved so mutinously on board as to make their reception dangerous, the captain submits to the direction of the court, professing his utter unwillingness to let these people come on board. From this statement of the pleadings, three points arise for my decision: 1st. Whether the stay off the coast of La Vera Cruz is such a prolongation of the voyage as amounts to a breach of the articles. 2d. Whether the captain's severity to part of the crew will justify me in decreeing payment of wages and a discharge to them. 3d. Whether such as were voluntarily discharged in this port, and such as were refused admission on board for absence beyond their leave, are entitled to wages in the one case, and to wages and discharge in the other.

In determining the first point, the mercantile, not the warlike, character of the ship must be considered. She had a valuable cargo, great part of which was to be landed there. The seamen were shipped in a double capacity; they were to have wages, as belonging to a merchantman; and prize money as belonging to a letter of marque. The case quoted from Hopkinson, 122 [Brice v. The Nancy, Case No. 1,855], must be so construed as to protect the captain and owners, as well as the seamen, against too strict a construction of their contracts. In privateers monthly wages are not paid; the trading voyage occasioned their being stipulated for here. There was no wanton delay. The person, a Spaniard, who had agreed to purchase these goods, and to pay for them at La Vera Cruz, sailed in the Bellona from Jamaica, and left them at the Isle of Arcos that he might be ready with the money as soon as the ship should arrive off the coast. They cruized five or six days before he made his appearance. The goods were on deck and ready for delivery by the time this man and his boats were along side the ship. He had brought no money, and there was, of course, no delivery of the cargo. It appears, however, that he promised to return, prepared to pay for what he had bought. Would the captain, under such circumstances, have been justified to the freighters and owners if, by sailing away, he had totally defeated every purpose of the trading voyage? I think not. The Spaniard's return might be daily expected; wages went on, and the crew were liberally supplied. They knew the cargo was to be discharged at sea into boats; and that this must occasion additional delay and uncertainty. It might have been prevented for a week or ten days by rough weather. Would that have amounted to a deviation from the articles? Should the great interests of those concerned in this mercantile speculation have given way entirely to the commencement of a cruize in

which no certain interest was involved? At any rate, the vessel would have been much fitter for her business of cruizing, after the discharge of her cargo. [Case No. 1,855] lays it down that the constant practice of this court shews a greater liberality prevails here, in the construction of maritime contracts, than is found in the strictness of common law doctrines. This law applies to the case before me. An equitable construction of the articles, and the circumstances of the case concur to forbid my considering the delay off La Vera Cruz as a deviation sufficient to sustain this part of the libel.

The point of ill usage comes next. Of fifty men composing the crew, eight only complain of this. Four of these were in irons, some for a shorter, some for a longer time. One was threatened with death. The prizemaster put on board a captured vessel was shot at by the captain, while the prize was in tow, and cut over the head in the harbour. Ellison, upon giving some provocation, was desired by the captain to take his choice of a brace of pistols. This man, with two others, were ordered to remain below; but this, it seems, did not prevent their coming on deck when they pleased. They were refused cabin allowance but received ship's allowance from the cook. It is difficult for the judge of a neutral nation, not fully acquainted with the lex loci of the parties. to determine with precision questions of this sort; and I am happy to avail myself of the eloquent and able sentiments of a great admiralty judge, Sir James Marriott, as I find them delivered to the jury in a cause tried before him about six years ago. I have transcribed the charge verbatim, as well on account of its intrinsic merit, as because it appears strictly applicable to this ground of the libel before me. "You will call to mind continually," says he, "the state and condition of the parties concerned, the nature of their lives, business, and necessities. Consequently, in judging of matters committed on the high seas, you will take into view the state of society upon that element, where all is violence. This consideration makes a great difference between actions at sea, and actions on land, where every thing comes within sight and knowledge of the neighbourhood, and where the peace and tranquility of the subject is generally secure under a mild and moderate government. You have to judge of ferocious men, possessed of few, but strong ideas, peculiar to their employments; of men hardened by danger, and fearless by habit. The subjects of your deliberation are actions done on a sudden, vehement from the nature and necessity of the occasion. The preservation of ships and lives depends often upon some act of severe, but necessary, discipline. These scenes of violence present no very amiable picture of human nature; but such violence is frequently justifiable, sometimes absolutely necessary; because, without it, no commerce, no navigation, no defence of the kingdom can be maintained. The consideration of this should soften the rigour of judgment which might otherwise be made, on land, by persons ignorant and inexperienced of what is done at sea. It is painful to observe that, without the greatest care in weighing of evidence, no commander or officer of a ship can be safe upon his trial. In charge of the lives and properties of other men, contending with the most ferocious, upon an ungovernable element, a commander is placed every moment in danger of the loss of character and life. A ship is a little government, compressed into a narrow compass, in which there can be no hope of security for any man on board, without a rapid and strong occasional exertion of an absolute power placed in one man. Like other governments and situations, the command of a ship is open to the most horrid general combinations and conspiracies with all their consequences, fit to make the stoutest heart tremble. The passions operate, at sea, without control; and all, on board of a ship, is too often a scene of misery, terror, disorder, disobedience, resentment, and revenge." Let these Englishmen be judged by this rule of one of the ablest of their own lawyers, and then the conduct of the captain of the Bellona will appear in a more favourable light than it has been represented. Nevertheless, there are some parts of it highly censurable, particularly as to the man appointed to the command of the prize; and as to one other whom he threatened to shoot. If he had done it, I should have thought it murder; but if it was only in terrorem, it may well come within the necessity so ably stated by Sir James Marriott.

Upon the third point I am of opinion that Donnel the prizemaster, is entitled to his discharge and wages. The five men whom the captain is anxious to exclude from his ship may be discharged; but their wages must be paid. Those that left the ship before she was moored, under a short leave of absence, as they pretend, from the mate, were guilty of gross misbehaviour in extending it to twenty-four hours; but as the captain has offered to receive them again, and to pay them according to the articles, I shall not pronounce the contract dissolved. They were the aggressors, and must not be allowed to take advantage of their own wrong. Let them go on board and complete their voyage. I recommend to the captain to forgive and forget what has passed, and direct that he pay all costs of suit, since his refusal to receive some of the men on board occasioned a general application to this court for redress.

Case No. 4,407.

ELLISON et al. v. The BELLONA.

[Bee, 112.][1]

District Court, D. South Carolina. Sept., 1798.

LETTERS OF MARQUE—OCCASIONAL CRUISE—SUIT FOR WAGES IN NEUTRAL PORT.

1. Letters of marque differ in their character from national ships of war, or privateers, inasmuch as they are employed for commercial purposes, and are only allowed to cruize occasionally.

[Cited in Davis v. Leslie, Case No. 3,639.]

2. Seamen on board of letters of marque may sue for their wages in a neutral port.

[Cited in Packard v. The Louisa, Case No. 10,652.]

Before BEE, District Judge.

In arguing this plea to the jurisdiction of the court, two grounds were taken. 1st. The law of nations. 2d. The 25th article of the treaty between Great Britain and the United States.

Under the first head it was contended that, as this is a vessel of war equipped by a foreign power for capturing vessels of its enemy, and furnished with articles peculiar to such vessels and different from the common engagements made by merchant seamen, the court cannot interfere on this occasion. It is undoubtedly true (and so adjudged in Moitez v. The South Carolina [Case No. 9,697]) that mariners enlisting on board a ship of war or vessel belonging to a sovereign independent state, cannot libel for wages due; and the reason is that seamen in such case look to the government of their nation, by whom they are employed, and who undertake that they shall be paid. In privateers, whose commissions are altogether of a warlike nature, it is settled by contract between the owners and crew what share of prize each party may claim; and, before the seamen become entitled, the validity of every prize must be determined. This can only be ascertained by a court of the nation to which the captors belong; neutral nations have no sort of jurisdiction therein. But the case is materially different with respect to letters of marque, which are trading vessels, armed, and commissioned to cruize occasionally. The Bellona is one of these. It appears that she was fitted out at Leith, on a voyage to Jamaica with a cargo of great value, consigned to the captain and another person on board. The crew, consisting of about forty men, was shipped under articles. The vessel arrived at Jamaica, where this crew quitted her from some motive of dissatisfaction as to the further voyage; and a new crew was shipped under new articles which describe the new voyage, and stipulate what wages should be paid. It appears that part of the cargo on board was on freight to La Vera Cruz, and that, when this should be landed, the vessel was to cruize for six weeks. For the regulation of this cruize another set of articles was signed, by which it was fixed that the owners were to have three fourths of all prizes, and the seamen the remainder. The stipulated wages are decisive of the commercial character of this vessel, and distinguish her from a privateer.

Courts of admiralty have a general jurisdiction in causes civil and maritime; and the 9th section of the judiciary act of congress vests that power in this court. The case of seamen's wages comes within this description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally. The consular convention with France formed a single exception in relation to seamen of that nation. If, then, the court is entitled to look into and decide upon the articles of seamen engaged on board a merchant vessel, shall that jurisdiction be ousted merely because the vessel is armed? In cases of bottomry and hypothecation, the power of the court seems to be conceded; why not in the case of wages also? If a vessel arrive here and it appear that the voyage was to end, or the seamen to be discharged, in this port, no objection could be made to the enforcement of the contract. It is the daily practice of our courts, as well as those of England; both are guided by the lex loci, and regulate their decisions accordingly. I very lately discharged two seamen from a British armed ship, because it appeared by the articles that they had engaged only to come to this port. The 25th article of the treaty with Great Britain has been relied on in the second place. But this evidently relates merely to prizes. It is found in all our treaties, and generally in those between commercial nations possessed of a naval power. It provides that the neutral power shall not take cognizance of prizes, and permits the captor to have an asylum in our ports till he shall see fit to proceed, with his prize, to the ports of his own nation. But this by no means excludes jurisdiction as to incidental matters not connected with the question of prize. Before this provision by treaty, neutral courts were frequently induced to restore prizes brought within their jurisdictional limits; that practice is effectually restrained by the clause relied on.

Yet there are cases even of prize where this court will interfere. It will restore American vessels brought as prize into this port. It will divest a French privateer of his British or Dutch prize taken within our jurisdictional limits, or by a vessel fitted out in our harbours. French prizes, under similar circumstances would be restored, without regard to the claim of a British or other captor. Each of these cases has occurred, been decided, and confirmed in every stage of appeal. The law is therefore, fixed.

But it is said that this power of discharg-

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

ing the crew of an armed vessel amounts to a power of laying her under embargo, for that she is prohibited by our laws from recruiting in our ports. In support of this argument, the act of congress of June, 1794 [1 Stat. 381], was quoted. That act is declaratory of the law of nations, confirms all the doctrine cited from Vattel, and provides, inter alia, that no foreign armed vessel shall add to her force, within our ports, by augmenting the number of her guns or other equipment solely applicable to war, nor enlist men for the service of a foreign state. But it has been determined, under this clause, that repairs necessary to put a vessel in statu quo, alterations in the manner of her equipment (without adding to her force) and the shipping of men to the amount of the original number that composed the crew, are not such infractions of the treaty as call for the interference of the court. If every man in the Bellona were changed, I should decide that our neutrality was not committed, provided the ship carried out the same number, and no more, that she brought in. I should willingly have got rid of the trouble that must attend an investigation of the merits of this cause. But I hold myself bound by law to retain the suit, and to direct that the claimant answer over.

ELLISTON (SHELLEY v.). Case No. 12,750.

ELLITHORP (GIBBS v.). See Case No. 5,383.

Case No. 4,408.

ELLITHORP v. ROBERTSON et al.

[4 Blatchf. 307;[1] 2 Fish. Pat. Cas. 83; Merw. Pat. Inv. 702.]

Circuit Court, S. D. New York. March 3, 1859.

PATENTS — INTERFERENCE — PRIORITY — REDUCING AN INVENTION TO PRACTICE.

1. A patent was granted to R., in 1854. E., in 1858, applied to the patent office for a patent for the same invention. His application was denied. E. then filed a bill, averring that, in 1847, he invented what was patented to R., and made drawings of the invention, preparatory to applying for a patent, and praying for a decree declaring that the patent to R. was void, and that E. was entitled to a patent for the invention: *Held*, that the bill could not be sustained.

[Cited in Vermont Farm Mach. Co. v. Marble, 20 Fed. 119; Hubel v. Dick, 28 Fed. 139.]

2. The bill ought to have averred that E. had, before the granting of the patent to R., reduced his invention to practice, or embodied it in some practical or useful form, or adapted it to use.

[Cited in Electric Signal Co. v. Hall Signal Co., 6 Fed. 606.]

3. The making of drawings of a conceived idea is not such an embodiment of it in a practical and useful form as will sustain a patent. It must have been reduced to practice before the granting of the patent.

[Cited in Reeves v. Keystone Bridge Co., Case No. 11,660; Odell v. Stout, 22 Fed. 165; Christie v. Seybold, 5 C. C. A. 33, 55 Fed. 78.]

4. What is such a reduction to practice, defined.

This was a bill in equity, filed by Solomon B. Ellithorp against Thomas J. W. Robertson, of New York, D. W. Clark, of Bridgeport, Connecticut, and Augustus J. Jerome, of New Haven, Connecticut. Clark and Jerome were not served with process, and did not appear. Robertson was served with process, but made default, and the bill was taken as confessed against him. The bill charged that the plaintiff was, in July, 1847, the original and first inventor of certain improvements in sewing machines, and made drawings of the same at that time, preparatory to making application for a patent; that he was delayed, in presenting his application until about the 10th of April, 1858, for the want of the necessary means; that his house, in which he supposed his drawings were, was consumed by fire, in August, 1848; that he was unable to find the drawings until within less than six months before the 10th of April, 1858; that, having found the drawings, he, on that day, applied for a patent, deposited a model in the patent office, and paid the sum of thirty dollars; that the commissioner refused to grant him a patent, on the ground that his application interfered with a patent granted to Robertson on the 28th of November, 1854 [No. 12,015], the commissioner also deciding that, if the plaintiff was the first inventor, he had, by delay, abandoned the invention; that he appealed from the decision of the commissioner to the assistant district judge of the District of Columbia, who affirmed the decision of the commissioner [Case No. 4,409]; that two undivided fifths of the patent granted to Robertson were now owned by Robertson and Clark, and three undivided fifths by Jerome; that the plaintiff never intended to abandon his invention; and that the invention patented to Robertson had never been in practical use, and had never been supplied to the public. The bill prayed for a decree declaring the patent issued to Robertson to be void, and the plaintiff to be entitled to receive a patent for his claimed invention, as specified in his claim presented to the patent office.

Amos K. Hadley, for plaintiff.
Geo. Gifford, for defendants.

INGERSOLL, District Judge. The question for determination in this case is, whether the plaintiff has made out such a case, in his bill, as will authorize the court to declare the patent which was issued to Robertson void and of no effect. It should be borne in mind, that there is no allegation in the bill,

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

and no claim made by the plaintiff, that Robertson surreptitiously or unjustly obtained his patent, for that which was in fact invented and discovered by the plaintiff, who was using reasonable diligence in adapting and perfecting the same.

The object of the patent laws is to encourage useful improvements reduced to actual practice. Before a patent can be granted, it must be made to appear that the party applying for it was the original inventor of the thing sought to be patented, and that he has reduced the same to practice. To defeat a patent which has been issued, it is not enough that some one, before the patentee, conceived the idea of effecting what the patentee accomplished. To constitute such a prior invention as will avoid a patent that has been granted, it must be made to appear that some one before the patentee, not only conceived the idea of doing what the patentee has done, but also reduced his idea to practice, and embodied it in some practical and useful form. The idea must have been carried into practical operation. The making of drawings of conceived ideas is not such an embodiment of such conceived ideas in a practical and useful form, as will defeat a patent which has been granted. Experiments made, equivocal in their results, and given up for years, will not be permitted to prevail against an original inventor, who has reduced his invention to practice, and has, without fraud, obtained a patent. An invention is not patentable until it is perfected and adapted to use. In a race of diligence between two independent inventors, he who first reduces his invention to a fixed, positive, and practical form, has a priority of right to a patent. Many v. Jagger [Case No. 9,055]; Parkhurst v. Kinsman, [Id. 10,757]; Reed v. Cutter [Id. 11,645].

Robertson's patent, as appears by the bill, was issued on the 28th of November, 1854. There is no sufficient allegation, in the bill, that the plaintiff had, before that time, reduced his invention to practice, or embodied it in some practical and useful form, or that it had been adapted to use. All that is alleged in the bill, on the subject of the invention, is, that the plaintiff, in July, 1847, was the original inventor of the improvements patented to Robertson, and that, in the same month, he made drawings of the same, preparatory to making application for a patent. The making of the drawings is all that he did to show what his idea was. The bill does not show that there was any reducing of the invention to any practical and useful form, or that it was adapted to use. The allegations of the bill are, therefore, not sufficient to defeat the patent to Robertson.

If there had been any fraud in obtaining the patent issued to Robertson, or if it had been unjustly issued, the case would have been presented in another aspect. For, it is provided, by the 15th section of the patent act of July 4, 1836 (5 Stat. 123), that a patent issued may be avoided, if the patentee has surreptitiously or unjustly obtained his patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same. But there are no allegations of this kind in the bill; and there is no claim that Robertson either surreptitiously or unjustly obtained his patent, and no sufficient allegation in the bill, that the plaintiff, at the time the patent to Robertson was issued, was using reasonable diligence in adapting and perfecting his invention.

With this view of the case, it is not necessary to consider the other questions which have been presented. The bill must, therefore, be dismissed.

[1] [Subsequently, at October term, 1860, and after the death of Judge INGERSOLL, a new application was made for a decree to Mr. Justice NELSON and Judge SHIPMAN, under whose direction an order was entered, which is given in full, because of its general bearing upon the practice to be adopted under section 16 of the act of July 4, 1836. The decree of the court was as follows:

["This cause came on to be heard at this term as against the defendant, Thomas J. W. Robertson, he being the only defendant served with process herein, or who resided or could be found within the jurisdiction of this court; and the said cause was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely, that the said defendant, Thomas J. W. Robertson, and D. W. Clark, were, at the time of the commencement of this action, and now are, joint owners of two undivided fifth parts of certain letters patent for certain improvements in sewing machines in the said bill of complaint mentioned, issued by the United States unto the said defendant, Thomas J. W. Robertson, on or about November 28, 1854. That the said letters patent, according to the aforesaid interest therein, of the said defendant, Robertson, and to the extent of such interest, are absolutely void; and that the said complainant, Solomon B. Ellithorp, was the original and first inventor of the said improvement so, as aforesaid, patented unto the said Robertson, and is entitled, according to the principles and provisions of the acts of the congress of the United States in such cases made and provided, to have and receive a patent for such new and useful improvement in sewing machines, the claim which the said complainant is entitled to make for such improvement being 'The stationary bobbin D, enclosing and containing the second or locking thread upon a spool or ball, and suspended and operated in the case or basket E, and located in relation to the needle F,' as and for the purpose set forth in the specifica-

[1] [From 2 Fish. Pat. Cas. 83.]

tions to the said bill of complaint annexed, and as specified and described in the specifications and claims of the said Ellithorp in that behalf made and filed in the patent office of the United States on April 10, 1858; and the said commissioner of patents of the United States is hereby authorized and directed to issue such patent unto the said Solomon B. Ellithorp on his filing with such commissioner a copy of this adjudication and otherwise complying with the requisitions of the said acts of congress."

[The attention of Judge SHIPMAN having been called to the opinion and decision of Judge INGERSOLL, an order was entered June 10, 1861, setting aside the decree of October term, 1860, as follows:

["On reading and filing affidavits, and other documents, in this suit, and on motion of George Gifford, of counsel for the defendant, Clark, made at the last February term of this court, opposed by A. K. Hadley, Esq., and it having been discovered that the application on which the final decree was entered in this suit, dated December 3, 1860, was irregularly made through mistake of the fact that a written opinion and decision had already been given and filed in the office of the clerk of this court, dismissing the bill of complaint therein, and that an entry of the same had been made in the books of the clerk of this court, and that said decree, dated December 3, 1860, had been filed in the patent office of the United States:

["It is hereby ordered, adjudged, and decreed that said decree, and all the provisions and directions therein contained, dated December 3, 1860, declaring Solomon B. Ellithorp to be entitled to have a patent, and directing the commissioner of patents of the United States to issue a patent to said Ellithorp for illeged improvements in sewing machines, be, and the same hereby is, vacated, annulled, and set aside, and that no further action be taken under or by virtue of the same, and that this order be entered in the office of the clerk of this court, and a copy thereof served upon the commissioner of patents."] [1]

[NOTE. Patent No. 12,015 was granted to J. W. Robertson, November 28, 1854. For other cases involving this patent, see Ellithorp v. Robertson, Cases Nos. 4,409 and 4,410.]

Case No. 4,409

ELLITHORP v. ROBERTSON.

[1 MacA. Pat. Cas. 585.]

Circuit Court, District of Columbia. Sept. 28, 1858.

GRANTING OF PATENTS — PRIOR PUBLIC USE — LACHES OF INVENTOR — PRESUMPTIONS — BURDEN OF PROOF.

[1. Section 7 of the act of 1836 (5 Stat. 119) operates only to prevent a use, sale, or license given by the applicant himself from rendering the patent void, and does not apply to a public use by or under another independent inventor of the same thing.]

[2. Under the act of 1836 an inventor is bound to use reasonable diligence in applying for a patent, and a delay of 11 years after making complete drawings before filing an application is unreasonable, as against an independent inventor who secured a patent 4 years before such application was filed; it appearing that the only excuse was that the applicant supposed that his drawings had been burned, whereas in fact they were among some papers saved from the fire, and which he neglected to examine.]

[3. "Public use," as employed in the act of 1836, means use in public, and includes a use under a patent with the consent of the patentee.]

[4. Where the first inventor has neglected to apply for a patent until four years after another inventor has secured a patent for the same thing, the presumption is that the patentee has carried the invention into public use; and this presumption is sufficient to throw the burden of proof upon the later applicant.]

[See Babcock v. Degener, Case No. 698.]

[Appeal from the commissioner of patents.

[In the matter of the application of S. B. Ellithorp for a patent for an improvement in sewing machines, an interference was declared with the patent of T. J. W. Robertson, dated November 28, 1854, No. 12,015, and on hearing before the commissioner the application of Ellithorp was rejected, whereupon this appeal was prosecuted. The report of the commissioner is as follows:]

Commissioner's Report.

In the matter of the appeal of S. B. Ellithorp from the decision of this office refusing him a patent, I have to submit the following report:

On the 10th of April last the appellant filed in this office an application for a patent for an improvement in sewing machines, in which he claimed a stationary bobbin inclosing the leading thread, limited to the arrangement and operation described. He was advised that his invention was anticipated in the patent of T. J. W. Robertson, assignee to himself and A. E. Beach, dated November 28th, 1854, and on the 15th of July last he was put in interference with the patent, and on the 18th ultimo his application was finally rejected, as you will see from the decision of that date, herewith submitted, on the ground of want of diligence in the prosecution of his invention and a consequent abandonment thereof to the public. On the hearing in the interference the appellant rested the proof of his priority of invention upon a drawing which clearly showed the same, and bore date July 7th, 1847; and this drawing was authenticated by satisfactory affidavits, and is herewith submitted. The appellant had filed another application on the 28th of June last, which was put into interference with the same patent of Robertson, dated November 28th, 1854. This second interference was declared on the 6th of August last, and on the same day the office gave notice to the appellant that it would be well for him to furnish proof

[1] [From 2 Fish. Pat. Cas. 83.]

against the presumption of abandonment growing out of his want of diligence in the prosecution of his invention. A copy of this notice is herewith submitted. There cannot be a question as to the priority of invention between the appellant and patentee in this case, and of this the office was satisfied on the hearing of the interference; but at the same time the office deemed that the first and original inventor had abandoned his invention made in July, 1847, patented to another person on the 28th of November, 1854, and not himself asking a patent therefor until the 10th of August, 1858. The seventh section of the act of July 4th, 1836, to promote the progress of the useful arts, &c., provides that when an application for a patent is filed the commissioner of patents may grant a patent for the invention embraced in the application, except, amongst other causes of refusal, it be found on examination that the invention "had been in public use or on sale with the applicant's consent or allowance prior to the application;" and the same section prohibits the grant of a patent when "any part of that which is claimed as new had before been invented or discovered or patented in this or any foreign country." This section was amended by the act of March 3d, 1839 [5 Stat. 354], § 7, so that "no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

Under these two clauses the office deems every applicant for a patent to be required to exercise ordinary diligence in procuring a patent, in order to protect his invention; and that the only proper mode of exercising this diligence is by coming into the patent office as an applicant for a patent; and that the public use of his invention for more than two years prior to his application for a patent is an abandonment of his invention to the public when such use is not surreptitious. These positions are forced upon the office not only by the acts of congress referred to, but by the decisions of the courts; and while the one may be as familiar to your honor as the other, I will briefly refer to such of the decisions as have governed the practice of the office: "Though the discovery by the patentee is new, yet if he is guilty of negligence in procuring his patent, by which the invention has become publicly known and used by any persons, he has no right of action. * * * It (the invention) must be new to all the world * * * at the time of the application for a patent. But it will be considered as new, then, if the application is within a reasonable time after the discovery." Whitney v. Emmett [Case No. 17,585]. The true construction of the patent law is, that the first inventor cannot acquire a good title to a patent if he suffers the thing to go into public use, or to be publicly sold for use, before he makes application for a patent. Pennock v. Dialogue, 2 Pet. [27 U. S.] 1. "But this knowledge (of public use) may be presumed from the circumstances of the case. This will in general be a fact for the jury. And if the inventor do not immediately after this notice assert his right, it is such evidence of acquiescence in the public use as forever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public." Again, in this case, Judge McLean, who delivered the opinion of the court, says: "Whatever may be the intention of the inventor, if he suffers his invention to go into public use through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right." Shaw v. Cooper, 7 Pet. [32 U. S.] 292. If an inventor knowingly suffers his invention to go into public and general use without objection, it is a dedication of it to the public. Mellus v. Silsbee [Case No. 9,404]. In the case of Wyeth v. Stone, the patent was obtained in 1829, and no suit for infringement brought against defendants until 1839, although their use of the invention for a considerable period was notorious, and known to the patentee. Though in this case it was a bill for an injunction to protect a patent, Judge Story says: "I agree that it is quite competent for a patentee at any time by overt acts or by express dedication to abandon or surrender to the public for their use all the rights received by his patent. So, if for a series of years the patentee acquiesces without objection in the known public use by others of his invention, or stands by and encourages such use, such conduct will afford a very strong presumption of such an actual abandonment or surrender. A fortiori, the doctrine will apply to a case where the patentee has openly encouraged or silently acquiesced in such use by the very defendants whom he afterwards seeks to prohibit by injunction from any further use; for in this way he may not only mislead them into expenses or acts or contracts against which they might otherwise have guarded themselves, but his conduct operates as a surprise, if not as a fraud upon them." Wyeth v. Stone [Case No. 18,107].

From the current of these decisions the office has felt the necessity of adopting and enforcing the practice that has led to the rejection of the appellant. The office is aware of no mode by which an inventor can, under the act of 1836, give notice—legal notice—of his intention to protect his invention by a patent, except he make an application for a patent or file a caveat in the patent office. Notice through the office is notice for the whole country, and is also the statute notice of his intention to protect his invention. He may make public proclamation in the most

busy thoroughfares in our most populous cities, post his notice on the market place or at the cross roads, or publish it in the newspapers, without bringing it to the knowledge of the office, or, indeed, without its operating as any notice. He must, as an inventor, exercise ordinary diligence too, and not stand by for nearly eleven years, as in the present case, in the presence of extraordinary activity in the prosecution of inventions pertaining to the class in which himself was an inventor —an activity that has produced more than two hundred patents—before he comes into the office and gives notice that he wishes to obtain a patent. Allowing the appellant the full benefit of the act of March 3d, 1839, it is clear that Robertson's patent had been published for more than sixteen months when the two years of the act of 1839 had in this case commenced. The office is wholly at a loss to conceive of more direct or better evidence of an open, notorious, and public use of any particular invention than the publication of a patent therefor. It is an advertisement to the world that a certain person living at a certain place has for sale the sole right to make, use, and sell to others the invention covered by his patent. The patent is notice to the courts of the country of what it contains, and the vigilant inventor can at all times inform himself of what it purports, by consulting the records of the office that are daily kept open for his benefit. The enforcement of this rule of constructive abandonment has not been made for the first time in the present case by the office. In the interference between John A. Bradshaw and others, Bradshaw had in 1847 filed in the office a drawing, specification, petition, oath of of invention, and paid the fee; in short, completed an application for a patent, except furnishing a model. He was well acquainted with the progress of invention in sewing machines, and not until January, 1858, did he complete his application by filing a model. At the hearing in the interference the office rejected his application on the ground of presumed abandonment; and though a patent on his invention involved immense pecuniary consequences, there has been no appeal from that decision.

I have dwelt longer on this case than a proper regard for your honor's time would have justified were it not that I am gratified with the opportunity of presenting this rule of the office practice to your enlightened consideration; for the growing interest in patent property makes it a matter of moment to the office to have direct judicial sanction for those rules which necessity has created, but which the office has to rely on—those decisions of the courts, to sustain which have approached most nearly to positive construction of the several acts of congress under which these rules have been framed. Few cases can arise where the rule in question is likely to occur; but when its operation is clearly involved, the office has no course left but to enforce it, because, as now advised, it is regarded as a positive rule of law explained by the opinions of the supreme and circuit courts, to which your honor's attention is directed.

Low & Haskill, for appellant.

MORSELL, Circuit Judge. The commissioner in his report states that Ellithorp exhibited a drawing which presented the invention in question in several figures, and which has the following writing upon it: "Drawings and explanations of Ellithorp's improvements in sewing machines; executed this day, Albany, July 7th, 1847; in presence of (signed) S. B. Ellithorp, Isaac L. Weaver;" that this drawing is attested by the widow of the subscribing witness, who adds that she saw him sign on the day of the date; and the signature of this subscribing witness is further authenticated by the affidavit of another witness, who says he was well acquainted with the handwriting of Weaver, and that the signature, he believes, was written by him; that Ellithorp filed an affidavit, dated the 13th of August, reciting the drawing—its date and its representation—of the invention in question, and proceeds to account for his delay in applying for a patent on the ground of want of means to make the application, saying he has in vain endeavored to procure the aid of capitalists to furnish means, and that until recently he had supposed the drawings destroyed; and that he has not and never designed to abandon his invention, but has at all times and in all places, as he can prove by reliable witnesses, claimed the said invention as his own, and proclaimed his intention of securing patents for the same as soon and as fast as his circumstances would enable him so to do. The date of Ellithorp's invention is clearly fixed by the drawing at July 7th, 1847. The presumption of abandonment is distinctly presented to the office, from the fact that nearly eleven years had elapsed since the invention in question was completed by Ellithorp before he gave any notice to the office of his intention to obtain a patent therefor; from the fact that Robertson's patent is now nearly four years old, and had been before the public for more than three years at the time of Ellithorp's application; from the facts, as shown in his affidavit of the 13th instant, that he was not ignorant of the state of the art to which his invention pertains; "and now, when he is offered by this interference an opportunity to rebut the presumption of abandonment, he does not offer a single witness to show what diligence he has exercised for the protection of his invention." One reason of appeal only was filed, which is, "that the said decision was made without warrant of law." The report of the commissioner in answer refers to a number of legal decisions to sustain and fortify the ground taken.

in the decision made by him. Under this state of the case—with all the evidence, decision, reasons of appeal, report of the commissioner, and original papers—the same has been laid before me, due notice of the time and hearing of said appeal having been first given, on which occasion the appellant appeared by his attorney, and, after filing with me his argument in writing, submitted the said case for my consideration.

The counsel has argued the case under three heads: First. What constitutes an abandonment of an invention. Second. What measure of diligence in making an application for a patent is required on the part of the inventor. Third. Is the question of abandonment one to be taken into consideration and decided by the commissioner of patents, and if so, how is the abandonment to be proved.

It is contended that the position taken by the commissioner in his decision that the public use meant by the statute of 1836 "is involved in the publication of Robertson's patent" is incorrect, because it does not appear that any proof had been "advanced" by the office or by the patentee that his invention had ever been in public use or on sale at the time of the appellant's application; and that even if it had been proved that the invention had been in use or on sale under the patent, it would not be such a public use and sale as is clearly contemplated by the law, but a private and restricted one—restricted to those to whom the patentee might convey the right to use or sell—and would not be made with "the consent or allowance" of the original inventor. This cannot be conceded. The arguments used by the commissioner upon this point are very strong and the authorities referred to to support them pertinent. I do not know that much can be added. The statute under which the right in this case must be sustained, if it can be supported at all, is the act of congress of 1836 (chapter 357). I am satisfied that act of 1839 (chapter 88, § 7) can have no application to this case. That provision is intended to relate to the case of a use, sale, or license to use given, or made and claimed under the inventor who admits and claims the privilege; or, to make my idea more clear, and to use the language of a learned judge, "the clause should read thus: 'The patent shall not be held invalid by reason that the inventor has sold or allowed his invention to be used prior to the application for a patent, unless he has abandoned it to the public, or that such sale or prior use has been for more than two years prior to such application for a patent.'" The present is a case where the appellant, so far from claiming the exception, denies that he ever did use or sell the invention to any one, and the patentee sets up no such claim; on the contrary, he claims as an original, substantive inventor — adversary, therefore, to the claim of the appellant. How, then, is the right claimed to be considered under the act of 1836? To entitle the appellant to a patent by the sixth section the invention must not only be new and useful, not known or used by others before his or their discovery or invention thereof, but also "and not at the time of his application for a patent in public use or on sale with his consent or allowance." This latter part must be considered in the same category with the first. Part of the fifteenth section may also have a bearing on the matter under discussion. Alluding to objections which may be made to the validity of the patent, amongst other things, is this: "Or had been in public use or on sale with the consent and allowance of the patentee before his application for a patent; or that he had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another, who was using reasonable diligence in adapting and perfecting the same," &c. There are various other conditions as prerequisites contained in the law, with all of which the party must show that he has complied before he can have any right to demand or hold a patent. Although the party has a right to keep his inchoate title to his invention concealed from the public as long as he pleases, yet, when he desires to perfect his right by a patent, he must proceed with vigilance to secure his protection by as early an application as practicable; for although no particular time is limited for the application for a patent by the statute, yet it is very clear, according to a fair construction of its spirit and meaning, that it ought to be done in a reasonable time; otherwise the right may be lost by the laches of the party. What is or is not a reasonable time depends on the circumstances of each case. Whether the length of nearly eleven years from the time of the discovery to the application for a patent in this case can be deemed a reasonable time, is the question. Let the circumstances, then, be considered. Robertson having duly complied with all the previous requisites of the statute, obtained a patent, as an independent, fair, and real discoverer of the same invention, on the 28th of November, 1854, and an interference was declared on the 28th June, 1858, in the case of said patent and that of the application of the appellant of the said 28th of June, in the same year, for a patent for the same invention, as having been discovered on the 7th of July, 1847. Both of said parties were residents of the same county and state of New York. Robertson's patent had been granted and placed upon the public records of the patent office, as directed by law, and had been in operation upwards of four years before the appellant's application.

The argument by the appellant's counsel to this part of the case is that "no proof was advanced by the office or by the patentee that his invention had ever been in public

use or on sale at the time of the appellant's application. * * * Even if it had been proved that the invention had been in use or on sale under the patent, it would not have been such a public use and sale as is clearly contemplated by the law, but a private and restricted one—restricted to those to whom the patentee might convey the right to use or sell—and would not be made with the consent or allowance of the original inventor. * * * It is apparently held by the commissioner in his decision that such public use is involved in the publication of Robertson's patent." He supposes this argument to be fallacious; "for if such publication is public use, it certainly is not made so with the 'consent and allowance of the inventor,' but must be presumed to be so without and against it." Again: "That the use or sale of an invention on the part or on behalf of the patentee is not such a public one as is contemplated by law, is apparent from the fact that the monopoly of the invention for the term of years provided by law to the patentee is made the consideration that he shall at the expiration of that time allow the invention to be used by the public to compensate the public for the restriction of the invention to private use under the patent." He proceeds: "If this reasoning is sound, we hold it to be clear that the use and sale of an invention under a patent is not such public use and sale as is contemplated by law, and does not constitute an abandonment; and that the public use and sale, as well as the consent and allowance thereof by the inventor, must be made clear matter of proof before the abandonment can be legally shown; and that there having been no proof presented to or by the office that the appellant's invention had been in public use or on sale by his consent and allowance, there has therefore been no abandonment of his invention." There is considerable ingenuity and some force in this argument, and if it cannot be satisfactorily answered, ought to be allowed to have its desired effect. To recapitulate: What, then, had the office before it at the time application was made to sustain the objection to granting the patent? There was a public record of a patent for the same invention duly obtained and delivered to Robertson, a resident of the same place with the appellant, upwards of four years before, still in full force, the import and effect of which, in a legal point of view, was to give constructive notice of the fact to all who might be interested. The patent was prima facie evidence of the exclusive title of the patentee to use or sell the invention or the machine publicly, to whom, and as he thought best for his own interest. The object which no doubt Robertson had in view in incurring the expense and trouble of securing protection for the right was so to carry it into public operation and use and sale in the place of his residence or any other place. It is natural also to suppose that this he did, and that it must have been attended with considerable notoriety.

This, in a case like the present, and in the absence of any proof to impeach it on the ground that it had been surreptitiously or unjustly obtained, must be deemed sufficient to cast the burden of proof on the side of the appellant. The appellant's counsel, I think, is in error in supposing that the use or sale of an invention on the part or in behalf of the patentee is not such a public one as is contemplated by law. This proceeds from a misunderstanding of the terms "public use" or "on sale" as used in the statute. It is certainly not thereby meant that every one must know and have the right to use it, or even, generally, that there must be such a right or use. To show my idea to be correct, I will refer to Lund, Pat. p. 46: "The meaning of the words 'public use' is this: * * * that the use of it shall not be secret, but public. * * * If a man invents a lock, and puts it on his gate, and has used it for a dozen years, that is a public use of it." The meaning of the terms, under our statute of 1836, is similar. Curtis (section 53): "The phrase 'public use' means use in public, and not use by the public; so that under this act, if there had been a use in public by any person, with the consent or allowance of the patentee, the patent will be defeated." Under the second head of the argument the counsel considers what measure of diligence in making an application for a patent is required on the part of the inventor. His position is that there has been no such delay in this case as to bar his right; and he relies upon the case of Heath v. Hildreth [Case No. 6,309], decided by Judge Cranch. In that case, although Judge Cranch says "the statute does not limit any time in which the inventor must apply for a patent," he does not deny that he ought to apply in a reasonable time. That does not appear to have been the case of any longer delay on the part of the first inventor than was necessary to mature his invention and in preparing to make application in a reasonable time. According to the applicant's own showing, a drawing of his invention appears to have been made in the year 1847. In about a year after his house was destroyed by fire, and his property with some of his papers was destroyed, and he supposed that this paper was also; but he saved some of his papers, and this paper was among them. He says he thought it was lost, but he admits that he never searched for it until recently before filing his petition. In this respect, then, he certainly could not be excused. If he had any other reason for delay, why could he not have filed his caveat in the office? This would have protected him. He states, also, as a reason his want of means and his failure in obtaining aid from capitalists; but he says that the reason of his failure was the supposed loss of his sheet of drawings, which he never searched for until a few

months before his application. This, I have already shown, he was inexcusable for. He supposes that "the public is not injured by the non-use of an invention of which it has no knowledge, and for the lack of which it is put to no known loss or injury; and there is therefore no call or demand upon the applicant, as a matter of law or equity, to present his application within any specific time." I do not think this argument sound.

It is certainly true that while the original inventor chooses to depend upon his own secret contrivance—his inchoate right of invention—to secure him in the exclusive use and enjoyment thereof, he has a right to do so, and no one can complain of being injured; yet, when he finds it necessary to resort to the public for their aid to perfect his inchoate right by patent, a new and different condition of rights is to take place, limited by statute, in the nature of a statutory compact with mutual considerations—a quid pro quo offered by the inventor—the terms of which compact, according to the mode and spirit thereof, must be fulfilled—on the one part, fourteen years' exclusive right, secured by patent; on the other part, a new and useful invention, to become public without restriction at the expiration of that term. The main object with the legislature was to bring inventions early into public and unrestricted use; and this, of course, forming an essential part of the consideration, the public has a right to the knowledge as early as possible, consistently with the rights of the inventor in using such reasonable diligence on his part as may be necessary in adapting and perfecting his invention. This principle will be found as settled in a number of decided cases. I will refer to the case of Pennock v. Dialogue, 2 Pet. [27 U. S.] 19, where it is there stated: "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profit of it, relying upon his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries." In consequence of the delay, Robertson has been suffered or allowed to obtain with entire fairness a patent for the same invention, and by the use and exercise thereof, or at least by the public record thereof, the invention or the knowledge thereof has become public for upwards of four years. Upon general principles, it may be asked how can the appellant, then, be able to offer what is a most essential ingredient in the consideration of a new and useful invention, and can it be reasonable to suppose that the legislature intended to grant an exclusive right to any one to monopolize that which was already common? There certainly would be no quid pro quo. Again, upon equitable principles, under such circumstances is not the superior equity with Robertson, having combined both legal and equitable rights? If such disability is thus the consequence of the party's laches, it is of no consequence whether his intention was or was not to abandon his invention.

I think it unnecessary to add anything to what has been said by the commissioner on the ground of abandonment. The last ground of the argument is as to the jurisdiction of the commissioner to consider the ground of abandonment. Having on a former occasion fully considered and decided that he had jurisdiction of that question,—Mowry v. Barber [Case No. 9,892],—and seeing no reason to change my opinion, I shall say nothing more on that subject. With the aforegoing views, I cannot think the appellant's case has been sustained, and I think and decide that the decision of the commissioner is correct.

[NOTE. Subsequent to the final determination of this interference, S. B. Ellithorp, the applicant and appellant, filed a bill in equity in the district court of the United States for the southern district of New York against the owners of the Robertson patent, asking that it be declared void, and that a patent be issued to complainant on his application then on file in the patent office. The bill set up substantially the same state of facts and circumstances as was shown in this proceeding, and, the respondents defaulting, the bill was taken as confessed. Case No. 4,408.

[For another case between the same parties, relating to a different invention, but involving substantially the same facts and circumstances, see Case No. 4,410.]

Case No. 4,410.

ELLITHORP v. ROBERTSON.

[1 MacA. Pat. Cas. 634.]

Circuit Court, District of Columbia. April, 1859.

ISSUANCE OF PATENTS—LACHES IN MAKING APPLICATION.

[Many years' delay in applying for a patent, without sufficient excuse, during which time the invention has gone into public use, takes away the right to a patent.]

[See Case No. 4,408.]

[Appeal from the decision of the commissioner of patents.]

Low & Haskell, for appellant.

MORSELL, Circuit Judge. The points decided by me on the 28th of September, 1858 [Case No. 4,409], in a case of appeal from the decision of the commissioner of patents between the above-named parties for an "improvement in sewing machines," it appears to

me, are involved in the issue in this case. The objection in that case to granting a patent to the appellant was the great lapse of time which had been suffered to occur between the discovery of the applicant's invention and the time of his application, and of its being suffered to go into public use in the interval. The circumstances which were offered to prove this I was satisfied were sufficient. The invention claimed in this case is of the same date, and the facts and circumstances in that case are applicable to this. There is, however, evidence offered in this case to excuse the delay. I have carefully examined it, and should have been glad to have discovered in it enough for that purpose, but have not. Upon further deliberation upon the questions of law as settled by me upon the particular case then before me, I have found no reason to change my opinion. I think, therefore, the decision of the commissioner in this case is correct, and ought to be affirmed, which is accordingly done.

Case No. 4,411.

ELLSWORTH v. The WILD HUNTER.

[2 Woods, 315.][1]

Circuit Court, E. D. Texas. May Term, 1876.

SHIPPING—DELIVERY OF CARGO ON WHARF AT REQUEST OF CONSIGNEE — LIABILITY FOR DAMAGE BY RAIN.

Where the captain of a ship having goods on board was requested by the consignee to deliver them at once, and replied that he would begin discharging them at 12 o'clock noon, or soon after, and did so, and gave notice thereof to the consignee, who said his clerk would attend to them and take care that they were all removed from the wharf, and the clerk neglected to employ drays sufficient to carry off the goods before night, and a portion of them were left on the wharf during the night, and the captain of the ship piled them up and covered them with tarpaulins, and placed a watchman over them, and the ship's agent had general orders from the consignee not to store his goods: *Held*, that there was a good delivery of the goods, and the ship was not liable for damage done them by rain during the night.

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

This was a libel [by Thomas H. Ellsworth against the bark Wild Hunter] on a contract of affreightment, and the question was whether the goods—certain boxes of tin—were delivered according to contract.

T. N. Waul, for libellant, cited The Tybee [Case No. 14,304].

Thomas M. Jack, for claimant, contended that the circumstances of the case took it out of the decision of The Tybee.

BRADLEY, Circuit Justice. The bark Wild Hunter, Captain Errickson, arrived in the harbor of Galveston on the 24th of October, 1871, having on board, amongst other things, over five hundred boxes of tin plate, consigned to the libellant, Thomas H. Ellsworth. The latter was anxious to get the tin, and his warehouse clerk, Daly, says that he carried a note from Ellsworth to the captain of the bark, on the morning of the 25th, asking for the tin, and that the mate and inspector of customs told him he could have it about twelve o'clock, or after dinner. Webster, the agent of the ship, says that Ellsworth called on him that morning to use his influence with the captain to get the tin discharged as soon as possible, to have it discharged at once. Webster directed the captain to get stevedores and commence discharging at one o'clock, and to stop at four. He gave notice to Ellsworth, who replied, "Daly will attend to it and have it all hauled up." About three p. m., only two or three drays were hauling. Webster told Daly he would have to put on more drays if he expected to get it up that night. He put on two more drays. Webster says that the orders from Ellsworth to his firm were never to store his goods; that he would remove them from the wharf if it took till nine o'clock p. m. to do so. Such orders had always been carried out by the firm and its employés. He says it was perfectly practicable for Ellsworth to have had all the freight which was landed carried to his warehouse that evening. The note taken by Daly to the captain in the morning, was as follows: "Now that your vessel is up to the wharf, we must ask you to do your best to give us some tin and tin plate; in fact we must get them to-day, cost what it will. We hope you will be able to give us them at once." Captain Errickson says it was in pursuance of this note that he engaged to discharge the cargo. Up to four o'clock he had discharged 550 cases of tin, all in good order and condition. The captain says that Ellsworth began to haul the tin between two and three, and at four o'clock p. m., he went to Ellsworth's office, and told him he would be unable to get the tin off the wharf unless he put more drays on to haul it. He put on three more, and at half past five two more; but 249 cases of tin remained on the wharf. At half past five, or fifteen minutes before six, the drays ceased hauling. The custom house officer and Captain Errickson staid till seven, but no more drays came, and a night watchman was put on to watch the tin. At ten, the weather becoming stormy, the captain says he took the mate and carpenter and piled up the cases and covered all with two tarpaulins, of good quality, and waterproof. Next morning, the weather being clear, he began discharging the remainder, and between seven and eight the draymen began to haul away the tin. Between eight and nine libellant came to the ship. He said he was sorry any was left there over night; that he had left orders with his clerk to haul off all the tin the night before; that he did not think any of the tin had been

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

damaged. The mate and carpenter entirely corroborate the testimony of the captain.

I think it is clear from the evidence in this case, that there was a delivery of the tin. It was delivered at the owner's urgent request; he wanted it. If he had employed a sufficient number of draymen, he could easily have had it all carried to his store. Even after the draymen stopped work, it could have been done by working on into the evening. Ellsworth had given orders to have it all brought up; he supposed it had been. The difficulty was that his clerk did not employ enough drays. To this hypothesis, it is objected that the captain attempted to take care of the tin by setting a watchman over it, and by piling it up on the wharf and covering it with tarpaulins. From this it is assumed that he knew the tin was at his risk. I do not think so. Seeing the rain coming on, he, as a matter of common prudence, did what any man would do under the circumstances. Delivered or not delivered, he did not want to see the tin spoiled. Besides, he knew that questions might be raised and that an ounce of prevention of litigation, as of anything else, is worth a pound of cure. Then it is said that he had it hauled up to the store in the morning. This does not seem to be so. The draymen, anxious to finish the job they had begun, were there betimes in the morning, taking away the tin. The captain would naturally suppose that they were complying with orders received from Ellsworth. It is said that the custom-house inspector refused to attend. On the contrary, he remained on the wharf till seven o'clock, waiting for the drays to come and take the tin. Under the circumstances, and as Ellsworth had told the ship's agent not to store his freight (which is not contradicted), I think the goods were properly deliverable on the wharf, and that they were so delivered and were at the risk of the libellant.

I have not overlooked the testimony of the libellant himself, and of his warehouse clerk, Daly. The former admits that the captain promised him in the morning to discharge his freight that day; but he adds that he told the captain that he did not require the whole of the freight, but to give him some of it, adding that he supplemented this by two notes asking the captain to give him some of the tin-plate and block tin. Now we have seen the principal note. It says, "some tin and tin plate," it is true; but it adds, "In fact we must get them to-day, cost what it will. We hope you will be able to give us them at once." Ellsworth says the draymen informed him that no more goods would be delivered that night; but the inspector whom he met told him that some of them were on the wharf. He asked if they were protected, and was told that they were covered with tarpaulins. This must have been late in the evening. The libellant, however, seems to have been satisfied. This is the substance of Ellsworth's testimony, so far as it bears on the question. Taking this evidence all together, it does not materially contradict that of the other witnesses. I have already adverted to Daly's evidence. It does not materially alter the case. I think the tin was delivered, and that the libel must be dismissed.

ELLWORTH (PRENTISS v.). See Case No. 11,386.

Case No. 4,412.

ELLZEY v. MOSOROP.

[Cited in Davy v. Faw, Case No. 3,663. Nowhere reported; opinion not now accessible.]

ELM (UNITED STATES v.). See Case No. 15,048.

Case No. 4,413.

The ELM CITY.

[Affirming Case No. 4,414. Nowhere reported; opinion not now accessible.]

Case No. 4,414.

The ELM CITY.

[6 Ben. 58.][1]

District Court, S. D. New York. April, 1872.[2]

COLLISION NEAR HELL GATE — STEAMBOAT AND SCHOONER — LIGHTS — ESTIMATES OF DISTANCE — MOVEMENT IN EXTREMIS.

1. A schooner, bound to New York, was beating through the East river against a light southwest wind, the tide being ebb, about midnight of July 18th, 1871. She alleged that, having fully beat out her tack, she was in stays close in under Negro Point bluff, on Ward's Island, when a steamboat, bound from New York, ran into her, striking her on her port bow a blow, angling aft, which sank her. Both vessels had the regulation lights set, and both had lookouts stationed forward. The story of the steamboat was, that, as she rounded Hallett's point, she saw the schooner's red light off her starboard bow; that shortly afterwards she saw both lights of the schooner, then about a quarter or a half a mile off; that very soon afterwards the schooner's red light disappeared, the green light remaining visible, whereupon the steamboat's wheel was starboarded to go under the schooner's stern, and her engine slowed; that thereafter the red light suddenly came into view again, indicating that the schooner had changed her course; and that thereupon the steamer stopped, but too late to avoid a collision. *Held*, that, on the evidence, the pilot of the steamer mistook the distance he was from the schooner, when he starboarded to go between her and Ward's Island, and was then too near her to allow time for the schooner to get off on the other tack.

2. The schooner made no change back to the port tack after having come about on the starboard tack.

3. Although the schooner's jib was held up so as to keep her in stays, yet that did not con-

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

[2] [Affirmed by circuit court; case not reported.]

tribute to the collision, and was done in the extreme peril and alarm consequent on the close approach of the steamboat head on.

4. The steamboat was solely liable for the damages.

In admiralty.

R. D. Benedict, for libellants.
E. H. Owen, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner Oscar C. Acken, and the owners of the cargo laden on board of her, to recover the damages caused by a collision which took place about midnight, on the 18th of July, 1871, between the schooner and the steamboat Elm City, off Negro Point bluff, in Hell Gate, whereby the schooner was sunk. The steamboat was bound from New York to New Haven. The schooner, bound to New York, was beating down against a light southwest wind, the tide being the first of the ebb. The stem of the steamboat struck the port bow of the schooner, near the schooner's stem, a blow ranging inboard on the schooner a little, in a direction towards the schooner's main hatch.

The libel alleges, that, at the time of the collision, the schooner had beat fully across the channel, and was in stays close in under Negro Point bluff; and that the collision was caused solely through the fault of those in charge of the steamboat, in that, among other things, she did not take a course that would have taken her to the southward of the schooner, or wait till the schooner had crossed to the southward, and then pass to the northward of the schooner, in not having a competent and proper lookout, and seeing the position of the schooner sooner and more accurately, in not sooner stopping and backing, and in otherwise not taking proper measures to avoid the schooner.

The answer avers, that, when the steamboat rounded Hallett's point, she discovered the schooner's red light, bearing off the steamboat's starboard bow, such light being, as near as could be ascertained, somewhere abreast of, or to the eastward of, Negro Point bluff; that both vessels continued on their respective courses, and, shortly after, the schooner exhibited both of her signal lights, green and red, she being, at that time, as nearly as can be stated, about abreast of Negro Point bluff, and near the west shore, and from a quarter to a half of a mile distant from the steamboat; that, very soon thereafter, the schooner's red light disappeared and her green light alone remained visible, whereupon the steamboat's wheel was immediately hove to starboard, to go under the schooner's stern, between her and Ward's Island, and the bell was rung to slow, which was promptly answered, and the steamboat was slowed; that, immediately thereafter, and suddenly and unexpectedly, both lights of the schooner again came into view, whereupon the steamboat was immediately stopped and backed, and every effort made, that could be, to avoid the collision, yet the vessels came together, the steamboat's stem striking the schooner on her port side, somewhere forward of the port fore-rigging, and the schooner sank; that, from these various changes of the lights of the schooner, the pilot and those navigating the steamboat had reason to understand and believe, that, when they first saw the red light, the schooner was standing over towards Ward's Island, that, by the subsequent appearance of both lights, she was coming around upon the opposite tack, and that, by the disappearing of the red light, and the green light alone remaining visible, she had got around and was standing over towards Long Island; that, at that time, if the schooner had kept on, there was abundant time and room for the steamboat to have passed under her stern in safety, the steamboat's wheel having been starboarded, and her speed slackened to accomplish it; that it was the duty of the schooner then and there to have held on her course towards Long Island, but, instead of so doing, she, without any excuse therefor, wrongfully and improperly changed her course, and came around again with her head towards Ward's Island, which brought her port side towards the steamboat, and so baffled the navigation of the steamboat as to render the collision inevitable; and that the collision occurred by reason of the want of a proper and vigilant lookout on the schooner, and the erroneous and improper navigation on her part, and so changing her course, and thus baffling the lawful and proper efforts of the steamboat to keep out of her way.

The schooner had on board, at the time, her master, who was at the wheel, two seamen, who were forward, and a boy, 16 or 17 years old, who was steward. The master and the two seamen have been examined as witnesses for the libellants.

The master testifies, that he first saw the steamboat's red light when he was on his tack towards Long Island; that the steamboat was, at that time, about at Hallett's point; that he tacked on the Long Island shore, and stood towards Ward's Island, keeping the steamboat's red light in view, until he had got about half way over towards Ward's Island, when he saw the green light and the red light of the steamboat, as if she had turned to come towards him; that he stood over until within fifty feet of Ward's Island, and then tried to go about, the steamboat being, at that time, about 150 feet off, and still showing her green and red lights; that, in order to go about, he put his helm hard-a-starboard and held it there until the steamboat was not twenty-five feet off, and then let go of his wheel, and stepped a distance of two feet to the cabin door and called to the steward to come up, and then went back and put his hand on the wheel just as the steamboat struck the schooner; that the schooner, at the time of the blow, had got around nearly into the wind, so that her

sails shook a little; that he did not put his wheel to port at all; that, when he let it go, it did not run back or move either way; and that he heard two whistles from the steamboat when she was about 150 feet off.

Palmer, one of the seamen on the schooner, testifies, that he was standing forward on the starboard side; that he first saw the steamboat's red light when the schooner was going about on the Long Island shore; that, after the schooner had got a little more than half way across towards Ward's Island, he saw both of the colored lights of the steamboat; that the schooner stood over towards Ward's Island as far as the eddy (elsewhere he says he supposes they began to go about when about fifty feet from Ward's Island, "may be more"), and then came up into the wind and lay there, and did not get off on the other tack, her sails shaking and she being right in the wind when the steamboat struck her; that, when the steamboat was about twenty feet off, her two colored lights being visible, he started to go aft; and that, just before he started to go aft, he heard the master call the steward. This witness states a fact which the master did not testify to, that, when the schooner came up into the wind, the master told him to let the jib swing amidships, and he did so, the effect being to keep the vessel from going about, and to let her lie in the wind. He says, that the schooner lay in the wind "a minute, may be," before she was struck; that, if the jib had not been suffered to swing amidships, they could have about got around on the starboard tack, before being struck, but could not have cleared the steamboat; and that the steamboat was 150 feet off when the schooner got into the wind.

Lockwood, the other seaman, testifies, that he first saw the steamboat's red light when the schooner was about half way across on her tack towards Long Island; that, when the schooner was about half way across on her tack towards Ward's Island, he saw both of the colored lights of the steamboat; that, when the schooner got over to the eddy, about fifty feet from Ward's Island, and the steamboat was about 150 feet off, and apparently coming right towards the schooner, her two colored lights and her white headlight being visible, the schooner came head to the wind, but did not go around on the other tack; that, at the time the schooner got head to the wind, the steamboat was not over twenty or twenty-five feet off; that he stood forward, looking out and not handling the sails, and did not go aft before the collision; and that Palmer let the jib swing in when the steamboat was not over twenty-five feet off.

The sequence of events, as set up in the answer, is, (1) red light of the schooner seen off the steamboat's starboard bow; (2) both of the colored lights of the schooner seen, when the schooner was from a quarter to a half of a mile off; (3) the schooner's red light disappeared, her green light remaining visible, whereupon the steamboat starboarded and slowed; (4) both of the colored lights of the schooner again seen, whereupon the steamboat stopped and reversed.

The pilot, who was at the wheel, two wheelsmen, who were also at the wheel, the lookout, and the engineer, have been examined from the steamboat.

Stephens, the pilot, testifies, that, on turning Hallett's point, he discovered the red light of the schooner on his port bow; that, just as the steamboat was on the turn at Negro point, the schooner showed both of her colored lights, being somewhere near a quarter of a mile off, and the lights bearing on the port bow of the steamboat; that he then starboarded and slowed, so as to go between the schooner and Ward's Island; that the next thing he observed, in reference to the schooner's lights, was, that she shut in her red light, leaving her green light alone visible; that the next thing he observed, in regard to the schooner's lights, was, that she showed both of her colored lights again; that he then rang to stop and back, and blew two whistles; and that the schooner was gradually swinging towards Ward's Island, when she was struck. On cross-examination, he says, that he had turned Negro point, and got headed up the river, when he first saw the two lights of the schooner, the steamboat being then in about the middle of the river; that the schooner might, perhaps, have been 150 feet off, when she showed both of her colored lights the second time; and that, just before that, her green light bore off the starboard bow of the steamboat, the steamboat being on a swing to port. He also says, that, at the time of the blow, the schooner's green light had disappeared, and her red light alone was visible; that the schooner must have swung off with her head towards Ward's Island, in order to have been struck as she was; that, when he rang to stop and back, he had stopped the swinging to port, by steadying the helm; that the stopping and backing swung the steamboat's head a little to starboard, but he did not change his helm when he stopped and backed; and that the vessels were too close together for porting by the steamboat, at the time she stopped and backed, to have been of any service.

Burt, one of the wheelsmen, states, that, after seeing the schooner's red light, he saw both of her colored lights; that then the steamboat's wheel was starboarded, and she was slowed, the schooner being about a quarter of a mile off; that afterwards the schooner shut in her red light, and showed her green light alone; that then the wheel of the steamboat was let run amidships; that next both of the colored lights of the schooner became visible, and the steamboat was stopped and backed, the schooner being then over 200 feet off; that the wheel of the steamboat was not again changed; that

afterwards, and before the blow, the schooner's green light was shut in, her red light remaining visible; that, if the steamboat had ported when she stopped and backed, she would not have cleared the schooner; and that the schooner, when hit, was swinging towards Ward's Island.

Wedmore, the other wheelsman, testifies, that, after the schooner showed her red light, she showed both of her colored lights, being then about a quarter of a mile off; that then the steamboat starboarded and slowed; that, after that, the wheel of the steamboat was steadied; that after the schooner showed both of her colored lights, she next shut in her red light, her green light remaining visible; that next she showed both lights again, and then the steamboat was stopped and backed, when the schooner was 200 feet off; and that, when struck, the schooner was gradually swinging towards Ward's Island, and had shut her green light in.

Grant, the outlook, says that he stood about fifteen feet abaft the stem of the steamboat; that he reported the schooner as a sail off the port bow; that the schooner, after showing her red light, showed both of her colored lights, and then shut in her red light, her green light remaining visible, and then showed both of the lights again, when the steamboat was close to her; that, when struck, the schooner was swinging towards Ward's Island; that, when he first saw both of the schooner's colored lights, the vessels were, he should think, 150 or 175 feet apart, or, it might have been, further; and that, when he saw both of her colored lights the second time, the vessels were somewhere in the neighborhood of ten or twenty feet apart.

The engineer of the steamboat says, that the steamboat made between two and two and a half turns back, before the blow, it taking about four turns back to stop her headway when going slowed.

It cannot escape observation, that there are some discrepancies between the answer and the evidence of the witnesses from the steamboat. The answer states, that the red light of the schooner, when discovered, bore off the starboard bow of the steamboat; while the evidence is, that it bore off the port bow. The more important discrepancy is, that the answer sets up that the steamboat starboarded and slowed when, and not until, the schooner's red light was shut in; while the pilot and the two wheelsmen of the steamboat say that the steamboat starboarded and slowed when the schooner showed her two colored lights, and before she shut in her red light. The evidence makes the starboarding and slowing of the steamboat to have taken place when the vessels were further apart than they were if such starboarding and slowing did not take place till the time stated in the answer.

There is also a discrepancy, in a very important particular, between the testimony of the lookout on the steamboat and the testimony of the three persons who were in the pilot house of the steamboat. The latter testify, that, when the schooner first showed both of her colored lights, and the steamboat starboarded and slowed, the schooner was about or somewhere near a quarter of a mile off, that is, 1,320 feet off. The place where these observers were was some distance back from the bow of the boat, where the lookout was stationed, and was higher from the water. The lookout was fifteen feet abaft the stem, and gives his judgment of the distance apart of the vessels, when the schooner first showed both of her colored lights, as 150 or 175 feet, although, he says, it might have been further. The master of the schooner says, that, when he began to go about, the steamer was about 150 feet off. Palmer, one of the schooner's seamen, testifies, that the steamboat was 150 feet off when the schooner got into the wind; and Lockwood, the other one of the schooner's seamen, says, that the steamboat was about 150 feet off when the schooner came head to the wind. Until the schooner got pretty well around to the wind, she would not show her green light to the steamboat.

So, there is another important discrepancy between the testimony of the lookout on the steamboat, and that of her pilot and her two wheelsmen. The pilot says, that, when the schooner showed both of her colored lights the second time, and the steamboat stopped and backed, the schooner might, perhaps, have been 150 feet off; Burt says, over 200 feet off; Wedmore says, 200 feet off; and the lookout on the steamboat says, somewhere in the neighborhood of ten or twenty feet off. The master of the schooner says he did not let go his hard-a-starboard wheel till the steamboat was within twenty-five feet off, and that when he let it go he called the steward. He gives the distance off of the steamboat, when he heard her two whistles, as 150 feet. They were blown when the pilot rang to stop and back. Palmer says, that he started to go aft when the steamboat was about twenty feet off, and that just before he started to go aft he heard the master call the steward. Lockwood says, that the steamboat was not over twenty or twenty-five feet off when the schooner got head to the wind.

Estimates of the distance of lights, especially colored lights, seen across water, are of very little value to show their real distance. But the testimony, in this case, indicates, that, whatever the distance was, the lookout on the steamboat thought that the schooner was much nearer when she showed both of her colored lights and the steamboat starboarded and slowed, than the men in the pilot house of the steamboat thought she was, and much nearer when the steamboat stopped and backed than the men in the pilot house of the steamboat thought she was. The testimony also indicates, that the men on the schooner thought the steamboat was much nearer, when the schooner got into a position to

show both of her colored lights, than the men in the pilot house of the steamboat thought she was.

I am impelled to the conclusion, from all the evidence, that the pilot of the steamboat mistook the real distance off of the schooner, when he starboarded; that he starboarded and slowed instead of starboarding and stopping, or instead of stopping without starboarding, or instead of porting, under the mistaken idea that he was so far away from the schooner that he would have room, after she got about and off on her starboard tack, to go under her stern; that he ran on, under a starboard wheel, until he got so near to Ward's Island that he was obliged to steady his helm; and that then he found himself so close to the schooner that he could not avoid her, and had no time to port, but could only ineffectually stop and back. This starboarding of the steamboat, and her continuing to run directly head on towards the schooner, was, on the evidence of the steamboat's own witnesses, the result of the schooner's coming about so far as to show both of her colored lights, and, perhaps, to shut in her red light. Nothing is complained of by the steamboat as against the schooner, except that the schooner, after shutting in her red light, showed it again with the green. But the evidence from the schooner as to what, in fact, was done on board of her, shows, that it was done in the extreme peril and alarm of the close approach of the steamboat, head on, both of her colored lights visible; and the entire evidence fails to show satisfactorily that anything done on board of the schooner contributed to the collision. It was the duty of the steamboat to avoid the schooner, and, not having done so, to show a clear excuse for not having done so. I think she fails to establish such excuse.

There must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

ELM CITY CO. (MAGIC RUFFLE CO. v.). See Cases Nos. 8,949 and 8,950.

Case No. 4,415.

ELM CITY CO. v. WOOSTER.

[6 Fish. Pat. Cas. 452;[1] 4 O. G. 83.]

Circuit Court, S. D. New York. July, 1873.

PATENTS—PRIORITY—INFRINGEMENT—MISREPRESENTATIONS IN SPECIFICATIONS—AGREEMENT FOR TRANSFER OF INVENTION.

1. The patentees were the first inventors of the plaiting attachment mentioned in the patent on which suit is brought.

2. Defendant has infringed complainants' right under their patent.

3. The patent is not void on the ground of fraudulent misrepresentations in the specification, nor upon the ground that the patentees were not the joint inventors.

4. An agreement for the transfer of the invention, for the joint benefit of the inventors and those who will advance money for the manufacture or use of the machines invented, not carried into execution, and unaccompanied by any public use of the machine, but being prospective in its character, not consummated until within two years of the application, does not affect the validity of the patent.

Final hearing on pleadings and proofs. Suit brought [by the Elm City Company against George H. Wooster] upon letters patent [No. 37,033] for "improvement in machines for filling and crimping," granted to Chauncey D. Crosby and Henry Kellogg, December 2, 1862.

E. W. Stoughton and C. B. Stoughton, for complainant.

C. A. Seward and F. H. Betts, for defendant.

WOODRUFF, Circuit Judge. The testimony in this case is very greatly conflicting, or very much of it is not entitled to credit, either because, in my opinion, the witnesses exaggerate their asserted achievements, erroneously state the time, or describe inventions which did not in fact embrace the patented invention, or refer to crude or imperfect endeavors to imitate the magic ruffle, which appears to have been popular at the time when, according to the evidence, many were seeking to compete with those engaged in its manufacture.

After a laborious examination of the evidence my conclusions are:

First. The patentees were the first inventors of the plaiting attachment mentioned in the patent described in the bill of complaint, and on which the suit is founded.

Second. The defendant has infringed the rights of the complainant, as assignee of the said patent, as alleged in the bill of complaint, by the use of a plaiting attachment embracing the said patent invention.

Third. The said patent is not void on the ground that there was any fraudulent misrepresentation in the specification annexed to the patent. No such fraudulent misrepresentation is proved. Nor is the patent void upon the ground that the invention was not the joint invention of the patentees. The testimony proves such joint invention most clearly and distinctly.

There was no such sale of the patented machine or apparatus two years before the application for a patent as renders the patent void. An agreement for the transfer of the invention for the joint benefit of the inventors and those who will advance money for the manufacture or use of the machines invented, not carried into execution, and unaccompanied by any public use of the machine, but being prospective in its character, not consummated until within the said two years, does not, in my opinion, affect the validity of the patent.

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

Fourth. I find no ground upon which to hold that a corporation created by the law of a state without the limits of this federal judicial district, may not maintain a suit here for an infringement of their rights committed here.

These conclusions necessarily require a decree in favor of the complainant, according to the prayer of the bill.

It is obvious that the defendant has introduced testimony which was not admissible as a defense, relating to the knowledge and use of the invention by persons not named in the answer, to some or all of which objection was made by the complainant on the taking of testimony. I have not, however, regarded the objection in my consideration, because the briefs submitted do not involve a motion to strike out such testimony, and my conclusions are therefore founded on all the proofs.

Let a decree be entered for the complainant, awarding the relief prayed for.

[NOTE. For another case involving this patent, see Tuttle v. Claflin, 19 Fed. 599.]

Case No. 4,416.

ELMINGER v. DREW.

[4 McLean, 388.] [1]

Circuit Court, D. Michigan. June Term, 1848.

PROMISSORY NOTES—PARTIAL FAILURE OF CONSIDERATION AS A DEFENSE.

1. A partial failure of the consideration can not be set up as a defense to the note given on the purchase.

2. There are conflicting authorities on the subject; but the weight of authority is as above stated. It was the doctrine of the supreme court when this case was decided. Since that time, a different rule has been sanctioned by that court.

[Action at law by George Elminger against John Drew.]

Bates, Hand, Barstow & Lockwood and Douglass & Walker, for plaintiff.

Mr. Frazer, for defendant.

OPINION OF THE COURT. This is an action of assumpsit by the indorsee against the indorser of a note. The declaration contains eleven counts. The first count states that E. Morse & Co., made their promissory note on the 10th of March, 1838, for fifteen hundred dollars, payable sixty days after date, to the order of defendant, at the office of the American Fur Company, in the city of New York; which note was assigned by the defendant to the plaintiff, was duly presented for payment, and protested. The 2d. count was substantially the same. The 3d count the same, and in addition, that the makers of the note, who were commission merchants, transferred to the defendant a large amount of merchandise to indemnify the defendant, for his indorsements, etc., and, therefore, that he was not entitled to notice, etc. The 4th count was substantially the same as the third. The 5th count, that the said Morse & Co., made their certain other note in writing, on the same day payable to the defendant, at the same place, four months after date, for eleven hundred and one dollars, which was indorsed by the defendant to the plaintiff, that at maturity the note was presented at the place of payment, and due diligence used, etc. The 6th count states the making of the said note, payable to the order of the defendant, which was indorsed by him; and due diligence was used, etc., and that at the time the note was executed, a large amount of merchandize was transferred to defendant for his indemnity, etc. The 7th count was substantially the same. The four following were the general counts:

The defendant pleaded, 1. The general issue. 2. That the American Fur Company are the owners of the notes sued on, which company is incorporated, and that some of the corporators reside in the district of Michigan. The third plea is to the same effect. The 4th plea. That previous to the execution of the notes, E. Morse & Co. contracted with the American Fur Company to purchase a large quantity of white fish, at eight dollars per barrel; and that the company warranted the fish to be well cured, good, sound, and wholesome, on which six hundred barrels were purchased, and that the notes were executed in part payment of the same, and avers that the fish were not well cured, but were bad, unsound, unwholesome, and of no value whatever. That the said notes were assigned to the plaintiff after their maturity, to wit, on the 1st of February, 1842, and at the place last aforesaid. 5th plea. That E. Morse & Co. purchased six hundred barrels of white fish, at eight dollars per barrel, from the company, who fraudulently and deceitfully and knowingly stated and represented to said E. Morse & Co. that the fish were well cured, good, sound, and wholesome; that the same were unsound, etc., and of no value. 6th plea. That the defendant was a mere accommodation indorser on the notes. That the plaintiff by an instrument of writing, gave to Morse & Co. six months' time for a valuable consideration paid, for the payment of the notes, by which the defendant was discharged. 7th plea. That defendant was an accommodation indorser, and received no consideration therefor, that six weeks' time to the maker was given, after the notes became due, etc. 8th plea. That defendant was an accommodation indorser, and that six months' time was given, etc. 9th plea. That time was given, etc., for a valuable consideration, etc. 10th plea. That the promises in the 2d, 3d, 4th, 6th, 7th, 8th and 9th counts, were the same as set forth in the first and fifth counts, and that he received no consideration there-

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

for, and that without the assent or knowledge of defendant, for a valuable consideration, time was given.

The plaintiff replies to the 2d plea that the notes were not the property of the fur company at the time stated in the plea, and tenders an issue. To the 3d plea issue was joined. To the 4th and 5th pleas the plaintiff demurs, and assigns causes of demurrer. On these pleas the principal points arise on the pleadings. The defendants joined in demurrer.

The first cause of demurrer alleged "that the property was not returned or offered to be returned;" it is insisted by the defendant that it was not necessary to aver any such thing. Chief Justice Spencer says: "We know of no case in which there is an omission to return the article agreed to be sold which precludes the defendant from contesting the price on the ground that it was not returned to the vendor." See 18 Johns. 141; 17 E. C. L. 373, 121, 291; 3 N. H. 455. And the counsel remark, it was held in the above case, "that though the defendant had not returned or offered to return the hats, she might in an action brought against her, nevertheless, insist on a deduction of the price originally agreed to be paid, in proportion to the diminished value." This, it is contended, is the settled doctrine in this country and in England. The rule is, as contended, "that if there is no beneficial consideration there shall be no pay." 1 Camp. 38, 190; Peake, 59, 216; 2 N. R. 136. A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when in fact it was of no value, is without consideration and void. So where there is a warranty, and the return of the property is unnecessary; and it is insisted that it is immaterial whether the suit is brought on the original contract or on the security for the purchase money. Even a partial failure, if fraud intervene, is a good defense. 5 Mass. 46; 2 Taunt. 2; 1 Esp. 201; 1 Camp. 41, note; Bayley, Bills & N. 533, notes 7, 8; Miller v. Smith [Case No. 9,590]; 10 Mass. 415. There is great conflict in the authorities, whether a partial failure of the consideration may be set up in defense, in an action on the note given for the purchase money. The authorities all agree that where there is a total failure of the consideration, it is a good defense; or where the parties have agreed upon the amount, the failure being partial, defense may be made. But where the question as to the extent of the failure is open, the weight of authority is against the argument of defendant's counsel.

The article purchased, six hundred barrels of fish, is alleged to have been badly cured, and of no value, and the warranty of the vendor was, that they were well cured, etc. But there is no averment in any of the pleas that the barrels are worthless, and it is difficult to say, that there is a total failure of the consideration. The barrels, at twenty-five cents each, would be worth one hundred and fifty dollars, which, it is true, is an inconsiderable amount when compared to the sum of four thousand eight hundred dollars, agreed to be paid for the fish; yet there is no rule by which the court or jury can limit a defense in such a case. The failure, if matter of defense, cannot depend upon the extent of it. If it be less than total, it must avail the defendant, to the amount of it, on principle, however inconsiderable it may be, when compared to the purchase money. In the case of Greenleaf v. Cook, 2 Wheat. [15 U. S.] 13, the court say, "where a promissory note has been given for the purchase of real property, with full knowledge of the extent of an incumbrance, defect of title, arising from that incumbrance, is no legal bar to an action on the note." And they say, "that any partial defect in the title is not inquirable into in an action on the note in a court of law, but the party must seek relief, if any where, in chancery." There may be cases in which, to set up a partial failure of consideration, would be attended with but little difficulty, and, in the language of Chancellor Kent, would avoid a circuity of action. But the question is, not what might be practicable in some cases, but what is the best and safest rule on the subject. I say this, because there are decisions both ways. Now, where there had been a partial failure or defect of title, as in the above case cited from Wheaton, two issues would be presented: First, as to the execution of the instrument on which the action is brought; and, second, the extent of damage by the partial failure of title. Can both of these be submitted to the same jury; or would the defendant be required to admit the execution of the instrument, on pleading the partial failure? If this were adopted as a general principle, it would lead to embarrassment, if not uncertainty in pleading. A jury would not be the most competent tribunal to investigate an intricate controversy as to land titles; and if the partial failure had not been settled judicially, must the court and jury inquire into the title, and determine it? This would require another party to be brought before the court, who had no interest in the original suit. Such a course would be impracticable.

Where goods are sold and delivered with warranty, and a negotiable note is given in consideration of such sale and delivery, if the contract be absolute, such breach of it cannot be set up as a defense to an action on the security; unless the contract be rescinded by the consent of both parties, it remains open. Chit. Cont. 742, 743, note 495; 28 Wend. 114; 2 Hill, 293; Thornton v. Wynn, 12 Wheat. [25 U. S.] 183; 6 Conn. 508, 514; Power v. Wells, Cowp. 818; Weston v. Downes, 1 Doug. 23; 1 Term R. 135, 136. If the contract be yet open, the plaintiff's demand is for unliquidated damages, on a special contract of warranty; and the issue as to whether there has been a breach of war-

ranty cannot be tried, except on a special action on the warranty. Lewis v. Cosgrave, 2 Taunt. 2; Chit. Cont. 465. The case of Obbard v. Betham, 22 E. C. L. 363, enforces the distinction between an action for the price of goods and one brought on a security given, on the authority of Morgan v. Richardson, 1 Camp. 40, note, Tye v. Gwynne, 2 Camp. 346, cases which the court say have always been acted on, and the court expressly applies the doctrine to cases where there has been a warranty. 19 E. C. L. 121; 1 Term R. 133; Solomon v. Turner, 2 E. C. L. 291. The case of Moggridge v. Jones, 14 East, 486, is a strong case to show that in an action on a note the rule is strict with regard to letting in defenses founded on want of consideration. 25 Wend. 107. In New York, the English rule that partial failure of consideration can not be shown in evidence in an action on a note, has not been observed. 8 Wend. 109; 25 Wend. 114; 12 Wend. 566; Story, Bills, 204; 17 E. C. L. 121. A partial failure can not be set up as a defense to the note given for the purchase money. [Thornton v. Wynn] 12 Wheat. [25 U. S.] 183; 12 Wend. 566; 5 Mass. 319; 18 Pick. 95; 1 Metc. [Mass.] 547; 2 Kent, Comm. 480; 5 East, 449; 2 Barn. & Adol. 456.

The 5th plea sets up fraud and deceit; but does not aver an offer to rescind the contract by returning the property which, as appears from the plea, the defendant received, and still retains. Fraud, undoubtedly, avoids a contract. But, whenever the purchaser retains the property, it is evidence, in law, that he abides by the contract; and it is consequently considered as binding between the parties. And the only difference between such a case and one of warranty is, that the party defrauded may, at his own option, rescind the contract in a reasonable time. To this there may be an exception where, from the circumstances, it is impracticable to return the property, as the death of a horse, etc., and in such a case a notice should be given to the vendor. 2 Taunt. 2; [Jackson v. Chew] 12 Wheat. [25 U. S.] 153; 2 Hill, 292; 14 East, 486; 2 Kent, Comm. 480; 1 Metc. [Mass.] 547; Chit. Cont. 679, 680, 743; 15 Mass. 319; [Thornton v. Wynn] 12 Wheat. [25 U. S.] 193; Beecker v. Vrooman, 13 Johns. 302; [Boyce's Ex'rs v. Grundy] 3 Pet. [28 U. S.] 215; Scudder v. Andrews [Case No. 12,564]. In the case above cited from 12 Wheat. [25 U. S.] the court say, "If the sale be absolute, and there is no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action on the warranty." But, in such a case, where there had been a total failure of the consideration, it might be set up in defense. From the authorities cited on both sides, it will be seen, that courts differ as to the right of a defendant to set up a partial failure, in defense, to an action on the note given; but the weight of authority, especially in England, is against the right. And such I considered to be the established doctrine of the supreme court, as declared in Scudder v. Andrews [Case No. 12,564], above cited. A very recent decision, not yet reported, in the supreme court, has overruled the cases in that court. But, as the light of that opinion was not given, until long after the decision of the case now before us, the decision must be reported as it was pronounced. In its entombment, this opinion will not be dishonored; for it will repose, at least as regards the decision of the above point, by the side of the opinions of illustrious judges.

The 6th plea avers that the defendant indorsed the note for the accommodation of E. Morse & Co., the makers, and without consideration; and that the plaintiffs, for a valuable consideration, agreed with E. Morse & Co., without the assent of the defendant, to extend the time of payment, etc. The replication traverses the averment that the defendant indorsed for the accommodation of E. Morse & Co., and avers, that he received a valuable consideration therefor, and denies the agreement to extend the time of payment, etc. To this replication the defendant demurs, for duplicity in traversing both the averments, that the defendant was an accommodation indorser, and the averment that time was given. It is admitted to be a rule of pleading, where, on one side it consists of several distinct and material facts, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only one of them. A denial of either of them in law is an answer to the whole. A denial of more than one of such distinct and material points, is duplicity. U. S. v. Cumpton [Case No. 14,902]; Gould, Pl. 406, § 49. The averment in the plea, that the defendant was an accommodation indorser, as regards the extension of the time of payment, could be of no importance. If the time were extended, for a valuable consideration, as alleged, the indorser is discharged, whether he was an accommodation indorser, or indorsed for a valuable consideration. That allegation in the plea may be considered as surplusage, for in no point of view, as regards the extension of time, raised in the plea, could such allegation be of any importance. Story, Bills, § 191; Brown v. Mott, 7 Johns. 361. To avail himself of the fact of his being an accommodation indorser, the defendant must aver and prove, that the plaintiff gave no value for the notes, or took them over due. He will be presumed to be a holder for value, unless the contrary be made to appear. 3 Phil. Ev. 447; Swift v. Tyron, 16 Pet. [41 U. S.] 16; Bramah v. Roberts, 27 E. C. L. 464. The demurrer to the above replication is overruled. The demurrers to the fourth and fifth pleas are sustained. Leave given to amend the pleadings of either party, etc.

Case No. 4,417.

The ELMIRA.

[23 Int. Rev. Rec. 338; 2 Cin. Law Bul. 294.]

District Court, E. D. Michigan. March 19, 1877.

SHIPPING—LIABILITY OF TUG FOR DAMAGE TO TOW RESULTING FROM NEGLIGENCE.

A propeller having barges in tow left them outside of the port of Cleveland, and went in herself to take on fuel. The weather was threatening, and darkness approaching. During the evening a storm arose, and one of the barges was lost. *Held*, that the master should have taken them in, or sent a tug to their assistance, and that the propeller was liable.

In admiralty.

The libel set forth that on the 1st of November, 1875, libellants made an agreement with the managing owner of the propeller Elmira to tow their barge Chamberlain from the port of Bay City to Tonawanda, with a cargo of pine lumber and salt, and to return her, empty, to Bay City, for one-third of the freight of the round trip. That in pursuance of such agreement, the propeller towed the barge to Tonawanda, and received for such service about $462, and on the 27th day of November, after the barge had unladen her cargo at Tonawanda, started on the return to Bay City; that nothing unusual occurred until the tow reached a point off Cleveland, about five o'clock in the afternoon of the 28th, where the propeller left her tow, consisting of the Chamberlain, the head barge, the Kelley and the H. and G. at anchor, and went into Cleveland for coal; that the wind at the time was blowing fresh and increasing in strength, and the weather thickening up and threatening; that the master of the propeller left the barges out in an exposed sea, with notice of an increasing storm, and that they were in danger and exposed to loss; that they remained there until the next day; in fact the propeller was laid up there for the winter; that when the barges were left there was no difficulty about towing them into Cleveland, where they would have been safe from loss, nor was there any difficulty in her going out and bringing them in or in sending a tug to bring them in, at any time during the evening, before the loss occurred; that the barge came to anchor and lay there awaiting the return of the propeller, the wind and storm increasing and the sea continuing to make during the night; that the barge dragged her anchor until about two o'clock in the morning, when she went ashore on the rocks just below Cleveland pier, and became a total loss.

The answer admitted the contract and the performance of it until they left Tonawanda. It further alleged that the tow proceeded on the way to Bay City by the way of the north shore, that being the shorter route, and the season being late, until she reached Long point, about seventy miles from Buffalo, when, the wind coming on to blow from the south, the propeller, to avoid a lee shore, started for the south shore, and arrived at Cleveland on the afternoon of the 28th, where she left the tow and went into port. Respondents denied that the wind was blowing fresh or that the master had notice of an increasing storm, or that the barges were left in an exposed condition, and in danger of total loss. They admitted that there was no difficulty in taking the tow into Cleveland, when the same was left outside, as the weather was fair and the lake not unusually rough, and that there was no difficulty in the propeller's going out to the barges up to the time the storm burst on them. They further alleged that it is usual and customary for tugs and propellers to leave their tows outside when they go in to coal, and especially when such tows are light, as was the case with the Elmira's; that when the barges were so left the weather was fair for that season of the year, and the lake not unusually rough; that sometime after the propeller reached her dock for the purpose of coaling, the storm came up, after which it was impossible for her to go to the relief of the barges. They further insisted that upon being left by the propeller, the Chamberlain let go her anchor but held the other two barges; that when the storm came up, it was the duty of the barge to cast herself loose from the other barges, and for each one to have relied upon its own ground tackle, that is, that holding on to the other two barges caused the Chamberlain to drag her anchor; that her master then attempted to pay out more chain, but that owing to the great weight and strain of the barges and the faulty arrangements of the chain attached to the anchor, and the unskillful handling of the same, the chain parted, whereupon the Kelley let go her anchor and cast off the H. and G.'s line; that the H. and G. rode out the storm safely, but the anchor of the Kelley dragged, and both she and the Chamberlain, after several hours' holding, went ashore. The seventh article alleged that the master of the Chamberlain refused to be towed in, although the master of the propeller sent out a tug expressly to take the said tow in, when the storm was coming on.

Messrs. Moore and Canfield, for libellants.
Luther Beckwith, for claimants.

BROWN, District Judge. It seems the propeller left Tonawanda with a supply of fuel insufficient to take her through to the river, and although she may have been guilty of fault in that particular, it did not contribute to the subsequent loss in any such sense as would make the propeller responsible therefor. After reaching Long point the wind which had been to the northward veered around to the southward, and the propeller took her course along the south shore until she reached Cleveland. The weather during the day had been threatening but not stormy, and the master of the propeller decided to leave the barges outside, and about a mile

and a quarter from the piers, and go into the river for a supply of coal. He intimated his intention to the barges by hailing the Chamberlain, ordering her to cast anchor as he was going into Cleveland for coal, and said he would send a tug out to tow the barges in. It seems, from the testimony of the mate of the propeller, that the propriety of leaving the barges there, while the weather was so threatening, was discussed between him and the master, who finally decided to leave them, go into Cleveland and send a tug out to their assistance. The answer admits that the propeller might have towed the barges in herself, at that time, if she had seen fit to do so, and why this was not done, does not clearly appear, since the master as before observed, expressed his intention of sending a tug out. I am more inclined to think, however, he never intended to do this. On her way in, the propeller met a tug going out, the master of which hailed the propeller and asked if he wanted his barges towed in; to this the master of the propeller replied, "Go and see." The tug it seems did go out and hailed the stern barge and asked if she wanted to be towed in; the master of the barge supposing the propeller would return soon declined, and the tug left without making further efforts in that direction. During the evening, and while the propeller was coaling, the master went to the government signal office no less than three times to learn the indications of the weather, which continued to be threatening until about 9 o'clock, when the wind suddenly chopped around from the south to the north of west and began to blow with great violence. Captain Tebeau went to the masthead of the propeller to see how his barges were weathering the storm, but made no effort to save them. He also denies seeing their signal lights for assistance. By 11 o'clock, and probably by 10, the weather had become so stormy that any such effort would have been useless.

While it is undoubtedly customary to leave a tow of barges outside in pleasant weather, I think it showed a great lack of prudence to do so under the indications that evening. The testimony, including that of the officers of the propeller itself, is almost uncontradicted that the weather looked very bad, and the indications of a storm such that its approach could be predicted almost to a certainty. But the fault of the master in this particular was surpassed by his conduct during the evening. Instead of going out himself, or sending a tug, as the indications grew more threatening, he made no efforts to save them whatever, until the storm burst upon them with such fury, that all efforts would have been unavailing. If he were so anxious about the weather that he deemed it necessary to visit the signal office three times during the evening, he certainly should have shown solicitude enough for the safety of the barges to have sent a tug to their assistance. Having elected to take the chances of their riding out the storm in safety he cannot now be heard to complain of his ill luck. While the propeller was coaling at her dock, a tug lay directly astern of her awaiting an engagement. He was guilty not only of gross negligence, for which the propeller must be condemned, but of an indifference to the lives of those in his charge, approximating closely to inhumanity.

There was no unskillfulness shown on the part of the Chamberlain in holding on to the other barges as long as she could. She had every reason to expect that the propeller or a tug would come out to her assistance, and in order to pick them all up, in such weather as that, it was necessary that she should hold on to the rear barges. After all hope of this kind was abandoned, and the storm became so violent as to drag her anchor, she cast them off, let out more chain and did what she could to hold on alone. It seems that in letting out more chain, about midnight, the butt end of one of the chain shackels got caught in the norman, by which the shackel pin was broken and the anchor lost. It is insisted that if the round end of the shackel had been turned toward the anchor, this accident would not have occurred, the anchor would not have been lost, and the barge would have ridden out the storm in safety. While it is quite probable that this is the better mode of attaching the shackels, it is by no means universal to do so. Indeed the testimony shows that they are frequently fastened with the lug end outward, and in this conflict of opinion I certainly cannot pronounce this method of fastening to be such a fault as would condemn the barge, certainly without clear proof that her loss was attributable to it. The accident was such a one as might have happened with the most skillful management, and I see nothing in connection with it that I can call faulty or negligent seamanship. The master of the propeller says that he was familiar with the outfit, condition, and sailing qualities of the barge; that he had towed her frequently before, and knew that she had but a single anchor. With this knowledge his abandonment of her is the more reprehensible.

Nor was the barge in fault for not taking a tug and being towed in. Not only is there an entire lack of evidence showing that she had an opportunity of doing this, but the Elmira had contracted to take her safely back to Bay City. She had left the barge for a temporary purpose, and the master of the Chamberlain had a right to rely on her speedy return, or at least, on her sending out a tug if good judgment required that the barges should be towed in.

The barge was not in fault in making no effort to set sail and get off the shore. Being a flat bottomed vessel, drawing but eighteen inches of water and light, an attempt to make sail could only have resulted in her destruction. I have no doubt she did the best thing that was possible under the circumstances.

Considering the gross negligence of the propeller in leaving the barges in this predicament, claimants ought to be held to strict proof that the faults of the barge, if any there were, were the cause of her loss. The Blanche Page [Case No. 1,523]. As another of the tow, viz., the Kelley, also went ashore that night, it would seem that all efforts to save the Chamberlain, by her own exertions, must have proved fruitless A decree will be entered condemning the propeller and referring it to a commissioner to assess the damages.

Case No. 4,418.

The ELMIRA SHEPHERD.

[8 Blatchf. 341.] [1]

Circuit Court, E. D. New York. April 24, 1871.

CARRIERS—LIABILITY FOR DAMAGE TO GOODS DISCOVERED AFTER DELIVERY AND SALE — ADMIRALTY JURISDICTION OF DISTRICT COURT—NAVIGABLE WATERS WHOLLY WITHIN A STATE.

1. If, after goods are delivered by a carrier, they are found, on examination, to have been injured while being transported, their owner can recover for the injury, although he does not notify the carrier, and claim compensation, before he sells the damaged goods, and thus afford the carrier an opportunity of inspecting them. But a claim under such circumstances is suspicious and requires that the damage should be fully and very clearly proved.

2. A district court has jurisdiction, in admiralty, of a contract of affreightment, although the voyage contemplated begins and ends in one and the same state, and is prosecuted only on waters within such state, if the contract is to be performed on navigable waters.

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

In admiralty.

Edwin T. Rice, for libellant.

Charles Donohue, for claimant.

WOODRUFF, Circuit Judge. In the latter part of the month of February, 1865, the libellant shipped on board the sloop Elmira Shepherd, then lying at Sand's Point, in the waters of Long Island Sound, within the state of New York, a large quantity of onions and other vegetables, to be carried thence and delivered at the port of New York, the voyage of the sloop being begun, prosecuted, and ended wholly within the bounds of the state. On arrival, the onions and other vegetables were delivered. This libel is filed to recover for damages alleged to have been caused by bad stowage, a portion of the onions being placed on the bottom of the vessel, in the hold, where, by reason of the leaking of the vessel. salt water, to the depth of several inches, flowed around the lower tier of barrels, soaking in and wetting the onions. A decree was had in favor of the libellant in the district court. The claimant insists, that the injury to the onions, if any, was caused by frost, and was not the result of bad stowage; that the libellant ought not to recover, because no sufficient notice of loss or claim of injury to the onions was made or given to the carrier when they were delivered; and that the onions were removed and sold without giving to the carrier a proper opportunity to protect himself against a claim that they were damaged, by examining them or inspecting them, to ascertain the truth.

In my judgment, the clear preponderance of the evidence is, that the onions were damaged by salt water, which leaked into the vessel; and, although there was testimony that there was some frozen water when the onions were taken out of the vessel, the proof is that it was the wetting by salt water, and not the frost, which caused the injury. There was evidence that, as to some of the barrels, the carrier knew, when he delivered them, that the water had flowed in; but it is also true, that the onions were removed and were sold without any claim or notice that the owners claimed that they had sustained an injury entitling them to compensation from the carrier. Receiving the onions, removing them, and, after examination and discovery of the alleged injury, selling them, without notice to the carrier, entitles him, and calls upon the court, to regard the claim with some suspicion. In some sense of fairness, it would have been just to the carrier, if still in port, to notify him of the alleged damage, and give him an opportunity to inspect them; and, in determining the question of fact, the court may properly require very full and clear proof of the allegations of the libellant, before crediting a claim made under such circumstances. But the conduct of the libellant in this respect constitutes no legal bar to his recovery, if his claim is established by clear and distinct proof. The carrier was, in fact, aware that some of the barrels were wet. He, knowing that he was under an obligation to deliver in good order, had a right to make such examination as was necessary, to ascertain the truth, before he parted with the possession, so far as could be ascertained at that time. But no authority is cited to me in support of the proposition, that, after goods are delivered by a carrier, and, on subsequent examination, it appears that they were injured on the voyage, the owner cannot recover for the injury, unless, before he sells the damaged goods, he notifies the carrier of the fact, and claims compensation. All that can be said is, that the conduct of the owner may be scrutinized, and, if there appear want of good faith, concealment, and, especially, a disposition of the goods for the purpose of preventing inspection, this would go far to warrant the belief that his claim was groundless. Here, the proof comes from a witness apparently disinterest-

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

ed. The fact of damage is sufficiently proved, and also its extent. It is not improbable that the effect of the salt water was not fully developed until after the onions were delivered. At all events, the proof fully sustains the claim of the libellant.

It was suggested, on the argument, that the district court has no jurisdiction, in admiralty, of a contract of affreightment, where the voyage contemplated begins and ends in the state, and is prosecuted only in waters within the state. This has, unquestionably, been stated in terms in some cases, and in substance and effect in many. But, whatever doubt was caused by the earlier decisions, the question has been put at rest by the case of The Belfast, in the supreme court of the United States (7 Wall. [74 U. S.] 624). I assume that this case was not in the mind of the counsel, when the point was urged upon my attention. It would not be difficult to show, that there is no such limitation of the jurisdiction of courts of admiralty, and that the jurisdiction of the admiralty over causes of action founded on contract, as well as those founded in tort (see The Brooklyn [Case No. 1,938]), depends not on the question where the voyage of the vessel begins or terminates, but on the question whether the contract is to be performed, or the tort is committed, upon navigable waters; and, taking the whole course of decision prior to the case of The Belfast [supra] this will be found the result upon authority. It is, however, quite unnecessary, and, perhaps, impertinent, for me to do more than refer to that case.

The libellant is entitled to a decree for the damages and costs awarded him in the district court, with his costs on the appeal to this court.

Case No. 4,419.

ELMORE v. The ALIDA.

[13 Leg. Int. 369.][1]

District Court, S. D. New York. 1856.

MARITIME LIENS—STATE STATUTES — LIEN SPECIFICATIONS — DURATION OF LIEN — RIGHTS OF MORTGAGEE.

[1. Under the lien laws of New York (Acts March 29, 1855) the lien is in all cases gone on the expiration of 60 days after the vessel subject to it returns to the port where the debt was contracted; but no lien ever comes into existence unless lien specifications are filed within 10 days after the vessel leaves the port.]

[2. All credits which have run more than 10 days subsequent to the return of the vessel to the port where the debt was contracted are excluded from a privilege against the vessel when the lien specification is not filed within that period. Each credit for supplies is separately the debt contracted, and to that the limitation is applied by this court and the state courts.]

[3. A mortgagee in possession is a competent party to intervene and contest the validity of the libelant's lien.]

[1] [Reprinted by permission.]

[In admiralty. This was a suit brought by James H. Elmore against the steamboat Alida for supplies.]

Before BETTS, District Judge.

BY THE COURT. The action is by the assignee of a provision dealer or ship chandler, for a bill of supplies furnished the steamer. The purchases were made Sept. 3, 4, 8, 11, 13, 14, 17 and 19. No term of credit was stipulated, but the usual practice between the parties was to pay these bills monthly.

2. The boat was a domestic passenger vessel, running up and down the Hudson river daily, except Sunday, between New York and Kingston.

3. The libelant, on the 22d of September, filed his specification of lien, charging purchases by the boat at the dates above mentioned, and setting forth the prices and amounts, and on the 29th filed his libel in this cause to recover the entire amount.

4. On the hearing he claims the right to recover the whole sum of the bill of the items, and the claimants deny his lien at most for any purchases anterior to the 12th of September.

5. The libelant objects to the admissibility of the latter point of defense because not formally pleaded.

Held, 1. The existing lien law (Acts March 29, 1855, Laws 78th Sess, c. 10, p. 174) is a re-enactment, with amendments, of the act of 1850 (1 Rev. St. 505, §§ 1, 2).

2. The lien enacted by the act is fully determined and gone in all cases after sixty days after the vessel subject to it returns to the port where the debt was contracted; but, in reality, that prospective or permissive continuance of the lien is in this case fruitless, and never comes into action, because the debt being subsisting when the boat left port, is strictly declared by the statute to cease immediately thereupon, unless lien specifications are filed within ten days after such departure.

3. The filing of the lien specifications is thus made the operative and only means of giving life to the lien; previous to that act of the creditor the privilege is merely inchoate and permissive. The chronological order of the provisions is inverted in language, but the condition of filing the specifications is made the first affirmative act of the creditor, and the one vital to the prosecution of the lien.

4. The construction and effect of the amended act in respect to the lien (6 Hill, 496) is the same as that of the original act. All credits which have run more than ten days subsequent to the return of the vessel to the port where the debt was contracted are excluded from a privilege against the vessel when the lien specification is not filed within that period. This provision is the exact equivalent in effect of the original statute.

5. Accordingly, each credit for supplies is separately the debt contracted, and to that

the limitation of time is applied by this court and the state courts. Veltman v. Thompson, 3 Comst. [3 N. Y.] 438; 6 Hill, 494.

6. A mortgagee in possession is a competent party to intervene and contest the validity of the libelant's lien.

7. The restriction of the sixty days to the duration of the lien has no relation to this case. The action was brought within thirty days after first credit. But no recovery can be had thereon for any charges which had stood over ten days.

It is agreed between the parties that this order will embrace the sum of $161.29, and it is therefore directed that a decree be entered for that sum with costs.

ELMORE (ESSELTYNE v.). See Case No. 4,531.

Case No. 4,420.

The ELOINA.

[10 Ben. 458.][1]

District Court, E. D. New York. May, 1879.

COLLISION AT ANCHOR—DAMAGES FOR LOSS OF ANCHOR.

Where a vessel moored in New York harbor, upon a storm coming up which was impending, dragged her anchor and before another was let go struck another vessel at anchor astern, and did some damage: *Held*, that her master had knowledge of the danger and took the risk of the ability of a single anchor to hold his vessel, and she was liable, therefore, for the damage, no fault being attributable to the other vessel.

[Cited in The Mary Fraser, 26 Fed. 874; The Anerly, 58 Fed. 795.]

[See Johanssen v. The Eloina, 4 Fed. 574.]

The bark Eloina and the bark Atlantic were riding at anchor in the harbor of New York on the night of April 12th, 1873, about three ship's lengths apart, each having a watch on deck. The captain of the Eloina on taking his berth ordered another anchor to be got ready to let go if wanted. When the storm then impending came up, the Eloina began to drag her anchor, and the captain was called and immediately ordered the second anchor let go; but the bark did not fetch up on it till she had struck the Atlantic astern of her. The watch on the Atlantic saw the other vessel begin to drift, and hailed her, the crew immediately paid out more chain, and then by the mate's order let slip their anchor, in hopes to avoid the blow. The Eloina came down on her and received the blow about amidships, sustaining some injury; and the Atlantic lost her anchor and chain, received some damage about the bows, and being ready for sea was detained several days thereby—for which damages suit was brought.

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

Butler, Stillman & Hubbard, for libellant.
Coudert Bros., for claimants.

BENEDICT, District Judge. This collision was caused by the neglect of the master of the Eloina to put out a second anchor. The circumstances plainly required that precaution, and were sufficient to notify an intelligent master that such a precaution could not be omitted without danger of drifting and consequent collision with the libellant's vessel then anchored astern. The act of the master, in directing the second anchor to be got ready to let go immediately and he be called at once in case the vessel should begin to drag, shows knowledge of the danger. The master with such knowledge took the risk of the ability of the single anchor to hold his vessel, and having lost, must pay the damage.

No fault on the part of the Atlantic contributing to the disaster is shown, and the libellant is therefore entitled to the decree prayed for.

Case No. 4,421.

EL REFUGIO CASE.

[Cited in Dick v. Hamilton, Case No. 3,890. Nowhere reported; opinion not now accessible.]

ELSAS (BANTZ v.). See Case No. 967.

ELSWORTH (PRENTISS v.). See Case No. 11,387.

EL TELEGRAFO, The (UNITED STATES v.). See Case No. 15,049.

Case No. 4,422.

ELTING v. CAMPBELL et al.

[5 Blatchf. 183.][1]

Circuit Court, N. D. New York. Nov. 3, 1863.

NEW TRIAL — VERDICT FOR GREATER AMOUNT THAN CLAIMED IN DECLARATION — AMENDMENT —COSTS.

Where the declaration, in an action of trover, claimed, as damages, a sum less than that for which a verdict was rendered for the plaintiff, and he moved, after the verdict, to amend the declaration, by increasing the damages claimed to a sum larger than the verdict, and the defendant did not object to the amendment, provided a new trial should be granted: *Held*, that the amendment ought to be allowed, but only upon condition that the plaintiff relinquish the verdict, and pay the costs of the trial, and consent to a new trial.

[Cited in Davis v. Kansas City, S. & M. R. Co., 32 Fed. 863.]

At law. This was an action of trover. The declaration was filed in 1852, and claimed $15,000 damages. At the trial, there was a verdict for the plaintiff, for $19,298.62. The plaintiff [Benjamin Elting] now moved that the declaration be amended, without preju-

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

dice to the verdict, by increasing the damages claimed, to $25,000. The defendants [Daniel D. Campbell and others] opposed the motion, unless it was to be granted upon condition that the verdict should be set aside and a new trial be granted.

HALL, District Judge. As the defendants do not object to the amendment, upon condition that there shall be a new trial, it is not necessary to examine the question whether the court has power, in its discretion, to grant the amendment asked. This will be taken for granted, and the only question will be as to the terms and conditions upon which the amendment should be allowed.

The practice in this court is substantially that of the supreme court of the state under the constitution of 1821 and the Revised Statutes; and, although the question in this case may be regarded as one depending upon the exercise of a judicial discretion, the practice of the state courts under the Revised Statutes, if settled and uniform, should, unless there are very strong reasons in opposition, be followed on this motion.

The cases in the courts of New York are not entirely consistent. Indeed, they are not likely to be uniform upon a question depending entirely on judicial discretion. In Pease v. Morgan, 7 Johns. 468, an amendment was allowed, in an action of assumpsit, after a verdict for the plaintiff and a writ of error, on the payment of costs subsequent to the filing of the declaration, the defendant having liberty to pay the demand recovered in the court below, without costs, or to plead de novo within twenty days after service of the amended declaration. In Curtiss v. Lawrence, 17 Johns. 111, the plaintiff, in an action of slander, had claimed, in his declaration, $1,000 damages, and had a verdict for $4,250. He then moved for leave to amend the declaration, by increasing the amount of damages. The motion was denied, the court declaring that it had no power to allow the amendment. In Dox v. Dey, 3 Wend. 356, which was an action of assumpsit, on a special contract for the sale and delivery of wheat, the plaintiffs had laid their damages at $1,000, and had a verdict for $1,670.92. A motion on the part of the plaintiffs to amend, by increasing such damages, was granted on condition that the plaintiffs should give up their verdict, pay the defendants' costs of the trial and of the motion, and consent to a new trial. Mr. Justice Marcy declared that he knew of no precedent for allowing the amendment without prejudice to the verdict, and said that a similar motion was denied at the preceding term. And Hull v. Turner, 1 Wend. 72, seems to have been disposed of in substantially the same way. In Corning v. Corning, 2 Seld. [6 N. Y.] 97, in an action of assault and battery, the judge at the circuit, before receiving the verdict, allowed an amendment of the declaration, increasing the damages claimed to the amount of the verdict, but the order for this amendment was reversed by the general term of the supreme court. In delivering the opinion of the court of appeals, Mr. Justice Jewett says: "Before the adoption of the Code, it was well settled, that the supreme court had no power to allow an amendment of a declaration after verdict, by increasing the amount of the damages claimed, to correspond with the amount of the verdict, except upon the condition that the plaintiff relinquished the verdict, paid the costs of the trial, and consented to a new trial." There are other cases which were cited in support of the motion, but the case of Davis v. Smith, 14 How. Pr. 187, is the only one which is like the present. That case was decided in the third judicial district by three judges, and seems to be opposed to the other cases named above, but the weight of authority is clearly the other way. See Smith v. Allyn [Case No. 13,001].

On the whole case, I think that the motion can be granted only on the terms stated in Corning v. Corning, 2 Seld. [6 N. Y.] 97.

Case No. 4,423.

The ELVIRA.

[Cited in Bean v. The Grace Brown, Case No. 1,171. Nowhere reported; opinion not now accessible.]

ELVIRA, The (HAND v.). See Case No. 6,015.

Case No. 4,424.

The ELVIRA HARBECK.

[2 Blatchf. 336.] [1]

Circuit Court, S. D. New York. Oct. 7, 1851.[2]

CARRIERS OF PASSENGERS — PERSONAL BAGGAGE — LIABILITY FOR LOSS.

1. Where a passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery.

2. If a passenger does not accompany his baggage, the carrier may claim compensation in advance for its transportation, or may postpone his claim till the delivery and rely on his lien or on the personal responsibility of the owner; in either of which cases, the carrier is responsible for the safe-keeping and delivery of the baggage.

3. Where a person took passage in a vessel, but his personal baggage did not reach him in season to be put on board of that vessel, and he sailed without it, and it was put on board of another vessel, a receipt or bill of lading being given for it by the mate of the latter vessel, but it was never delivered at its port of destination: *Held*, in an action in rem brought against the latter vessel for the value of the baggage, that the case was one of the ordinary shipment of goods on freight, for whose safe delivery the vessel was liable, and that her

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

[2] [Reversing Case No. 2,005.]

owner was not to be regarded merely as a gratuitous bailee, responsible only for gross negligence.

4. The words "personal goods" on the margin of the receipt or bill of lading, were at most but a description of the character of the goods, and did not exempt the owner of the goods from freight, or the vessel from responsibility.

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

In admiralty. This was a libel in rem, filed by Jeanette Brown, in the district court, against the bark Elvira Harbeck. The libel set forth that the libellant shipped, on board the Elvira Harbeck, lying at the port of Antwerp and bound for New York, ten packages and one basket of goods—the same being personal baggage and tools—all in good order and condition; that the mate of the vessel, acting on behalf of the master and owners, undertook and agreed to deliver the same, at the port of New York, to the libellant or her order, the dangers of the sea only excepted; that eight of the ten packages contained the tools of the trade of her son, put up in boxes, and two others were trunks secured by lock and key; that the two trunks and the basket contained the personal apparel belonging to the libellant and her family; that the Elvira Harbeck arrived from Antwerp safely, in New York, on the 10th of August, 1849, and eight of the packages were delivered according to the bill of lading executed by the mate; but that the two trunks and basket had not been delivered to the libellant, though the same had been frequently demanded.

The answer denied the allegations in the libel, and averred that all the packages received on board the vessel were delivered to the libellant. It denied all negligence, and charged that, if any of the goods had been lost, they were lost by the negligence and carelessness of the libellant.

The proofs showed that the libellant and her family emigrated from Aix-la-Chapelle to this country; that the goods were packed in eight boxes, two trunks and a basket, which were forwarded to Antwerp by the railroad; that the family had taken their passage to New York in the ship Roscoe, then lying at Antwerp; and that, in consequence of this vessel's having left the port, on her voyage, with the family, before the arrival of the boxes of tools and baggage by the cars, it became necessary to send them on another vessel. They were sent, accordingly, by the agent of the libellant, in the Elvira Harbeck, and a receipt or bill of lading for the goods was duly executed by the mate, then in charge of the vessel, at the port of Antwerp. The receipt, when put in evidence, had on its margin the words "personal goods," in pencil. When they were put on, did not appear. A witness, the brother of the libellant, saw the goods put on board the vessel and stowed away in the hold, the usual place for stowing away merchandize. On the arrival of the vessel at New York, the eight boxes of tools were duly delivered to the order of the libellant; but the two trunks and basket could not be found and had never been delivered. The libel was filed to recover the value of their contents.

The ground of defence relied on was, that the goods were shipped on a passenger ship, as personal baggage belonging to a passenger or passengers; and that, inasmuch as the owner did not take his passage on board the ship and pay the fare, which would include compensation for the usual baggage, no compensation was paid, in this case, for the freight, and the ship was entitled to none; and hence, that the master and owners were to be regarded as gratuitous bailees, and responsible only for gross negligence, to be charged and proved, in the transportation of the property.

The district court sustained the defence set up and dismissed the libel. [Case No. 2,005.] The libellant appealed to this court.

Erastus C. Benedict, for libellant.
Welcome R. Beebe, for claimants.

NELSON, Circuit Justice. There is no evidence that the libellant and her family took passage in the Elvira Harbeck or ever intended to take passage in her. On the contrary, their passage was taken in the Roscoe, on which ship they expected to have carried with them their personal effects; but they were disappointed, in consequence of the non-arrival of the goods in the cars from Aix-la-Chapelle, when the vessel sailed. It was then arranged with their agent to send the goods in some other vessel bound for the same port. But, even assuming that the libellant and her family had engaged their passage in the Elvira Harbeck, but changed their minds, and failed to complete the engagement, and took passage in another ship, sending their baggage, however, in the Elvira Harbeck, it by no means follows that the vessel is not entitled to freight, or that the owners are to be regarded as gratuitous bailees, and to be held responsible only for gross neglect in the transportation of the goods. On the contrary, I cannot doubt that they would be entitled to reasonable freight-money, and to a lien on the goods until it should be paid.

In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If the passenger does not accompany it, the carrier may claim compensation in advance for its transportation, or may postpone his claim till the delivery and rely on his lien or on the personal responsibility of the owner. And I do not see why the rule of responsibility for the safe-keeping and delivery should not be the same in both cases. The actual payment of the freight in the one case, and the actual lia-

bility and lien for its payment in the other, constitute the consideration for the undertaking.

But it is sufficient to say, in this case, that the proofs show an independent shipment of the goods in question, unconnected with the owner as a passenger. The case is one, therefore, of the ordinary shipment of goods. The words "personal goods," in pencil-marks, upon the margin of the receipt—when put on, does not appear—cannot alter the nature of the undertaking. They do not exempt the owner of the goods from freight or the ship from responsibility. At most, they are but a description of the character of the goods put on board.

I think that the libellant is entitled to recover, and must, therefore, reverse the decree below, and refer the case to the clerk, to report the value of the property lost.

ELVIRA HARBECK, The (BROWN v.). See Case No. 4,424.

Case No. 4,425.

ELWELL v. MARTIN et al.

[1 Ware (53) 45;[1] 3 Wheeler, Cr. Cas. 11.]

District Court, D. Maine. July 28, 1824.

MARINE TORTS — DISMISSAL OF LIBEL AS TO ONE RESPONDENT TO ENABLE HIM TO TESTIFY — AMOUNT OF EVIDENCE AGAINST HIM—AUTHORITY OF SUBORDINATE OFFICERS TO PUNISH A SEAMAN — LIABILITY OF MASTER FOR EXCESSIVE PUNISHMENT—PERSONAL INJURIES.

1. In a joint libel against two or more persons for a marine tort, the court has the authority to dismiss the libel as to one of them, even if there be some evidence against him, for the purpose of his being used as a witness, if the purposes of justice require it.

2. A court of admiralty being judge both of the law and fact, is not, in this respect, confined to the strict rules of the common law.

3. But if there be any evidence to inculpate him, the dismissal of the libel as to him cannot be demanded as a matter of right.

4. The subordinate officers have no authority to punish a seaman when the master is on board.

5. If a seaman merits punishment, the captain is liable for damages if the punishment inflicted is excessive. But when punishment is necessary to maintain discipline and subordination on board the vessel, the court will not give damages, unless there is a manifest excess of punishment.

6. If in administering merited punishment on a seaman, by the officers, they proceed with unnecessary harshness of manner, and thereby a severe injury is unintentionally done to the man, as the dislocation of an arm, they will be liable for the actual pecuniary damage sustained by the man, though not for vindictive damages.

[Cited in Roberts v. Skolfield, Case No. 11,917. Distinguished in Murray v. White, 9 Fed. 569.]

This was a libel for an assault and battery, technically called a cause of damage, against the master and the first and second mates of the brig, jointly. After the evidence was closed a motion was made by the counsel for the respondents to dismiss the libel as to one of the parties, for the purpose of introducing him as a witness for the other two.

C. S. Daveis, for libellant.

Fessenden & Deblois, for respondents.

WARE, District Judge. The examination of the witnesses having been brought to a close, a motion is now made to dismiss the libel as to Storer, one of the respondents, for the purpose of introducing him as a witness for the other two. The motion is supported on the ground that there is no sufficient evidence to charge him as a joint trespasser. The counsel for the respondents resists the motion, because, as he contends, there is sufficient evidence to charge him, and if there be not, he is so connected with the trespass that it is impossible to decide on the present motion without going into a consideration of the whole case. Of the right of the court to grant this motion, provided a proper case is made out, I do not profess to feel a doubt. No precedent is indeed cited, and none is now recollected, in point. But the principle itself, as a rule of practice, stands on too strong grounds of reason and good sense to require a precedent to lean upon. If the practice of the court would not admit of it, the libellant would always have the power of practising the greatest injustice. All that would be necessary would be to join in his libel every person acquainted with the transaction, who, he was not assured would testify in his favor; and it would thus, in a small ship's crew, be the easiest of all things, to shut out any obnoxious witness. The worst which the libellant would have to fear would be that he might be amerced in costs.

The material question is whether the present is a proper case for the interposition of the court in this way. Though the admiralty reports furnish no light on the question, as to the practice of these courts, the practice of the courts of common law, in analogous cases, appears to be well settled. If a person is made a defendant, against whom there is no evidence, he is entitled to his discharge as soon as the opposite party has closed his case, and may then be introduced as a witness. But if there be any evidence against him, even the slightest, the court will not undertake to decide on the effect of the evidence, but the whole case must go to the jury together. Bull. N. P. 234; Phil. Ev. 61; Peake, Ev. 159. In a recent case at nisi prius it was holden that in a case of tort, if there be no evidence against one of the defendants, it is in the discretion of the judge whether he will direct an acquittal of him for the purpose of his being introduced as a witness. The other defendants cannot claim his discharge, as a matter of right. Davis v. Living, 1 Holt, N. P. 275.

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

If the strict principles adopted by the common law courts are to be followed in the practice of the admiralty, the facts in the present case will most clearly not warrant a dismissal of the libel against this respondent, at this stage of the proceedings. That testimony has been produced which may go to charge this respondent, is admitted by the whole argument. He was certainly a party to the assault when the principal injury might have been and probably was received. It is, however, readily conceded, that on applications of this kind to the discretion of the court, a court of admiralty may properly allow a greater liberality of practice than is admitted in a court of common law. In the admiralty, the whole case, both of law and fact, is submitted to the decision of the court. If there be some evidence which may go to charge one of the respondents, but which, in the opinion of the court, is competent to decide this fact, it is sufficient, I see no good reason why the libel may not be dismissed as to him, for the purpose of introducing him as a witness, when the ends of justice require it. The sensible reason, which precludes a court of common law from doing it, seems to be this, that by its constitution it is rendered incompetent to decide on the weight and value of testimony, and it is the right of parties to have their questions referred to the decision of a jury. The decision of the court would then be a trenching on the province of the jury. In the admiralty, this objection does not exist.

It is argued in support of the motion that, though there is evidence which may tend to inculpate this respondent, yet its sufficiency in point of fact is not admitted, that it presses on him with much less force than on either of the others, and as the parties are severally, as well as jointly, liable for the whole damage, no injury can possibly accrue, by allowing the motion, to the libellant, a sufficient stipulation having been filed by the master to cover all the damages that can in any event be decreed. The argument, as addressed to the discretion of the court, would be entitled to great consideration, if no witnesses had been adduced on the part of the respondents. If all the ship's crew had testified on the part of the libellant, I think it would have been the duty of the court to go far to sustain this motion, particularly if there were appearances of prejudice or ill-will on the part of the witnesses against the officers. Such, however, is not the present case. Two witnesses have been called on each side. The officers appear to have had their friends as well as the libellant. Both sides of the story have been told, and the application now is to extricate from the case one of the parties to the tort, to enable him to tell his story. The testimony of a witness standing in such a situation, is in all cases to be received with great caution, and often with many grains of allowance. When exonerated from his legal liability he will carry with him to the stand the feelings and prejudices of a party, and as he stands at present excluded by the rules of law, and the purposes of justice do not seem in this case to require his testimony, the motion must be overruled.

July 28th. After the interlocutory motion was disposed of, the case was elaborately argued by the same counsel, on the merits. The facts of the case are fully stated in the opinion of the court.

WARE, District Judge. This is a libel for an assault and battery, brought by Elwell, one of the crew of the brig Mentor, against Martin, the master, and Storer and Fales, the two mates. Elwell complains against the respondents that, on the 25th of June last, they jointly made an assault upon him with great violence, and inflicted, among other injuries, the very serious one of dislocating his left shoulder. To this libel, the respondents have put in several answers, admitting and justifying the assault as necessary and proper correction to punish the mutinous and disobedient conduct of the libellant, and denying that the dislocation of the arm was the effect of the assault. Elwell, in his replication, reaffirms the matters stated in his libel, with considerable amplification, and denies the sufficiency of the justification. The cause has been very fully and ably argued on both sides, and now stands for decision.

Four of the ship's crew have been examined in the case, two called by the libellant, and two by the respondents. In the principal facts, there is among the witnesses a substantial agreement; but in a variety of circumstances there are considerable differences in their representations. The affair which gave occasion to this prosecution, took place at Turk's Island, after the brig was loaded, and was in the act of departing from the port. The captain had been on shore in the boat, to clear out his vessel, and took with him as boatmen, the libellant and John Martin, another of the crew. While he was on shore, Elwell left the boat, and meeting the crew of a vessel that had been wrecked, he went into a shop and drank with them. In returning he met Martin, his companion, and drank with him again, so that on his arrival at the boat he is alleged by the captain to have been so much intoxicated that he was obliged to employ another hand as oarsman. This intoxication, however, was not to such a degree but that he assisted in dragging the boat off, which had been drawn up on the beach, in doing which, as he alleges in his replication, and as he complained at the time, he cut his foot with a shell, so that he could not row without pain; and it turns out in evidence that the hand employed by the captain was a black servant who came off in the boat with a gentleman who was going with the captain on

board the vessel. When the boat arrived, Elwell also went aloft and loosed one of the top-gallant sails. The vessel was already under way, backing and filling, to await the arrival of the captain. The crew then went to dinner. While at dinner, the cook, who is one of the witnesses, was sent aft for the customary allowance of grog. On his return, he told them that they must go themselves for it, but that Elwell had better not go, as he would not get any. One of the other witnesses also advised him not to go, as he had already drank full enough. Elwell, however, answered with an oath, that he would have his grog; and as he went with the others and demanded it of Fales, one of the respondents, said that he would cut the throat of any one that touched him. Fales refused to deliver it, and Elwell persevered in his demand. Fales ordered him forward, and took a piece of board or plank and struck him. Elwell came aft with an open knife in his hand, with which he was eating his dinner, and during this time he appears to have been brandishing it about, probably in a threatening manner, but without any apparent intention of striking Fales, who stood below and beyond his reach. When Fales took his stick and struck him, Elwell closed his knife and put it away, grasped the stick which Fales had in his hand, and wrenched it from him, and threw it on deck. He then dared Fales to come on deck, and declared that he would hide him. Fales was not slow to accept the challenge, but immediately came up and recovered the stick which had been wrenched from his hands, and again brandished it at Elwell, and probably struck him. They then clenched, and a scuffle ensued. This part of the affray is related with circumstances of difference by the witnesses, some of them saying that they immediately clenched, when Fales first came up, and that he then disengaged himself from Elwell, took up the stick and struck at him, and that afterwards they clenched a second time. During the scuffle, Storer, the first mate, came up and parted the combatants, gave Elwell a shove on the shoulder, and ordered him forward. Elwell, with an oath, refused to go until he had his grog. While Storer was pushing him forward, the captain came on deck, and asked if there was mutiny. One of the officers replied that it looked like it. He then ordered Elwell forward, and accompanied his order with a kick on the back. This was twice repeated in quick succession, the captain sustaining his body by his hands hold of the rigging, and planting both feet on the back of the libellant, the two first times lightly, the third with such force as to throw Elwell several feet forward, and prostrate him on his face or side, on the deck. There is no satisfactory evidence that Elwell refused to obey the captain when he ordered him forward, but it is without doubt that his obedience was surly and reluctant. When he was prostrated by the last blow, the captain called out to confine him, and as soon as, or before he had fairly got upon his feet, he was seized by the captain and both mates, cast down again on deck, and lashed either to the boat or to a spare topmast that was lying on deck. He remained here, lying with his legs over the topmast and his body on the deck, for about an hour, when he was released by Storer, and went below. After he was thrown down the second time, he cried out that his arm was broke, and during the whole time that he lay on deck he continued holding the wrist of his lame arm in his right hand, to utter loud and piercing cries that his arm was broken, intermingled with oaths, and occasionally singing parts of songs. Once or more he asked some of the crew if they could see a shipmate lying thus, with a broken arm, and not relieve him. He told the captain that his wages were damned for breaking his arm, and that it would cost more than he was worth to pay for the injury. There was no examination until after he went below, to ascertain the reality of the injury. After that, it was examined by the master and others of the crew, and it was concluded that the arm was not broken, but merely sprained, and emollients were directed to be applied, to soothe the pain. On his return to Portland, fourteen days after the injury, he applied for surgical assistance. On examination, it was found that the left shoulder was dislocated, the luxation being downward and forward, and the head of the os humeri being protruded forward under the pectoral muscle. It was reduced with difficulty, and with great pain to the patient. It is stated by the surgeon that it will be some months, two or three at least, before he can recover the use of his arm, in consequence of the time that elapsed before it was reduced, and that he may always remain more liable to a like injury, than if no luxation had taken place.

There is a suggestion in each of the answers, that there was an apprehension of mutiny, and some causes are assigned for the apprehension. They do not appear to be such as would seriously disturb the mind of a firm and resolute man, and I feel bound to say, that if any such apprehensions were felt at the time, they have not been sustained by anything like proof on the trial, but that the whole of the evidence most decisively negatives any such idea. The entry on the log-book, of June 26, nautical time, is, "Robert Elwell mutinied by coming aft with an open knife, swearing that he would cut the throats of the officers, unless he got rum, clenching the second mate, and striking at him with a stick of wood. So we lashed him to the deck." And on the following day there is another entry: "Robert Elwell was put off duty on account of his depredations," an expression, as applied to this case, which I confess I do not comprehend. No complaint was made of Elwell during the voyage, but

at this time, except that one of the witnesses stated that once before he had been intoxicated, and probably on the same day there is this entry in the log, "Robert Elwell for misbehavior;" and except, also, that he was not so good a seaman as he shipped for. At the same time, it is but justice to add that the testimony of the witnesses places the master entirely free from any suspicion of habitual severity. Such, in substance, are the facts, as nearly as I can elicit them from the somewhat contradictory statements of the witnesses, both of the injury and the justification. It is not too much to say, that the feelings of the witnesses on both sides have given a coloring to their testimony, which should make us cautious of admitting all their representations without some grains of allowance.

The affray commenced between Elwell and the second mate, Fales. When Elwell, after his grog was refused, continued to demand it, and refused to go forward on his order, Fales took upon himself to chastise him for his insolence and disobedience. That Fales was correct in refusing to deliver the customary allowance of grog, is admitted. It seems to have been in conformity with the orders of the captain. But it is not equally clear that he is as fully justifiable in assuming to himself the authority of inflicting corporal chastisement on the man for his disobedience, when the captain was at his elbow. It was not a case where the safety of the vessel or the discipline of the crew required the instant exertion of such authority. And it may be here remarked, that though the law does indeed justify the master in chastising on the spot a reluctant or disobedient seaman, I am not aware that this authority is extended to his subordinate officers, when he is present, especially to the lowest on board the vessel. Such things often, without doubt, are done, and pass off, and if the punishments are merited and not unreasonably severe, I do not say that courts will give much encouragement to a seaman who should ask for damages. But I am now inquiring for the legal rights of the subordinate officers in the presence of the captain, and I am free to say that I do not know the law which in such cases invests the inferior officer with such powers. The ancient sea-laws are curiously directory in fixing the limitations of this authority in the captain, and the authority itself is, in some of them, rather suggested than directly given. Consulat de la Mer. c. 165; Laws Oleron, art. 12; Cleirac, p. 48; Laws Wisbuy, art. 24; Ordinance de la Marine, bk. 2, tit. 1, art. 22; 1 Val. 447. But there is not, within my recollection, an intimation that any such authority is intrusted to the inferior officers of the ship. I am by no means satisfied that the interests of commerce, the security of navigation, or the good discipline of ships' crews require it. On the contrary, it seems to me that such a distribution and extension of power would be the parent of confusion rather than order, and by breaking in upon the unity of authority, would tend rather to the relaxing than the sustaining of good discipline. To me it seems that a good shipmaster should allow no person but himself to inflict a blow on a seaman, in his presence.

If such be the law, it takes some shades from the misconduct of Elwell in the scuffle which took place between him and Fales. It does not excuse him from persevering in the demand of his grog, after it had been refused; much less does it excuse his insolence and disobedience to his superior. If he was aggrieved, his appeal lay to the master. But he was probably conscious of the propriety of the officer's conduct, and well satisfied that the refusal of Fales would be confirmed by the captain. It, however, places Mr. Fales, when he commenced the assault, in the legal attitude of the aggressor. When Storer came up and parted the combatants, he was merely in the execution of his official duty, but the libellant added to the aggravation of his previous misbehavior the refusal to obey the proper and just order of this officer. When the affray commenced, the captain was in the cabin. He was called up by the noise on deck, and asked if there was mutiny, to which one of the officers replied that it looked like it. This was the only inquiry he made into the cause or nature of the quarrel. But as he was within hearing during the whole, he may well be supposed to have understood the origin and character of the affray. He proceeded to punish the delinquent on the spot.

It is not difficult to state, in general terms, the nature and extent of the master's authority in such cases. It is his duty to preserve discipline on board his ship, and it is his right to correct the disobedience or insolence of a seaman by moderate chastisement, his authority in this respect being analogous to that of a parent over his children, or a master over his apprentice. Abb. Shipp. (Am. Ed.) 187; 1 Valin, Comm. 447. But though there is little difficulty in stating the right of the master in general terms, it is not so easy in practice to fix the precise point at which a just and wholesome exercise of domestic discipline passes into a criminal abuse of power. In such cases, I am not insensible that the condition of the captain is to be looked upon with indulgence. The occasion that calls into activity his authority, usually requires that it should be exercised with promptitude, often under circumstances of strong excitement, with but little time for reflection, and little opportunity of weighing in critical scales the just amount of punishment against the magnitude of the offence. Something, under such circumstances, is to be indulged in his favor, to the infirmity of human nature. To hold him responsible for what another person, who looked on as a cool and unconcerned spectator, might think a moderate excess, would be trying his conduct by too severe a test; it would give too

much encouragement to not the best class of mariners to enter prosecutions for trivial injuries, and have a tendency to break down all authority and discipline. It was very justly urged by the libellant that the greatest discretion is not to be expected from the humble condition of a common sailor, but that the usefulness of the class to which he belongs, his hard services, and small reward, and the character of frankness, and thoughtless intrepidity which seems to be naturally created by the nature of his employment, justly require that we should look on his failings with sentiments of kindness and not severity. To this argument it may be replied, with equal truth, that when the misbehavior of the seaman has called into action the correctional power of the master, the like reasons claim for him a like indulgence of judgment in favor of the necessary exercise of discretionary authority.

In the present case, there was misbehavior on the part of the libellant that unquestionably justified correction, and the true question is, whether in inflicting summary justice, the officers have passed the limits beyond which the indulgence of the law cannot, consistently with justice and sound policy, follow them. In my opinion they have. It has been argued for the respondents that the master, under the circumstances, having the right to chastise Elwell, that the mode of punishment being a legal and proper one, and the dislocation of a limb not being intended nor likely to occur in the mode of correction adopted, the officers ought not to be holden responsible for an accidental and unexpected injury. There is certainly a great degree of plausibility in this mode of considering the case. But will the facts warrant it? When the master, in this way, takes his stand upon his strict legal rights, I must be permitted to say that he showed, as is perhaps too apt to be the case, quite as much alacrity as was suitable, in resorting to severe measures. From all the evidence, the dislocation seems to have been effected when Elwell was thrown down to be lashed. The master and both mates had then hold of him, and assisted in lashing him down and making him fast. With such odds as the strength of three against one, it would seem that with ordinary caution in the application of their force, Elwell might have been secured without the employment of such violence as must have been exercised to produce the injury he sustained. That degree of violence was unnecessary and unwarrantable, and if an injury was done beyond what was intended, though as happening partly from misadventure, it may not call for vindictive, no reason is perceived why the authors of it should not be holden answerable for actual pecuniary damages, as the expense of cure and loss of time occasioned by the injury. Under all the circumstances, to this amount I think the damages ought to be limited.

It is contended on the part of the respondents' counsel, that whatever may be the decision as to the master, Storer and Sales, who acted in obedience to his order, can in no event be held responsible. They would, indeed, be justified in confining Elwell, and this was the extent of the master's order. But in executing it, if a serious injury was inflicted, from their unnecessary harshness or want of caution, they must be held to answer for it. They were jointly engaged in doing the wrong, and I do not perceive any reason why they should not be jointly held to respond the damages. Decree, $80 damages, and costs.

ELWELL v. THE PRINCE ALBERT. See Case No. 3,424b.

Case No. 4,426.

The ELWINE KREPLIN.

[9 Blatchf. 438.][1]

Circuit Court, E. D. New York. Feb. 23, 1872.[2]

CONSTITUTIONAL LAW — EFFECT OF EXPRESS PROVISIONS OF FOREIGN TREATY UPON JURISDICTION OF LOCAL COURTS.

Article 10 of the treaty between the United States and the king of Prussia, of May 1, 1828 (8 Stat. 378, 382), provides, that the consuls, vice-consuls and commercial agents of each party "shall have the right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities," subject to the right of the contending parties "to resort, on their return, to the judicial authority of their country," and to the right of the consuls, vice-consuls or commercial agents to require the assistance of the local authorities, "to cause their decisions to be carried into effect or supported." The crew of a Prussian vessel sued her in rem, in admiralty, in the district court, to recover wages alleged to be due to them. The master of the vessel answered, denying the debt, invoking the protection of said treaty, denying the jurisdiction of the court, and averring that the claim for wages had already been adjudicated by the Prussian consul at New York. The consul also protested formally to the court against the exercise of its jurisdiction. The case was tried in the district court, and it appeared that the consul had adjudicated on the claim for wages. The district court decreed in favor of the libellants. *Held*, that the district court had no jurisdiction of the case.

[Cited in The Belgenland v. Jensen, 114 U. S. 364, 5 Sup. Ct. 864; Re Aubrey, 26 Fed. 851; Davis v. The Burchard, 42 Fed. 608; The Welhaven, 55 Fed. 81.]

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

[This was a case of subtraction of wages, instituted by Max Newman, the chief mate of the Prussian bark Elwine Kreplin, to recover the sum of $173, amount of wages due; also $1,158, the aggregate amount of the wages of the crew, which he claimed to recover as assignee. In the district court a de-

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

[2] [Reversing The Elwin Kreplin, Case No. 4,427.]

cree was given in favor of the mate (Case No. 4,427), whereupon this appeal is prosecuted.]

Dennis McMahon, for libellants.
Edward Salomon, for claimants.

WOODRUFF, Circuit Judge. By the tenth article, of the treaty made by the United States with the king of Prussia, on the 1st of May, 1828 (8 Stat. 378, 382), it is provided, that "the consuls, vice-consuls, and commercial agents,"—which each of the parties to the treaty is declared entitled to have in the ports of the other—"shall have the right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities. * * * It is, however, understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." To this general rule there is a qualification: "Unless the conduct of the crews, or of the captain, should disturb the order or tranquility of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance" (the assistance of the local authorities,) "to cause their decisions to be carried into effect or supported." This treaty is, by the constitution of the United States, the law of the land, and the courts of justice are bound to observe it. When a case arises which is within this provision of the treaty, jurisdiction thereof belongs to the consul, vice-consul, or commercial agent of the nation whose interests are committed to his charge, and with the exercise of that jurisdiction the local tribunals are not at liberty to interfere, unless such consul, vice-consul, or commercial agent requires their assistance, to cause their decision to be carried into effect or supported.

In the present case, the mate and several of the crew of the barque Elwine Kreplin prosecuted their libels against the vessel, in the district court, for the recovery of wages alleged to be due to them, which the master of the vessel denied to be due, upon various grounds; and the vessel was attached to answer. The master of the barque, intervening for the interest of the owner, sets up, in his answer, various grounds of defence to the claim, some of which arise under the laws of Prussia; and, especially, he invokes the protection of the treaty above mentioned, and denies the jurisdiction of the district court, alleging, moreover, that the matter in difference—the claim of the libellants for wages—has already, in fact, been adjudicated by the Prussian consul at the port of New York. Before the cause was tried in the district court, the consul-general of the North German Union presented to the district court his formal protest against the exercise of jurisdiction by that court in the matter in difference. He invoked therein the treaty above referred to, and claimed exclusive jurisdiction of such matter in difference; and he also declared, that, before the filing of the libel, the said matter had been adjudicated by him, and insisted that his adjudication was binding between the parties, and could only be reviewed by the judicial tribunals of Prussia.

The barque is a Prussian vessel, the mate and crew are Prussian seamen, who shipped in Prussia, under and with express reference to the laws of Prussia, referred to in the shipping articles, and it should be assumed, that the treaty which binds this nation and its citizens and seamen, binds also Prussia and her subjects and seamen. The consul-general of the North German Union is commissioned by the king of Prussia, and, by certificate of the secretary of state of the United States, under the seal of that department, it appears, that the executive department of the United States recognizes the consuls of the North German Union as consuls of each one of the sovereign states composing that Union, "the same as if they had been commissioned by each one of such states." The kingdom of Prussia is one of the states composing the North German Union. The treaty does not require that the consuls, vice-consuls, &c., should bear any specific name. It is sufficient, that the "interests" of Prussia "are committed to their charge," and quite sufficient, that the government of the United States, by its executive, recognizes the consul as consul of the kingdom of Prussia.

The discussion of the case at the hearing on the appeal, was, on the part of the libellants, very largely devoted to the merits of the claim for wages, upon principles applicable, it may be, to the subject, if no such treaty was in force, and under decisions of our courts in reference to the rights and duties of seaman and master, the effect of the misconduct of either upon the obligation of the other, for the purpose of showing that the treatment of the libellants by the master exonerated them from their duty to serve according to the terms of the shipping articles, and also from all others of its stipulations, even from such as arise from the laws of Prussia forming a part of the terms, stipulations, and conditions which enter into the relation of the crew to the master and owners, and to the vessel. That discussion was very full, and was presented, in argument, with great ability, by the counsel for the libellants. With most of the rules of law invoked by the counsel, when considered apart from and independent of any treaty stipulation, the claimants have no contest; and they are, no doubt, settled, by the cases cited. But the prior question of jurisdiction must be determined, before it is competent even to enquire into the merits of the libellants' claim to recover their wages.

In the first instance, it would seem clear, that a claim of the crew of a Prussian vessel to recover wages which the master of the vessel either denied to be due, or refused to pay, was, par eminence, a matter in difference between the captain and crew, which, by the very terms of the treaty, the Prussian consul or vice-consul had jurisdiction, as judge or arbitrator, to determine, "without the interference" of the courts of this country; and such jurisdiction, when it exists, is, by such terms as these, exclusive. It is, however, claimed, that the present cause is not at all embraced within the treaty, for the reason, that it is a proceeding in rem, to enforce a maritime lien upon the vessel itself, and not a difference between the captain and crew; and, also, because the Prussian consul has no power to conduct and carry into effect a proceeding in rem for the enforcement of such a lien.

The treaty can receive no such narrow and technical construction. The master is the representative, in this port, of the vessel, and of all the interests concerned therein. He is plainly so regarded in the treaty. The matter in difference in this cause is the claim for wages. That arises between the crew and the master, either as master, or as the representative here of vessel and owners. It is precisely that which is in litigation in this case. The lien, and the proceeding in rem against the vessel, appertain to the remedy, and only to the remedy. The very first step in this cause is to settle the matter in dispute. If the claim be established, then, as incident to the right to the wages, the lien and its enforcement against the vessel follow. The district court can have no jurisdiction of the lien, nor jurisdiction to enforce it, if it has no jurisdiction of the difference or dispute touching the claim for wages. To hold that the jurisdiction of the consul is confined to cases in which there is no maritime lien, and in which no libel of the vessel could, apart from the treaty, be maintained. is to take from the treaty very much of its substance. The existence of any lien, and of any right to charge the vessel, is in difference here. To say, that the treaty gives the consul jurisdiction of claims against the master in personam, and does not include a claim to remove the vessel itself from his custody, as the owner pro hac vice, or as the representative of all the interests therein, that the voyage may be broken up, and the vessel sold for the wages of the crew, and that an effort, by judicial proceeding, to do this, is not included in the terms, a difference arising between captain and crew, seems to me to destroy the very substance of the stipulation, and defeat its obvious purpose, to confine both masters and crews of Prussia to the rights and obligations of the Prussian laws, and compel obedience to its mandates. And, be it observed, the treaty gives the same protection to, and requires the like obedience by, the masters and crews of vessels of the United States. It does not add to the legal reasons for this view, but, if a vessel of the United States were sold in a port in Prussia, to pay the wages of its crew, alleged by the master not to be payable, and in repudiation of any right of the United States consul at that port to act as judge or arbitrator upon that claim, it would, at least, stimulate our quickness of apprehension to discover, and would incline us to insist, that the treaty intended to protect our shipowners against the application of foreign laws, and the decisions of foreign courts, to our vessels and the relations of the master and crews thereof.

To the suggestion, that the consul has no power to enforce the maritime lien, and cause the vessel to be sold, to satisfy the wages, if he should find that wages are due and payable, it is sufficient to say, that the treaty has been deliberately entered into, and has become the law for both nations. Each preferred to employ its own officers. The power given to consuls to act as judge or arbitrator is not made final. The parties have the right of resort to the tribunals of their own country, without being concluded by the decisions of the consul. This was deemed a sufficient protection, and to afford, for the time being, a sufficient remedy to both master and crew; and it is not for this court to say, that the remedy here, by attachment of the vessel, will be more efficient and useful, and, on that ground, to apply it. Besides, this court cannot know that the remedy by resort to the vessel is not, if it exists, so regulated in Prussia, that it was intended that her seamen should not invoke against the vessel the remedies permitted by our laws, under the mode of administration and rules of decision by which our courts are governed. And, further, under the expressed exception, which permits resort to local tribunals by consuls, &c., who may require their assistance to cause their decisions to be carried into effect or supported, it is plausible, at least, to say, that, if the consul decide, on a difference between captain and crew, that wages are payable, the power of the court to attach and condemn the vessel for their payment may be invoked to support and give effect to such decision.

Again, it is said, that, in this case, the captain and crew were not confronted before the counsel, witnesses were not examined, no adjudication in writing was made, but the consul only orally declared his judgment of the matter in difference, after hearing the statement of the master and the statement of the libellants, and then declared that he had nothing further to do therein. The proceeding does not, it is true, conform to our ideas of the requisites of a judicial proceeding; but, are the courts of this country to prescribe to the Prussian consul the forms and modes of proceeding which he must adopt when he acts as a judge or arbitrator between master and crew under this treaty? Must he follow the

practice, and be governed by the rules, governing trials and arbitrations under our laws? Must our consuls in Prussia follow the rules and practice of the courts of that kingdom? If so, then the district court here was sitting as a court of error, to review the judgment or award of the Prussian consul. What can this court say are the formal requisites of a Prussian arbitration? It is manifest, by the reservation of the right to resort to the judicial tribunals of the home country, without being concluded by the decision of the consul, that the proceeding before him as an arbitrator or judge was intended to be summary, and its conduct left very much in his discretion; and, especially, it is manifest, that the nations respectively intended to confide in their consul, and temporarily entrust to him the adjustment of differences between officer and crew of their vessel in the port of the other, and it was not intended that the courts of such other nation should sit in judgment upon the form or regularity, or the justice, of the acts of the consul, or interfere therewith in any manner. It was deemed safe and proper to leave to such consuls this temporary administration of the interests of their seamen abroad, assured that they would act with fairness and integrity therein, but yet giving the right of full and final investigation and adjudication at home, where home laws, home remedies, and home modes of investigation could be resorted to. The district court here not only passed upon the requisites of the proceeding as judicial, or as an arbitrament, but assumed to inquire into the details of the evidence, and the truth of the declared grounds upon which the vice-consul testified that he acted, and which he says were before him in the admissions of the crew—thus, in effect, reviewing the law and the facts which the consul made the basis of his decision.

It is claimed, that the consul did not act as judge or arbitrator to determine this case, and that, he not having taken jurisdiction, a proceeding in our courts is no interference in disregard of the treaty. It is by no means clear, that the attachment of the vessel, on the libel of the crew, is not, in itself, such an interference as precludes the action of the consul. But in this case, the argument disregards the clearly established fact, that the consul or his vice consul, (who is, in terms, included in the treaty, and whose acts in the matter the consul recognizes,) did hear the parties respectively. On the statement of the case by the crew (who, whichsoever of them was the first speaker, had the opportunity to tell their story,) he pronounced against them. On their own story, he decided that they had forfeited their wages, by the Prussian law, applied to their contract of shipment; and, afterwards, when this suit was commenced, he formally represents to the court, that he had already adjudicated the matter in difference, and claimed that his jurisdiction for that purpose is exclusive of the courts of this country. It was after such declaration of his decision to the crew, that he, knowing that the vessel was laid up, advised them to see the captain, and, by civil and conciliatory deportment, induce him to waive the forfeiture and pay the wages which had accrued. In the situation in which the vessel and her master then were, it is obvious, that, if the men had forfeited their wages, (of which I here express no opinion,) their acts had wrought no great harm, the captain had no present need of the services of so many, and many considerations might properly have moved him to pay their wages and let them go. The advice of the consul indicated that he thought the loss of their service was no inconvenience to the captain and, even if wrong theretofore, they had claims to his consideration, while destitute and in a foreign country, which might and, perhaps, ought to induce him to pay their wages. This is all there is of the argument, that the consul himself regarded the crew as practically discharged.

I do not propose to examine the merits of the libellants' claim for wages. That they were, on the requisition of the consul, and without sufficient grounds therefor, held in prison as deserters, is most probable. That their departure from the vessel, and going ashore without leave, and against the will of the master, (save as to one, who had his consent,) is not desertion by our law, unless it was done without the intention to return, is, no doubt, true. That the master did not, in fact, consent to the discharge of any of them, is, I think, clear, while I think it in the highest degree probable, that, if this difficulty had not arisen, he would, in view of the laying up of the vessel, have consented to part with most of them.

I do not think it certain, that an imprisonment, on the requisition of the consul, though induced by a statement of the facts by the captain, operated to discharge the seamen from their articles, even though the imprisonment was not warranted by the facts. Jordan v. Williams [Case No. 7,528]. Nor is it certain that, under this treaty, and the act of March 2, 1829 (4 Stat. 359), a state magistrate can have no jurisdiction to arrest and detain a seaman charged as a deserter. True, the laws of the United States may not make it the duty of a state judge to act; but it does not follow, that, if he is included in the law, his acts will be without authority. There are many powers conferred upon state magistrates by the laws of the United States, which, if executed, are valid. Whether such magistrate is bound to accept the authority and act upon it, is another question. The act of 1829, in determining the duty, confers the power on "any court, judge, justice, or other magistrate having competent power, to issue warrants" to arrest, &c. See Pars. Shipp. & Adm. 102; Kentucky v. Dennison, 24 How. [65 U. S.] 66, 107, 108. It is apparent, that the requisition was given to the master to be delivered to the justice at Staten Island, who,

as the captain informed the consul, then detained the seamen; and if, as stated by counsel, (though it does not appear as printed in the copy proofs handed to me,) it was addressed to "any magistrate," &c., the power of the magistrate is not clearly wanting.

But all these and other questions go to the merits. They bear on the broad question, whether, under the terms of the shipping articles, and the Prussian rules contained in the navigation book, &c., the seamen had a right to their wages. The effect of the stipulation not to sue in a foreign country, which appears to be one of those rules, also, and what amounts to a discharge from the contract, actual or constructive, are questions on the merits; and the sympathy, which the condition of these men, penniless in a foreign land, whether with or without fault on their part, must awaken in every mind susceptible of human emotion, strongly inclines to a condemnation of the conduct of the master in this matter.

But I am constrained to the conclusion, that the treaty required that this matter in difference should have been left where, I think, the treaty with Prussia leaves it—in the hands, and subject to the determination, of their own public officer. The necessary result is the dismissal of the libels.

[NOTE. An application was afterwards made to the supreme court for a mandamus to compel the circuit court to pass upon the merits, but it was denied.]

Case No. 4,427.

The ELWIN KREPLIN.

[4 Ben. 413.][1]

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

SEAMEN'S WAGES—DESERTION—IMPRISONMENT ON SHORE—CONSUL—TREATY WITH PRUSSIA—JURISDICTION—PARTIES—PRACTICE—MINOR—EXECUTIVE RECOGNITION.

1. A Prussian bark, with a crew whose term of service had not expired, was laid up at Staten Island, on account of the war between Prussia and France. A difficulty arose between the captain and the crew, and they demanded leave to go and see the consul. This the captain refused to allow, but agreed that one of them, named L., might go. They insisted that they would all go, and the captain went ashore to get the aid of the police. After he had gone, the crew informed the mate that they were going to see the consul, and went ashore, without serious objection from the mate. The captain, returning, was told by the mate that the men had gone ashore, and high words passed between them, which resulted in the mate's saying that he would go too, and he went ashore, without objection from the captain. The captain, with a police officer, overtook the crew, and all hands went before a police justice, where the captain made a complaint against the mate and the crew for mutiny and desertion. The justice informed the captain that he had no jurisdiction, but he directed a policeman to take the men into custody, and they were locked up. The captain then went before the Prussian consul, and made complaint, requesting that the crew be punished, and that they be kept in custody preliminarily, and stating that he could not receive the mate on board again. The consul then issued a requisition to a commissioner of the circuit court of the United States, stating that the men had deserted, and asking for a warrant to arrest the men, and, "if said charge be true," that they be detained until there should be an opportunity to send them back. This requisition the captain took to the police justice, who thereupon, without examination, committed all the men to the county jail, where they lay for ten days. On the direction of the consul, they were then released, and came to the consul's office, where they were advised to go to the ship, and ask the captain for their wages. Some of them went, and the captain agreed to meet the crew at the consul's office next day. He came there, but the parties failed to meet each other, and thereafter the seamen executed assignments of their wages to the mate, but without consideration, and he filed this libel against the vessel, to recover the wages of all. The captain was part owner of the ship. He defended the suit, and claimed that the men had forfeited their wages by desertion; that they had agreed in the articles not to bring the suit; and that the court, under the treaty between the United States and Prussia, had no jurisdiction. *Held*, that, as to the mate and L., there could be no pretence of desertion, for they left the vessel with the captain's consent.

2. The other seamen only left the ship, without taking their clothes, to go and see the consul, the charge of desertion was not made out against them. The conduct of the captain, in imprisoning the men, was unlawful, and sufficient to dissolve the contract of the mariners.

3. No law permits the imprisonment of deserters in our jails, except on proof of the facts before a competent tribunal.

4. The men were not prevented from bringing this suit by the clause in the articles referring to that provision of the German mercantile law, that "the seaman is not allowed to sue the master in a foreign port," because this is not a suit against the master, and the master having, by his unlawful conduct, absolved the men from their agreement, had absolved them from this portion of it with the rest.

5. The clause in the treaty between the United States and Prussia, that "the consuls, vice-consuls, and commercial agents shall have the right, as such, to act as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless, &c., &c.," was not sufficient to oust this court of its jurisdiction over this controversy. Whether this clause has any application to suits in rem—quaere.

[Cited in The Belgenland v. Jensen, 114 U. S. 364, 5 Sup. Ct. 864.]

6. The Prussian consul had not acted in this matter as judge or arbitrator, which words must be taken in their ordinary sense, implying investigation of facts upon evidence, the exercise of judgment as to their effect, and a determination thereon.

7. The consul is not a court, and neither his record nor his testimony is conclusive on this court.

8. As the consul, though really appointed as consul of the North German Union, was recognized by the executive department as consul of Prussia by virtue of such appointment, the action of the executive was binding on the court, and he must be held to be the Prussian consul.

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

[2] [Reversed in Case No. 4,426.]

9. The seamen might file a petition to be now made co-libellants, and on such petition being filed, and the cancellation of their assignments to the mate, they would be entitled to decrees for their wages.

10. In admiralty, minors are allowed to sue for wages in their own names.

In admiralty.

D. McMahon, for libellants.

E. Salomon, for claimant.

BENEDICT, District Judge. This is a cause of subtraction of wages, instituted by Max Newman, who was the chief mate of the Prussian bark Elwin Kreplin, to recover the sum of $173, being the amount of his wages earned in the capacity of chief mate of that vessel; and also the sum of $1,158, which is the aggregate amount of the wages of the crew, which he claims to recover as assignee of the seamen. A statement of the facts in proof is necessary to an understanding of the many questions raised.

The time of service and rates of wages are not disputed. The libel concedes the term of service for which the men were shipped to have been two years, which has not yet expired.

This term of service being admitted in the libel, is to be taken as proved, although it is not entirely clear from the agreement itself that such was its legal effect. In the prosecution of her voyage, the brig arrived in this port, and, war having broken out between Prussia and France, she was compelled to lay up here to wait for peace. She was accordingly laid up at Staten Island, and while there the difficulty arose which gave rise to the present litigation. It appears that on the morning of the 1st of August, 1870, before breakfast, the master undertook to chastise the cabin boy, in the cabin. The boy's cries being heard by the crew, who were at work on deck, they went in a body into the cabin, and challenged the right of the master to chastise the boy. The master thereupon desisted, and the men returned to their work on deck. The master soon followed, and an altercation ensued between the master and crew, in which various complaints were made, and some vile epithets applied to the master by the mate, who was not in the cabin with the men, but in the altercation on deck took part with the crew. During the dispute, the men, in a body, demanded permission to go before the consul with their complaints. Permission was given to one named Lutte, and perhaps to Martens also. The permission to Lutte is conceded by the master, but permission to Martens is denied. Upon permission being given to Lutte, the crew cried out, "We will all go." When the dispute ended, the captain went to his breakfast, and after breakfast went ashore, to obtain, as he says, the aid of the police, on account of the mutinous condition of the crew. After he was gone, the crew, having finished cleansing the decks, and eaten their breakfast, dressed and informed the mate, then in command, that they were going to the consul, and went ashore. No objection was made by the mate, beyond a suggestion that they had better wait till the captain returned. Soon after the men had left, the captain returned, but without any police, and was informed by the mate that the crew had gone ashore. Words thereupon passed between the captain and mate, which resulted in the mate's saying, "I will go too," whereupon he also left, without any objection by the master. On leaving the ship, the mate proceeded to the ferry leading to New York City, where the office of the Prussian consul is located. The rest of the crew appear to have followed the carpenter, who went to the police station to enter a complaint against the master for beating the boy, in whom the carpenter, doubtless, took more interest than the others, as he came from the same town in Germany. The master soon appeared at the police station, and shortly after at the ferry house, with a policeman. The mate, at their request, accompanied them to Justice Garret, a police justice of the village of Edgewater. There the captain made a complaint against the whole crew, including the mate, for mutiny and desertion, but was informed by the justice that he was without jurisdiction, and that application must be made to the United States courts. The justice, however, was afterwards induced to direct a policeman to take the men into custody, if he would do so at his own risk. This the policeman did, and the mate and men were then locked up.

The master next proceeded to the consul's office, and there made complaint in writing, of which a protocol was made, describing the occurrence of the morning on board the ship, and stating that the men were then in custody on Staten Island, and ending as follows: "I request of the consul-general the punishment of the entire crew, especially of the mate, Newman, who has instigated the complot. Since my life is not safe, I request that the entire crew be kept in custody preliminarily; and, under existing circumstances, I cannot again take the mate on board."

The consul thereupon issued a requisition, the substance of which has been proved, in the absence of the original. To whom this requisition was addressed is not certain. Justice Garret thinks that it was addressed, "To Any Marshal or Magistrate of the United States;" but it was written on a blank, which was addressed in print, "To the Commissioner of the Circuit Court of the United States for the District of New York," and it is not shown that the blank address was altered or filled up. This requisition, after referring to the treaty with Prussia stipulating for the return of deserting seamen, and authorizing the consul to require the assistance of the local authorities for the search, arrest and imprisonment of deserters,

represented that these seamen, naming them, and including the mate and Lutte, had deserted from this vessel on that day; that the consul made application for a warrant to the marshal of said district to cause the men to be arrested, and "if said charge be true," that they be detained at the consul's expense until there should be an opportunity to send them back. No action was taken by the consul in regard to the master's complaint, except to deliver this requisition to the master, who instead of presenting it to a U. S. commissioner, took it to Justice Garret, the next morning, and thereupon Justice Garret, without examination, committed all the men to the common jail of Richmond county, his commitment stating that it was upon the complaint of the master for desertion, and containing no allusion to the consul's requisition.

On the 9th of August the master desired a release of some of the men, and the consul appears to have directed a release of them all, but no order for their return to the ship was made by the consul or asked for by the master, nor was the production of the men before the consul directed.

On the 11th of August two policemen took the mate and three of the men from the jail to the consul's office, and were then directed to release them, and the men were advised to go on board and persuade the master to pay them their wages. The next day the remaining four were released from jail, and during the day all the men appeared at the consul's office. They were again advised to go to the ship and ask the master for their wages, but they had no money to pay their ferriages from New York to Staten Island. By putting all their means together, however, enough was found to pay the ferriage of three. Accordingly, the mate, the carpenter and Lutte went to the ship and saw the master. The mate testifies that the captain promised to pay him and appointed the next day to meet him at the consul's.

The master admits making the appointment and that he gave the mate his navigation book and entered in it the credits to date, but denies the promise to pay him. As to what actually took place at this interview, the witnesses differ, but the result was an arrangement to meet at the consul's office the next day. This meeting never took place. The men and the master appear to have been at the consul's during that day, but they failed to meet, although the master says that as he came down from the consul's he saw Torriff and Reischoff, two of the crew, whom he asked to return to the ship, and they laughed at him and said, "No! Not a bit of it." Subsequently this action was commenced. Upon these facts it is contended that these seamen are not entitled to recover their wages, admitted to have been earned in the service of this vessel, on several grounds.

Upon the merits, it is said that the wages have been forfeited by desertion.

The charge of desertion against the mate has no foundation. He left the ship openly without objection from the master, without taking any of his clothes, and with a remark, which, under the circumstances, was a notification that he was going to see the consul. He was shortly arrested and cast into prison and there kept during ten days of the extremely hot weather of last August, and then let out without a request or suggestion that he return to the vessel. Indeed the master had expressly declared that he should not return. It is vain to contend that these facts present any of the features of desertion, so far as the mate is concerned. With regard to Lutte, the case is still stronger, for the master concedes that Lutte asked and obtained of him permission to go to the consul. He also was in a similar manner imprisoned as a deserter. With regard to the other seamen the case is simply one of leaving the ship without permission. "It has been uniformly held that it is not desertion, for the seamen to leave the vessel against orders to go before the consul at a foreign port to complain of their treatment." 1 Pars. Mar. Law, 470, note. In this case the men did not take their clothes. When the master gave permission to Lutte to go to the consul, they announced their intention to go too. When they left they informed the mate, who was then in command (The Union [Case No. 14,347]), that they were going to see the consul. Upon the evidence, I find nothing to justify the master in supposing that the men were not going to the consul, and would not return to the ship at nightfall, and yet they were all at once arrested and cast into prison; and, so far as appears, without any prior request that they return to the ship. To hold such a leaving of the ship to be desertion is impossible. But it is said that when released from jail they refused to return to duty, and are therefore deserters. There is some evidence to this effect, but it is loose, and, upon a consideration of all the evidence, I am satisfied that the master never in fact communicated to the men either an intention to forfeit their wages or a desire to have them again in his service. As to the mate, he had expressly refused to have him on board. As to Kruise and Reischoff, he had, before the difficulty, given them to understand that they would be permitted to leave. He was half owner. His vessel was laid up to await the result of a great war—only the services of watchmen were required on board—and he had engaged two other men for that duty. He had, therefore, no reason to desire the return of the men, and, I am satisfied, did not desire it, although he may have been quite willing to make out a case of desertion, in the hope of saving the very considerable sum due the men; but his action was such as to lead the men to suppose that their leaving the service of the ship was acquiesced in, and such, it appears,

was the impression formed by the consul; for he says he told the men he was sure the captain would pay them their wages. I am, therefore, of the opinion that the connection of the men with the ship was severed by mutual consent, and consequently, they are entitled to their wages.

But if this be not so, I am of the opinion that the conduct of the master, in imprisoning these men, was unlawful, and sufficient to dissolve the contract of the mariners; and I apply to the case of these foreign seamen in an American port the same rule which our courts have applied in cases of the imprisonment of American seamen in foreign ports. The rule is stated as follows: "The practice of imprisoning disobedient and refractory seamen in foreign jails is one of doubtful legality. It is certainly to be justified only by a strong case of necessity. It should be used as one of safety, rather than discipline, and never applied as punishment for past misconduct." Wilson v. The Mary [Case No. 17,823]. In Jordan v. Williams [Id. 7,528], it is stated as settled, that it is not one of the ordinary powers of a ship-master to imprison his men on shore.

The imprisonment inflicted on these men was without justification. The only excuse for it is the occurrence on the morning of the 1st of August, above detailed, which was not a very serious matter. The men were undoubtedly wrong in appearing in the cabin, and calling in question the master's right to punish the boy; for which, perhaps, there is some palliation in the fact, that, while the crew, doubtless, knew that by the Prussian laws, corporal punishment of seamen is not permitted, they may not have known, that, by the same laws, "ship boys are subject to the parental chastisement of the master." The punishment of the boy, in this instance, was not cruel, and the men could not complain of some punishment inflicted on them for their appearance in the cabin, and their disrespectful language afterwards on deck. But there was nothing alarming in the temper of the crew; there had been no difficulty with them before this, and nothing occurred on this day which any master of order, judgment, and firmness would not have easily dealt with. No weapons were shown, no blows struck, no threats made, except that of reporting to the consul, and, if punishment was thought necessary, it should have been inflicted on board, and not by imprisonment in a foreign jail.

Neither does the master stand excused, if it be considered to have been shown that he really thought the men had left the ship, with intent to desert, for his whole conduct was unlawful. No law permits the imprisonment of deserters in our jails, except on proof of the facts before a competent tribunal. The act of March 2, 1829 [4 Stat. 359], which is the only statute enacted to render effective the provisions of article 11 of the treaty with Prussia, requires an application by the consul, with preliminary proofs, before a magistrate having competent jurisdiction, and the warrant of such magistrate for the arrest. The seaman cannot be surrendered to the authority of the consul, until an examination be had before the magistrate, and the statement that the seaman is a deserter found to be true. And the arrest and detention of the seaman, in such cases, is not for punishment, but simply for safe-keeping until he can be sent back. Here the men were imprisoned, in the first instance, for a day and a night, upon the request of the master, without any of the preliminary proofs required by the statute, and without the interposition of the consul. And when, on the next day, the consul issued the requisition for an examination before a U. S. commissioner, the master took it to the police justice, where it was used, apparently by way of inducement, for the imprisonment was then continued for some ten days, upon the complaint of the master, and not by virtue of the requisition. This imprisonment was, in law, the act of the master. He caused it to be done by a magistrate, known to him to be without jurisdiction. Nor can he protect himself by saying that he acted under the direction of the consul. The consul made no requisition upon the police justice, and never requested that officer to imprison the men, and his requisition is not alluded to in the commitment. He did direct somebody to release them, but it is not shown what person, other than the captain and the policeman, he so directed. It is also true that he paid the jail-fees to the jailer, but there is evidence showing that this payment was for the account of the master.

If it be true, that a master is not responsible for an imprisonment inflicted by competent authorities, under the order of a consul (Johnson v. The Coriolanus [Case No. 7,380]; Wilson v. The Mary [Id. 17,823]; Jordan v. Williams [Id. 7,528]), it is also true that he is responsible for an imprisonment inflicted, at his request, by a police justice without jurisdiction in the premises (Snow v. Wope [Id. 13,149]).

In every aspect, then, the conduct of the master in respect to these men, was unlawful, and, it appears to me, without excuse. Three of the men who have appeared before me, are men of intelligence, and of truthful appearance. The mate appears quite the equal of the master, and is, in fact, his connection by marriage. The difficulty arose in a port where there was every opportunity for protection, and for lawful investigation, and there was nothing requiring haste. Such an imprisonment, under such circumstances, I consider sufficient, within the principles of the adjudged cases, to dissolve the mariners' contract, and sever the connection between the men and the vessel.

But it is said, that the men contracted not to sue in a foreign country, and, therefore, this action cannot be maintained. This po-

sition is based upon the words of the ship's articles or muster roll, which declare that "the seamen hire themselves on the abovementioned vessel in accordance with the legal regulations printed in the Book of Navigation." The Book of Navigation referred to is a book which is furnished to every Prussian seaman, and which contains the name of the holder, with a description of his person, and memorandum of every shipment and every discharge of the holder, signed by the mustering authorities. The book contains also a printed appendix, where may be found certain extracts from the German mercantile law, among which extracts is this provision: "The seaman is not allowed to sue the master in a foreign court." Assuming that this provision of law is incorporated into the agreement, by the words used in the articles, and, therefore, to be considered as part of the contract, which is not entirely clear, the first answer is, that the provision, by its express terms, is made to relate to suits against the master, which this is not. Another answer is, that the master having, by his unlawful conduct in violation of his contract, absolved the men from their agreement, has absolved them from the whole of it, and this portion with the rest. Shulenburg v. Wessels, 2 E. D. Smith, 71.

In the English courts, a foreign statutory prohibition of this description has been considered not enforceable, unless incorporated as part of the contract. Macl. Shipp. p. 226. In the American courts, it has been held that such a provision in the contract will not be enforced, "where the voyage, as respects the seamen, is put an end to" (Weiberg v. The St. Oloff [Case No. 17,357]), "where the interests of justice demand it" (Bucker v. Klorkgeter [Case No. 2,083]); and, "where the seamen are left destitute by an improper discharge" (Id.).

Again, it is said that this is a Prussian vessel, and therefore, the court is without jurisdiction in the premises by reason of the treaty between the United States and Prussia, ratified in 1828 (8 Stat. 382). This position, which has been urged upon my consideration with earnestness and ability, has received my careful consideration. The provision of the treaty is as follows: "The consuls, vice-consuls and commercial agents shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country, or the said consuls, vice-consuls or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is however understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

In considering the effect of this treaty in the present case, I remark first, that its language does not precisely cover an action in rem like the present. Such an action is more than a mere difference between the master and the crew. It involves the question of lien upon the ship and her condemnation and sale to pay the same. In the absence of any express words, it is hard to infer that it was intended to confer upon consuls and vice consuls, the power to direct a condemnation and sale of a ship—a proceeding which brings up, for determination, many questions besides those relating to seamen. Moreover the statute of August 8, 1846 [9 Stat. 78], which was passed to render effective this provision of this treaty, confers upon the commissioners of the circuit court full power, authority and jurisdiction to carry into effect the award, arbitration or decree of the consul and for that purpose to issue remedial process, mesne and final, and to enforce obedience thereto by imprisonment. It certainly cannot be supposed that it was the intention to give to the commissioners of the circuit court power to make a decree in rem, and direct the sale of a ship. This position, that the treaty is not applicable to the present case because it is a proceeding in rem, which did not strike me with much force upon the argument, has gained strength in my mind by reflection, and I confess that I am now inclined to the opinion that it is well taken; but I do not intend to rest my determination upon it. Nor do I discuss the position that the treaty was not intended to apply to any difference, except personal differences, between the master and the seamen alone, such as assaults and the like, and does not cover differences as to wages, to which the owners as well as the ship are always real parties.

But I pass on to consider whether the effect of this treaty is to prevent the courts of admiralty of the United States from taking cognizance of any action brought by seamen to recover wages earned by them on board a Prussian vessel. At the outset, it appears strange to hear it contended that the jurisdiction of the district courts of the United States is thus to be limited, because of an agreement arrived at between Prussia and our government, as to the jurisdiction of our own courts. Courts are created and their jurisdiction fixed by the law-making power; and the extent of their jurisdiction does not appear to be a fit subject of an agreement with a foreign power. If, in any case, the powers exercised by the courts become a subject of discussion between our government and a foreign nation, and any limitation of the jurisdiction, already conferred by law, be found to be desirable, the natural, if not the only way of accomplishing such a result would be by the action of the law-making power, instead of the treaty-

making power. It appears reasonable, therefore, at least to require that an intention to accomplish such a result by a treaty, should be manifested by express words. The treaty under consideration contains no such definite provision. It simply declares that the consuls shall have the right to sit as judges and arbitrators in certain cases, without the interference of the local authorities, which is a very different thing from saying that the courts of the United States shall not have jurisdiction in such cases. Furthermore, the law-making power established the district courts of the United States and the jurisdiction thereof, and gave to them, in civil cases of admiralty and maritime jurisdiction, all the judicial power vested in the national government by the constitution; and it is not to be lightly supposed that the president, acting with the advice of the senate as the treaty-making power, has undertaken to repeal, pro tanto, an existing law relating to the jurisdiction of the courts, and to remove from the jurisdiction of the district courts certain classes of actions, and that by reason of their subject matter, for the provision in this treaty is not confined by its language to Prussian subjects, but applies to all seamen on Prussian vessels without regard to their nationality. It seems to me that no such intention should be imputed to the treaty, if any other can be discerned—and another, and a reasonable intention can be discerned when we consider, in connection with the treaty, the well known practice of maritime courts in respect to actions brought by seamen to recover wages earned on foreign vessels. Such actions, courts of admiralty have long been accustomed to entertain, or to decline, in their discretion. Ordinarily, in the exercise of a sound discretion, they have refused to entertain such actions, when the consul of the foreign power shows reasonable grounds for such declination, and his willingness to determine the matter in controversy. The Nina, W. & B. Ad. p. 180, n.

Having this practice in view it may well be inferred, from the language used in this treaty, that the object of the provision in question was to insure, so far as possible, without a repeal of the existing law, a declination of such actions by the courts in all cases where the consul has acted, and perhaps also where he expresses a willingness to act, as judge or arbitrator between the parties—thus giving to the foreign nation the guarantee of this nation for the continued exercise, by the courts, of that sound discretion which has ordinarily been exercised, and committing the nation to answer any demand which might arise from any omission by its courts to exercise such a discretion in this class of cases. Such an effect given to the treaty appears to my mind to be reasonable and sufficient to accomplish all that was intended. To hold that the treaty repeals pro tanto the act establishing the district courts, and ousts them of all jurisdiction in this class of cases, would permit consuls to refuse to act, and at the same time withhold from seamen—and American citizens, it may be—all right of resort to the courts of the land. It would give opportunity for great frauds, and open a wide door for the oppression of a class of men entitled by the maritime law, above all others, to the protection of maritime courts. Of the use which would be made of such a construction of the treaty, the present attempt, in violation of all law, to appropriate some $1,100 of the earnings of these men, is not a bad illustration.

Under the view of the treaty above indicated, I am thus brought to consider whether the evidence sustains the averment, that the consul-general of Prussia has already taken cognizance as a judge or arbitrator of the demand of these seamen, and makes out a case where, for that reason, this court should decline to entertain the action.

The words "judge and arbitrator," used in the treaty, must be taken in their ordinary significance. They imply investigation of facts upon evidence, the exercise of judgment as to the effect to be given thereto and a determination therefrom. And the use of these words indicates an intention not to deprive the seamen of a full and fair hearing of their cause and a decision thereof. If such a hearing had been given these men by the consul, the case would have been different. But here nothing has been done which can in any fair sense be called a hearing of the cause. The consul has not even gone through the form of sitting as judge or arbitrator in respect to the demands of these men. He examined no witnesses, he did not bring the parties before him, and he made no definite determination whatever. The men say that he refused to hear their story at all. The mate swears that he demanded to see the captain's charge against him and he was refused. The vice-consul denies this, and says that he did listen to the men, and because they admitted themselves deserters, there was nothing to do but to tell them they had forfeited their wages, which he did. But he cannot say what persons admitted having deserted, and on cross-examination he shows that the admission was simply an admission by some, he does not know whom, of having left the vessel without leave. He admits having urged the men to go and see the captain, and expressed confidence that if they spoke civil the master would pay them their wages, which appears to be inconsistent with the idea that he had passed on the demand and adjudged the men not entitled to any wages whatever.

The consul is not a court, and neither his record nor his testimony is conclusive on this court. He cannot shut his door in the face of parties and then, by declaring that he has adjudicated upon the demand, cut them off from a resort to the courts. Before he can call

upon the courts to decline to entertain the action, he must show that he has given or is willing to give, to the seamen that hearing which the treaty intends they should have. Here the vice-consul himself testifies, "No adjudication was made in writing—a memorandum only was made. It was noted on the protocol as follows: 'A requisition has been made and given to the captain to be given to the court.'" The making such an entry is not sitting as judge or arbitrator on the present demand. To hold, on such proof, that the vice-consul has acted as judge or as arbitrator in respect to this demand, would countenance a mode of procedure which I should be sorry to see obtain. My conclusion, therefore, is that there has been no such examination and adjudication of the matter in hand by the consul as the courts require and the treaty intends to secure.

In the absence then of any legal limitation of the jurisdiction of the court by the treaty, and in the absence of any proof of such action on the part of the consul as should call upon the court to decline to entertain the action, I deem it my duty to proceed to render a decree—and I do this the more willingly because the master of this vessel is half owner of her, and is here present, where also the seamen are—and because the ship is laid up here by reason of war, nor can it be told when, if ever, she will return to her home. It is a vain thing, therefore, to say to these sailors, who, although having some $1,100 of wages due, and unpaid, are left paupers, that they must go to Prussia, and there await the return of the ship in order to enforce their demand. If they cannot now maintain this action, they are practically deprived of all remedy, and thrown upon this community penniless. Against such a result my sense of justice revolts, and I am unwilling to believe that it is compelled by the law. I, therefore, without hesitation, pronounce in this case the decree which the maritime law, applied to the facts, requires, and condemn the vessel to pay the wages of the men.

In considering this case thus far, I have treated the action of the vice-consul as equivalent to that of the consul, and have so spoken of it. In point of fact, Dr. Roesing, the consul-general who signed the requisition, which is the only official act proved, aside from the memorandum on the protocol, never saw either the master or the men, the vice-consul acting for him in everything, except signing the requisition. I have also spoken of the consul as the consul of Prussia, and have considered him to be the official referred to in the treaty with Prussia.

The point has been taken that the proofs show Dr. Roesing to be consul-general of the North German Union; that there are now no consuls of Prussia, nor any similar treaty with the North German Union. But it appears, from the law, proved, that the consul of the North German Union is the consul of each power comprehended in the Union, which is a confederation rather than a Union. Besides, the executive department recognizes Dr. Roesing as the consul of Prussia, by virtue of his appointment as consul-general of the North German Union, and the courts are bound by the action of the executive in such a matter, the question being political, and not judicial.

There remains to allude to the phase of the case which is presented by the fact that the libel is filed by Newman, the mate, to recover his own wages, and also the wages of the other men, as the assignee of their demands. So far I have treated the case as if all the men were parties libellant.

The evidence shows the execution of a formal assignment to the mate of the claims of the other men, but it also appears that the assignment was without consideration, and that the men all expect to receive whatever may be recovered as their wages. This mode of procedure to save multiplicity of suits seems to have been adopted in ignorance of the rule of the admiralty, which enables several seamen to join in one action; and the mate, upon the trial, filed a consent that the other men be now joined as co-libellants, and receive in their own persons whatever might be awarded for their claims. Upon such a consent and such facts, I deem it competent to permit all the seamen to join in the action, upon petition to be made co-libellants, and, on showing the cancellation of their assignments to the mate, to take a decree in their own names for the wages found due them. Two of them are minors, it is true, but, in the admiralty, minors who are mariners are permitted to sue for their wages in their own names. All seamen are in a certain sense treated as minors in maritime courts.

In accordance with these views, let a decree be entered in favor of the mate, for his wages earned in the services of this vessel, and still unpaid, with a reference to ascertain the amount, and let similar decrees be made in favor of the seamen, upon the filing of their petition, and showing the cancellation of their assignments to the mate.

NOTE. This case was reversed by the circuit court [Case No. 4,426], on the ground that this court was prohibited, under the treaty with Prussia, from exercising jurisdiction. An application was made to the supreme court for a mandamus, to compel the circuit court to pass upon the merits, but was denied.

ELWOOD (SMITH v.). See Case No. 13,042.

Case No. 4,428.

In re ELY.

[5 Law Rep. 323.]

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

BANKRUPTCY—WHO ARE CREDITORS—ASSIGNOR OF BOND AND MORTGAGE.

[One to whom the bankrupt had executed a bond and mortgage, assigned the same to a third party as security for a debt, and afterwards assigned all her property, credits, etc.,

to a receiver appointed in a suit pending against her. *Held* that, notwithstanding these assignments, the assignor was not deprived of the title to the bond and mortgage in such sense that she ceased to be a creditor of the bankrupt, but, on the contrary, she was entitled, as such, to take part in the proceedings.]

On the coming in of the commissioner's report, exceptions were taken by the bankrupt [John Ely] to the competency of the opposing party to the objections on the ground that she was not a creditor. On the 9th March, 1835, the bankrupt executed a bond and mortgage to Mrs. Traphagen. She assigned the bond and mortgage to Bernard L. Simpson, May 1, 1836, to secure a debt owing him, and also the payment of rent, &c., on premises leased of him, and stipulated that the assignment should become absolute on her failing to pay. Simpson assigned his interest therein to Mr. Cram, May 14th. In 1841, Cram sued the bond in the name of Mrs. T., and recovered judgment; his claims against Mrs. T. would absorb the judgment within about $200. Messrs. Grahams prosecuted a creditor's bill against Mrs. T., and April 12, 1841, she assigned to a receiver in that suit, all her estate, effects, interests, &c., &c., but she is contesting the creditor's bill with the complainants, and the case yet remains undecided between them. The court held, that the assignment to Simpson, notwithstanding the absolute clause on her default to pay, was only by way of security, and did not render the bond his property, or that of his assignee. That the assignment of Mrs. T. under the creditor's bill, only placed her effects in the custody of the law, and did not transfer her title so entirely but that she possessed an interest dependent only upon the termination of the chancery suit in her favor. If in judgment of law, she no longer stood in the relation of creditor to the bankrupt, she was interested in obtaining the whole debt from him, as that would increase the funds passed to the receiver in extinguishment of the claim in chancery, and furthermore, because if that bill is displaced, equity would secure the restoration of the fund to her. The act [of 1841 (5 Stat. 440)] authorizes creditors who have proved their debts, and other persons in interest, to oppose the discharge, and in the one character or other she makes out a clear title to file the objections. Exceptions overruled.

E. H. Ely, for bankrupt.
Benedict & Belknap, for creditors.

Case No. 4,429.

In re ELY.

[1 N. Y. Leg. Obs. 343.]

District Court, S. D. New York. Dec. 31, 1842.

DISCHARGE AND CERTIFICATE—FILING INVENTORY.

1. Where a petition for an involuntary decree was filed on the 17 June, 1842, and it appeared that the bankrupt had, by two several assignments dated the 26 May and the 14 June preceding, conveyed his real and personal estate upon trust to be conveyed among his creditors pro rata:—*Held*, that these assignments were not preferences by the bankrupt, and a bar to his obtaining his certificate.

2. Where the bankrupt had committed an act of bankruptcy by concealing himself, to avoid being arrested:—*Held*, that such an act, not being of a fraudulent character, the objection to his obtaining his discharge on that ground was untenable.

3. In the case of involuntary bankruptcy, the bankrupt is not bound to file an inventory of his estate and effects, or a list of his creditors.

This case came before the court on objections to the allowance of the discharge and certificate to the bankrupt [Smith Ely]. The facts sufficiently appear in his honor's adjudication.

W. Skidmore, for bankrupt.
Carter, Edgerton, Schell, Mason, Marbury & Low, for creditors.

BETTS, District Judge. Previous to the petition by creditors, filed June 17, 1842, to obtain a decree of bankruptcy, the bankrupt assigned all his real and personal estate to be applied amongst his creditors pro rata, and without preference. The first deed of assignment was executed the 26th day of May, and the second the 14th day of June, 1842. These were no unlawful preferences by the bankrupt, which bar his discharge. Whether the assignees can hold and distribute the property under the trusts, or it passes by the decree of bankruptcy to the official assignee, is not a question now necessary to decide. The objection, that it amounts to a fraudulent preference is not sustained. The act of bankruptcy committed by the debtor, and the only one charged in the petition, was concealing himself to avoid being arrested, &c. This is not one of the particulars made by the act a cause for denying the bankrupt a discharge and certificate: no mere act of bankruptcy, not of fraudulent character, can have that effect under the statute. This objection is therefore untenable.

The bankrupt has not filed an inventory of his estate, or list of his creditors, &c., and that is alleged as another ground why he should not receive his discharge. The statute does not enjoin this proceeding in the case of compulsory bankruptcy. It is made necessary that the voluntary bankrupt should do it in order to obtain a decree of bankruptcy, but with that class of bankrupts it is not part of the procedure consequent upon such decree, and necessary to obtain a discharge. It might be meet and convenient that the practice should be so in regard to bankrupts, declared such in compulsory proceedings, but no provisions of the act, and no rule of the court enjoins it, and accordingly the party here has been guilty of no default in the omission. The objections are all overruled, and disallowed.

ELY, In re. See Case No. 5,306.

Case No. 4,429a.

ELY et al. v. ELLIOTT et al.

[14 Reporter, 513;[1] 28 Int. Rev. Rec. 370.]

Circuit Court, D. California. 1882.

INJUNCTIONS—AGAINST ACTION AT LAW—SERVICE OF SUBPOENA ON ATTORNEYS.

Where an action at law is brought in a federal court by a non-resident, and the defence rests upon equitable grounds, a suit in equity to establish the defence may be brought by the defendant in a federal court, in which suit an injunction may issue to restrain proceedings in the action at law until the determination of such suit or the further order of the court, and the subpoena issuing in such suit may be ordered to be served on the attorneys in the action at law.

Suit for relief against an action at law brought by defendants against these complainants for the possession of certain lands in Oakland, Cal. The plaintiffs in the action of ejectment (the defendants herein) are both non-residents. An order was served on the attorneys for such defendants herein to show cause why the subpoena issued in this suit should not be served on them in place of their clients. Upon its return, the attorneys said they were retained in the action at law only, and are not authorized to appear in any other proceeding. The complainants say they cannot make their defence at law available without the relief prayed in this suit.

Cope & Boyd and W. W. Crane, for complainants.

Flournoy & Mhoon, for defendants.

FIELD, Circuit Justice, in delivering the opinion of the court said: The case presented by the bill in equity is sufficient to justify the court in directing a stay of proceedings in the action at law until the plaintiffs therein appear to the suit and until it is heard and determined. It is brought in aid of the defence to that action, and if the complainants are entitled to a correction of the deed executed to their grantor in 1856, or to a conveyance from the defendants, as purchasers with notice of their equity, it would be inequitable to preclude them from showing the fact and obtaining the relief prayed. In the state courts the complainants here could, as defendants in the action at law, set up in their answer their equitable defence and obtain a decree upon it before the trial of the issue at law. Arguello v. Edinger, 10 Cal. 159; Weber v. Marshall, 19 Cal. 447. The plaintiffs in that action are allowed by reason of their citizenship in another state to institute their action in the circuit court of the United States, but they ought not to be permitted for that reason to deprive the defendants therein, the complainants here, of any just defence to which they are entitled under the laws of the state, although, by reason of the separate systems of law and equity in the federal courts, they are obliged to seek their relief through the more cumbersome and laborious proceeding of an independent suit. The complainants will be allowed to serve a subpoena upon the attorneys of the plaintiffs in the action at law, and an order will be entered granting an injunction staying proceedings in that action until the hearing and determination of this suit, or the further order of the court, upon the complainants filing a bond in the usual form in such cases for damages if it should be ultimately determined that they are not entitled to the relief prayed, or the suit should be dismissed—the bond to be approved in form and amount by the circuit judge. Although the attorneys of the plaintiffs in the action at law are not specially authorized, as stated by them, to appear for the plaintiffs in any other case, their original authority is deemed to extend to such proceedings as immediately affect the right to recover the property in controversy. The power of a court of equity to authorize substituted service in suits instituted in aid of the defence to an action at law, where the plaintiffs in such action are non-residents and absent from the state, is well established. Says Daniell, in his treatise on Chancery Pleading and Practice, which is a work of approved merit: "The jurisdiction is most frequently exerted where actions at law are brought by persons resident abroad to enforce demands, which, although they have, strictly speaking, a legal right to make, it is against the principles of equity to permit. In such cases the court will interfere by injunction served upon the attorney employed in this country to conduct the proceedings at law to restrain the further prosecuting of such proceedings until his employer has submitted himself to the jurisdiction. In order to accomplish this purpose it is permitted to the plaintiff in equity, in the first instance, to obtain an order, directing that service of the subpoena upon the attorney employed in the cause at law shall be deemed good service. (2d Am. Ed.) 518. See, also, Burke v. Vickars, 3 Brown, Ch. 23; 4 Ves. 359; 3 Madd. 550; Hitner v. Suckley [Case No. 6,543]; Read v. Consequa [Id. 11,606].

Order for injunction on bill, and for service of subpoena on attorneys, granted.

[1] [Reprinted from 14 Reporter, 513, by permission.]

Case No. 4,430.

ELY et al. v. HANKS.

[1 West. Law Month. 107.]

District Court, N. D. Ohio. Sept. Term, 1858.

FOLLOWING STATE PRACTICE — ATTACHMENT — "FORMS OF MESNE PROCESS AND MODES OF PROCEEDING" — AFFIDAVIT FOR ATTACHMENT — FRAUDULENT INTENT.

1. This court is authorized, by the acts of congress of May 19, 1828 [4 Stat. 278], and March 14, 1848 [9 Stat. 213], to adopt, as by its 25th rule it has adopted, the provisions of the Ohio Code of Civil Procedure, relative to proceedings by attachment, as well in respect to debts to become due, as to those already due, as the practice of this court.

2. The words "forms of mesne process, and modes of proceeding," used in the act of 1828,

embrace, not only process, but the whole course of the proceedings in an action.

3. If this were otherwise doubtful, it is settled by the construction given by Chief Justice Marshall, in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, to the like words in the "Process Act" of 1789 [1 Stat. 93].

4. This construction, of the authority of the court, is further confirmed by the words of the act of 1848, providing for attachments in the courts of the United States, which declare the intent and meaning of that act to be, "to place such attachments in the courts of the states and of the United States upon the same footing."

5. It is not necessary that the deponent, in an affidavit upon which an attachment is applied for, should swear, positively, to the fraudulent intent of the defendant; and it would be of no avail if he should. Facts, going to show the intent, must be stated; and facts reasonably authorizing a belief of the fraudulent intent are sufficient—especially, as the defendant may have the attachment vacated upon showing that it was, in fact, issued without just cause.

[At law. Assumpsit by Ely, Bowen & McConnell against Hanks.]

Spaulding & Parsons, for plaintiffs.

Mason & Estep, for defendant.

WILLSON, District Judge. This is a motion made by the defendant, to dismiss an attachment. The suit was commenced and the order of attachment allowed under the provisions of the 25th rule of this court. Both the summons and the writ of attachment issued on the 2d day of December, 1857. The cause of action, as endorsed upon the writ, is set forth to be three promissory notes of the defendant, dated September 23d, 1857, for $1,184.50 each, payable, respectively, in four, six and eight months from the date of their execution.

The grounds for dismissing the attachment, as detailed in the motion, are: 1. That the affidavit is insufficient, in this: that it nowhere avers positively that said Hanks had disposed of, or was about to dispose of, or to remove his property with the fraudulent intent to cheat, or hinder and delay his creditors; but states only the belief of the affiant, that such is the fact. 2. That the affidavit shows, that the real estate mentioned therein, was sold before the said debt of the defendant was contracted; and, 3. That said affidavit is defective, and does not state facts sufficient, upon which to allow an attachment before the maturity of a debt.

The main point discussed by counsel, in the argument, is not embraced in the written motion. It is a point, however, which involves a grave question, inasmuch as it goes directly to the power of this court to adopt, by rule of practice, the provisions of the statute law of Ohio, regulating proceedings in attachment. It is insisted that the circuit court of the United States has no power or authority to order the writ, in a case where no right of action has accrued at common law, upon a debt against the defendant. In the case at bar, the record shows an action brought on notes not due. The right of thus bringing suit is claimed by virtue of the 25th rule of this court, which rule declares "that attachments may issue for the same cause and like proceedings may be had thereon (so far as the same may be applicable) as is prescribed in chapter 3 of the Code of Civil Procedure of the state of Ohio," &c. This rule has been adopted in conformity to the acts of congress of May 19, 1828, and March 14, 1848. The first section of the law of 1828 provides "that the forms of mesne process, (except the style,) and the forms and modes of proceeding in suits in the courts of the United States, held in those states admitted into the Union since the 29th day of September, 1789, in those of common law, shall be the same in each of those states respectively, as are now used in the highest court of original and general jurisdiction of the same, subject however to such alterations and additions as the said courts of the United States respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same." By the act of 1848 it is provided—"that whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached, to satisfy any such judgment as may be recovered by the plaintiff in such process, and any contingency occurs, by which, according to the laws of a state, attachment would be dissolved upon like process pending in or returnable to the state courts, then such attachment or attachments made upon process issuing from or pending in any of the courts of the United States within such state, shall be dissolved;—the intent and meaning of this act being to place such attachments in the courts of the states and the United States upon the same footing."

That the circuit courts have power to prescribe, and regulate, by rules, the mode of proceeding and practice, in all common law actions which come before them, (unless in cases specially provided for by act of congress, or the rules of the supreme court) cannot be seriously questioned, or admit of any argument. This power, in new states, is conferred by the act of congress of 1828, and its exercise is indispensable to the proper administration of justice by those courts. Nor can the words "forms and modes of proceeding" used in the act of 1828 be misapprehended in their just interpretation and import. And if they were susceptible of doubtful meaning, any such uncertainty is removed by the construction given to the precise language of the act, by the supreme court of the United States in Wayman v. Southard, 10 Wheat. [23 U. S.] 1. Chief Justice Marshall, in construing the process act of 1789, in that case says: "To the forms of writs and executions, the law adds the

words, 'and modes of process.' These words must have been intended to comprehend something more than the 'forms of writs and executions.' We have not a right to consider them as mere tautology. They have a meaning and ought to be allowed an operation more extended than the preceding words. The term is applicable to every step taken in the cause. It indicates the progressive course of the business from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding." This construction is supported by the succeeding sentence, which is in these words: "And the forms and modes of proceedings, in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law." The preceding sentence had adopted the forms of writs and executions, and the modes of process then existing in the courts of the states, as a rule for the federal courts in suits at common law. And this sentence adopts the forms and modes of proceeding of civil law, in cases of equity and maritime jurisdiction.

"It has not been doubted," (says the chief justice,) "that this sentence was intended to regulate the whole course of proceeding in causes of equity and admiralty and maritime jurisdiction. It would be difficult to assign a reason for the solicitude of congress to regulate all the proceedings of the court, sitting as a court of equity or of admiralty, which would not equally require that its proceedings should be regulated when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought, together, to their view. If, then, the words making provision for each, fairly admit of an equally extensive interpretation, and of one which will effect the object that seems to have been in contemplation, and which was certainly desirable, they ought to receive that interpretation. 'The forms of writs and executions and modes of process in suits at common law,' and 'the forms and modes of proceeding in cases of equity, and of admiralty and maritime jurisdiction,' embrace the same subject, and both relate to the progress of the suit from its commencement to its close." We give this exposition of the intent and meaning of the language used in the process act of 1789, in order to arrive at a more satisfactory conclusion as to the scope and purposes of the terms employed in the act of 1828. Doubts had arisen in relation to the import of the words "modes of process," as used in the law of 1789, and those doubts had rendered it necessary for the supreme court to give them a judicial interpretation. Congress, in enacting the law of 1828, obviated this difficulty by the use of words of obvious and unequivocal meaning. The phrase "modes of process" was abandoned, and that of "the forms of mesne process and the forms and modes of proceeding" was substituted, thereby placing beyond controversy the whole question of the power of the court in adopting rules of practice in common law actions.

But it is urged, that the provisions of the Ohio code, authorizing the commencement of a suit, and the issuing of a writ of attachment, upon a debt not due, being proceedings in derogation of the common law, cannot be incorporated into the rules of practice of the federal courts. This position of counsel would be well taken, if such proceeding interfered with, or in any way affected, the law of contract. But such is not the effect. They simply go to the law of the remedy. No judgment can be obtained till the debt is due, and no application of the money, secured by the process of attachment, can be made in satisfaction of the debt until after the rendition of the judgment. The whole purpose and the only purpose of these remedial proceedings is to protect the creditor against the frauds of a dishonest debtor, which purpose is alike commendable in morals and salutary in practice.

It is true, that by the 25th rule, a practice is adopted, variant from the usages known to the common law. This, however, is not an infallible test, either of the propriety of the rule, or of the power and authority in the court to adopt it. The supreme court of the United States has repeatedly sanctioned the adoption by the federal courts, of rules of state practice which were unknown to the common law. Mills v. Bank of U. S., 11 Wheat. [24 U. S.] 431, was a case in which the circuit court adopted a rule of state practice, dispensing with proof of the execution of a note, unless the party annexed to his plea an affidavit that the note was not executed by him. In Fullerton v. Bank of U. S., 1 Pet. [26 U. S.] 604, it was decided that there was nothing in the constitution or laws of the United States, to prevent the circuit from adopting, as a rule of practice, the legislative act of the state of Ohio concerning actions against drawers and endorsers of commercial paper. These rules of the circuit court were certainly in derogation of the common law, but the practice inaugurated by them was sanctioned and approved by the highest judicial tribunal of the country. But the law of the 14th of March, 1848, leaves no latitude for the exercise of discretion by this court in the framing of rules regulating attachment proceedings. It expressly declares, that the true intent and meaning of congress was, "to place such attachments in the courts of the states and the United States upon the same footing." This law is not only free from doubt and uncertainty as to the intention of the legislature, but it has also its foundation in reason and justice. It furnishes a rule of practice, alike available to the citizens of the different states, whether they seek justice and prosecute their actions, in the federal or state courts of Ohio, and the 25th rule, which was adopted in con-

formity to this act of congress, provides a security for the foreign creditor, by operation of law, equal to that provided for the domestic creditor, whenever the debtor, by fraudulent practices, has placed the debt in jeopardy. Hence we declare, that not only was this rule demanded by the requirements of the act of 1848, but also, that it is entitled to the liberal and enlarged construction which we have given it. Besides, by adopting the provisions of the Ohio code in relation to attachments, the court did no more than simply carry out that injunction of the judiciary act of 1793 [1 Stat. 333], which requires the courts of the United States "to so regulate the practice thereof, as shall be fit and necessary for the advancement of justice, and especially, to that end, to prevent delays in proceedings."

This brings us to the consideration of the question raised, by the first, second, and third points made in the written motion; to wit, the insufficiency of the affidavit, on which the order for attachment was granted. In section 191 of the Ohio code (which is embraced in the 25th rule) it is provided that "the plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof have an attachment against the property of the defendant, and (among other causes) upon the following grounds: "When the defendant has assigned, removed or disposed of his property, or a part thereof, with the intent to defraud his creditors; or that he fraudulently contracted the debt or incurred the obligation for which suit is about to be, or has been brought." In section 192, it is further provided that "an order of attachment shall be made, when the plaintiff, his agent or attorney shall make an oath, in writing, showing the nature and amount of the plaintiff's claim, that it is just, when it will become due, and the existence of some one" of the grounds enumerated in section 191 (Swan's St. 647). The affidavit in this case was made by the plaintiff's attorney. It is alleged in the affidavit, that said Hanks, in the latter part of September, 1857, was a citizen of Ohio, engaged in the mercantile business at Toledo, at which time he went to the city of New York to purchase goods. That while in said city he called on the plaintiffs, to whom he represented that he was worth $20,000, and requested them to sell him goods on a credit of four, six or eight months. The plaintiff, supposing from his representations, that he was possessed of a valuable real estate in the city of Toledo, and that he was fairly worth $20,000, sold him goods to the amount of $3,553.50, for which they took his three notes now in suit. That the defendant has, for several years last past, been a vendor of merchandise at Toledo, where he was seized of a valuable real estate, consisting of city lots on which was built a store and various dwelling houses.—That during the year 1857 he conveyed away said real estate, for a pretended pecuniary consideration, a portion of which was deeded to his three minor children, and a valuable dwelling house and two lots to a "sort of speculator" in New York by the name of Hunt. That early in November, 1857, the defendant sold his whole stock of dry goods, (which he had in store at Toledo,) to J. H. Butler, Jr., for about the sum of $7000, for which he took the notes of said Butler, payable in six, twelve, eighteen and twenty-four months, without any security whatever. That many of these goods were those purchased of the plaintiffs by the defendant in the preceding month of September. That, at the same time, the said Hanks sold his whole stock of groceries which he had for sale in his brick store in Toledo, (and which was separate and distinct from the store containing the dry goods,) to William Anderson & Samuel Scott, and took their promissory notes for about $3000, payable in eight, twelve, sixteen and twenty-four months without security. The affiant further states, that as the attorney of the plaintiff, he made personal application to the said Hanks on the 28th of November, 1857, for security, and proposed to take as collateral security an amount of notes (for which said goods had been sold) equal in amount to the notes held by the plaintiffs against said defendant; but was refused.

Upon this statement of facts, detailed by him, the affiant says he verily believes said sales were made by said Hanks with the intent, on his part, to place said property beyond the reach of an execution at law. To the sufficiency of this affidavit it is objected, that the attorney making it, does not swear positively to the fact of the fraudulent intent of the defendant. A man's intention can only be ascertained by facts and circumstances evinced by his conduct. None but the "Great Omniscient" can penetrate, know and declare the secret purposes of the heart. And he who undertakes to swear absolutely to the intention of another, must have faint conceptions, of not only the moral sanctity of an oath, but also of its nature and obligations. The statute requires the order of attachment to be made when "the plaintiff, his agent or attorney shall make oath, in writing, showing the existence of the fraudulent intentions of the defendant." How is this to be "shown?" Certainly, not by an independent arbitrary oath, simply declaring those intentions. That of itself would prove nothing. We must resort to the same kind of evidence as the law requires in other cases of like character. We look to what the defendant has said,—what he has done, and the circumstances attending his conduct in the particular transactions. Those facts and circumstances, when known, may warrant or may not justify the belief of fraudulent intentions. And it is by these tests only, that the sufficiency of this affidavit is to be determined.

It has been the practice of this court to grant an order of attachment, whenever, by affidavit filed, a prima facie case is made out against the defendant. That particularity as

to form and detail in an affidavit has not been exacted, which is required in an indictment charging crime. Neither has that fulness of proof, usually necessary to convict of crime, been deemed necessary. And the reason for acting upon prima facie evidence, is, that the party, against whose property the attachment issues, has the speedy remedy of moving for its dissolution and showing by ex parte affidavits, that the allegations of fraud made against him are untrue. How then stands this case? The defendant is charged with disposing of his property to third persons, with the intent to defraud his creditors. The proof is, that a short time before this debt was contracted, he disposed of all his real estate, and a large portion of it to his minor children. That immediately after the debt to the plaintiffs was created, he sold two entire stocks of goods, (including the goods purchased of the plaintiffs) upon a credit, varying from eight months to two years, taking no security for the same. Now, the conduct of a party may be just as obnoxious to the provisions of the statute, when he obtains a credit upon what he once had and has parted with, as by fraudulently disposing of his property after the credit is obtained. The fraud in such a case does not necessarily consist in disposing of the property, but in the dishonest mode of obtaining the credit. He fraudulently contracts the debt. But when a merchant buys goods on deferred payments of four, six and eight months, and immediately sells them on a credit of eight, twelve, sixteen and twenty-four months, and without security, and thereby divests himself of all property liable to seizure on execution, the sale, and in fact the whole transaction carries with it the most palpable badges of fraud. And this is the most common as well as the most effectual mode of defrauding eastern merchants; and one, when unexplained, that makes at least a prima facie case of fraud, and which merits no favor in a court of justice. The defendant has produced no proof, either denying or in explanation of the case made by the affidavit of the plaintiffs' attorney.

The motion to dismiss the attachment is overruled.

Case No. 4,431.

ELY v. MONSON & B. MANUF'G CO.

[4 Fish. Pat. Cas. 64.][1]

Circuit Court, D. Massachusetts. Oct., 1860.

EQUITY PLEADING — FAILURE TO DENY ALLEGATIONS OF THE BILL—UNCONDITIONAL INJUNCTION — RIGHT TO TRIAL BY JURY — CONCLUSIVENESS OF FINDING — BOND TO SECURE COMPLAINANT'S RIGHT—EFFECT OF PRIOR SUITS—REISSUE—CONSTRUCTION—QUESTIONS FOR THE COURT — WITNESS—RECOLLECTION AFTER TWENTY-ONE YEARS.

1. Where the bill alleges that the defendant uses a certain machine which it describes, and the defendant does not disprove or deny, it is an admission that he uses such a machine.

2. Although the court might, by granting a conditional injunction, guarantee the security of the plaintiff, and although the granting of a peremptory injunction might work hardship upon the defendant, yet, these considerations will not prevent the court from granting an unconditional injunction if there be no substantial doubt of the right of the plaintiff.

3. The constitutional right of trial by jury applies only to actions at common law. In suits in equity an inquiry by the jury depends upon the discretion of the court.

4. The finding of a jury in an equity case is not conclusive; it only aids the court.

5. It is for the court to say whether the rights of the plaintiff are so clear that he ought to be protected by injunction, or whether they are not so clear but that he may be made secure by a sufficient bond.

6. It is not just that the patentee, whose rights have already been settled in suits, should still be under the necessity of meeting litigation in a great variety of cases, so that his patent should become of little or no value by reason of a multiplicity of actions.

7. If a reissued patent is of doubtful construction, we may refer to the original to aid the doubt.

8. When a question of law or of the construction of a patent is involved in the opinion of experts, that is not to be left to a jury.

9. If the court, looking at the machine and at the patent, says that upon any true construction of the patent the machine could not be an infringement, there is no question for experts or for the jury.

10. It would be extremely hazardous to rely upon the recollection of a witness who describes a machine from memory only, after the lapse of twenty-one years.

In equity. This was a motion [by Alfred B. Ely] for a preliminary injunction to restrain the defendants [the Monson & Brimfield Manufacturing Company] from infringing letters patent for "improvement in machines for cleaning wool from burrs and other foreign substances, and also for ginning cotton," granted to Milton D. Whipple, October 28, 1840, and more particularly referred to in the report of the case of Whipple v. Baldwin [Case No. 17,514].

B. R. Curtis, for complainant.

C. L. Woodbury, for defendants.

SPRAGUE, District Judge. This is an application for an injunction against the Monson and Brimfield Manufacturing Company, by Alfred B. Ely, assignee of Milton D. Whipple.

Affidavits have been filed; and the first question that is made, is as to the infringement of the patent of Mr. Whipple by the respondents.

The evidence of the infringement is the affidavit of the plaintiff himself to the bill; who does not speak from personal knowledge; and also, an affidavit filed with the bill, of a party who describes himself as fully competent as an expert, and who has examined the machines, and seen them used by the respondent, who swears that they are the same as used by the Middlesex Company;

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

which were involved in the trial of Whipple against that company; thus presenting facts that, prima facie, make out the case. There are other affidavits, not so direct and full, which tend also to the same result.

The respondent puts in one affidavit, made by defendant's agent, and that affidavit does not say what he uses; but says that they use a carding machine, with a burring cylinder in connection with it, which they bought of a manufacturer in New York or New Jersey, and that it is the same as is used by thousands; and he says essentially that it is not an infringement of Whipple's patent, and that it is a small part only of what he uses that is claimed by Whipple.

But the essential difficulty is that he does not state to the court what he does use; and that is a matter perfectly in his power. He can state what is the burring apparatus he uses, and can thus enable the court, by a comparison with the Whipple patent, to determine whether it is an infringement of that patent. He can see the affidavit of the plaintiff, filed with his bill, and he can say whether it is true; whether the machine he uses is the same as that in use by the Middlesex Company. He does not deny that it is the same. Now, where there is a charge of infringement, it is in the power of the party charged to bring into court the article that he uses, so that the court can see what he does use.

It is his duty to tell the court what he uses, and to describe it. But the defendant does not do this. He generally and vaguely says that it is not an infringement. That is a question the court has to decide on the facts, and he carefully avoids giving any facts in denial or avoidance of plaintiff's facts. And when plaintiff alleges that defendant uses a certain machine, which he describes, and defendant does not disprove or deny, it is an admission that he uses such a machine.

The court, therefore, thinks it is clearly made out, in this case, that there is an infringement—taking the Middlesex machine to be an infringement; and to that question the court may have occasion to advert hereafter. Besides, the affidavit of the expert—where the other party has such ample means to overcome it—must of itself be satisfactory; the question being what the defendant himself uses, and which he doubtless has the best means of showing to the court.

Then the question of the validity of this patent—the priority of invention—is brought into consideration. Well, there is, in the first place, the patent; and there is nothing in the affidavit of the respondent to meet it. There is a single affidavit on his part, but there is nothing in it to meet the patent. This affidavit does not set forth any prior invention, or describe any thing, or refer to any thing that anticipated Whipple's patent. And then, besides the patent itself, there are the various suits at law, as recited in the bill, and some others. There are recited in the bill several suits at law.

The first was brought in this district, and the defendant was defaulted, and plaintiff had judgment and damages.

In the next place, there is the suit which was tried and went to a jury in this district, in which a verdict was rendered for the plaintiff. Then there was the trial in Connecticut before Judge Ingersoll (and it is said trials are had there by the court under the provisions of law), and he decided against the defendant in that case, and judgment was entered. There are two judgments, therefore, upon both trials; one before a jury, and one before a court in Connecticut, and prior to the trial in this district a year ago. That case was referred by the parties to a referee, and a full and elaborate trial was had, as the counsel knows, and a decision was given, and an award in favor of the plaintiff, and besides that a judgment on the award. Besides that, there was the case or suit defended by Sargeant, who, being himself an expert, submitted, and took a license from Whipple. Since that there have been various cases and applications for preliminary injunctions, submitted to by the parties; and recently, within a few days, a permanent injunction has been granted upon a final hearing before his honor, Judge Clifford; and against all this there is nothing, unless it is merely the affidavit of the agent of the respondent who denies the originality of the patent. The case, therefore, as to the infringement, and the originality of this patent, is made out very fully.

The only real question I have had at any time in this case, is whether there should be a peremptory injunction, or whether the parties should be permitted to proceed by giving bonds. That is the only question on which I have ever had any doubts; and strong views may be presented on both sides. The respondent says that all the rights of the complainant may be protected by a bond, without a peremptory and absolute injunction. In the first place, that pending the suit, what he may have the right to recover by way of damages, can be fully secured by bond; and that the means of ascertaining the amount of damages may be very easily secured by certain conditions imposed by the court; that it would be in the power of the court in granting a conditional injunction to impose the means of guaranteeing the security of the plaintiff. I do not see any difficulty in the court imposing such conditions as would give the plaintiff ample security.

In the next place, the defendant says he purchased the instrument he is using in the market before he was aware that the plaintiff set up any exclusive right; that he is going on with its use, and that it would be a great injury to him to desist from its use at the present time; that if he did so, he must shut up his establishment, turn his men out of employment, and that the expense of substi-

tuting another machine would be more than the value of the whole claim of the plaintiff; and he then presents a strong appeal to the court to permit him to go on, and use this machine. These considerations are very strong, and would be conclusive if the defendant could introduce one other element, and that is, any substantial doubt of the right of plaintiff.

If I should see in the case as presented, such a question as the court should say rendered it necessary that there should be further litigation, or rendered it expedient there should be further litigation, in order definitely to settle the rights of the parties, then I would not say that I should, during that litigation, disturb the defendant, provided he gave satisfactory security. But I think that is one of the elements that should be brought in; that if there is something to be tried, and counsel has urged it, then, while that something is in the process of being tried—pending the litigation—parties ought to be left in possession of what they are using.

Then we are brought to consider whether there is such a doubt that the court should say they should countenance further litigation, and withhold an injunction on the ground that it is expedient, wise, and proper that further litigation should be had. Is there any substantial defense?

In the first place, it is insisted that the defendant ought to have a trial by jury, and that is held as a constitutional right. The constitutional right of trial by jury in actions at common law is not denied; but this is not an action at common law: this is a suit in equity, and depends upon the discretion of the court.

If the court thinks there are matters of fact that would render it proper to send the case to a jury, he may send it to a jury; but even then, with the decision of a jury, it would not settle it finally. The finding of a jury is not conclusive; it only aids the court. It has not been the practice in this district to send questions to a jury in patent cases, or in any cases. The practice in England exists to a considerable extent; but it should be remembered that there are two classes of courts—the courts of common law and the courts of equity, both very distinct from each other; and when the chancellor sends a case for trial by a jury, he sends it to another court, for trial before another bench, because he has no jury in his court; and one reason is, that it is supposed that the judges in the courts of common law determine questions of law in patent cases, and the chancellor can have the aid of the opinions of the judges in the other courts, on questions of law, as well as the finding of the jury on the facts. But that is not our practice.

Now, what is the question of fact to be sent to a jury? I have not been informed in this case of one single question of fact which the defendant wishes to put to a jury. He wants to put the general question of infringement, and the general question of the validity of the patent; but does he mean to controvert that this defendant uses the instrument which it is said he uses? That is not stated even in argument; only he means to say that it would not be an infringement. But is that enlightening the court on any question of fact different from what has been repeatedly tried? There is not in the affidavit any statement of any question of fact different from those that have been repeatedly tried, either in regard to the question of infringement, or that of priority of invention, and repeatedly decided.

Now, in regard to the question of the validity of this patent, how many trials is the patentee to encounter before it is to be considered satisfactory to a court that his right is established? Here the trials have been going on for years up to the present time, even up to the present week; and every decision has been in favor of this patent, and establishing the rights of the patentee against the adverse use of this machine by other persons. I can not say that I see any substantial fact in this case that should be submitted to a jury; and therefore, if this case is to go on, there is nothing suggested which would induce me to send it to a jury. Why then should I act upon the supposition that it is to go to a jury? Now is the time for the defendant to present to the court sufficient considerations to induce the court to send the case to a jury. The defendant might have done this by affidavit, but this has not been done; and, upon this present showing, I might say I should not send the case to a jury on any such statements. It would be the weakest case that could possibly be imagined.

I have already referred to the trial that was had a year ago. Of course, the knowledge I acquired on that trial, which occupied some nine or ten days, enables me to speak with more certainty, in relation to what took place at that trial, than if I had not myself tried the case. Now the respondent has this advantage—he has the advantage of my opinion, both as to the law and the facts—the case being fully reported at the time. If, therefore, there was any substantial question of doubt—if any views then expressed were erroneous—the defendant could have pointed them out. All the matters both of law and of fact have been published; and the defendant has not set forth a single statement on which to ground an application, either for a trial by jury, or for delay in the present proceedings. It is said they want to go to the supreme court on questions of law. What questions of law? Not a single question has been suggested. The first case that was tried here and the charge of the court to the jury is in print, as also the case which was tried before the referee. They allege that they want to carry the case to the supreme court on a question of law, but they do not show me what is the question. But

how are they going to get any question of law before the supreme court? The damage does not amount to two thousand dollars, and the judge before whom it might be tried, must certify that there are questions of law to carry up in order to send the case to the supreme court—and, moreover, he must certify that these questions of law are grave and important. We do not send trifling questions to the supreme court. They must be grave and important questions. Now, so far from being able to say that there is a grave or important question, I can not say that there is any question at all. I can not see any question of law to carry up. I am really ignorant what question of law there is, that the learned counsel wishes to send to the supreme court. I have not heard a single doubt, as to the construction of the patent, or any question of law that the supreme court is to be called upon to decide. I can not, therefore, see why the case should be carried to the supreme court. Why, therefore, should the court say that it is expedient to countenance further litigation, in the face of all these facts to the contrary? I can not in any aspect in which the case has been presented here, see any sufficient reason to induce me to think that further litigation is necessary, in order to settle the rights of these parties satisfactorily.

Now, injunctions are granted both in England and in the United States when there are grave doubts, and are granted on condition that suits at law shall be brought to try some fact or title. We say in such case that the plaintiff has such a prima facie right that we will secure him in the present enjoyment of his right. But, in the meantime, there are such grave doubts, as will induce us to order him to bring the case before a court of law to decide those doubts. This being entirely a matter of discretion, it is for the court to say whether the rights of the plaintiff are so clear that he ought to be protected by injunction, or whether they are not so clear but that he may be made secure by sufficient guaranties by bond and security.

Now, if this were the only case of alleged infringement of this patent, there would be strong grounds for an application for an injunction. But it appears both in the hearing and indeed as set forth in the affidavit of the respondent, that there are a great many other cases. If the court is to allow one case to go on, for the same reasons, he may allow others to go on; and though the amount claimed in each case is not large; as to this complainant, who has already had his rights settled by various suits and courts of law, it would not seem just that he should be still under the necessity of meeting litigation in a great variety of cases, and of carrying on a great many suits at great expense, so that his patent should become of little or no value by reason of a multiplicity of actions.

I think, therefore, it is the duty of the court to protect the rights of the plaintiff by such means as they have, and by means of injunctions.

Subsequently, certain questions of law having been presented and argued, the court delivered a further opinion, as follows:

SPRAGUE, District Judge. A hearing has already been once had, and an opinion pronounced on this motion for a preliminary injunction. After that opinion was pronounced the counsel for the respondent desired time to present certain questions of law, and certain other evidence as to matters of fact. By consent of the counsel for the complainant time was allowed, and another hearing was had on the questions thus presented. All that remains is to consider the new matter that may have been presented on this second hearing.

I do not propose to repeat any thing that was said by me in giving the opinion on a former occasion. The new matters which are presented consist of new arguments presented, and new opinions of experts, and one affidavit, that of Mr. Baldwin, which I suppose was intended to present some new fact to the court, which I shall consider hereafter.

The points of law presented are objections to the construction of this patent, in the opinion which I gave as referee, and which has been printed. There are several exceptions which are presented to the construction of the patent. The first is the construction given as to the guard that is named in the plaintiff's patent; and it is said that it is erroneous, because the court allowed other guards to be named, as coming within the plaintiff's patent, than that specifically described by the plaintiff. The guard which he describes is a stationary guard. The guard used by the defendant in the Middlesex case is a rotary guard; and it is insisted that the construction given, declaring that the plaintiff's patent was such that a rotary guard might be an infringement of it, was an erroneous construction. In order to see whether or not it was an erroneous construction, we must look at the plaintiff's claim. It is the second claim in the patent that is in controversy on which the bill is founded. That claim is for forming and arranging certain teeth in a cylinder. Further, it is the forming and arranging them in a certain manner which is the limitation contained in the patent. It is not every arrangement, but a certain arrangement, which is claimed as new. What is that form and arrangement? They are to be so formed that the convex backs of the teeth shall be substantially concentric with the axis of the cylinder. That is one of them. Another requirement is, that they shall be so arranged as to present a surface on which the burr, or other material, not wool, is to be fastened so as to present it to the action

of the guard. These are the two requirements in the formation and arrangement of the teeth. Their backs are to be concentric with the axis of the cylinder, and they are to form a surface whereby a burr may be floated, and thus present a surface on which the guard is to act in removing it. It does not embrace the claim of a guard. What he claims is the forming and arrangement of teeth in a certain manner, and in describing it he says, they are to form a surface so that the guard will act upon them. He does not confine himself to a stationary guard. Any guard that will act thus on the teeth is substantially the same as the guard he names. Indeed, his invention, he says, consists in the forming and arranging of the teeth in the manner described; and if that invention can be used without a guard, it is using his invention. The fact that another patentee may dispense with part of his machine and use his invention, would not give him a right to use that invention.

The next ground of exception to the construction is, that in that opinion it is stated that the teeth are protected by the heels of the teeth that precede them, and it is insisted that they are not so protected; that is to say, that by the true construction of Whipple's patent the teeth would not be so protected. Well, in the first place, it is apparent that if the backs of the teeth are concentric, and the whole exterior surfaces of the teeth are concentric, then they must be protected, because, being at every point equidistant from the center, constituting a perfect circle in the rotation, they would be protected.

But it is insisted that there is another error in the opinion which says that these teeth are "substantially concentric," whereas it is insisted that they are not concentric; that is to say, that they are to be so constructed that they are not designed to be concentric, and a model was exhibited to prove this point. But whether somebody may have made an imperfect model is not the question.

In the first place the claim says, as an essential part of itself, that these teeth shall be substantially concentric, and how can it be an error of construction when that is the language of the patentee? Again, in the specification, it is said these teeth are to be concentric, and in the specification itself, it is stated to be an essential part of his invention that protection should be given to the points of the teeth by the heels of the preceding teeth, and how can it be said that it is an error of construction to say that that is a part of the plaintiff's patent? But it is said that in the consideration of the plaintiff's patent in the formation of the cylinder, it is apparent that the teeth will not be concentric, and that the back of one comb will not protect the points of the succeeding comb.

There are two modes named of forming a cylinder and teeth, in this respect: one by putting slips of paper under the edge that will raise the teeth; the other, by slightly filing off the backs of the preceding teeth. It is insisted that one of these modes will elevate them, so that they will not be substantially concentric. Suppose it was so, the other mode remains of making them, and the complainant has claimed both. The other mode by which you file off the back of the teeth, leaves them, it is conceded, or must be conceded, perfectly concentric. Well, if they are perfectly concentric, they are "substantially" concentric. It is impossible to make them more substantially concentric than mathematically concentric. How can it be said to be an error of construction, to say that the teeth are to be concentric when such is the statement of the patent itself; and one of the modes in which he recommends the making of the machine, does make them mathematically and substantially concentric, even supposing the other mode does not. But I do not think that there is any force in the argument that the other mode does not. The words "substantially concentric," were used to allow the other mode, by which the teeth might be slightly elevated. But there is this limitation to that elevation. That is, they are still to be so that they shall be substantially concentric, and be protected by the preceding teeth. That is the limitation; and they are not to elevate them so much as to violate that condition.

I can not think that there is any substantial ground to suppose that there is an error in construction in this respect.

Remarks were made in relation to the patent, as issued in 1840, and they were made with a view to the construction of the reissue in 1849. But the reissue was to correct mistakes made in the issue of 1840, and if there is any real doubt in the construction of the language of the issue of 1849, that construction may be aided by reference to the issue of 1840. If it is of doubtful construction we may refer to the original to aid the doubt as to the reissue; but, taking the language of the reissue, I do not think it can be said there is a doubt that can be aided by the first issue in 1840.

We then come to what I suppose is more relied upon, and that is, the Shly patent, in respect to which there are two or three affidavits: One by Baldwin, one by Tainter, and one by Goulding. As to Tainter and Goulding, they are mere opinions of experts, going to show that Shly's patent describes Whipple's invention, with such improvements as he has described and claimed in his patent. It will be necessary, of course, to look at these affidavits as to Shly's patent and Whipple's patent, to see what effect should be given to these affidavits, and these opinions of these experts. It will not follow, that because experts have expressed an opinion that Whipple's patent is like a

preceding patent, the court will consider that as evidence to go to a jury. The court must look at it itself. It might be urged, I know, that this is evidence, and that therefore it is matter to be weighed by a jury. That is not always true of opinions of experts. We must see how much the opinions of experts embody questions of law as well as of fact, or whether they embrace in them any question of law. When a question of law is involved in the opinion of experts, that is not to be left to a jury; and when the fact stated involves in effect the construction of a patent, that fact is founded on a question of law, and is of no force except as it embraces a question of law. Consequently the opinion of the experts contains nothing to go to a jury, and in fact nothing on which they can sustain themselves.

Now I apprehend these affidavits proceed on an entirely erroneous construction of the plaintiff's patent. There is no other way of accounting for them. They have undoubtedly adopted a construction of the plaintiff's patent entirely different from what the court construes it, and adopting that construction, then with their knowledge of facts, they incorporate an opinion with that erroneous construction, and come to a certain conclusion.

It seems to me impossible that they could form any such conclusion on the construction which I gave to the plaintiff's patent. They say that in Shly's patent they find a surface for floating burrs, so that the guard can act upon it. I dare say they found something they consider a surface, but is it the plaintiff's surface? That is the question; and it depends on the construction which they give to Whipple's patent. Now, how is Whipple's surface made? It is that the backs of the teeth are to be concentric, so as to present a surface against which a guard can act. What are the teeth of Shly's patent? Here is a model presented by the respondent—not authenticated and proved a true one by any means, but presented by him as a model. Now the patent gives no other description of the teeth, but that they are saw teeth. That is all. Are we to infer that the backs of circular saws are concentric with the axis on which the saw revolves? Take a line of the back of one of these teeth; will it be concentric and form a circle concentric with the axis on which the saw revolves? I do not think that anybody could gather that from the name of circular saw teeth. Then how do these saws present a surface, on which the burrs are to be sustained, subject to the action of the guard? Why, by the very terms of the patent, the saws are to be an inch apart, just as in Whitney's saw gin, regarding which Shly's patent professed only to be an improvement on a machine then in use. The space left between the saws is for the purpose of allowing burrs to fall down, and so as not to be on the teeth of the saws. They do not constitute a plain surface, therefore. There may be a plain surface between the saws; but that is not on a level with the points of the teeth, nor does it make a continuous surface with the backs of the teeth. There need be nothing further said in that respect. Shly's patent does not seem to have changed Whitney's patent. It is the same as to saws and gratings. He has named certain improvements which he has made, but not one of them touches this part or the machine. The truth is, that what they call this plain surface, so far as it has any operation, is a guard.

It is a guard by which the burr is prevented from going along with the teeth of the saw. You may call it a guard on each side of the saw for preventing the burr from passing with the wool, and thus supporting it; but, so far from that surface being concentric with the axis, it is partly concave and partly convex. So far from constituting any part of the cylinder, or moving with the cylinder, it is stationary. It is, therefore, quite certain that both of these affidavits which have been offered have mistaken the construction of Whipple's patent, and have misapplied their notions to Shly's patent. They have used certain language, not one word of which is found in Shly's patent, and have appealed to us as if that meant the same thing as in Whipple's when he uses these terms. With these mistakes, I do not think I can take their opinions as of value in relation to it, because their opinions are the result of an error.

There is a strong opinion, in point, in the house of lords, by the late Baron Park, now Lord Wensleydale, which I think is quite applicable to this case. The question there was, whether there was evidence to be left to a jury of an infringement. I think the court of queen's bench left it to a jury. It was carried to the court of exchequer. Thence it was carried to the house of lords, and they affirmed the opinion of the court of exchequer. There were two most eminent experts who were introduced on the trial, and swore it was an infringement, and yet the court of exchequer and the house of lords decided there was no evidence to be left to a jury. Why? There is no very full explanation; but Lord Wensleydale says: "The opinion of experts is often given to a jury as evidence of infringement, but it ought to be rejected whenever it involves a question of law; and that an expert is never to testify to a question of law. And the court then, looking at the machine themselves, and looking at the patent, says, that upon any true construction of the patent that machine could not be an infringement, no matter how many experts may testify, and their evidence is not to go to a jury." Now I do not think in this case, which is very differently stated from what it would be if it were new before me, I should send it to a jury. The only question is, whether

I see such difficulty in matters of fact that I will put it to a jury. I do not see any such difficulty. At all events there is not such matter that, sitting in a court of equity, I should send the case to a jury to determine. There was Mr. Baldwin's evidence which I suppose was intended to introduce a machine as actually existing, and going further than Shly's patent. Here was a machine actually in use which was like his. Mr. Baldwin describes a machine which was in use in 1839, and speaks of a roller which acted as a guard. Now if Mr. Baldwin had described that machine much more fully than he has —if he had described it so that his description would have accurately described Whipple's invention—I think there would be great difficulty in allowing that evidence to prevail against the patent—I mean to say that where the recollection of a witness, who, after the lapse of twenty-one years, is called to state that he has seen or used a certain machine, and then undertakes to describe it from memory without stating that he has had any thing to refresh his memory during that time, producing no model or drawing—I think it would be extremely hazardous upon such a recollection, to undertake to say that that machine was like the plaintiff's. There are so many errors to which a man honestly is liable that I think it would be extremely hazardous. Why, we see every day, when a machine is presented to experts, one set of witnesses will say that it is like the inventor's patent, and the other set will testify directly to the contrary. The one or other of them must be wrong. It is every day's experience that this is the case. Take the case of Howe's sewing machine. The Walter Hunt machine is sworn to, and if the recollection of the witnesses had been taken years before as to Hunt's invention, it would be certainly an invention exactly like Howe's. Experts were called—were rigidly examined, and it was very difficult to show that this machine was not like Howe's, except in this mode: it was averred that that machine would not make a continuous seam, and it was contended that Howe's would. This was the difference, and it shows that they were not the same. But there were oaths of witnesses that they were the same. But the stubborn fact that Hunt's machine would not work and that Howe's would, made the oaths of the witnesses as inoperative as the machine.

I recollect another case in reference to a saw-set. A witness testified to having used a saw-set, exactly like the one patented, before the date of the patent, and that he still had it at his house. He was told to produce it, and he brought it into court, and it had the maker's name on it who made the plaintiff's machine, and under the plaintiff's patent.

I name these cases to show how extremely hazardous it is, after many years, for a witness to state that any given machine is exactly like another machine. But in this case, there is a greater difficulty. Mr. Baldwin was produced to show that there was another machine, different from Shly's patent; otherwise, his evidence is worth nothing. He was a witness on the stand, in the case before the referee, and there he says his machine was the same as Shly's patent, and he is now brought to swear that it was something materially different. And it is a little singular, that, in the affidavit, it is first written that it is substantially like Shly's patent. The word "substantially" is erased, and the word "considerably" is used. I infer that the party defendants were not pleased with the word "substantially," and changed it for the word "considerably." I hardly think that Mr. Baldwin meant to say in this affidavit, that the machine he used was not substantially the same as Shly's patent; and that although he has given a description of it, I think he himself would not say he considered it substantially different. In his former testimony, he said it was announced by Shly, as having been made according to his patent, and that he had compared it, and it was so.

I do not think, therefore, that either as to matters of fact or law, there has been any thing presented on this re-hearing which can affect the opinion I formerly expressed, and it seems to me that I must adhere to the result I formerly came to, that an injunction must be granted.

[NOTE. For another case involving this patent, see note to Whipple v. Baldwin Manuf'g Co., Case No. 17,514.]

ELY (PINNES v.). See Case No. 11,169.

ELY (SMITH v.). See Cases Nos. 13,043 and 13,044.

Case No. 4,432.

EMACK v. CRABB.

[5 Cranch, C. C. 611.][1]

Circuit Court, District of Columbia. Nov. Term, 1839.

REPLEVIN—RETURN OF GOODS NOT PREVIOUSLY IN POSSESSION OF PLAINTIFF.

If the plaintiff in replevin never had previous possession of the goods replevied, the court will, of course, order them to be returned to the defendant, on motion, upon the usual security.

Replevin to get possession of goods conveyed by the defendant [Horatio N. Crabb] to the plaintiff [William Emack] by a deed of trust to sell them, in case a certain note should not be paid at maturity. The defendant now moved for a return of the goods.

Mr. May, for defendant. The plaintiff never had possession, and therefore the court will, of course, order the return; for it is only where the possession having been origi-

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

nally in the plaintiff, has been forcibly or fraudulently obtained by the defendant, that the court is authorized, by the Maryland act of 1785, c. 80, to refuse to order the return.

Mr. Hellen, contra. When the note was due and unpaid the plaintiff had a right to the possession; and the possession of the defendant then became fraudulent.

THE COURT (THRUSTON, Circuit Judge, absent) ordered the property to be returned, upon the usual security.

Case No. 4,433.

EMANUEL v. BALL.

[2 Cranch, C. C. 101.] [1]

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

ESCAPE OF SLAVE—FREEDOM—ACT MD. 1796.

If a slave escape from his master in Virginia, and be found in Washington, and there sold by his master, the slave does not thereby acquire a right to freedom.

This was a petition for freedom [by the negro Emanuel against Henry W. Ball]. The petitioner was permitted to come from Virginia, to the city of Washington to see his wife, and to return by a certain day; but he stayed some months longer, and was taken up in Washington, by an agent of his owner, but escaped and eloped, and the agent sold him to the defendant, while he was so eloped and while he was in the city of Washington. The petitioner's counsel prayed the court to instruct the jury that upon that state of facts the petitioner was entitled to his freedom.

THE COURT refused, and instructed the jury that he was not entitled to his freedom under the Maryland law of 1796, c. 67.

E. M. BICKNELL, The (BLAGG v.). See Case No. 1,476.

Case No. 4,434.

The EMBLEM.

[2 Ware (Dav. 61) 68.] [2]

District Court, D. Maine. July 27, 1840.

SALVAGE—REWARD FOR SAVING LIVES AND PROPERTY—CLAIM IN PERSONAM—DELIVERY OF SAVED PROPERTY TO OWNERS — REWARD FOR SAVING BILLS OF EXCHANGE.

1. In cases of salvage, the court has no authority to allow a reward for saving life. This is a common duty of humanity. But when the saving of life is connected with the saving of property, the court may consider it, in fixing the amount of salvage.

[Cited in The Mulhouse, Case No. 9,910; The W. D. B., Id. 17,306; The Cheeseman v. Two Ferry Boats, Id. 2,633; Browning v. Baker, Id. 2,041; Maltby v. Steam Derrick Boat, Id. 9,000.]

2. The rights acquired by the salvors are only in rem, to be paid by the property. They have no claim in personam against the owners, if they choose to abandon the goods.

[Cited in The Independence, Case No. 7,014.]

3. But if the property is delivered by the salvors to the owners, before a compensation for saving them is made, the salvors may maintain a libel in personam for the salvage.

[Cited in Seaman v. Erie Ry. Co., Case No. 12,582; The Mayflower v. The Sabine, 101 U. S. 390.]

4. The court can allow no salvage for saving, from a wreck, bills of exchange or other papers, the evidence of a debt, or of title to property.

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

This was a libel for salvage. It appeared from the evidence, that the schooner Emblem, of New Bedford, sailed from Apalachicola, on the 18th of March for Havana, with a crew of six hands, and with five passengers. On her passage she met with unfavorable weather, but no serious accident befell her until the morning of the 25th, when she was struck by a squall, about 6 o'clock, and upset. She lay upon her beams for about eight hours, when her masts gave way and she righted. For some time before the disaster, there had been a strong wind. The waves ran high and continually broke over her, and the crew and passengers could save themselves, from being washed over, only by lashing themselves to the wreck. In this situation she lay from six o'clock in the morning of the 25th, to the same hour in the morning of the 29th. During the whole time, the weather was boisterous, and the waves constantly broke over the wreck and the heads of the persons on board, so that they were constantly kept wet, lashed to the wreck to save themselves from being carried away by the waves, and without food or drink. They were within sight of land, not from the wreck, but from the mast-head of a ship, and in a place where vessels were continually passing and repassing. The only one of the persons saved, who was examined, Mrs. Judah, stated that she saw five vessels pass them on the first day, and seven on the second; and was informed by one of the crew, that twenty-three, in all, were in sight, at different times, from the wreck, while they lay in this helpless and distressing situation. Some of them came so near, that the persons on board could be plainly and distinctly seen from the wreck. But none came to their relief. In the mean time, one after another of this sad company, as their strength became exhausted and the powers of nature failed, were loosened from their holdings and washed into the deep. The master of the vessel expired in the evening after the disaster, and five others, before they were relieved. Mrs. Judah saw her husband and her two children successively swept from the deck, by the violence of the

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

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

waves, and buried in the ocean. At last, after being thus tossed upon the sea, for four full days, about six o'clock of the morning of the 29th, they saw a vessel bearing down for them. It proved to be the Charles Miller, of this port, George M. Hatch, master, which had left Havana the day before, on her return to Portland. He immediately brought his vessel near to the wreck, and the waves still continuing to run high, he sent his boat to their relief, and took from the wreck those whom the waves had spared, but who were now so much enfeebled, by their long sufferings, as to be entirely helpless. They were lifted into the boat, and lifted out again, by the crew of the salvor ship, and one was so much reduced that he died of exhaustion in the course of the day. Having taken off the survivors, he proceeded on his way; but, about two hours after, the wind subsiding, and having learnt that there was some property of value on board the wreck, he returned for the purpose of attempting to save it. After about four or five hours' labor, the crew of the Charles Miller succeeded in fishing out of the cabin two trunks, one containing theatrical dresses, of little value, and the other, two bags containing about 500 dollars of specie, and bills of exchange and drafts amounting to about 8000 dollars. On his arrival at Portland he libelled them for salvage.

Mr. Haines, for libellant.
Longfellow & Fessenden, for claimants.

WARE, District Judge. This is a case of salvage of no extraordinary merit, if the time employed, and the labor and risk, incurred in the service be alone taken into consideration. It is not pretended that, in saving the property, the salvors were occupied more than four or five hours, nor that the service was attended with any peculiar hazard. But there are other circumstances in the case, which will incline the court to look upon it with a more favorable eye. It was connected with the saving of several lives which, but for the timely aid of these salvors must inevitably have been sacrificed. Now a court of admiralty has no authority to allow a reward merely for the saving of life. That, as is observed by Lord Stowell, "must be left to the bounty of individuals. But when it is connected with the preservation of property, then the court can take notice of it, and it is always willing to join that to the animus displayed in the first instance." The Aid, 1 Hagg. Adm. 83. See, also, The Two Catherines [Case No. 14,288]. The rate of salvage rests entirely on the discretion of the court, but it is a judicial discretion, governed by fixed and certain principles. The first principle is, that it shall be liberal, and not confined to a mere quantum meruit for the service actually performed, but such as will operate as an inducement to men of daring and adventurous courage, to engage in these perilous enterprises. It would be surprising, when courts are thus liberal in remunerating hardy enterprise, displayed in the saving of property, if they were entirely deaf to its merits, where the same dangers are braved in saving life. But this is a charge which cannot justly be imputed to courts of admiralty. It has been stated by high authority, that stopping, for the purpose of saving the lives of shipwrecked persons, is a meritorious duty, and is not such a deviation as will discharge underwriters. The Boston [Case No. 1,673]. Now, though the court is not authorized to grant a reward directly, for the discharge of this common duty of humanity, yet when it has incidentally led to the saving of property, it will not exclude it wholly from its consideration, in determining the amount of salvage upon the property.

The motive, for the deviation in this case, seems to have been the saving of life. When the survivors upon the wreck were safely lodged in the salvor's vessel, she continued on her course, and it was not until after the wind lulled, and the danger of entering upon the wreck was diminished, that Capt. Hatch returned to ascertain what property could be saved; so that the acquiring any reward for themselves appears to have been, in the minds of the salvors, an after or secondary consideration. I am clearly of the opinion, that in this case, looking at the risk, time, and labor of the service only, the remuneration ought to be liberal, and that the humanity of the salvors, although it cannot be the object of a direct reward, in the way of salvage, is not to be forgotten in determining the rate of salvage upon the property. Not that the court has the authority to take one man's property and appropriate it, as a reward for saving another man's life; but that the general principles of humanity and of enlarged policy, applicable to these cases, where all, who are interested in adventures upon the high seas, are liable to become in turn the salvors and the saved, require that the circumstance of the preservation of life ought not to be wholly kept out of sight, in measuring the reward. Sure I am, that no one, who has once been exposed to the horrors which these persons suffered, will ever object to the principle. But, in the present case, there are some circumstances which, I am free to say, have struck my mind with considerable surprise. They are, that this vessel should have lain, for four days, in one of the most frequented parts of the American seas, with vessels continually passing her, some of them almost within hailing distance, and when they were in full view of this unhappy company, who were lying thus lashed and dying upon the wreck, and no one came to their relief until more than half of their number were released from their sufferings, by death, and consigned to a watery grave. It is a fact, which would seem to be incredible, if

it did not rest upon indubitable and unsuspected proof. If this fact is to be taken as a just measure of the humanity of the persons who frequent those seas, I know not but it may be the part, not only of humanity, but of worldly wisdom, to let them understand that sometimes even in godliness there is gain, and to tempt them by the allurements of pecuniary profit, if they can be led by no other, to acts of humanity and mercy.

The counsel for the claimants have fairly allowed full credit to the humanity of Capt. Hatch and his crew, standing as it does in such striking contrast with that of others in the neighborhood of those seas. They have not contended against a reasonable allowance of salvage, upon the particular circumstances of the case. The principal question, which has been discussed, is, whether any salvage can, upon the principles of law, be allowed upon the bills of exchange and drafts, which were saved in the same trunk which contained the specie. The argument for the claimant is, that a bill of exchange is not property, in any proper sense of the word, but merely the evidence of a debt, and that if lost, the debt is not cancelled, but the creditor can recover it, upon the original consideration for which the bill was given; and therefore, if saved from a shipwrecked vessel, it is no more subject to salvage than a deed of real estate, or any other muniment of title, which may be useful to the owners, but is of no value in the hands of any other person. On the other side it is argued, that although a bill of exchange is not strictly property, it is a security, and although the loss of the security does not cancel the debt, it renders the recovery of it difficult, and may, from the inability of the creditor to procure sufficient proof, render a recovery impossible, and thus by the saving of the security, the salvors have rendered an essential benefit to the owner, capable of being valued in money. For this benefit, it is contended, they are entitled to a remuneration. The fact which gives force to this argument, is, that the whole set of each of the bills was saved, all being found together in the trunk of Mr. Leland, the supercargo.

That the owners of these bills have derived some benefit from the rescue of them from destruction, cannot be denied. It has furnished them with the proof that no bill, of any of the sets, is now outstanding in circulation, in the hands of a bona fide holder, and has thus removed one of the difficulties they would have to encounter, in a suit for the debt, upon the original consideration, and if the finding and saving of property in this way furnished the ground of a personal action against the owner, quasi ex contractu, I see no insuperable obstacle to a decree against the owners of a suitable remuneration to the salvors. But, by the common law, the finder of property which has been casually lost has no legal claim against the owner to anything in the nature of a reward or compensation for finding. All that he can pretend to is the repayment of the actual expenses he has incurred in preserving it, and upon the payment of this, the owner is entitled to receive his property free from all other charge. Kent. Comm. 256. The finder of a check or promissory note or other chose in action acquires no property in the note and has no right to demand the payment of it; and if a promiser pays it, after notice that it came into the possession of the holder by finding, he would not be protected against a demand by the owner. McLaughlin v. Waite, 5 Wend. 404. And in this rule, the common agrees with the civil law. The finder, of what belongs to another, acquires no property in the thing found, unless the owner had renounced his property in it, and left it derelict as bona vacantia, but he was bound to restore it to the owner. Dig. 6, 1, 67; Pothier, Traité de la Proprieté, No. 66.

This is the law if the thing is lost on the land. But the maritime law, from considerations of public policy, has established a different rule for goods which are lost at sea. A person who preserves goods which are lost, or in danger of being lost, by the fortunes of the sea, is entitled to a reward for that service. But what is the nature of this right? Is it a personal claim, or right of action, to recover the reward against the owner of the thing saved, or is it merely a right to proceed against the thing itself to obtain his satisfaction? This is a material question which arises in the consideration of this case. That the salvor has a perfect right to proceed against the goods saved, admits of no doubt. By saving them he acquires a sort of proprietary interest in the goods, a jus in re, and a complete possessory right, against all persons claiming an interest in them, to retain them until his compensation is paid, or until he can proceed to enforce his right against them by due course of law. And it is the familiar practice of courts of admiralty, in all the maritime courts of Europe, to give him a remedy by process in rem. The goods, upon filing a libel by the salvor, are taken into the custody of the court, and ordered to be sold for the payment of the salvage. The right of dominion, or the absolute property, in the mean time, remains in the original owner. But he is under no obligation to assert his right, by intervening with a claim. He may abandon his property if he pleases, and if he does so, and declines to make himself a party to the suit, no decree can be made against him. In certain cases, it is true, the admiralty has jurisdiction, in cases of salvage, to proceed in personam. If the owner wishes to receive his goods, before proceedings at law are instituted and the salvor delivers them to him, a personal libel may be maintained for the salvage. Such were the cases of The Trelawney and The Hope. 3 C. Rob. Adm. 215, 216; 4 C. Rob. Adm. 223.

But this is solely on the ground of his possession of the property. All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's claim in the same way as a right against the property saved, and the usual mode of compensating the service is by the allowance of a certain portion of the goods saved or of their value. The service is nowhere spoken of as constituting the ground of a personal claim against the owners.

Upon these principles, admitting that the salvors have performed a meritorious and valuable service to the owners of these bills, by rescuing them from destruction, it is difficult to see in what mode the court can give them a remedy. It can only act on the thing and pronounce the bills subject to salvage, and it can execute its decree only by an order of sale. If they are sold, what right would be transferred to the purchaser? Could he recover from the persons whose names are on the bills the sums for which they were drawn? The difficulties, it appears to me, would be insuperable. Suppose the title deeds of an estate were saved from a wrecked vessel, it would not be pretended that the possession of the deeds carried with it any title to the land, or any interest in it. Or, suppose the paper saved were a will, and it were pronounced subject to salvage, would a sale, under a decree of a court of admiralty, transfer to the purchaser any interest in the legacies? Or, if the papers saved were settlements, receipts, or acquittances, these papers might be of great value to the owner, but would be of no use to any one else. If any salvage is due on such articles, it can only be recovered in a personal suit against the owners. But the saving of property, from the perils of the sea, creates no personal obligation against the owner, independent of his interest in the property saved.

But it is contended for the libellant, that the papers having been saved and brought into court, the court may prescribe the terms upon which they may be redelivered to the owner, and may hold them impounded until the condition be performed. When goods are brought into the custody of the law by process in rem, a claimant cannot, it is true, recover the possession of them but by an order of the court. But when he is entitled to the possession, the court is bound to pass the order. The authority of the court to retain the possession is founded on that of the libellant, and the foundation of his right is a supposed lien upon them, for the payment of salvage. But if they are not subject to salvage, then his right fails. The case falls under the rule of the common law, and the owner is entitled to receive them upon the payment of the actual expenses which the finder has incurred in preserving them, and it will be the duty of the court to order them to be restored to the owner upon proper proof of his title.

My opinion is, that nothing can be allowed upon the bills of exchange and drafts; but I think that there are peculiar reasons for allowing a liberal salvage on the property saved. And I allow it the more willingly, as, from the evidence now before the court, it appears that the specie belongs to the same persons who are entitled to the bills. As the salvors have performed a meritorious service, in rescuing from destruction the evidence of property, for which, upon the principles of the maritime law, no remuneration can be allowed, this fact may be justly remembered, in the allowance of salvage on those articles which are legally subject to that burden. The whole amount of the property saved will not probably exceed six hundred dollars. I shall allow three hundred and eighty dollars for salvage, and charge the expenses upon the residue. This will be divided in the proportion of two-fifths to the owners of the salvor ship, and three-fifths to the master and crew; to be divided into thirteen shares:

Four shares to Capt. Hatch, the master.
Two shares to Lewis West, the mate.
One share to James Cole, mariner.
One share to Charles Dennison, "
One share to George Morris, "
One share to Daniel Nash, "
One share to Stephen Chase, "
One share to Wm. Robinson, "
One share to Isaac Johnson, steward.

Case No. 4,435.

The EMELINE.

[Blatchf. Pr. Cas. 370.][1]

District Court, S. D. New York. June 25, 1863.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for violation of blockade.

BETTS, District Judge. The above sloop and cargo were arrested and libelled May 26, 1863, as prize of war, having been captured off Charleston harbor on the 16th of May, ten days previously, by the United States ship-of-war Courier, and brought into this port for adjudication. No person intervened, or claimed the vessel or cargo, and a default against both vessel and cargo has been entered. The master testifies, on his examination in preparatorio, that the vessel belongs to R. T. Walker, of Charleston; that Walker appointed him master, and delivered the vessel to him there; that she was captured twenty-two hours after leaving Charleston, for running the blockade; that she was laden with cotton and turpentine belonging to the owner of the vessel, except that one bale of cotton and one barrel of turpentine

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

were owned by the master; that the vessel was bound to Nassau, N. P.; that she brought no papers whatever with her; that the master had no papers with him relating to the vessel or cargo, and knows nothing about them; and that he knew of the war and of the blockade of Charleston at the time he sailed thence. No evidence contradicting that of the master was given by the two seamen examined.

The testimony affords clear proof that the vessel, with knowledge of the blockade, was carried out of Charleston at the time alleged, with intent to evade it.

A decree condemning the vessel and cargo to condemnation and forfeiture must be entered.

EMERALD ISLE, The. See Case No. 4,270.

EMERSON (CAMPBELL v.). See Case No. 2,357.

Case No. 4,436.

EMERSON v. DAVIES et al.

[3 Story, 768; 4 West. Law J. 261; 8 Law Rep. 270; 13 Hunt, Mer. Mag. 558.][1]

Circuit Court, D. Massachusetts. May Term, 1845.

COPY-RIGHT—INFRINGEMENT—NEW ARRANGEMENT OR COMBINATION—IMITATION.

1. Any new and original plan, arrangement or combination of materials, will entitle the author to a copy-right therein, whether the materials themselves be new or old.

[Cited in Greene v. Bishop, Case No. 5,763; Keene v. Wheatley, Id. 7,644; Lawrence v. Dana, Id. 8,136; Bullinger v. Mackey, Id. 2,127.]

2. Whosoever by his own skill, labor and judgment writes a new work, may have a copy-right therein, unless it be directly copied or evasively imitated from another work.

[Cited in Johnson v. Donaldson, 3 Fed. 24.]

3. Where the plaintiff wrote an arithmetic, the plan, arrangement, and illustrations of which he claimed to be new,—It was *held*, that the taking thereof was a violation of his copy-right, although the materials and the several particulars of his plan had existed before in separate forms and in separate works, inasmuch as they had never before been united in one combination in the same manner.

[Cited in Bullinger v. Mackey, Case No. 2,127.]

4. To constitute a piracy of copy-right, it must be shown that the original work has been either substantially copied, or has been so imitated as to be a mere evasion of the copy-right.

[Cited in Webb v. Powers, Case No. 17,323; Story v. Holcombe, Id. 13,497; Drury v. Ewing, Id. 4,095; Daly v. Palmer, Id. 3,552; Lawrence v. Dana, Id. 8,136; Banks v. McDivitt, Id. 961; S. S. White Dental Co. v. Sibley, 38 Fed. 753.]

Bill in equity [by Frederick Emerson against Charles Davies and Alfred S. Barnes], for an infringement of the copy-right in a book called Emerson's North American Arithmetic, Part First. The bill, in substance, stated, that the plaintiff is a citizen of the United States, and is the author and proprietor of a certain book, entitled "Emerson's First Part. The North American Arithmetic, Part First, containing Elementary Lessons, by Frederick Emerson;" and that on the 28th day of August, in the year 1829, Ensign Lincoln and Thomas Edmands, both citizens of Massachusetts, and doing business under the firm of Lincoln & Edmands, published the above mentioned book, composed by the plaintiff, who at the same time, for a good and valuable consideration, agreed with them, that they should be the exclusive proprietors and publishers of the said work, and that they accordingly did take out a copy-right in the said book, and caused the certificate of the clerk to be printed in the said book, and deposited a copy thereof in the clerk's office, and took all the measures and steps required by law for securing the said copy-right; and by, and in virtue of the statutes of the United States, they, the said Lincoln & Edmands, and their assigns, have had the lawful and exclusive right of publishing the said book from the time of the date of the said certificate, until and at the filing of this bill. That on the 17th day of February, in the year 1835, by a certain assignment, in writing, of that date, for a good and valuable consideration, the said Thomas Edmands and one Charles D. Gould, administrator of the said Ensign Lincoln, then deceased, conveyed and assigned to the plaintiff all their, the said Lincoln & Edmands', right, interest, and property in the said book, and the copy-right thereof, and the plaintiff thereby became the sole legal proprietor of such copy-right, and ever since the date last aforesaid, has been, and now is, such sole proprietor, having the sole and exclusive right of printing, publishing, and exposing to sale, and selling copies of the said work as aforesaid.

And the plaintiff farther says, that afterwards, in the year 1838, he revised and amended his said book, and in the same year took out a copy-right thereof in his own name, he being then and there the author and exclusive proprietor of the said book, and of the said revisions and amendments thereof; which said revised and amended book was entitled "Emerson's First Part. The North American Arithmetic. Part First, For Young Learners. By Frederick Emerson." That before the publication of the said revised and amended book, he deposited a printed copy of the said title thereof in the clerk's office of the district court of the said district of Massachusetts, and did, within three months from the publication thereof, cause to be delivered a copy of the same book to the said clerk, and did also give information of the copy-right thereof being secured, by causing to be inserted in the several copies of the same, on the page immediately following the title page thereof, the following words, to wit: "Entered according to act of congress, in the year 1838, by

[1] [Reported by William W. Story, Esq. 13 Hunt, Mer. Mag. 558, and 8 Law Rep. 270, contain only partial reports.]

Frederick Emerson, in the clerk's office of the district court of the district of Massachusetts." That the purpose of both the said editions of his said book, is to teach children the elements of arithmetic, and that the plan of the lessons therein contained is his own invention; and that in the execution of his said plan he has arranged a certain set of tables, in the form of lessons, and the said Davies and Barnes, in the construction of a book, hereinafter mentioned, purporting to be composed by the said Davies, have adopted the same arrangement, and the same tables, and have published the same in their said work, hereinafter mentioned. And the said Emerson, in his said book, has also arranged a gradation of examples to precede each table, in such manner as to form, with the table, a peculiar and symmetrical appearance of each page; and the said Davies and Barnes, in their said book, have adopted the same arrangement, giving the lessons of the said Davies's book a similar appearance, page for page, to those of the said Emerson's book; and farther, that the said Emerson, in his said book, illustrated his lessons by attaching to each example unit marks, representing the numbers embraced in the example, which said method of illustration is his own invention; and the said Davies and Barnes have also in the said book of the said Davies, adopted this method of illustration in divers lessons contained in the said work. That the plaintiff being the lawful proprietor of the said book called "Emerson's First Part," and the said copy-right thereof, and in possession of the same, and having divers copies of the said book on hand, and offered for sale at a reasonable price, and always having had on hand and offered for sale at a reasonable price, a sufficient number of copies of the said book, and being in the enjoyment of the profits of the same, the said Charles Davies and Albert Barnes, on the 20th day of February, in the year 1843, without the consent and allowance of the plaintiff, exposed to sale and sold fifty copies of the said work, purporting to have been composed by the said Davies, and have, at divers times, before and since that day, exposed to sale and sold divers, to wit, one thousand copies of the same work, and still have on hand, and offer for sale, copies of the same; the said work being entitled "First Lessons in Arithmetic, designed for beginners. By Charles Davies," which said last mentioned work, in divers parts therof, is adopted from the book first above mentioned, composed by the plaintiff, and the printing and selling thereof, and the exposing of the same to sale are infringements of the said copy-right of the plaintiff. And the said Davies and Barnes, at the time of making such sales, and of exposing to sale the said copies of the said work of the said Davies, knew that the plaintiff was the author and proprietor of the said "Emerson's First Part," and that he had the copy-right aforesaid, and they knew the said copies by them so sold, and exposed to sale, to have been copied from the said work of the plaintiff; and knew that the printing, exposing to sale, and selling the same, without the consent of the plaintiff, was an infringement of such copy-right; and knew the said copies by them so sold and so exposed to sale, to have been printed and published without the consent of the plaintiff. That the said work of the said Davies is copied and pirated from that of the plaintiff, and is an infringement of the plaintiff's copyright in the particulars hereinbefore set forth and specified. That in consequence of the said Davies and Barnes having so exposed to sale and sold the said work of the said Davies, the sales of the plaintiff's book have been hindered and rendered less in number than they would have been had not the said Davies and Barnes so exposed to sale and sold said pirated work.

The bill concludes with a prayer that the said Davies and Barnes may be restrained by injunction from selling or exposing to sale, or causing or being any way concerned in the selling or exposing to sale, or otherwise disposing of any copies of the said Davies's work; and that they be ordered to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiff; and that they be ordered to surrender and deliver up to the plaintiff all the copies of the said Davies's said work that they have on hand, and they be ordered and decreed to pay to the plaintiff his costs in this suit; and that the plaintiff may have such further and other relief in the premises, as the nature and circumstances of the case may require.

The answer of the defendants stated in substance as follows: That the defendant, Charles Davies, was assiduously engaged for several months previous to the month of September, in the year 1840, in devising, composing, and preparing for publication a small book intended for the use of beginners in the study of arithmetic, and to precede and be studied before a larger and fuller work on arithmetic, theretofore published by the defendant, Charles Davies, and which small book the defendant, Charles Davies, had completed; and the defendants did publish, on or about the said month of September, in the said year 1840, under the following title, viz: "First Lessons in Arithmetic, designed for beginners." That the said book was well received by the public, and widely circulated, and that the sale and circulation thereof have gradually increased from that time to the present, and largely so within the past year. That the defendant, the said Charles Davies, has from time to time, since the first publication thereof, corrected, enlarged, and improved the same, which corrections, enlargements, and improvements have from time to time, appeared in new

editions of the said book; but that every page and part thereof charged by the said complainant, in his said bill of complaint, to have been copied or taken from his book therein mentioned, was published in the first edition of the said book, composed by the defendant, Davies, and has remained in every edition thereof unaltered. That the defendants are informed and believe, and state the fact to be, that the said Emerson knew of the publication of the said book composed by the defendant, Davies, and became acquainted with the contents thereof soon after the same was first published; and they further say, that he never made any complaint respecting the same to either of them, or intimated to either of them that his, the said complainant's copy-right for his said book, had been invaded, until the filing of his said bill of complaint. That neither the said work composed by the defendant, Davies, nor any part thereof, was copied, adopted or taken from the said book of the said complainant, or any part thereof. That the said book of the said complainant is only new and distinguishable from other books on the same subject previously published and in general use, in the following particular, viz: adopting the representation of sensible objects as unit marks, and by such marks instead of the unit marks in common use, illustrating the combinations of figures. And this the said complainant has, in substance, avowed by an endorsement printed or caused to be printed by him on the back of his said book, in the following words, viz: "The plan of this little book is entirely original and very peculiar; the lessons are illustrated with cuts and unit marks, and are rendered at once interesting and impressive." And the defendants further say, that the unit marks used by the said complainant, in his said book, and which do not represent sensible objects, and are used by the defendant, Davies, in his said book, were in common use long before the publication of the complainant's said book, and thus leaving the said complainant's original invention to consist merely, as above stated, in adopting the representations of sensible objects for unit marks. That the book of the defendant, Charles Davies, does in no respect adopt, copy, or use the said original invention of the said complainant, he having in no instance used any unit marks representing, or with the intent to represent, sensible objects. That after a careful consideration of the allegations contained in the complainant's said bill, with the aid and advice of their counsel, they are unable to determine whether the said complainant insists that the defendant, Charles Davies, has adopted anything in his said book, which the said complainant claims to be original in his; and the defendants, for this cause, demur to the complainant's said bill of complaint, and claim the same advantage thereof as if they had in form demurred to the said bill for such cause. That if the said complainant is understood by his said bill to allege that "the plan of the lessons" contained in his said book, and which he claims to be his own invention, has been adopted by the defendant, Charles Davies, in his said book, then the defendants further answer and say, that such plan alone consists, irrespective of using the representation of sensible objects for unit marks, in the combination of numbers, the arrangement of these combinations and the tables of numbers, none of which were original with the said complainant, and they were in general use before the publication of his said work. That if the said complainant is understood by his said bill to allege, that he has arranged a certain set of tables in the form of lessons, and that the defendant, Charles Davies, has in his said book, adopted the same arrangement of the same set of tables; then the defendants further answering, say, that the same arrangement of a like set of tables, embracing the same combinations of numbers, was in general and common use long before the publication of the complainant's said book, and is not original with him, nor, as the defendants understand the allegations of his said bill, does he claim the same to be original with him. That in respect to the similarity alleged by the complainant, in his said bill of complaint, to exist in the appearance of certain pages of his book, and in the book of the defendant, Davies; that such similarity of appearance, if it do exist, which these defendants deny, was purely accidental, and was not intended, expected, or desired by the defendant, Davies; that in the preparation of the manuscript for his said work, he made no arrangements or divisions for pages, and when the same was completed, he handed it over to Richard Hobbs of Hartford, in the state of Connecticut, a skilful compositor and stereotyper, to be composed and stereotyped, with a general direction to arrange the matter of the book in the best form, and without any instruction or intimation as to what he should put upon one page and what upon another; and that they never knew, heard, or believed that any such similarity, as is stated by the complainant, in his said bill of complaint, between certain pages of the said books, (if it existed at all), existed, or that the said complainant, or any other person, alleged that any such similarity existed, until after the filing of the said bill of complaint; and the defendants are informed by the said Richard Hobbs, and believe the information to be true, that he arranged the matter of the said book of the defendant, Davies, according to his own taste and judgment, without copying from, and without reference to, the said book of the said complainant; and which book the said Richard Hobbs never saw until after he had composed, stereotyped, and the defendants had published the said work of the defendant, Davies. That the location of

neither the examples nor the tables, on particular parts of the pages, forms any part of the plan or design of the said book of the defendant, Davies. And neither the value nor utility thereof, in any respect, depends upon the location of such examples or tables, or upon any appearance given to the pages by such location thereof. That the gradation of examples to precede each table, mentioned by the said complainant, is not new or original with him, and the same was in general use before the publication of the complainant's said book; nor is the same claimed by the said complainant to be original with him, as these defendants understand his said bill of complaint. That illustrating lessons in arithmetic by attaching to each example unit marks, representing the numbers embraced in the example, is not the invention of the said complainant, as is incorrectly alleged by him, the same having been in general and common use before the publication of the said book of the said complainant. And the defendants finally deny, that they have infringed the said copy-right of the said complainant, by printing or selling or exposing to sale, the said book composed by the defendant, Davies; and they pray to be dismissed from this honorable court, with their reasonable costs and charges to be paid by the said complainant.

The general replication having been filed and the evidence taken, the cause was set down for a hearing at this term, and was argued by—

George T. Curtis and John Pickering, for plaintiff.

Ivers J. Austin and Samuel A. Foot, for defendants.

For the plaintiff the following points were made:—

I. That the book of the plaintiff is the subject of a copy-right, and that his copy-right protects the following parts and features of his said book, which he caims to be new and original: (1) The plans of the lessons, in which each set of examples is recapitulated in an abstract table, the whole forming a connected lesson. (2) The plan of arranging these lessons with a gradation of examples, each lesson upon a separate page, so as to form a peculiar symmetrical page, attractive to the eye of the pupil, and not requiring his attention to be withdrawn from that page in order to acquire the whole lesson. (3) A method of illustrating the addition of numbers by means of unit marks printed in immediate connection with each question, problem, or example, and so arranged as to furnish to the eye of the pupil an immediate sensible illustration, and establish in his mind a clear conception of the quantity of numbers.

II. That the defendants have violated the copy-right of the plaintiff, in all the foregoing parts and features of his said book, in the use of the same plans and methods of illustration.

III. That the defendant, Davies, had, in fact, seen, and did, in fact, so follow and imitate the plaintiff's book, and that he has (1) produced and published a book which is so closely an imitation of the plaintiff's, as to impair the value of the plaintiff's copy-right by force of the similarity; and, (2) that he has imitated and followed the plaintiff's book in the particulars above mentioned, without drawing the same from any common sources; and the plaintiff denies that such common sources exist.

And the plaintiff, under the points aforesaid, will rely upon and refer to the several passages in the plaintiff's and defendant's books mentioned in the bill, on page 6 of the printed record.

For the defendants the following points were made:

I. The plaintiff's book contains nothing new or original except the use of pictures of visible objects for unit marks.

II. Illustrating lessons in arithmetic, by attaching to the example unit marks representing the numbers embraced in the example, is not the invention of the plaintiff.

III. The form and appearance of the pages in the defendant's book, were not copied from the plaintiff's book, and whatever resemblance there is between them is owing to other causes.

IV. The plaintiff has not stated his "plan of lessons," which he claims as his invention, with sufficient certainty to entitle him to relief respecting it.

V. The plaintiff's plan of lessons, whatever it may be considered to be, is not new; independent of his use of pictures of sensible objects for unit marks.

STORY, Circuit Justice. This cause has been argued with great ability, and with great fullness of the examination of the evidence. The merits of the case, however, seem to me to depend mainly, if not altogether, upon two points: First, whether the plaintiff's book contains any thing new and original, entitling him to a copy-right. Secondly, whether, if the plaintiff has a title by copy-right, the defendants have infringed that copy-right by the book published by them, or, as it is technically expressed, whether they have printed the work of the plaintiff.

Upon the first question, at least, upon the evidence in the case, there does not appear to me to be any reasonable ground of doubt. The book of the plaintiff is, in my judgment, new and original, in the sense in which those words are to be understood in cases of copy-right. The question is not, whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the

same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copy-right, although he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement. from existing and known sources. He may have borrowed much of his materials from others. but if they are combined in a different manner from what was in use before, and a fortiori, if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copy-right in the book embodying such improvement. See Lewis v. Fullarton, 2 Beav. 6. It is true, that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials: but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations, or combinations; for these are strictly his own. A man who constructs a new machine, is entitled to a patent therefor, if the combination and arrangements thereof are new and his own invention, although he uses old materials and old mechanical apparatus and powers in constructing such machine. He may use wheels, or levers, or screws, or toggle-joints, or cranks, or any other known modes of accomplishing given mechanical ends, if he combines them in a new manner, and thus produces a beneficial result. The steam-engine, the steam-boat, the cut-nail machine, the card machine, the grooving machine, are all but new combinations of old materials, old processes, and old mechanical powers and apparatus.

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copy-right? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements.

In truth, every author of a book has a copy-right in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance. Sir John Leach, in Barfield v. Nicholson, 2 Sim. & S. 1, 6, recognised this doctrine in its fullest extent; and there stated, that a copy-right might well be taken where the composition is either new, or there is a new arrangement thereof. Nay, the right to a copy-right does much farther. A man has a right to a copy-right in a translation, upon which he has bestowed his time and labor. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labor; and not the mere use and publication of the translation already made by another. Wyatt v. Barnard, 3 Ves. & B. 77. A man has a right to the copy-right of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labor, or money. Another man may publish another map of the same state or country, by using the like means or materials, and the like skill, labor and expense. But then he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is downright piracy; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other. Matthewson v. Stockdale, 12 Ves. 270; Wilkins v. Aikin, 17 Ves. 422. He, in short, who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copy-right therein; if the variations are not merely formal and shadowy, from existing works. He, who constructs by a new plan, and arrangement, and combination of old materials, in a book designed for instruction, either of the young, or the old, has a title to a copy-right, which cannot be displaced by showing that some part of his plan, or arrangement or combination, has been used before.

The case of Gray v. Russell [Case No. 5,728] affords a strong illustration of the

doctrine, as that was a case confessedly of a mere improvement of an old work, Adams's Latin Grammar, a subject that had been discussed and treated in many hundred works, and in which little more could be done than to arrange the materials upon a new plan, or in a new combination, with additional illustrations and initial remarks. Yet the court held it clearly to be the subject of a copy-right; and from the doctrine therein stated I feel not the slightest inclination to depart. It was upon the like ground that an action has been held to lie for the recovery of damages for pirating the new corrections and additions to an old work, (the Itinerancy of England.) Upon that occasion, Lord Kenyon said: "The courts of justice have been long laboring under an error, if an author have no copy-right in any part of a book, unless he have an exclusive right to the whole book." See, also, Trusler v. Murray, and Tonson v. Walker, cited in 1 East, 360, 361, and notes. Another illustration may be found in the cases of histories and dictionaries, as stated by Lord Mansfield in Sayre v. Moore, Id. 361, note. "In the first, a man may give a relation of the same facts, and in the same order of time; in the latter, an interpretation is given of the identical same words. But he must not servilely copy the words of another on either subject. An author has as much right in his plan, and in his arrangements, and in the combination of his materials, as he has in his thoughts, sentiments, opinions, and in his modes of expressing them. The former as well as the latter may be more useful or less useful than those of another author; but that, although it may diminish or increase the relative values of their works in the market, is no ground to entitle either to appropriate to himself the labor or skill of the other, as embodied in his own work.

It is a great mistake to suppose, because all the materials of a work or some parts of its plan and arrangements and modes of illustration, may be found separately, or in a different form, or in a different arrangement, in other distinct works, that therefore, if the plan or arrangement or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer of it, (call him which you please,) is not entitled to a copy-right. The reverse is the truth in law, and, as I think, in common sense also. It is not, for example, in the present case, of any importance that the illustrating of lessons in arithmetic by attaching unit marks representing the numbers, embraced in the example, may be formed by dots in Wallis's Opera Mathematica, p. 28; or in Colburn's Arithmetic in the form of upright linear marks, in a pamphlet detached from the main work. That is not what the plaintiff purports to found his copy-right upon. He does not claim the first use or invention of unit marks for the purpose above mentioned. The use of these is a part of and included in his plan; but it is not the whole of his plan. What he does claim is, 1. The plan of the lessons in his book; 2. The execution of that plan in a certain arrangement of a set of tables in the form of lessons to illustrate those lessons; 3. The gradation of examples to precede each table in such manner as to form with the table a peculiar and symmetrical appearance of each page; 4. The illustration of his lessons by attaching to each example unit marks representing the numbers embraced in the example. It is, therefore, this method of illustration in the aggregate that he claims as his invention, each page constituting of itself a complete lesson; and he alleges that the defendants have adopted the same plan, arrangement, tables, gradation of examples and illustrations by unit marks, in the same page, in imitation of the plaintiff's book, and in infringement of his copy-right, and, in confirmation of this statement, he refers to divers pages of his own book in comparison with divers pages of the book of the defendants. Now, I say that it is wholly immaterial whether each of these particulars, the arrangement of the tables and forms of the lessons, the gradation of the examples to precede the tables, the illustration of the examples by unit marks, had each existed in a separate form in different and separate works before the plaintiff's work, if they had never been before united in one combination or in one work, or on one page in the manner in which the plaintiff has united and connected them. No person had a right to borrow the same plan, and arrangement, and illustrations, and servilely to copy them into any other work. The same materials were certainly open to be used by any other author, and he would be at liberty to use unit marks and gradations of examples and tables and illustrations of the lessons, and to place them in the same page. But he could not be at liberty to transcribe the very lessons and pages and examples and illustrations of the plaintiff, and thus to rob him of the fruits of his industry, his skill, and his expenditures of time and money.

I have dwelt the more upon this point, because it seems to me that some of the learned witnesses, whose evidence is in the case, have entirely misunderstood the law upon this subject; and some portions of the argument at the bar seem to me to have proceeded upon an equally inadmissible ground, that if none of the materials of the plaintiff's book were new, or invented by him, that new combinations or arrangements, or illustrations of the old materials would give a title to a copy-right. My judgment is far otherwise; and as far as the evidence in this case goes, it is clear to my mind, that the plaintiff has a good copy-right in his book; that, taking his plan, arrangements, lessons, examples and illustrations, as a whole, they are not to be found combined in any former work. I must con-

fess, that it strikes me that the plaintiff's method is a real and substantial improvement upon all the works which had preceded his, and which have been relied on in the evidence; but whether to be better or worse is not a material inquiry in this case. If worse, his work will not be used by the community at large; if better, it is very likely to be so used. But either way, he is entitled to his copy-right, "valere quantum valere potest."

The second question is the real and important question in the cause; and certainly it is not without its difficulties. It falls within that class of cases, where the differences between different works are of such a nature, that one is somewhat at a loss to say, whether the differences are formal or substantial; whether they indicate a resort to the same common sources to compile and compose them, or one is (as it were) uno flatu borrowed from the other, without the employment of any research or skill, with the disguised but still apparent intention to appropriate to one what in truth belongs exclusively to the other, and with no other labor than that of mere transcription, with such omissions or additions as may serve merely to veil the piracy. It is like the case of patented inventions in art or machinery, where the resemblances or diversities between the known and the unknown, and between invention and imitation, are so various or complicated, or minute or shadowy, that it is exceedingly difficult to say what is new or not, or what has been pirated and what is substantially different. The approaches on either side may be almost infinitely varied, and the identity or diversity sometimes becomes almost evanescent. In many cases, the mere inspection of a work may at once betray the fact that it is borrowed from another author with merely formal or colorable omissions or alterations. In others, again, we cannot affirm that identity in the appearance or use of the materials is a sufficient and conclusive test of piracy, or that the one has been fraudulently or designedly borrowed from the other. Take the case for example (already referred to) of two maps of a city, a county or a country. We cannot predicate that the one is a piracy from the other, simply, because their external appearance is in nearly all respects the same, with or without some additions or alterations or omissions. Take the case of two engravings copied from the same picture, or two pictures of natural objects by different artists;—it would not be practicable, in many cases, from the mere inspection of them and their apparent identity, to say, that the one was a transcript of the other. It would be necessary to resort to auxiliary and supplementary evidence to establish the fact either way. And this leads me to remark, that the bill directly charges "that the said work of the defendant Davies is copied and pirated from that" of the plaintiff, and is an infringement of his copy-right in the particulars set forth in the bill. These particulars we shall have occasion hereafter to consider. The defendant, Davies, in his answer, alleges from his own knowledge, and the other defendant Barnes alleges from information and belief, "That neither the said work composed by the defendant Davies, nor any part thereof, is copied, adopted or taken from the said book of the said complainant, or any part thereof." Now this part of the answer, being directly responsive to the charge made in the bill, is positive evidence of the fact for the defendants, unless it is overcome by the clear testimony of two witnesses, or of one witness and equivalent circumstances. In short, the true exposition of this rule in equity is, that where the answer is responsive to the charge in the bill, it is to be taken as true, unless its credibility is impeached in such a manner as renders it unsafe and improper to place confidence in it; and this may be by direct testimony, or by circumstantial evidence sufficient to overthrow its credibility.

It has been suggested at the bar, and it is a suggestion not without weight, that the answer of the defendants no where denies, that Davies had seen the plaintiff's book before his own was compiled and published. The omission of such denial would have been more stringent if the bill had contained any interrogatory pointed directly to the fact that Davies had seen it. Not containing any such interrogatory, the attention of the defendants may not have been drawn to the importance of such a denial, if it could be correctly made. Still, as the book of Emerson was published in 1829, and had a wide circulation, and that of Davies was not published until 1840, the natural inference certainly is, that, composing a book on the same subject, for the same professed object, the instruction of beginners in arithmetic, he should, considering his local position in New York, have examined all the existing works published and on sale in the neighboring states upon the same subject. I rather incline, therefore, to think, that, under all the circumstances, it must be taken as a fact by the court, that Davies, when he compiled his work, had seen and read that of Emerson. But then this circumstance does not necessarily displace the substance of the answer to the charge in the bill. It may be true, that Davies had seen and read Emerson's book, and yet that he may not have copied or adopted or taken any part of it from that of Emerson; but from common sources open to all authors and compilers. It should be added that the answer expressly alleges that the similarity of appearance between certain pages of the two books alleged in the bill, "if such similarity of appearance do exist, which the defendants deny, was purely accidental and was not intended, expected or desired by this de-

fendant, Davies." There is some evidence that the arrangement of the whole matter of one lesson on one and the same page was the act of the stereotyper, and was afterwards adopted by Davies. But the stereotyper did not change the arrangement by Davies of the matter of each lesson; and if that matter had been on different pages, and yet it had been a mere transcript from Emerson's book, it would have been a clear invasion of his copy-right. The question is not in what part of one or more pages the matter is found, but whether it is borrowed or pirated from the plaintiff, without any substantial alteration or difference. In truth, however, the placing each lesson in one and the same page, having been finally accepted and acted upon by Davies, binds him just as much as if he had originally authorized or directed it.

The case, therefore, comes back at last to the naked consideration, whether the book of Davies, in the parts complained of, has been copied substantially from that of Emerson, or not. It is not sufficient to show, that it may have been suggested by Emerson's, or that some parts and pages of it have resemblances, in method and details and illustrations, to Emerson's. It must be further shown, that the resemblances in those parts and pages are so close, so full, so uniform, so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it. In short, that there is substantial identity between them. A copy is one thing, an imitation or resemblance another. There are many imitations of Homer in the Aeneid; but no one would say that the one was a copy from the other. There may be a strong likeness without an identity; and as was aptly said by the learned counsel for the plaintiff in the close of his argument, "Facies non omnibus una, non diversa tamen, qualem debet esse sororum." The question is, therefore, in many cases, a very nice one, what degree of imitation constitutes an infringement of the copy-right in a particular work. It is very clear that any use of materials, whether they are figures or drawings, or other things which are well known and in common use, is not the subject of a copy-right, unless there be some new arrangement thereof. Still, even here, it may not always follow, that any person has a right to copy the figures, drawings, or other things, made by another, availing himself solely of his skill and industry, without any resort to such common source. A striking case to illustrate the first part of this proposition, is Barfield v. Nicholson, 2 Sim. & S. 1, 6. There, the question was whether a work called the "Practical Builder," was an infringement upon the "Architectural Dictionary," both works having been compiled by the same gentleman, Mr. Nicholson, and both being, plainly, on the same subject, the science of architecture and the art of building. On that occasion, Sir John Leach (the vice-chancellor) said: "The Architectural Dictionary, and The Practical Builder, are plainly both works upon the same subjects, namely, the science of architecture and the art of building. The question is, whether the latter work is a piracy upon any part of the former work, which the author of that work had a right to claim as his own property, in respect that it was his own composition. Composition is either in new matter or new arrangement. The arrangement in the two works is altogether different. In The Architectural Dictionary, the information is scattered through the whole work, under the head of each particular term of science or art, arranged in alphabetical order: in The Practical Builder, the information is conveyed in the connected form of a treatise. If there be piracy here, it must be piracy of the matter of The Architectural Dictionary. The general answer of the defendant is, that The Practical Builder was conceived and planned by him as a speculation on his own account, and that he employed various artists in the execution of this work, and, among others, Nicholson and his son; and especially in the plates; and that he paid for everything as original design; and that, if it be a piracy, he is himself imposed upon. The Practical Builder, as far as published, consists of forty-six plates; and the affidavits allege that thirteen of these plates contain one, two, three or four figures, which are imitations of figures contained in The Architectural Dictionary; and the particular figures are pointed out in the affidavits. The entire resemblance of these figures, though in some instances denied, is generally admitted; but it is said, this resemblance is no proof of imitation. The figures of geometry must necessarily resemble each other in all works; and, in a great degree, this applies to the figures of architecture or building, where they are descriptions of things in use, as, for instance, in one of the articles, 'Roofs.' Where two works describe the figures of roofs in use, they must necessarily produce resembling figures. And the defendant then proceeds to show, that the figures used in his plates, supplied by the Nicholsons, are not, in fact, piratical copies of the plaintiff's works. The defendant does not deny (what could not be denied) that if the Nicholsons, whom he employed, piratically copied these figures from the plaintiff's work, that he is bound by their acts, as the acts of his agents, and that piracy in the Nicholsons is piracy in him. As to those figures in which he admits resemblance, he says there is not one of them, which was not given to the public in some or many works prior to The Architectural Dictionary; that some of these prior works were the works of Nicholson himself, as the articles of architecture in Rees's Cyclopedia, and the same articles in Brewster's Encyclopedia, and The Carpenter's Guide,

published in 1792. And he says further, that not only were these figures extant prior to The Architectural Dictionary, but that the Nicholsons had not, in fact, recourse to The Architectural Dictionary for them, nor to any materials collected for The Architectural Dictionary. Upon reference to the prior publications, it is proved to be indisputably true, that there is not one of these figures which had not been given to the world prior to The Architectural Dictionary; and the matter not being new, the author of The Architectural Dictionary could acquire no property in these figures except by a new arrangement; but there is clearly no novelty in his arrangement. The figures of The Architectural Dictionary are introduced to illustrate the letter-press; and so are all figures in prior works, as well as in The Practical Builder. If therefore the figures furnished by Nicholson for The Practical Builder had in fact been copied from the Architectural Dictionary, this would have been no piracy, because the author of The Architectural Dictionary had no property in these figures. But the Nicholsons, both father and son, positively swear that these figures were not copied from The Architectural Dictionary, nor from any materials collected for The Architectural Dictionary. With respect to the letter-press, the affidavits filed by the plaintiff do not point out particular instances of invasion; but upon the motion, I was referred to the article 'Roofs,' which is nearly a verbatim copy of the same article in The Architectural Dictionary. The defendant's answer here is the same as to the figures. This article was published verbatim in the Encyclopedia prior to The Architectural Dictionary, and is not therefore the property of the plaintiff."

The other part of the proposition may be illustrated by the case, already stated, of maps and engravings borrowed from copy-right maps and engravings, without any resort to the originals, or to any common sources. Wilkins v. Aikin, 17 Ves. 422, 424, 425; Matthewson v. Stockdale, 12 Ves. 270; Longman v. Winchester, 16 Ves. 269. In Roworth v. Wilkes, 1 Camp. 94, which was among other things, an action for pirating certain prints in a work on fencing, it appeared in evidence that three of the engravings of the defendant represented figures in exactly the same attitudes as the plaintiff's, but disguised by a different costume. Lord Ellenborough on that occasion, said: "But it is still to be considered whether there be such a similitude and conformity between the prints, that the person who executed the one set must have the others as a model. In that case, he is a copyist of the main design. But if the similitude can be supposed to have arisen from accident, or necessarily from the nature of the subject, or from the artist having sketched designs merely from reading the letter-press of the plaintiff's work, the defendant is not answerable. It is remarkable, however, that he has given no evidence to explain the similitude, or to repel the presumption which that necessarily causes." And the verdict was for the plaintiff. Now, it is quite as remarkable that the defendant, Davies, has not, (as far as I recollect) given any evidence as to what sources he examined in the compilation of his own work; and this, coupled with the fact that he has offered no denial, or proof that he had not seen, or read the plaintiff's book before his own compilation was made, is certainly a circumstance of some significance. It is in the highest degree probable that he had seen and read some of the works on arithmetic, referred to by the witnesses, before his compilation was made, such as Colburn's Arithmetic, Leslie's Philosophy of Arithmetic, Adams's Arithmetic, Develey's Arithmetique d'Emile, for they are all to be found in the library at West Point, where he was a professor. But it is far from being certain, that he had ever seen Francoeur's Cours complet de Mathematique Pures, or Jonaune's Arithmetique Elementaire; and there is no pretence to say that he had seen or used Wallis's Arithmetic. But neither of these works embraces in itself the same plan, method, arrangement, tables and examples, in the same connection, or for the same purposes, or in the same progressive order of lessons, as the plaintiff's. Adams's Arithmetic is wholly different. Colburn's Arithmetic approaches the nearest to the plaintiff's in its use of unit marks. But it differs from the plaintiff's in this material respect; that in Colburn's the unit marks are in a separate pamphlet from the text, and need, of course, the aid of an instructor. In the plaintiff's they are united, and the child instructs himself.

Now, it is by no means clear, that the defendant, Davies, without consulting the plaintiff's work, was in fact led to the same course of lessons, examples, and illustrations, and tables, which he has used in the first twenty pages of his work, on addition, and which bears so close a resemblance to the first eighteen pages of the plaintiff's work. And the question then comes to this, whether he has, in substance, copied these pages, in plan, method, arrangement, illustrations and tables, from the plaintiff's work, with merely colorable alterations and devices to disguise the copy, or whether the resemblances are merely accidental, and naturally or necessarily grew out of the objects and scheme of the defendant, Davies's work, without any use of the plaintiff's. If the defendant, Davies, had before him, at the time, the work of the plaintiff, and used it as a model for his own plan, arrangements, examples and tables, then I should say, following the doctrine of Lord Ellenborough, in Roworth v. Wilkes, that it was an infringement of the plaintiff's copyright, notwithstanding the alterations and disguises in the forms of the examples and unit marks. Lord Mansfield, in Sayre v. Moore, cited 1 East, 361, 362, note, said: "In

all these cases the question of fact to come to a jury, is, whether the alteration be colorable or not. There must be such a similitude as to make it probable and reasonable to suppose, that one is a transcript of the other, and nothing more than a transcript. So in the case of prints; no doubt different men may take engravings from the same picture. The same principle holds in regard to charts, that a man who has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly in the subject here, any more than in the other instances. But upon a question of this nature the jury will decide, whether it be a servile imitation or not." Observe, his lordship does not say, a mere literal copy, but a servile imitation. In Trusler v. Murray, Id. 362, note, Lord Kenyon put the point in the same light, and said: "The main question here, was, whether, in substance, the one work is a copy and imitation of the other; for, undoubtedly, in a chronological work, (the case before the court was of that nature) the same facts must be related." The same doctrine was recognized by the court of king's bench, in Cary v. Longman, Id. 358; and it was fully acted on in Matthewson v. Stockdale, 12 Ves. 270, and Longman v. Winchester, 16 Ves. 269, and Wilkins v. Aikin, 17 Ves. 422, 424, 425, in the court of chancery. So that, I think, it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources.

In respect to the Abacus, I throw it, at once, out of the case. The controversy is not, here, in respect to a patent for a machine, embodying the Abacus, but in respect to the copy-right of a book, instructing by lessons in an entirely different form and method. The Abacus may have suggested means of instruction by signs; but it is not a book, and has not the same identical objects, uses and methods of instruction. In comparing the book of the plaintiff with that of the defendant, Davies, in the first eighteen to twenty pages, the tables appear to be identical. It is said, that there is nothing new in these tables. That they are well known, and were in common use, long before the plaintiff's work was published. Be it so. The question is, not whether such tables existed before; but whether the use and arrangement of them as a part of the plaintiff's work, is new, and has not been borrowed by the defendant from the plaintiff. In each book they stand at the bottom of the page or lesson, and are used for the same purpose, to fix in the memory what has been previously taught in the lesson which precedes it. Then again, the mode of illustration by progressive lessons, and visible unit marks, is the same in each, and is used for precisely the same purpose. Take, for example, pages 10 and 11 of Davies and compare them with pages 8 and 9, of Emerson's; each puts the question in the same form, and each suggests the answer by visible unit marks. The unit marks in Davies are, uniformly, a star; the unit marks in Emerson are various—trees, apples, horses, chairs, &c. But will it be contended, that, if in all other respects these twenty pages were identical, the substitution of a star for other figures, or of one figure for another, would have made these pages substantially different? I presume not. The change of costume of the fencing figures, in the case before Lord Ellenborough, was treated as a mere evasion.

The two principal differences between the book of the defendant, Davies, and that of the plaintiff, in the pages in "Addition," already referred to, seem to be, first, that Davies uniformly uses stars as unit marks, and the plaintiff a great variety of different figures, to illustrate the questions; and secondly, that Davies there omits all the different modes of illustrating the questions by putting cases which the plaintiff uniformly uses. Thus Davies puts the question, "One and two are how many?" merely, and then places a star under one, and two stars under two; whereas the plaintiff puts the case thus, "Tell me how many trees are one and two trees," placing the figure of a tree by itself, and then the figures of two trees together, and then comes the question in the abstract, "One and two are how many?" Davies, however, puts divers illustrative examples, see pages 20, 21, but they are placed in a subsequent page, and are not a part of the original lesson, nor put in juxtaposition. In each book, (as has been already remarked), tables exactly alike follow at the bottom of the page, to be committed to memory, as the result of the lesson. The resemblances in the title or section of "Subtraction" in Davies are not so striking. The questions there put, and the tables there given, are of a similar nature; but the stars are omitted. But it is principally in the title or section of "Addition" that the resemblances are so close and exact, as directly to raise the question whether the title or section of the one book was borrowed, with colorable alterations only, from the other. If it was then, quoad this title or section, the injunction ought to be granted, although the rest of the work of Davies may not infringe any part of that of the plain-

tiff; for, to amount to an infringement, it is not necessary that there should be a complete copy or imitation in use throughout; but only that there should be an important and valuable portion, which operates injuriously to the copy-right of the plaintiff. The cases of Wilkins v. Aikin, 17 Ves. 422, and Bramnell v. Halcomb, 3 Mylne & C. 737, 738, and Campbell v. Scott, 11 Sim. 31, fully establish this position. See, also, Mawman v. Tegg, 2 Russ. 385, 397–400. Nor is it any objection to the injunction, that if it goes to a part of a work, it may render the other part, which is original, wholly without value, or injuriously diminish its value. The answer to this suggestion, if made, is to be found in the language of Lord Eldon, in Id. 388, 390. His lordship there said: "As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say, that, if the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him, must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame."

It has been truly said, that the subject of both of these works is of such a nature that there must be close resemblances between them. But the real question on this point, is, not whether such resemblances exist, but whether these resemblances are purely accidental and undesigned, and unborrowed, because arising from common sources accessible to both the authors, and the use of materials open equally to both; whether, in fact, the defendant Davies used the plaintiff's work as his model, and imitated and copied that, and did not draw from such common sources or common materials. Then, again, it has been said that, to amount to piracy, the work must be a copy and not an imitation. That, as a general proposition, cannot be admitted. It is true the imitation may be very slight and shadowy. But on the other hand, it may be very close, and so close as to be a mere evasion of the copy-right, although not an exact and literal copy. And again, it is said that the plan of the work of the defendant Davies is different from that of the plaintiff's. The volume is but the commencement of a course of mathematics. It may be true, (but into this I do not inquire), that taking the entire volume, the other parts may not be executed upon the same plan as the plaintiff's. But, then, if it substantially includes the essential parts of the plaintiff's plan, of his arrangement, examples and tables, so as to supersede the work of the plaintiff, it is a violation of his copy-right. It is like the case of publishing the substance of an article of an author in an Encyclopedia; or the substance of a volume of poems of an author in a work purporting to contain extracts from his works and those of other authors. Yet in each of these cases the copy-right of the author is violated. The cases of Mawman v. Tegg, 2 Russ. 388, and Campbell v. Scott, 11 Sim. 31, abundantly establish this. The plaintiff's volume consists but of forty-eight pages; and if it turns out that twenty or more of them have been so closely imitated by the defendant, Davies, and that it superseded that of the plaintiff, it will be difficult to say that it is not an infringement of his copy-right.

I have bestowed a good deal of reflection upon this case; and, at last, I feel constrained to say, that I am unable to divest myself of the impression that, in point of fact, the defendant, Davies, had before him, when he composed his own work, the work of the plaintiff, and that he made it his model, and imitated it closely in his title or section of "Addition," and in a great measure, in that of "Subtraction" also. The coincidences in plan, arrangement, modes of illustration, and tables, appear to me to be too exact, and various, to have been wholly accidental and without resort to the plaintiff's work. Both of the works appear to me to be highly meritorious; which is the most useful and convenient in practice, it is no part of my duty to consider or decide. That properly belongs to another tribunal—the public. Nor do I mean to suggest that the defendants have not acted with entire good faith; although I cannot but think they have acted under a mistake of the law. I strongly incline to the opinion, although I admit the case is not free from all difficulty, that it is my duty to order an injunction as to all the book of the defendant, Davies, from the tenth to the nineteenth pages inclusive, and from the twenty-fifth to the thirty-fourth pages, inclusive.

My only doubt has been, whether, under all the circumstances of the case, I ought not to direct an issue to try the question of the violation of the copy-right, as was done in Bramnell v. Halcomb, 3 Mylne & C. 737. If such an issue were directed, I should order it to be tried by a jury at the bar of this court, in the following form and confined to that; the jury to find whether the defendant, Davies, in his book, entitled "First Lessons in Arithmetic," stated in the case, in the pages thereof from the tenth to the nineteenth pages inclusive, and from

the twenty-fifth to the thirty-fourth pages inclusive, and from the thirty-seventh to the forty-fourth pages inclusive, did use the work of the plaintiff entitled "The North American Arithmetic, Part First," stated in the case, as a model, and copy or imitate the plan, arrangement, mode of illustration, and tables thereof, or whether the same pages of the work of the said Davies were prepared without knowledge or use of, or reference to the said work of the plaintiff, and the coincidences therein arose from the use of common sources of information and common materials, open to both, and were accidental and undesigned. If the defendants shall elect the trial of such an issue, I shall be willing to grant it upon the terms, that they pay the ordinary taxable costs of the suit to the plaintiff up to the present time, the expense of the printing of the record being divided between the plaintiff and the defendants; and the future costs to abide the result of the verdict and decree of the court. In case such an issue shall be elected, no other evidence is to be laid before the jury except that contained in the record and the works therein referred to—with this qualification and enlargement, that the defendants shall be at liberty to offer evidence (if they choose), to show what were, in point of fact, the original sources and works to which the defendant, Davies, resorted, or which he used in compiling his work; and the plaintiff shall also be at liberty to offer evidence (if he chooses), that the defendant, Davies, had before, or in compiling his work, seen, known, and used the plaintiff's work; and for this, and for no other purpose, the plaintiff shall be at liberty to require the defendant, Davies, to answer upon oath, such written interrogatories as to his having seen, known, or used the plaintiff's work before or in compiling his own work, as he shall be advised.

The defendants are to elect whether they will take an issue or not, on or before the first day of September.

A petition for a re-hearing was afterwards filed [Case No. 4,437], but while it was under argument, the matter was finally settled by a private agreement of the parties, the plaintiff admitting, that the infringement of the copy-right by the defendant was unintentional, and the petition was accordingly withdrawn.

Case No. 4,437.

EMERSON v. DAVIES et al.

[1 Woodb. & M. 21.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

REHEARING IN EQUITY CASES ON CERTIFICATE OF COUNSEL.

A rehearing of a case in equity, is not granted by this court, on the mere certificate of counsel as to the sufficiency of the reasons for it. The English practice in such cases, if allowing it in all where there is such a certificate (which is doubtful), is not to be adopted here, except so far as it is reasonable, and suited to circumstances here.

[Cited in Hunter v. Marlboro, Case No. 6,908; Bentley v. Phelps, Id. 1,332; Tufts v. Tufts, Id. 14,232; Steines v. Franklin Co., 14 Wall. (81 U. S.) 22; Giant Powder Co. v. California Vigorit Powder Co., 5 Fed. 201.]

This was a petition, by the defendants [Charles Davies and another] for a rehearing in a case in equity between these parties, wherein a decretal order was made at the last May term of this court, and entered on the 17th of August, 1845, and a final decision entered on the 15th of October last in favor of the plaintiff [Frederic Emerson]. Both of these were averred in the petition to be erroneous, for various causes, which need not now be detailed, as the petitioners relied on their right to be heard, without going into the consideration of the causes, because the counsel in the case had certified to their sufficiency.

The point was argued in writing by—

I. J. Austin and S. A. Foot, of New York, for plaintiffs.

G. T. Curtis, for respondent.

WOODBURY, Circuit Justice. It is certain that in England the rehearing of cases in equity is much more frequent than in this country. Part of this arises from a difference in our systems, and from the word "rehearing" being often applied there to what would be considered an appeal here. Thus, after a decision by the master of the rolls, or vice chancellor, if the case be heard by the lord chancellor, it is called a "rehearing." 1 Grant, Ch. Pr. 205; 2 Smith, Ch. Pr. 18. Such a rehearing, without any inquiry beyond a request by the party feeling aggrieved, and a certificate of counsel that the reasons for it were sufficient, might not be questionable, where a party has a right to have his case considered by other officers. But another class of cases, such as are usually here denominated rehearings, are a second hearing before the same judge or court, on application of a party supposing himself injured by the decision made after the first hearing. Such is the present case; and though, under some very doubting chancellors in England, such rehearings may have been very frequent and often granted merely on the certificate of counsel, yet I apprehend the court there always could, in its discretion, properly refuse them, notwithstanding such a certificate. In support of this view, the general position there, as here, is, that no rehearing can be had, unless the case comes within some rule of the court, without satisfying the discretion of the court that it is right. 1 Grant, Ch. Pr. 205; 2 Smith, Ch. Pr. 25. A certificate of counsel alone might sometimes do this, and sometimes not; and it is not understood to be contended that in England there is any rule of

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

court making such a certificate sufficient, but only a practice of the kind.

Decrees in England are enrolled soon in order to prevent a renewed hearing before the same officer—as well as one before the chancellor when the first hearing was before the vice chancellor or the master of the rolls. 1 Smith, Ch. Pr. 427. Another proof that in England the court may refuse a hearing, though the propriety of it be certified by counsel, is the form of the certificate itself. It is —"We conceive this cause is proper to be reheard, touching the matters mentioned in the petition, if your lordship shall think fit." 2 Grant, Ch. Pr. 110; 2 Smith, Ch. Pr. 26. It will be seen that the certificate itself is only conditional—that is, if the court sees fit to allow the rehearing. It seems to be reasonable that the court should look to the matters stated in the petition, and would deem it a duty first to see if they were proper ones, provided they were requested to do it by the opposing counsel, or provided the case had, within their own recollection and judgments, been already fully argued and considered. But if the course be otherwise in England, such a practice, we think, has never been adopted here, nor in the supreme court of the United States.

In the supreme court the 88th rule must be complied with;[3] and it is well known that the provisions of that rule are in some respects even more liberal on this subject than the practice which preceded it. [Hudson v. Guestier] 7 Cranch [11 U. S.] 1; Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591. No case has been found, or is believed to exist, of a rehearing in that court, on the mere certificate of counsel; and the rule requires counsel to sign the petition, but says nothing about their certifying to it. Furthermore, it prescribes an oath in some cases to the special matters which must be set out in it. I cannot, therefore, acquiesce in what seems to be the inference of the counsel for the petitioners, that this rule is not intended to be different from what is contended for in the present case. Had the court meant to adopt the English practice on this subject, and that practice is, as the petitioners argue, it is probable that the language of the rule would simply have conformed to it, instead of being so different. In this view of that rule, and considering that it was expressly adopted in this circuit, May 20, 1842, beside being in force here after August 1st, 1842, by the 92d rule of the supreme court, it is too late to contend for a more indulgent practice in this than in that court, if the present case comes within the provisions there laid down, and is to be regulated only by them.

Supposing, however, for a moment, that the present is a casus omissus, and is covered by no published rule, either of the supreme court or of this court—and supposing, further, that the English practice is settled to grant rehearings, as of course, on the certificates of counsel merely, without any inquiry or argument, ought we to adopt that practice, under the 90th rule of the supreme court? That last rule, where none other applies, does not regulate the practice of this court by that of the high court of chancery in England throughout, or require it to be adopted without qualification, as is argued; but it is only "so far as the same may reasonably be applied, consistently with the local circumstances and local convenience of the district where the court is held;" and so far, "not as positive rules, but as furnishing analogies to regulate the practice." Now it hardly needs much explanation, that such a practice here would be likely to involve this court in numerous rehearings, with little real benefit to the public or to parties in advancing sound justice. Without more judicial machinery, the business of the court would be likely to be almost interminable. The different grades of counsel there, devoted so exclusively, as many are, to one branch of law, have little analogy here, in the active and multifarious duties imposed on most of our bar, and give there a weight almost semijudicial to such certificates and examinations, less frequently to be claimed here.

For reasons like these, it has probably happened that such a practice has never yet been deemed applicable to our local circumstances, or consistent with our local convenience, and has therefore never been adopted in this circuit. On the contrary, the learned judge, who presided here so ably for the last third of a century, is understood recently to have pronounced an opinion opposed strongly to the propriety of such a practice. It was in the case of Jenkins v. Eldredge [Case No. 7,267], at the May term, this year; and is fortunately drawn up in detail on this point, and ere long will be published. I understand it was delivered before his death, and not merely sketched out. Though it does not go into some of the considerations which have influenced me on this question, and looks at others under aspects somewhat different, yet it contains so much in opposition to the expediency and applicability of such a practice here, that nothing more need be said to show the impropriety of adopting it. In New York, by a rule of the court, rehearings are not granted on such certificates alone (1 Paige, 256); and I am not aware that such a practice prevails in any of the United States. It is not entirely of course there to grant a rehearing on a certificate of counsel. Field v. Shieffelin, 7 Johns. Ch. 250, 256.

[3] That rule is as follows: "Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term, at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."

In my judgment, then, a rehearing in this case should not be allowed merely on the certificate of counsel. In this conclusion my associate concurs, and consequently the case stands for argument on the merits of the petition.

EMERSON (DAY v.). See Case No. 3,677.

EMERSON (DOGGETT v.). See Cases Nos. 3,960-3,962.

Case No. 4,438.

EMERSON v. GENNEY.

[Cited in Doremas v. Bennet, Case No. 4,001. Nowhere reported; opinion not now accessible.]

Case No. 4,439.

EMERSON v. HOGG.

Circuit Court, S. D. New York. May, 1847.

[Cited in footnote to Emerson v. Hogg, Case No. 4,440. Nowhere reported; opinion not now accessible. See Emerson v. Hogg, 6 How. (47 U. S.) 437, and 11 How. (52 U. S.) 587.]

Case No. 4,440.

EMERSON v. HOGG et al.

[2 Blatchf. 1;[1] 1 Fish. Pat. Rep. 77; 40 Jour. Fr. Inst. 27.]

Circuit Court, S. D. New York. Dec. 1, 1845.

PATENTS—VALIDITY — SEVERAL INVENTIONS COVERED BY A SINGLE PATENT — DESCRIPTION AND SPECIFICATION — BURNING OF PATENT OFFICE—RESTORED DRAWINGS UNDER ACT OF 1841 AS EVIDENCE—INFRINGEMENT PRIOR TO SUCH RESTORATION—SPECIFICATIONS—CONSTRUCTION.

1. Where a patent contained three claims, viz.: (1) A mode of converting the reciprocating motion of a piston into a continued rotary motion, by a new combination of machinery; (2) an improved spiral propelling-wheel; and (3) the application of a revolving vertical shaft to the turning of a capstan on the deck of a vessel; and it appeared from the specification that the three inventions were contrived with the view of being used conjointly, and as conducing to a common end, in the better propelling and navigating a ship: *Held*, that the patent was valid.

2. The fact that the three inventions were capable of being used separately and independent of each other, did not prevent their being embraced in one patent.

3. If a patent describes an invention, and how it is to be applied, it is not necessary in either the specification or the drawing to describe or delineate the old machinery, with which the new contrivance is to be connected, when no change in its form or proportions enters into the new invention.

4. Under the act of February 21, 1793 (1 Stat. 322, § 3), it is sufficient for the patentee to put on file, with his specifications, drawings and written references, without their being mentioned in the specification; and, if the references are written on the drawings, the terms of the act are complied with.

5. Where a patent was issued in 1834, to which no drawing was annexed, but a drawing had been originally deposited in the patent office, and the record of the patent and the drawing were destroyed by fire in the burning of the office in December, 1836, and the patentee, under the act of March 3, 1837 (5 Stat. 191), restored the record of his patent in May, 1841, but did not file a drawing under section 1 of that act, verified by oath, until February, 1844, and then, in March, 1844, finding that drawing imperfect, made and swore to and filed a second one, and, in May, 1844, commenced an action for the infringement of his patent: *Held*, that a duly certified copy of the second drawing, as so attested and filed, was admissible in evidence, on the trial of such action, under section 2 of that act.

6. It being alleged that the patentee had abandoned his discovery, and the lapse of time from the grant of the patent to the commencement of the action being urged as proof of that fact: *Held*, that he was entitled to give evidence of the filing of his drawings, or of any other act done by him in assertion of his right.

7. Where, in such case, on a motion by the defendant for a new trial, it was objected that the plaintiff was not entitled to damages for infringements committed prior to the re-recording of his patent, the charge of the court at the trial having imported a general liability of the defendant, and the court not having been prayed to instruct the jury otherwise, and no exception having been taken to the direction as given: *Held*, that the objection could not now be taken.

8. It is the province and the duty of the court to settle, as a question of law, the meaning of the specification of a patent, and, if that cannot be ascertained satisfactorily upon its face, the patent is void for ambiguity.

9. Accordingly, where it was objected, upon the face of the specification of a patent for improvements in the mode of propelling vessels, that it was uncertain whether the patentee claimed a wheel constructed spirally, or only spiral paddles attached to a wheel, and the court instructed the jury that the question whether the specification was ambiguous in the particular charged was one compounded of law and fact, and that, if the jury should find that a spiral wheel and a spiral propeller were the same thing in ordinary acceptation, then the specification was sufficiently certain in that respect: *Held*, that the instruction was erroneous.

10. Where prayers for instructions to the jury are made, and are not complied with by the court, they are to be considered as refused.

11. Exceptions will lie to the refusals of the court to give instructions when requested, in like manner as to the instructions actually given.

12. A patent embracing several distinct inventions is valid, where they are capable of being used in connection, and to subserve the same common end.

13. But their actual employment together is not required to sustain the validity of the patent, and the wrongful use of either invention separately is a violation of the patent pro tanto.

This was an action [by John B. Emerson against Peter Hogg and Cornelius H. Delamater] on the case, commenced in May, 1844, for the infringement of letters patent granted to the plaintiff on the 8th of March, 1834, for "a new and useful improvement in the steam-engine." The specification is set forth at length in the case of Hogg v. Emerson, 6 How. [47 U. S.] 437, 438-441. In the pre-

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

amble to the specification the invention was said to be of "certain improvements in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land." The claims were as follows: "What I claim as my invention, and for which I ask a patent, is the substituting for the crank in the reciprocating engine a grooved cylinder, operating in the manner hereinbefore described, by means of its connection with the piston-rod, together with all the variations of which this principle is susceptible; as, for example, a bar of metal may be bent in the form of a groove, and attached to the revolving shaft, and friction-wheels on the piston-rod may embrace this on each side, producing an effect similar to that produced by the groove. I also claim the spiral propelling-wheel, constructed and operating in the manner which I have set forth; and likewise the application of the revolving vertical shaft to the turning of a capstan on the deck of a vessel. Not intending, in either of these parts, to confine myself to precise forms or dimensions, but to vary them in such manner as experience or convenience may dictate, whilst the principle of action remains unchanged, and similar results are produced by similar means." It appeared at the trial that the drawing and model of the plaintiff's invention, originally deposited in the patent office, were destroyed when that office was burned in December, 1836. Under the act of March 3, 1837 (5 Stat. 191), the plaintiff, for the purpose of restoring the record of his patent, filed in the patent office, in May, 1841, a court copy of his patent. No drawing was annexed to the patent originally issued, nor was any referred to in the specification. But the plaintiff, when he restored the record of his patent in May, 1841, at the same time deposited in the patent office a new drawing of his invention, which, however, was not sworn to by him or in any way attested. On the 12th of February, 1844, this drawing, having been duly sworn to by the plaintiff, was filed in the patent office. But, on a subsequent examination of it, it was found to be imperfect, and a second drawing was made and sworn to and filed in the patent office on the 27th of March, 1844. A certified copy of this drawing, as so attested and filed, was offered in evidence by the plaintiff, and admitted, under the objection of the defendants. The validity of the patent was objected to by the defendants, on the ground that the specification was ambiguous, and that it was uncertain upon its face whether the patentee claimed a wheel constructed spirally, or only spiral paddles attached to a wheel; and the defendants requested the court to charge the jury that the patent was void on that ground. The part of the specification on which the point arose is quoted in the opinion of the court. The court refused to charge as requested; but charged that the question whether the specification was ambiguous in the particular charged was one compounded of law and fact, and that, if the jury should find that a spiral wheel and a spiral propeller were the same thing in ordinary acceptation, then the specification was sufficiently definite and certain in that respect. The defendants also objected to the validity of the patent, on the following grounds: (1) That the claim of the patent covered three distinct and independent inventions; (2) that the specification did not sufficiently indicate what was the invention claimed; (3) that it did not sufficiently distinguish the new mechanism from what was before known. The court charged that the patent was not open to any of these objections.

[2] [The counsel for the plaintiff offered to put this corrected drawing in evidence. The counsel for the defendants objected upon the ground that the commissioner of patents had no right to receive and file more than one drawing, and that by the filing of the drawing made by Emerson in February the power conferred by the act of 1837 has been exhausted. The court overruled the objection, and the second was put in evidence. The counsel for the plaintiff then produced the model of a ship, with the propeller wheel, patented by the plaintiff, and then read the deposition of Chas. Robinson, who deposed that he had made the said model in the year 1837, in New Orleans, and that it had been publicly exhibited for a year in the Merchants' Exchange of that city, and from thence was taken to the plaintiff's ship yard. The plaintiff's counsel then called William Serrell, who testified that he was a civil and mechanical engineer. Being shown models of the plaintiff's wheel, and Ericsson's propeller, he stated that he had examined them, and had been forced into the conclusion that they were essentially the same. This witness was subjected to a very long and minute cross-examination, which strongly exhibited his accurate and scientific acquaintance with the principles of practical mechanics. He stated, in substance, that the two machines were substantially the same in mechanical construction and action; that he could construct the plaintiff's wheel from his specification. He went into a detailed explanation of the specification, and said, that taking it as a whole he considered it sufficiently disclosed that which the inventor intended to construct. The plaintiff's counsel also called James P. Allaire, who testified that he had been engaged for many years in making steam engines and other machinery; that "Ericsson's propeller" was identical in mechanical construction and effects with the plaintiff's wheel. He examined the specification, and testified that he could from it construct a wheel similar to the models produced in court. John C. Kiersted testified that he was a practical

[2] [From 40 Jour. Fr. Inst. 27.]

mechanic, and that, taking the specification, with either of the drawings filed by Emerson, he could construct a wheel similar to the models. He also proved that the defendants had made and applied "Ericsson's propeller" to a large number of vessels. Stephen E. Glover testified that he was acquainted with Ericsson's propeller; that he had been interested in his patent; and that the charge for the use of his propeller was three dollars per ton for large vessels, and two dollars and fifty cents per ton for those of a smaller class. The counsel for the defendants admitted that they had applied "Ericsson's propeller" to six vessels, each 150 tons, and to one vessel of 340 tons. The counsel for the defendants then called Dr. Dionysius Lardner, who testified that, before the date of the plaintiff's patent, he had seen propellers in England which had been patented by Mr. Perkins, and also by Mr. Smith. Models of them were produced, but the witness admitted that they differed substantially from the plaintiff's. He testified that the specification was vague and indefinite, and that he could not, from its directions, construct a wheel such as the plaintiff claims to have patented. The deposition of Chas. M. Keller was then read. He testified that he was a clerk in the patent office; that he had officially examined the two patents of Emerson and Ericsson; and in his opinion they were different, and did not conflict; and he had made a report to that effect to the secretary of the treasury. James J. Mapes and William A. Cox testified that they were consulting engineers, and they had read the plaintiff's specification; that it was vague and indefinite; that they could not, from its directions, construct the wheel claimed by the plaintiff. Upon cross-examination, these witnesses stated that they were not practical mechanics. Joseph Belknap, a draftsman in the employ of Dunham & Co.; James Cochran, second engineer of the steamer Princeton; and Geo. Birkbeck, Jun., a person in the employ of the defendants, stated that they could not, from the specification alone, have constructed the wheel; but that, with the aid of the correct drawing made by Dr. Jones, they could have done so.

[The court charged the jury, that the patentee is bound to file a specification of his discovery, which shall apprize the public of his invention without ambiguity or uncertainty; that, if they shall find that the plaintiff originally filed drawings, so that all persons might have examined them, and that such drawings were similar to those produced in the trial, then they might come in aid of the specification. He directed the jury to view it as the whole specification, and gather from it what the plaintiff intended to claim. His honor then examined the terms of the specification in detail, and reviewed the testimony of the witnesses. He instructed the jury, that they must construe the language as addressed to men skilled in this branch of art, and if a competent mechanic could, from it, have constructed the wheel, it is sufficient. If such a mechanic could not, from the specification, have constructed the machine, then the plaintiff must fail, unless he can help it out by the drawings; that these must be shown to have been filed with his original application; that in this case, the patent office and its contents having been destroyed by fire, he is compelled to supply the evidence in the best way he can. The judge then reviewed the evidence as to the drawings filed in 1844. He further instructed the jury, that it had been contended that Emerson had abandoned his patent to the public by nonuse; that this might arise from either positive abandonment, or might be implied from circumstances, and if the jury should find that he had relinquished his right, then he could not maintain this action; that a patentee cannot lie by an unreasonable time, and allow his invention to go into use. The judge then reviewed the evidence on this point. He further charged that it did not appear to be denied that if the plaintiff's patent was valid, that the defendants had infringed it; that the jury were bound, if they found in favor of the plaintiff, to give him a verdict for his actual damages; that in some cases the court had instructed the jury that they might, in addition, give damages to compensate the plaintiff for the expenses of the litigation, but that, in the present instance, he thought they ought not to find beyond the actual damages proved. He repeated that the great question was, had the plaintiff established his right to the wheel commonly known as the "Ericsson's propeller?"

[The jury found a verdict for the plaintiff for $3,575 and six cents, costs. It is stated that, of the jury, eight were practical mechanics.][2]

The defendants now moved for a new trial, on a bill of exceptions.

Francis B. Cutting, for plaintiff.

Seth P. Staples and John O. Sargent, for defendants.

BETTS, District Judge. The exceptions taken to the rulings of the court on the trial, and to the final instructions to the jury, and the points raised on the argument under those exceptions, embrace a great variety of topics, relating as well to general principles applicable to all patent cases as to the particular features of this case. Several days have been occupied in the discussion of those questions, but the conclusion to which we have come in examining the exceptions will spare us the necessity of considering the argument in its whole extent, and of adjudicating all the matters in controversy.

We think the exception well taken to the fourth instruction given by the court to the

[2] [From 40 Jour. Fr. Inst. 27.]

jury, which is as follows: "Whether the specification be ambiguous is generally a question of law to be decided by the court. In this case, it is compounded of law and fact, and, if the jury find the fact to be that a spiral wheel and a spiral propeller are the same thing in ordinary acceptation, then the specification is sufficiently definite and certain in this respect." The part of the specification to which the instruction is applicable is this: "I employ an improved spiral paddle wheel, differing essentially from those which have heretofore been essayed. This spiral I make by taking a piece of metal of such length as I intend the spiral propeller to be, and of a suitable width, say, for example, eighteen inches; this I bend along the center so as to form two sides, say of nine inches in width, standing at right angles, or nearly so, to each other, and give to it, longitudinally, the spiral curvature which I wish. Of these pieces I prepare two, three, or more, and fix them on the outer end of the paddle-shaft, by means of arms of a suitable length, say two feet, more or less, in such a position that the trough-form given to them longitudinally shall be effective in acting upon the water. It must be entirely under water, and operate in the direction of the boat's way. Instead of metal, the spiral propeller may be formed of wood, and worked into the proper form, the shape, and not the material thereof, being the only point of importance."

The specification was objected to on the trial as ambiguous, and one of the particulars urged in support of the objection was, that it was uncertain, upon the face of the specification, whether the patentee claimed a wheel constructed spirally, or only spiral paddles attached to a wheel. The court did not dispose of the point as a question of construction merely, but left a fact to be found by the jury, and indicated the rule of law that would govern when that fact should be ascertained. This was undoubtedly error. It is the province and the duty of the court to settle the meaning of the patent, and, if that cannot be ascertained satisfactorily upon the face of the specification, the law declares it insufficient for ambiguity and uncertainty. Gods. Pat. 109, and Supp. 29; Phil. Pat. 249, 252. The meaning of the terms employed, in view of the object the inventor had in contemplation, and to ascertain the extent of his claim, must be determined and declared by the court. The specification is laid before the jury as defined and settled by the exposition of the court, and the matters of fact presented by the respective parties to support or defeat the patent are then to be examined and applied as if the construction fixed by the court had been incorporated in the specification. It accordingly devolved upon the court to dispose of the question as a point of law, and either to decide that the patent was in this respect ambiguous, and therefore void, and direct the jury to find a verdict for the defendants, or to rule against the objection, and decide that the patent conveyed, in this particular, a meaning sufficiently certain, and point out what its claim was. Washburn v. Gould [Case No. 17,214]. This court cannot now estimate what effect upon the conclusions of the jury this wrong direction of the court may have had, and, as the defendants were entitled to an explicit instruction on the point, the refusal of the court to give it must necessarily avoid the verdict, it not being manifest that the point is irrelevant and immaterial to the issue tried.

The question whether the specification in this particular is so ambiguous and uncertain as to defeat the patent, was not argued on the exceptions, and we, therefore, forbear pronouncing upon that point now. It will remain to be brought up again on the new trial.

Numerous instructions were prayed for by the defendants. When the charge has not complied with the prayers, they are to be considered as refused, and exceptions will lie to the refusals of the court to give instructions when requested, in like manner as to the instructions actually given. Douglass v. McAllister, 3 Cranch [7 U. S.] 298; Smith v. Carrington, 4 Cranch [8 U. S.] 62; O'Neale v. Long, 4 Cranch [8 U. S.] 60; Pennock v. Dialogue, 2 Pet. [27 U. S.] 1; Pitts v. Whitman [Case No. 11,196]; Clymers' Lessee v. Dawkins, 3 How. [44 U. S.] 674. The court is accordingly to be regarded as having decided on the trial: (1) That the patent is good on its face, including the claim for three different inventions; (2) that the specification is not defective for ambiguity, in any particular other than the one submitted to the jury as before stated; and (3) that the specification sufficiently distinguishes the new mechanism from the old.

We shall not spread out at large the reasons governing our decision upon these general heads. Yet, as all the important questions involved in the case were fully argued, and the same questions may again arise on the new trial, we submit the conclusions adopted by us, as a guide in the future proceedings in the case. It will be the proper time to determine how far this present decision shall be held conclusive on these points, when the offer shall be made to re-open and review before us the same questions.

1. In Evans v. Eaton, 3 Wheat. [16 U. S.] 454, 506, and in Barrett v. Hall [Case No. 1,047], doubts are started whether, under the general patent law, improvements on different machines can regularly be comprehended in the same patent, so as to give a right to the exclusive use of the several machines separately, as well as a right to the exclusive use of them in combination. But the special statute (6 Stat. 70) applicable to the first case, furnished a rule in itself, and the doctrine intimated by the court must accordingly be accepted as put hypothetically, and not laid

down as a settled principle to govern the construction of specifications. The case of Barrett v. Hall [supra] attempts a generalization of the doctrines of the patent law, and, in the particular now under inquiry, the definition there adopted has no necessary connection with the case decided. Judge Story, in Moody v. Fiske [Case No. 9,745], enters a caveat against his reasoning in that case being held to authorize the including in one specification several improvements in separate machines, having distinct and independent operations; much less the claiming in the same patent a combination of different machines, and distinct improvements in each. The suggestions advanced in all these cases were by way of caution, and were probably designed to avoid the conclusions that the court had prejudged or was committed upon that particular form of the question. No one of the cases demanded a judgment upon the specific point. In Wyeth v. Stone [Id. 18,107] the court reviews those cases, and restricts their application to such inventions as are necessarily distinct from each other, and not contemplated to be used in connection, and holds that a patent for several machines, each being a distinct and independent invention, is valid, where they have a common purpose and are auxiliary to the same common end. Phil. Pat. 216, 217; Pitts v. Whitman [Case No. 11,196]. The principle seems to be, that the inventions should be capable of being used in connection, and to subserve a common end.—Wyeth v. Stone [supra],—though their actual employment together does not seem to be required to sustain the validity of the patent in which they may be united. Accordingly, the wrongful use of either separate machine is a violation of the patent right pro tanto. Wyeth v. Stone [supra].

We think the specification in this case shows that these three separate machines were contrived with the view of being used conjointly, and as conducing to a common end, in the better propelling and navigating a ship, and, in our opinion, their capability of being used separately and independent of each other, does not prevent their being embraced in one patent.

2. We think the other objections of ambiguity are not supported. The patent sufficiently indicates what the patentee claims to be his improvement, and the only question is, whether his description is sufficiently full and exact to enable a mechanic to construct the new machine. This is a fact to be inquired into and settled by the jury, and not a matter for the court to adjudicate. If it be decided that the patent claims the invention of a spiral wheel, or of a spiral propeller, as distinct and different from a wheel, there does not seem to the court any further uncertainty or ambiguity as to the object sought to be secured by the patent.

3. We think, also, the specification distinguishes the new mechanism from the old with as much particularity as is required by the rules of law. It describes the invention, and how that is to be applied, and the law does not render it necessary to set forth the old machinery with which the new contrivance is to be connected. Phil. Pat. 270, and cases there cited. The drawing becomes part of the patent, and may be referred to in order to help out the description. But in neither need the old and well-known parts of the machine be described or delineated, when no change in their forms or proportions enters into the new invention.

One great object of the exceptions taken by the defendants is to rectify the decision of the court as to the admissibility of evidence.

1. It is contended that the court erred in admitting the drawings in evidence, they not being referred to in the specification. It is at best equivocal, whether the act of February 21, 1793 (1 Stat. 318, 322), requires the specification to contain written references to drawings. The language (section 3) is: "and he shall accompany the whole with drawings and written references," &c. The express terms of the clause no more require that the written references should be incorporated in the specification, than that the drawings should be. Judge Story first read the section as demanding that the references should be set forth in the specification. Earle v. Sawyer [Case No. 4,247]. But the specification in that case was so prepared, and accordingly the interpretation of the statute was not demanded of the court. Congress clearly suppose that the drawings are not necessarily to be noticed in the patent, for they say, in the act of March 3, 1837, § 1 (5 Stat. 191), "wherever a drawing was not originally annexed to the patent, and referred to in the specification," &c. And again, in the 3d section of the same act, the mode of making evidence of the drawing of an invention, if separate from the patent, is prescribed in language importing that it may be distinct, and without connection, by references or otherwise, with the patent.

Upon general principles, and in view of the policy and convenience of the matter, it might probably have been the better construction to hold that the drawings should be so connected, by reference or annexation, to the specification, as to make it certain that a drawing was relied upon, and what particular one was intended. There could then be no mistaking what was to be examined to learn the inventor's discovery, and no surprise could be practised by offering in evidence a different drawing, or producing one that had not been originally prepared with the description, to fix its meaning and extent. But we think the more recent acceptation with the circuit judges has been, that the patentee complies with the requirements of the act, if he puts on file, with his specification, drawings and written references, without their being mentioned in the specification, and that, if the references required

are written on the drawings, the terms of the statute are satisfied. This was directly decided by Judge Story in Washburn v. Gould [Case No. 17,214], and seems to have been so ruled by Judge McLean in Brooks v. Bicknell [Id. 1,944]. The long usage at the patent office to receive and record drawings not referred to in the specification, is of weight, also, in fixing the meaning of the clause. And we, in this case, conform our construction of the law to that usage and understanding, and hold that there was no error in the decision of the court at the trial on this point.

2. Another objection much pressed on the argument was, that the court admitted in evidence several different copies of drawings filed by the patentee. It was insisted that he was not entitled, under the act of March 3, 1837, to offer in evidence any other than the first drawing deposited by him in obedience to the requirement of that act.

The original patent and drawings were destroyed with the patent office in 1836. On the proof of that fact the plaintiff would, at common law, have been entitled to give secondary evidence of the contents of those documents. The second section of the act of 1837 restricts this common law rule of evidence, and interdicts the receiving any patent in evidence, unless it be re-recorded conformably to that act, and also excludes drawings not verified pursuant to that act. The first section of the act authorizes any person having in his possession or being interested in any patent issued prior to December 15th, 1836, to have the same recorded anew in the patent office, together with the descriptions, specifications of claim, and drawings annexed or belonging to the same. Then follows a direction to the commissioner to cause the same, or any authenticated copy of the original record, specification or drawing which he may obtain, to be transcribed and copied into books of record. The act then declares: "And wherever a drawing was not originally annexed to the patent, and referred to in the specification, any drawing produced as a delineation of the invention, being verified by oath in such manner as the commissioner shall require," may be filed, &c.; and, by the second section, copies thereof, certified by the commissioner, are made primâ facie evidence, the same as copies of the original record.

The plaintiff, after the loss of his original drawings, made out and filed a copy verified as directed by the commissioner, and subsequently, considering that copy imperfect, he had another prepared and verified and filed. The certified copy of this second one was offered in evidence and received by the court, and to that admission the exception applies.

We think the evidence was properly admitted upon either one of two grounds: (1) The plaintiff had a right to draw up at any time a delineation or pictorial representation of his invention, and present it in elucidation of his written description. It performs in part the office of a model, which may at any time be constructed for the purpose of illustrating and giving application to contrivances which may be obscure or difficult to understand, as described in the specification. Phil. Pat. 294, 295. (2) This drawing was not originally annexed to the patent and referred to in the specification, and accordingly was of that particular class which was to be received at the discretion of the commissioner. The provisions of the first section of the act of 1837 are full to show the meaning of congress, that the board of commissioners were to take all practicable measures for restoring to the files the best possible substitutes for lost drawings. They may be prepared in the patent office, or obtained from clerks of courts, &c. When put on file they are public records, and all parties are entitled to copies of them, and such copies must be received in evidence, when offered. If they are discordant, one may destroy the effect of another. But, if they concur in the essential particulars of the invention, the fact that there is a variety of them, derived from different sources, would conduce to prove that the contents of the original one are substantially recovered. We think the authentication of the commissioner entitled the party presenting the copy to read it in evidence, in the first instance, and that the facts proved or offered to be proved on the part of the defendants, did not entitle them to exclude from the consideration of the jury the copy offered by the plaintiff. (3) It might be added that the plaintiff was entitled to give evidence of the filing of his drawings, or of any other act done by him in 1841, in assertion of his patent right. One branch of the defence taken in the notice under the plea was, that the plaintiff had abandoned his discovery, and the lapse of time from the grant of the patent to the commencement of this suit was urged as proof of that fact. The plaintiff was entitled to rebut any presumption of abandonment by showing acts prosecuting or asserting his discovery.

3. It is objected that the plaintiff is not entitled to damages for infringements committed anterior to the re-recording of his patent, and that the jury were not correctly instructed on that subject. The charge imports a general liability of the defendants, and no intimation is given that their liability ought to be so qualified. This point was not raised at the trial. The court was not prayed to instruct the jury otherwise, nor was a specific exception taken to the direction as given. If the defendants wished more definite instructions, or desired that those given should be qualified, they should have called the matter to the notice of the court, that the mistake, if one, might have

been then rectified. No advantage can now be taken, if an error has been so committed. Smith v. Carrington, 4 Cranch [8 U. S.] 62; Carver v. Jackson, 4 Pet. [29 U. S.] 1; Norman v. Wells, 17 Wend. 136; Stafford v. Bacon, 1 Hill, 532, 537.

A new trial must be granted, the costs to abide the event.[3]

[NOTE. Patent was granted to J. B. Emerson, March 8, 1834. For other cases involving this patent, see Hogg v. Emerson, 6 How. (47 U. S.) 437, 11 How. (52 U. S.) 587.]

Case No. 4,441.

EMERSON v. HOWLAND et al.

[1 Mason, 45.][1]

Circuit Court, D. Massachusetts. May Term, 1816.

SEAMEN'S WAGES — SLAVE SHIPPED AS SEAMAN — DISCHARGE IN FOREIGN PORT — EFFECT OF CAPTURE — ACT FEB. 28, 1803.

1. Where a slave was illegally discharged abroad, his master recovered full wages up to the time when he might have returned to the United States.

[Followed in Plummer v. Webb, Case No. 11,233. Cited in Osborn v. Nicholson, 13 Wall. (80 U. S.) 657.]

2. The effect of capture upon the contract for mariner's wages.

[Cited in M'Kenzie v. The Oglethorpe, Case No. 8,857; The Dawn, Id. 3,665; Highland v. The Harriet C. Kerlin, 41 Fed. 224.]

3. Where seamen are discharged abroad without the payment of the three months' wages required by the act of congress of the 28th of February, 1803 [2 Stat. 203], on a libel for wages the court will enforce the payment of the three months' wages.

[Cited in Willard v. Dorr, Case No. 17,680; Hutchinson v. Coombs, Id. 6,955; The America, Id. 286; Pool v. Welsh, Id. 11,269; Farrell v. French, Id. 4,683; The Maria, Id. 9,074; Wells v. Meldrun, Id. 17,402; Pratt v. Thomas, Id. 11,377; Nevitt v. Clarke, Id. 10,138; Bush v. The Alonzo, Id. 2,223; The Almatia, Id. 254; Dustin v. Murray, Id. 4,201; Banta v. McNeil, Id. 966; The Cornelia Amsden, Id. 3,234; Worth v. The Lioness, No. 2, 3 Fed. 925; Highland v. The Harriet C. Kerlin, 41 Fed. 223. Approved in The Rovena, Case No. 12,090; The Frank and Willie, 45 Fed. 489.]

This was a suit in personam [by Arthur Emerson against George Howland and others] for subtraction of mariners' wages, against the owners of the ship Ann Alexander. The material facts were as follows: The plaintiff being owner of a slave, called Ned, at Norfolk, in Virginia, on the 2d of March, 1811, shipped him as a mariner, at the monthly wages of $22.00 on board of the Ann Alexander, Kempton master, on a voyage from Norfolk to Liverpool, in England, and from thence to one or more ports in Europe, and back to her port of discharge in the United States. The ship safely arrived at Liverpool, and sailed from thence for Archangel, in Russia, in January, 1812, and while on the voyage, on the 5th of July following, was captured by a Danish cutter, and carried into Drontheim, in Norway, for adjudication. After the usual proceedings, the ship was finally restored, about the 20th of September, 1812. About ten days before the restoration, Captain Kempton discharged all his crew, under the pretence that they refused to remain any longer, and either had deserted, or intended to desert. The ship did not pursue her voyage to Archangel, under the pretence that a suitable crew for the voyage could not be obtained. In the spring of 1813, the ship took in a cargo of deals, and proceeded to Ireland, and after landing that cargo, went to Liverpool, and from thence sailed for the United States, and arrived at Boston about the 12th of March, 1814. Ned received his discharge at the same time with the rest of the crew, and Captain Kempton gave him a due bill for the amount of his wages up to that time, and also a letter to his master, in which he spoke with approbation of his conduct during the whole voyage, and stated that he had been captured, and was under the necessity of discharging him. Ned went immediately on board of the barque Frederick, Coffin master, then bound to London, under an engagement to work for his passage without wages. Captain Kempton stated to Captain Coffin, that Ned was a slave; and requested him, on his arrival in London, to procure him a passage to the United States, and to assist him in this object he gave him £5 sterling. The barque proceeded to London, and on his arrival there, about the 1st of November, 1812, Captain Coffin procured a passage for Ned in a cartel, then bound to New York; and gave him the £5 to enable him to proceed from New York to Norfolk. The last time that Captain Coffin saw Ned was on board of the cartel. The cartel arrived at New York on the 29th of March, 1813; but there was no positive evidence that Ned came home in her, or had ever returned to the United States.

Mr. Aylwin, for plaintiff.
William Sullivan, for respondents.

Mr. Sullivan. The contract in this case, may be considered in two points of view; either as entered into by the slave himself, on his own account; or as made by his owner. The slave having entered into this contract for the purposes of this voyage, it has been annulled in one of two ways; either, first, by his desertion, or, secondly, by a mutual agreement between him and the master. Was it by desertion? The vessel, on her return voyage, was captured and carried into Drontheim, from whence, after her release, the master contemplated proceeding to Archangel, but the slave, together with others of the seamen, unwilling to undertake this voyage, refused to continue on board, and actual-

[3] The case was again tried before Nelson, J., in May, 1847, when the plaintiff again had a verdict. The defendants, after judgment, carried the case to the supreme court, where it is reported as Hogg v. Emerson in 6 How. [47 U. S.] 437, and in 11 How. [52 U. S.] 587, and where the decision of this court as to the validity of the patent was sustained.

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

ly left the vessel. The master, not being able to avail himself of any legal means of coercing them, was obliged to submit to the loss of them, and they were noted in the log-book for desertion. But if this does not amount to a desertion, yet, it is contended, that there was at least a mutual agreement between the parties, to the discharge of the slave. The depositions in this case, go to prove, that the master, finding that the slave was determined not to continue with him, and being unwilling to consider him as a deserter, thought it best to give him a discharge. There is nothing in evidence to contradict this, unless the letter from the master to the owner of the slave should be considered as so doing; but this only states the discharge, and affords no ground for the supposition, that it was contrary to the desire of the slave. How is the contract altered by considering it in the other point of view? that is, as made by the owner of the slave. Here it will be insisted, that whatever might be the power of the owner over the will and conduct of his slave, whilst the latter continued in the same country with the former, still, that in a distant region, where slavery is not allowed, the slave enjoys the same rights as any other citizen, and is able to dissolve a contract made by his owner, if it should be expedient for him so to do.

Mr. Aylwin contended, first, that the slave did not desert, and, secondly, that he could not rescind the contract. The only evidence to prove the desertion, is derived from the depositions of the master and mates. Much credit cannot be given to them, for they not only vary among themselves, but are absolutely contradicted by the letter of the master, which, under the circumstances of this case, is more deserving of credit, than any other evidence produced. In that, the master informs the owner of the slave, that he had discharged him, and that he had been perfectly satisfied with his conduct, during the time he had been with him; now he surely would not have said this, if the slave had left the vessel without his consent. Nor is it to be credited, that he would not, on the contrary, have made particular mention of that circumstance, had it taken place. But even conceding that the slave did in fact desert, still the subsequent conduct of the master in agreeing to discharge him, and in paying part of his wages was a sufficient remission of the offence; and it cannot, therefore, now be taken advantage of. Secondly, the slave could not rescind the contract made by his owner. If the master found the civil authority of the country insufficient to prevent his desertion, it was in his power to confine him on board the vessel, and this he ought to have done, and not have consented to his discharge, when by that means the owner might lose not only the wages due for the remaining portion of the voyage, but also the slave himself.

The plaintiff asked for wages up to the time of the actual return of the vessel.

STORY, Circuit Justice. In future, where seamen are discharged in a foreign port, I shall decree against the owners the whole of the three months' wages authorized and required to be paid by the statute of the 28th of February, 1803 (chapter 62). The practice has heretofore been to allow only the two months' wages, which belong to the mariner. But the owner ought not to be in a better situation than if he had complied with the terms of the law; and it is the duty of the court to see, that it is enforced. The additional month's wages will not, however, be paid over to the mariner, but retained in the registry, for the use of the United States, —to be applied according to the regulations of the statute. See The Courtney, 1 Edw. Adm. 239. I shall take a little time to consider the present case.

Afterwards, during the term, the following opinion was delivered:

STORY, Circuit Justice (after stating the facts). Upon the evidence in this case, it is impossible to support the first point asserted in the argument at the bar, viz. that the slave actually deserted at Drontheim, and therefore has forfeited all title to wages. In the first place, the answer of the respondents admits the amount of the due bill to be wages yet due and unpaid to the plaintiff, and alleges an actual tender of this sum to the proctor of the plaintiff. This alone would be conclusive against the plea of desertion. It is also as clear from the evidence, that the slave behaved himself to the entire satisfaction of the master; for in the letter to his owner, he says, "Ned has behaved himself extraordinary well, while on board, and has discharged every duty with propriety." He adds, "I have had the misfortune to be taken by the Danes, and brought up to this place, and am under the necessity of discharging your servant Ned." And not the slightest hint of desertion is suggested in any part of the letter. In the next place, if Ned had previously deserted, (of which I see no reasonable evidence,) the captain's receiving him again into favor, and giving him a discharge, with an acknowledgment, that he was entitled to his wages, was a complete purging away of all the previous forfeitures incurred by the asserted desertion. In every view, in which this defence presents itself, it seems to be as disingenuous, and unsupported, as any, that could have been devised by the owners of the ship.

The next question is, as to the validity of the discharge of the slave at Drontheim. It is the settled rule of this court, that the capture of a neutral ship does not of itself dissolve the contract of mariners' wages. The utmost effect, that can be attributed to it, is, that it suspends the contract, which is revived or extinguished by the ultimate acquit-

tal or condemnation. The Saratoga [Case No. 12,355]. The seamen, therefore, are not bound to quit the ship immediately upon the capture, nor can the master compel them to receive a discharge. They have a right to remain by the ship until a sentence of condemnation or acquittal has passed, or all reasonable hope of recovery is gone. But if, with consent of the master, they leave the ship, they are not prejudiced in their rights; and their title to wages for the previous period of the voyage will be confirmed or destroyed, according to the event of the ultimate adjudication. And such would have been the principles applicable to the present case, if the discharged mariner had possessed a legal capacity to make, and dissolve, the contract for wages. His discharge would then have been a voluntary act, and binding upon him; and as the ship was restored, his title to full wages for the antecedent term of service would have been perfect. But such a legal capacity can in no respect be attributed to him. The contract for his wages was entered into by his owner in Virginia; and must, therefore, be construed with reference to the lex loci contractus. In Virginia slavery is expressly recognised; and the rights founded upon it are incorporated into the whole system of the laws of that state. The owner of the slave has the most complete and perfect property in him. The slave may be sold or devised, or may pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract; and the perpetual right to his services belongs exclusively to his owner. It follows from these considerations, that the discharge of the slave at Drontheim, even with his own consent, was an unauthorized act, and in no respect binding upon the plaintiff. As the latter never assented to, or ratified it, it was, as to him, a tortious act, and draws after it all the consequences of an unjustifiable discharge.

The next point, which, in fact, constitutes the principal question in this cause, is, to what time wages are, in this case, to be allowed. The counsel for the plaintiff claims wages up to the time of filing the libel, or at least to the time of the arrival of the Ann Alexander in the United States in 1814. The counsel for the respondents on the other hand contends, that no wages under all the circumstances ought to be allowed after the time of the discharge at Drontheim. If a seaman is wrongfully discharged during a voyage, it is asserted to be a rule of the maritime law, that he is entitled to wages up to the successful termination of the voyage, deducting any wages he may in the mean time have earned in any other vessel. Abb. Shipp. pt. 4, c. 3, § 1, pp. 424, 425. But it may be doubted, if this position is not laid down in too broad and unqualified a manner. Cases may occur, in which the wages for the whole voyage may be a very inadequate compensation; as, for instance, where the seaman is dismissed in a remote part of the world, and has no opportunity to return until long after the voyage is completed.

On the other hand, if the voyage is a long one, and the seaman is dismissed at an intermediate port early in the voyage, and he immediately returns home, wages for the subsequent portion of the voyage, after his return, would be too great a compensation. In the one case the payment would exceed, and in the other fall short of, the damages sustained by the breach of the contract; whereas, by the general principles of the maritime law, as well as the common law, it ought, in both cases, to be equal to the real loss and injury to the party. By the rule of the civil law, if the party be prevented, without his default, from performing full services, he is still entitled to the stipulated hire for the whole period for which he contracted to serve. "Qui operas suas locavit, totius temporis mercedem accipere debet; si per eum non stetit, quo minus operas praestat." Poth. Pand. de Loc. Conduct. art. 4, § 4, p. 845; 1 Dom. Civ. Law, B. 1, tit. 4, § 9, art. 6, p. 107. This rule is followed in the maritime codes of foreign nations. By the laws of Wisbuy (article 3), a mariner unlawfully dismissed during the voyage, is entitled to full wages up to the termination of the voyage; and in addition to this the Hanseatic and French ordinances allow him the expenses of returning to the country of his departure. Hanseat. Ord. art. 42; 1 Valin, Comm. lib. 3, tit. 4, art. 10, p. 705; Poth. Louage des Matelots, pp. 206, 207. And a similar rule seems applied, where the vessel is sold in a foreign country, by the Consolato del Mare, c. 148. There is much good sense and equity in these regulations; and perhaps if the point were entirely new, it might not be unfit to incorporate them into our maritime code. But our law seems to have adopted a different course. It gives the party compensation for the injury, which he has sustained, according to the circumstances of each particular case. The courts of common law usually sustain the claim in a special action on the case for damages for the illegal discharge. But the admiralty, (which in this respect is sometimes followed by the courts of common law,) does not hesitate to pronounce for compensation in a simple suit for wages. It is not, that the admiralty cannot sustain a suit for damages, but it deems it proper to award damages in the shape of wages.

Notwithstanding this diversity on the point, the rules adopted by both courts in estimating the damages are, or ought to be, the same. In some adjudged cases, indeed, wages up to the successful termination of the voyage have been allowed; in others, wages up to the return of the seaman to the country, where he was originally shipped, without reference to the termination of voyage. The Beaver, 3 C. Rob. Adm. 92; The Exeter, 2 C. Rob. Adm. 261; Hoyt v. Wildfire, 3 Johns. 518; Brooks v. Dorr, 2 Mass. 39;

Ward v. Ames, 9 Johns. 138; Sullivan v. Morgan, 11 Johns. 66; Rice v. The Polly & Kitty [Case No. 11,754]; Mahoon v. The Gloucester [Case No. 8,970]; Hart v. The Littlejohn [Case No. 6,153]. But these apparent contrarieties are easily reconcilable, when the circumstances of each case are carefully examined. In all the cases, a compensation is intended to be allowed, which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time, and the expenses incurred by the party. It is presumed, that after his return home, or after the lapse of a reasonable time for that purpose, the seaman may, without loss, engage in the service of other persons; and where this happens to be the case, wages are allowed only until his return, although the voyage may not then have terminated. On the other hand, if the voyage has terminated before his return, or before a reasonable time for that purpose has elapsed, wages are allowed up to the time of his return, for otherwise he would be without any adequate indemnity. Cases, however, may occur, of such gross and harsh misbehaviour, or wanton injustice, as may require a more ample compensation than can arise from either rule. The doctrine, therefore, asserted in the learned treatise of Mr. Abbott (Abb. Shipp. pt. 4, c. 2, § 1, p. 424), is far from being universal in its application. The qualification, too, of the doctrine, by allowing a deduction of the intermediate earnings in another vessel, is not supported by any authority cited by him for the text.

So far as foreign writers speak on the subject, they uniformly allow full wages without any deduction. Laws of Wisbuy, art. 3; Laws of Oleron, art. 13; Kuricke, 707; 1 Valin, Comm. 705; Poth. Louage des Matelots, pp. 206, 207; Curia Phillippica, cited Peters R. 120. It is true, the civil law seems in a parallel case to have incorporated the like deduction. 1 Domat, B. 1, tit. 4, § 9, art. 6, p. 107; 3 Poth. Pand. 843, art. 4, § 4. But it may well be doubted, if sound policy, or equity, authorizes it. It is not always easy for a mariner, upon his return home, immediately to engage in another service; and to turn him ashore in a foreign country, without friends or protection, is an injury, which is hardly compensated by a mere remuneration for the loss of time. The French ordinance, with great propriety, allows a deduction of the wages earned in the homeward voyage, from the expenses allowed for the return; but never from the wages which would have become due by a completion of the voyage. 1 Valin, Comm. 706, 719, art. 5; Poth. Louage des Matelots, note, 205, 207. If, therefore, this deduction of the intermediate earnings be not established by some authoritative decision, it will deserve consideration, whether it be not more consonant to sound policy and justice to disregard it; especially as the laws of the United States manifestly intend to discourage all discharges of our seamen in foreign countries. Perhaps, as a general rule, the provision of the French ordinance, in cases where the voyage is broken up by the act of the owner, or master, after its commencement, is as equitable as any that can be devised, in reference to the ordinary cases of the unjustifiable dismissal of seamen in foreign ports. It declares, that in such cases, the mariner shall receive wages, for the time he has served, and also for such farther time, as may be necessary for his return to the place of departure of the vessel, and also a reasonable allowance for the expenses of his return.[2]

In the case now in judgment, the principal ground upon which the claim for wages, up to the commencement of the suit, is attempted to be supported, is, that the slave has never returned to the possession of his owner, or to the United States. But this allegation is not satisfactorily made out in proof. On the contrary there does arise a strong presumption of his actual return to the United States; since he expressed a wish so to do; and he was actually shipped on board of a cartel, which afterwards safely arrived at New York. Under these circumstances the party, who seeks to avail himself of the asserted fact, that he has not returned, should be prepared to repel this presumption, and to show, that it was not the result of his own negligence or default. But if the proof of the fact were positive, there would be intrinsic difficulty in sustaining, in point of law, the claim of wages to the extent prayed for. Neither the master, nor owners of the ship, have guaranteed the return of the slave, or fraudulently prevented it. Every thing indeed seems to have been done to facilitate his return; and even the discharge itself does not appear to have been occasioned by any wanton violation of good faith. The utmost extent, therefore, to which, under these circumstances, the law ought to go, should be, to give the party compensation for the ordinary and necessary consequences of the act. It is not pretended, that the

[2] 1 Valin, Comm. lib. 3, tit. 4, art. 3, p. 686; Poth. Louage des Matelots, 203–205, note. There is a remarkable difference in the French ordinances between the case of the breaking up of the voyage by the act of the owner or master, and the discharge of a mariner without a valid cause. In the former case, wages are given, up to the time when the mariner has or might have returned home. In the latter case, the whole wages for the whole voyage are given. In both cases there is added the expense of his return. A corresponding difference is made in the present commercial code of France. In the case of a rupture of the voyage, seamen hired by the month, receive their stipulated wages for the time they have served, and in addition, as an indemnity, one half of their wages for the presumed duration of the remainder of the voyage, for which they were engaged, and the expenses of their return. In cases of a dismissal, without valid cause, they are to receive the whole of their wages, and their expenses of return. See Code de Commerce, lib. 2, tit. 5, arts. 257, 270, and Mr. Rodman's very valuable translation of it, pages 179, 183.

master or owner of the ship would have been responsible for the desertion of the slave during the voyage; and it is not easy to perceive, why they should be for any loss occasioned by his personal misconduct after his discharge.

It is clear, that a free mariner would have no such right or remedy; and in the case of slavery, as to rights and remedies, the owner is substituted by the law in lieu of the slave. But if the present argument could prevail, the duties and responsibilities of the master and owners of a ship would, in the two cases, materially vary. No correspondent distinction has as yet been recognised, between common mariners, and servants shipped by their masters; and a slave is in this respect but a servant bound to perpetual servitude. His situation differs but little from that of the villein of feudal times. If there had been in the case at bar gross fraud, enticement, or oppression, there might have been some reason to have decreed the compensation by way of punishment; but in the absence of all these circumstances, it cannot be allowed.

The claim for wages up to the time of the arrival of the ship in Boston is not entitled to more favor; because it must be taken for true upon the evidence, that the slave actually returned, or might, but for his own default, have returned to the United States, a full year before that period. The utmost extent, to which wages can be allowed, is up to the 29th of March, 1813, the time of the arrival of the cartel, in which he embarked. It does not appear, that up to that time there was any reasonable delay in his endeavour to return to the United States; and as there were no additional expenses incurred, and no intermediate wages earned, the plaintiff upon the principles, which have been already stated, is fully entitled to this compensation. The decree of the district court must therefore be affirmed with costs.

EMERSON (KELLUM v.). See Case No. 7,669.

Case No. 4,442.

EMERSON et al. v. The PANDORA.

[1 Newb. 438.] [1]

District Court, E. D. Louisiana. May, 1853.

SALVAGE — BURNING VESSEL — COMPENSATION OUT OF PROCEEDS — TOWAGE — CLAIMS FOR SUPPLIES AND OF STEVEDORE.

1. Where the master of a vessel on fire gives authority to another to save what he can, and look to the property he may be enabled to save for his compensation, the person thus authorized is to be regarded in the light of a salvor, and is to be compensated as such out of the proceeds of the property saved.

[Cited in The Williams, Case No. 17,710.]

2. The owners of a steamboat, for services in towing a burning vessel from one shore of the river to the other, are entitled to a reasonable compensation for towage; but they are not, for that service alone, entitled to salvage.

3. The claim of the stevedore for loading and unloading the vessel, and that of a commercial firm for supplies furnished her, before the fire which rendered necessary the services of the salvors, cannot be permitted to interfere with the claims of the latter, but may be paid out of any remnant in the registry.

[In admiralty. This was a libel by John B. Emerson and others against the proceeds of the sale of the bark Pandora and cargo.]

Mr. Durell, for libelants.

Mr. Bright, for respondent.

McCALEB, District Judge. The libelants in this case claim a compensation for salvage services rendered in saving from loss by fire the bark Pandora, of Liverpool, on the 26th of December last. The vessel had on board a cargo of cotton, and was lying in this port, moored at the wharf, when she was discovered to be on fire. By order of the proper authorities of the city, she was towed across the river, near to the opposite shore. The libel states, that at about 11 o'clock, a. m., the said bark being on fire fore and aft, with main and mizzen-mast burned off and in the water, was abandoned, together with her cargo, by her master, Captain Wemyss, to the libelant, for the purpose of saving, if possible, some part thereof: that the libelant thereupon consented to render such assistance as was in his power, and immediately took possession of the bark and proceeded to scuttle her; but, finding it impossible to sink her, in consequence of the rapid progress of the flames, he engaged the services of other men, and with them continued to watch her, and to throw water upon the flames until they were extinguished, and the hull of the vessel and a portion of the cargo, to wit:— bales of cotton, finally saved in a damaged condition. The libel further alleges, that at the request of the master of the bark, and for the purpose of saving expense, the libelant consented that the bark and cargo thus saved, through his exertions, should be sold, he at the same time reserving his lien upon the proceeds: that the sale accordingly took place, and the proceeds thereof amounted to the sum of $1,525. He further avers, that in consequence of the great risk and expense he incurred in saving the bark and cargo, he is entitled to receive a compensation of seventy-five per cent.; but that the owners, through their agents, refuse to pay the same, or any part thereof. The respondent, as owner of the bark, denies that the vessel was ever indebted to the libelants, and avers that they are not entitled to any compensation in the nature of salvage. An intervening libel has been filed on behalf of the owners of the tow-boat F. M. Streck, which was employed by the city authorities to tow the burning vessel to the opposite side of the river. The interveners, also, deny that the services alleged in the libel were performed by the

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

libelants. An intervening libel has also been filed on behalf of Bell, a stevedore, who discharged the cargo brought by the bark to this port, and also put on board 550 bales of the cargo with which she was loaded at the time she took fire, on the 9th of December; for it appears that the vessel was twice on fire during the same month. The intervener alleges that he assisted in putting out the first fire which occurred on the bark, and in discharging the cargo. He also avers, that subsequently to the first fire, and previous to that of the 26th December, he stowed on board the bark 1,245 bales of cotton. For these services, rendered at different times, his accounts, amounting in the aggregate to the sum of $924.89, were approved by the master. He also contests the right of the libelants to claim salvage. An intervening libel has also been filed on behalf of David Maxwell & Co., for supplies furnished the bark from the 2d of November until the 20th of December, inclusive.

This claim for supplies, as well as that of the stevedore, for loading and discharging the bark previous to the fire of the 26th of December, must be asserted against any remnant in the registry after the other claims have been satisfied. The claim of the libelants for a salvage compensation is resisted upon the ground that Emerson, and those employed under his orders, acted merely as watchmen, to prevent whatever might be saved from the bark from being stolen after it was landed. But evidence does not justify the court in regarding them in the light of watchmen merely. Without detailing at length the facts contained in the depositions, I will extract such only as may be necessary to show the nature of their services and the circumstances under which they were rendered.

James Titus states, that when he saw the bark, at 9 or 10 o'clock on the morning of the 26th of December, she was a mile or mile and a half below Algiers. She was burning then, abaft the foremast. She was at anchor, about forty feet from the shore. He does not know the fact, but she might have been aground. The master of the bark was pointed out to witness, standing on the forecastle; and there was a city fireman on the bowsprit, cutting away the headstays, which, after being cut away, swung in and caught fire. This was all that was done till the master came ashore. There were several boats around picking up and carrying away what they could. When the master came ashore the libelant Emerson spoke to him about giving up the vessel. The master replied that he did not know how that would do, but that he could not save anything more. After speaking to several of his friends here and there, the master returned to Emerson and told him to save what he could, and to look to the things saved for his pay; also to keep a look out on the things ashore, and see that no one stole them. These were things that had drifted from the ship, such as spars, rigging, tackling, &c., which had burned away and floated ashore, and were lying along the bank. The master of the bark then said he was sick, and left and went to the city. The person pointed out to the witness as the mate went away with the master. Emerson and the witness then went to Algiers to get tools for the purpose of scuttling the bark. They commenced by cutting a hole in her, forward, but persons ashore calling out that the foremast was falling, they abandoned the forward, and went to the larboard quarter, where they cut a hole; but the vessel burned so fast that the hole rose above the water, the vessel lightening all the while. There was great danger attending their work, their clothes catching fire several times. There were four of them at work in the boat, alongside the bark, at the same time. The port warden, Mr. Clark, now hailed Emerson and witness to come ashore, as they could do nothing more. They then went ashore, and Emerson determined to let the fire burn low enough to permit him to put men there to put it out with buckets. It was nearly dark. Emerson employed some men to watch the things ashore and also the ship, to prevent theft. This was all that was done on that day.

The next day, quite early in the morning, the witness went down again and found Emerson there with men employed in wetting the sides of the bark to stop her burning and sinking. The planks and timbers along the edge of the vessel were burning, and they put water on to prevent her from sinking. She was burnt nearly to the copper, and was about a foot or eighteen inches only above the water. The witness was again there Tuesday morning. The vessel was still burning, and Emerson and his men were working with their buckets and watching the goods on shore. This they continued to do until the purchasers of the bark came forward and took possession, they employing the same men to work on until they could get a tow-boat to bring her across to this side. The witness was present at the sale of the bark and the rigging, &c. There were two separate sales. The materials saved by the F. M. Streck were sold before the hull and separately. The witness was paid ten dollars for his services. This testimony is corroborated by that of Bishop, Crane, Foster and Robinson, and it is sufficient to show that the services rendered by the libelants were salvage services for which a liberal compensation should be allowed. They were three days at work, and though perhaps there was no great danger incurred, their exertions were incessant and finally successful.

The claim of the F. M. Streck must be asserted against the proceeds of that portion of the rigging which was actually saved by her. So far as it relates to her services

rendered in towing the bark across the river, she would be entitled to a reasonable compensation as towage. But I cannot regard her in the light of a salvor. She did not actually save the hull of the bark and her cargo; for she abandoned them before they were finally rescued by the salvors. As no specific claim has been asserted against the proceeds of that portion of the rigging brought away by her from the burning vessel, no allowance can be made in this decree. On the proceeds of the bark and cargo I am of opinion she has no lien except for towage.

As the exertions of the libelants may be considered as in all respects meritorious, they should, as I have already intimated, be liberally rewarded. The value of the property saved is small, and it is certain that it was entirely through their persevering efforts that it was finally rescued from the flames. The bark and her cargo were to all intents and purposes abandoned by the master to the salvors (though such an abandonment may not be what is properly and technically termed a derelict in the maritime law), and I do not think that under all the circumstances a moiety would be an extravagant compensation.

The proceeds of the bark and cargo amount to the sum of $1,525. From this sum the costs and expenses of court must be first deducted. Of the balance, one moiety will be paid to the salvors, Emerson and his associates; a reasonable compensation for towage (the amount to be shown by evidence) will be allowed the F. M. Streck; the claim for supplies will next be satisfied, and the residue, if any, will be paid to the stevedore.

The case will now be referred to the commissioner in admiralty, who will distribute the proceeds in accordance with this decree.

Case No. 4,443.

EMERSON et al. v. SIMM et al.

[6 Fish. Pat. Cas. 281;[1] 3 O. G. 293.]

Circuit Court, D. New Jersey. Feb., 1873.

PATENTS — SUIT IN EQUITY FOR INFRINGEMENT—DAMAGES—INNOCENT INFRINGEMENT—EXEMPLARY DAMAGES—ESTABLISHED LICENSE FEE.

1. In a suit in equity for the infringement of a patent, it is not necessary that the complainant should pray for damages eo nomine.

2. It is well established that, under the general prayer of the bill, for such relief as may be agreeable to equity, the complainants became entitled to damages upon a decree being rendered in their favor. By the law, they follow as one of the results of the decree.

3. When the defendant purchased the machine in the open market, not knowing that it was patented, and abandoned all the patented appliances on being notified of their infringement: *Held*, that it was not a case for exemplary damages.

4. It is well established that when an inventor exercises his monopoly, by selling licenses to make and use his improvement, he has himself fixed the average of his damages when his invention has been used without his license.

[Cited in Goodyear Dental Vulcanite Co. v. Van Antwerp, Case No. 5,600; Stutz v. Armstrong, 25 Fed. 147.]

5. The fact that the defendants discontinued the use of the infringing machine on notification of infringement, and that they might have used some other unpatented machine with equal advantage, has no weight in measuring the complainants' damages, when the complainants have an established license fee.

6. A decree for damages, when the complainants have an established license fee, for the amount of the fee, gives the defendant no right to use the invention for the life of the patent.

[Cited in Stutz v. Armstrong, 25 Fed. 148.]

In equity. Final hearing on motion to confirm master's report. Suit brought [by E. S. Emerson and others, against Edward Simm and others] on letters patent for "improvement in sawing-machines," granted Robert G. Emerson and John Meyers, May 23, 1854. It appeared that the defendants, without knowledge of the patent, had purchased a single machine, which was acknowledged to be an infringement of complainants' patent; and further, that when they were notified they were infringing, they promptly abandoned the use of all the devices protected by the patent. It also appeared that the complainants had an established license fee for persons of the class of the defendants, for using machines made under the patent. The case came up upon exceptions to the master's report, to whom it had been referred to state an account of the profits received by the defendants, and to assess the damages suffered by the plaintiffs.

F. H. Betts, for complainants.

S. J. Glassey, for defendants.

NIXON, District Judge. The bill of complaint in this case prays, "that the defendants may be compelled to account for, and pay over unto the plaintiffs, all such gains and profits as have accrued or arisen to, or been earned and received by, the defendants, and all such gains and profits as they would have received but for the wrongful acts of the defendants, and such other relief as the equity of the case may require." The bill was taken as confessed, for want of an answer, and a final decree entered May 9, 1872, with a reference to a master to take, and state an account of the profits accrued to or received by the defendants on account of their infringement, and also to assess the damages suffered by the plaintiffs from such infringement.

The master's report was filed November 22, 1872, finding (1) that no satisfactory proof was made before him that the defendants had derived, or received, any profit from the use of the plaintiffs' invention; and (2) that the plaintiffs had suffered damage by the infringement of their patent right by defend-

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

ants to amount of $1,200, arising from their loss of the license fee, as established by the complainants, for the use of their invention and machine, by persons engaged in business of the character carried on by the defendants.

Six exceptions are filed to the report in behalf of the defendants, all of which, I think, are embraced in these two: (1) Because the master reports that the complainants are entitled to any damages in this suit. (2) Because he reports that they should be awarded the sum of $1,200 as a license fee for damages for the infringement; or that the evidence in the case warranted the finding of any such sum as the value of a license for complainants' invention.

1. The first exception was not very seriously urged at the argument. The bill in this case was filed June 14, 1871. Section 55 of the act of July 8, 1870 [16 Stat. 206], supplementing the provisions of the patent act of 1836 [5 Stat. 117], provides that, "upon a decree being rendered in any case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same, or cause the same to be assessed under its direction, and shall have the same powers to increase the same, in its discretion, that are given by said act to increase the damages found by verdicts in actions upon the case." It will be perceived that the above section materially changes and adds to the remedy given to plaintiffs under the act of July 4, 1836. Section 14 of that act confined the jury to the actual damages which had been sustained by the plaintiff; and this amount the court was authorized to increase to any sum not exceeding three times the amount of the verdict. The objection of the defendants in this case is, that the bill of complaint does not pray for damages eo nomine, and hence, that no damages should be allowed. The answer is, that the bill asks for an account of gains and profits, and such other relief as may be agreeable to equity, and that under this general prayer for relief, upon a decree being rendered in favor of the complainants for an infringement of their patent, they are entitled, under the statute, "to receive, in addition to the profits to be accounted for by the defendants, the damages they had sustained thereby." The damages follow, by the law, as one of the results of the decree, whether specifically prayed for or not. It has been so held in England under Lord Cairns' act (22 & 22 Vict. c. 27), which simply gives jurisdiction to the court of chancery to award damages, if it sees fit so to do. Betts v. Neilson, 16 Wkly. Rep. 524; Id., 19 Wkly. Rep. 1125; Catton v. Wyld, 32 Beav. 266.

2. I have examined the testimony taken by the master, returned and filed with his report, upon which he bases his award of $1,200 for damages to the complainants. It appears that the defendants purchased the machine in the open market, without a knowledge of the patent; that they used it about nine months, commencing in September, 1870, and ending in June, 1871; that it was used solely in their own business in sawing boards for the manufacture of trunks, and that they abandoned all the patented appliances to the machine, when notified of their infringement, and before the suit was commenced. No case is, therefore, made for exemplary damages, and the sole question is, whether the amount fixed by the complainants for a license fee, to be paid by persons engaged in business of the character carried on by the defendants, is a fair criterion by which to judge of and measure the damages suffered by complainants from the defendants' infringement. The courts have always found it difficult to lay down any precise rule of damages in patent cases. The legislation of congress in the matter is quite suggestive. By section 5 of the act of 1793 [1 Stat. 318] if any person made or used an invention without the consent of the patentee, he forfeited and became liable to pay to the patentee a sum that should be at least equal to three times the price for which the patentee had usually sold, or licensed, to other persons, the use of the said invention. This was found in actual practice to be a measure of damages both inconvenient and harsh; inconvenient, because it did not make provision for those cases where the patentee manufactured and sold his invention, and depended upon the profits thus realized for his remuneration; and harsh, because it did not allow any discrimination to be made between the innocent violator and the willful pirate. Section 14 of the act of July 4, 1836, before referred to, restricted the jury to actual damages, but allowed the court, in its discretion, to treble the amount, according to the circumstances of the particular case. This section has been re-enacted in the law of July 8, 1870, and, in addition thereto, authority has been conferred upon the court, sitting in equity, to ascertain and assess, not only the profits of the infringer, but the damages of the inventor, with power of a corresponding increase in its discretion. But, although no rule can be laid down applicable to all cases, there is one which ordinarily applies to cases of this sort, where the patentee depends upon license fees or royalties for his compensation for the use of his invention. If he has an established license fee, the amount of such fee is his loss or damage for the use of the invention without a license.

The supreme court, in Seymour v. McCormick, 16 How. [57 U. S.] 490, says: "Where an inventor finds it profitable to exercise his monopoly, by selling licenses to make or use his improvement, he has himself fixed the average of his actual damages, when his invention has been used without his license."

The same rule was applied in Sickles v. Borden [Case No. 12,832]; in Goodyear v. Bishop [Id. 5,559]; and in Spaulding v. Page [Id. 13,219]. The defendants seek to avoid the application of this rule in the present case by showing that they ceased to use the complainants' invention, when apprised of the patent, and substituted other appliances, which rendered the machine quite as effective and useful for their purposes. I do not now listen to the suggestion of complainants' counsel that these substituted appliances are mere mechanical equivalents, for this is not the proper time and mode of trying that question; but surely the defendants are not permitted to get rid of the consequence of a confessed infringement by alleging that they might have used some other machine as advantageously as the complainants'. However available such proof might be, in considering the question of the defendants' profits, it has no weight in measuring the complainants' damages. I am therefore of the opinion that the exceptions must be overruled and the master's report confirmed, and it is ordered accordingly. Such a decree in this case will give to the defendants the right to use the invention of the complainants during the life of the patent.

[NOTE. For other cases involving this patent, see note to Myers v. Frame, Case No. 9,991.]

EMERSON (UNITED STATES v.). See Cases Nos. 15,050 and 15,051.

EMERSON (WARREN v.). See Case No. 17,195.

Case No. 4,444.

Ex parte EMERY.

[3 App. Com'r Pat. 215.]

Circuit Court, District of Columbia. Oct. 8, 1859.

PATENTS—ANTICIPATION.

[A device for raising the cutter-bar of a mowing machine from its usual position, close to the ground, in order to pass over obstacles, is not anticipated by a device to hold the cutter-bar of a reaping machine permanently at a greater or less distance from the ground.]

[Appeal from the commissioner of patents.

[Application by Horace L. Emery for a patent for an improvement in mowing machines. The commissioner rejected the application.]

MORSELL, Circuit Judge. The appellant states his claim in his specification thus: "Having fully described the nature of my invention, and shown the manner in which the same may be made available, what I claim as my invention, and desire to secure by letters patent, is: (1) Combining with the cutter-bar an adjustable arm or lever provided with a roller or other means of sliding easily upon the ground, for the purpose of sustaining the cutter-bar at any required distance from the ground, or allowing it to rest upon the ground at pleasure for purposes herein set forth. (2) I also claim placing said arm directly in rear of the shoe, in order that it may be prevented by said shoe from clogging as described. (3) I also claim connecting said arm by a rod along the back of the cutter-bar with a lever near the frame of the machine so that the attendant may elevate and depress the cutter-bar at pleasure." The commissioner has adopted the report of the board of directors for his decision and reasons, the substance of which will be stated.

As to the first claim presented he says: "Strictly speaking, Emery's adjustable arm or lever is not combined with the cutter-bar, but with the finger-bar, and to this it is attached in such a manner as to be entirely independent of the platform, so that such platform can be removed when the machine is to be converted from a grass to a grain harvester without disturbing the said arm or lever. That Atkins' harvester, patented Dec. 21st, 1852, possesses an adjustable arm provided with a roller for the purpose of elevating and depressing the outer end of the finger-bar, we do not understand to be denied. But it is contended that as this machine has corresponding devices at each end of the platform for adjusting it and the cutter to different heights for cutting high or low, and as the patent contains no hint of any other object, corresponding devices do exist in Atkins' harvester (the model on file does not show them as applied to the main wheel, however), still it cannot be pretended that both wheels are not adjustable independently the one of the other, and that while one end of the machine remains at a stationary elevation the outer may be adjusted at the pleasure of the operator. What Atkins' object was in making his arm or lever adjustable as described in his specification is immaterial. If the contrivance can and does operate substantially like Emery's, it is sufficient to deprive the latter of all color of right to a patent. It is further alleged that if the platform be removed from Atkins' machine, changing it from a grain harvester to a mowing machine, the adjustable wheel would go with the platform, and leave a mowing machine without an adjustable wheel. But this objection does not appear to us to be well taken. We can see no reason why Atkins' platform may not be wholly removed, and yet leave the adjustable arm with its wheel attached to the machine. It is true that if a working machine were constructed like the model deposited in the office there would be, in case the platform were removed, an extension of what might be called the shoe behind the finger-bar remaining, but it does not appear to us probable that such extension would prove a greater obstruction to the draught, or that it would otherwise be any more inconvenient than Emery's shoe and track-clearer, which,

whether the machine be used as a mower or grain harvester, form constituent parts of it. But Atkins' machine is not practically constructed like his models. The adjustable arm provided with the wheel for raising or lowering the outer end of the finger-bar is shown in a full-sized working machine which may be seen in the agriculture store on Seventh street, near Pennsylvania avenue, in this city, and to which the attorney for Emery has referred us, to be attached directly to the finger-bar, and to which in combination with it so that the whole platform may be removed, carrying with it, if desired, even the shoe, the divider and the track-clearer, and yet leave the adjustable arm attached to the finger-bar, as in Emery's machine. Since then so close an identity is found between the device claimed by Emery and that shown by Atkins, it is perhaps superfluous to refer to any other instance of its use. It may however be well to observe, with a view to mark the extent of the application of what Emery claims as exclusively his own, that the same idea is embraced in the application of J. W. Dana, rejected Oct. 4th, 1849, to which the applicant has been referred by the examiner, and in the patent granted to B. Densmore, Feb. 10th, 1852, application filed January 10th, 1851, to which this is the first reference, wherein are clearly seen adjustable arms or levers connected with the finger-bar or its equivalent, and provided with means of sliding easily upon the ground, like Emery's model; Dana's machine has no platform attached, and, as from Emery's, so from Densmore's may the entire platform be removed, leaving nothing but the finger-bar and the shoe." "The second claim relates to the position of the arm or lever which carries the roller, or other means of allowing the finger-bar to slide easily over the ground. It is placed directly in rear of the shoe, so that the said shoe may prevent its clogging. And why the corresponding arms in Atkins' and Dana's machines do not hold the same relative position, or why they are not equally prevented from clogging, and by the same means, we are unable to discover, and the applicant (evidently regarding the first claim as covering the important point of his invention) has failed to make clear to us,—indeed, he has not, either in his written argument, or his intercourse with us, alleged that any distinction does in reality exist. The adjustable arm in Densmore's machine is also placed in rear of shoe. The third claim has reference to the means of operating the arm and roller, or other means of sliding, from the attendant's seat: the said arm being connected with a lever near the frame of the machine by means of a rod placed along the back of the finger-bar; and this device is, in our opinion, shown in Dana's machine, where the arm which elevates the bar that carries the cutting apparatus is attached to the handle or lever near the driver's seat by means of a chain of cord passing along the back of said bar; and it appears to us to be no answer to the pertinency of this reference that the machine is an impracticable one, as is verbally alleged by the attorney for Emery. The machine as a whole may be practically devoid of utility, and yet some of its parts may possess considerable merit, and such appears to us to be the case with Dana's elevating apparatus. It is clear that his device will raise and lower the bar, and with it the cutting apparatus, although the attorney for Emery alleges that such is not the case. We must therefore recommend that the action of the examiner in this case be affirmed, and that a patent be refused on all of the claims submitted,"—which report was adopted and confirmed by the commissioner on the 19th June, 1858.

Four reasons of appeal were filed from this decision. They are general, denying that the invention was old and not patentable, and affirming that the features thereof are new and patentable, and denying that the said claims are analogous to the references given. It will be unnecessary to state them particularly. The commissioner's report in reply to the reasons is substantially nothing more than the reaffirmance of the report of the examiners.

After due notice was caused to be given, all the aforesaid papers in the case were laid before me. The appellant, also. by his attorney, appeared, and, having filed his written argument, submitted the case. From all which the case presented appears to be an improved grass mowing harvester, consisting of an entirely auxiliary and additional device for tilting the mowing machine in emergencies, and to be thrown out of use, when the machine is performing its regular duty, to be used in the combination as first stated; this claim is supposed to be for nothing more in substance than for a double use, and to be therefore devoid of novelty; and to show it, the reapers and rake for harvesting machines were referred to, with the examiner's remarks, as before stated. Considering the references, what they import to be designed for according to their operations as a whole, it must be acknowledged, I think, that there is a wide and substantial difference between them and the mowing machine. No farmer would think of suffering the grain reaper to enter his meadow, or a grass-mower to harvest his wheat—there must have been made a radical change both as to the operation and character of the reaper to adapt it to an identity with the mower, if such would be necessary in this case, then the doctrine of a double use would not apply. The party will be entitled to a patent for such parts of his machine as are new, or for the result of such a combination of old parts as he shows is new and valuable.

With these remarks, I proceed to consider more particularly the parts of his references which he thinks are the same with the contrivance of Emery. Such he says is the

adjustable arm provided with a roller for the purpose of elevating and depressing the outer end of the finger-bar in Atkins' machine, and that Atkins' platform may be wholly removed and yet have the adjustable arm with the wheel attached to the finger-bar. This, however, he says, to judge from the machine in the office, could not be in the case without "an extension of what might be called the shoe behind the finger-bar." Is the commissioner correct that the two things are identical? The conditions under which they work are not alike, the same evidence is not to be performed, the principle is different, the purpose which ought to be identical is entirely different, no identity of object or effect, the one is always elevated above the ground, and occasionally increased to suit the grain that is to be cut; the other never raised from the ground only to be raised over stumps or rock, &c.; the one remains elevated during the operation of cutting, the other on the ground. The nature and purpose being different, how can there be identity, except in mere name? I have derived assistance in tracing the differences in this case by the learned argument of the counsel of the appellant, part of which I will recite. He says: "As before remarked, the ends of the cutter-bar of the mowing machine travel on what is called a shoe, allowing this bar to travel on the ground. In the reaper a wheel and divider take the place of this shoe, which always holds the cutter-bar a considerable distance above the ground, and is never thrown out of action, but the tilting device does not take the place of the shoe, but is added to it. It never holds the cutter-bar above the ground, when the machine is in regular action; but at such time it is always out of action." The wheels referred to by the commissioner do not anticipate the device of appellant, because they never permit the shoe and cutter-bar to come to the ground. They do not perform the double office of elevating the cutter when necessary and allowing it to come down to the ground when necessary. This is the gist of the invention. So as respects the second and third claims. The references appear to me to be equally inapplicable. The reaper has no shoe, nor anything that resembles it. If anything, it is the wheel known as the divider, but the only purpose of this is as a separator of the grain cut from that which is to be left standing (for the present) and marks and limits the width of the swath. It has neither shoe, nor tilting lever. Dana's machine has neither rod-finger, bar, or shoe. I think therefore that an identity has not been shown as alleged by the commissioner, and that the appellant is entitled to a patent as prayed.

MORSELL, Circuit Judge. I, James S. Morsell, assistant judge of the circuit court of the District of Columbia, do certify to the honorable commissioner of patents that I caused due notice to be given of the time and place appointed for the hearing of the above appeal, at which time and place all the papers and references in said case were laid before me, and the appellee, by his counsel, appeared, filed his written argument, and submitted the said case; whereupon, after due consideration, I am of opinion, and do so adjudge and determine, that the decision aforesaid is erroneous, and ought to be, and is hereby reversed and annulled, and it is hereby ordered that a patent be refused to the said appellant for his invention accordingly.

Case No. 4,445.

The EMERY.

[2 Adm. Rec. 342.]

Superior Court, S. D. Florida. Aug. 18, 1840.

SALVAGE—COMPENSATION.

[Cited in Baker v. The Slobodna, 35 Fed. 542.]

[This was a libel by James Curry and others, against the cargo and the brig Emery.]

S. R. Mallory, for libellants.

Adam Gordon, for respondent.

MARVIN, District Judge. This cause having been heard upon the proofs and allegations of the parties and mature deliberation had, it is ordered, adjudged, and decreed that from the proceeds of the cargo saved from said brig Emery the clerk first pay the duties thereon, and that he also pay the bills and charges for wharfage, storage and labor upon said cargo and materials, and the costs and expenses of this suit; and that of the residue of the proceeds of said cargo and of said materials he pay to the libellants in this case, in proportion to their respective interests as set forth in their libel, forty-seven per cent., as a full compensation for their services in saving said cargo and materials, and that he pay the residue of the said proceeds to the master of said brig, for and on account of whom it may concern.

Case No. 4,446.

EMERY et al. v. CANAL NAT. BANK.

[3 Cliff. 507;[1] 7 N. B. R. 217; 6 West. Jur. 515; 5 Am. Law T. Rep. U. S. Cts. 419.]

Circuit Court, D. Maine. April Term, 1872.

BANKRUPTCY — DEBTS PROVABLE AGAINST THE ESTATES OF A PARTNERSHIP AND ONE OF THE PARTNERS.

A creditor, holding commercial paper signed by a firm in bankruptcy, and indorsed by an individual member of the firm, a bankrupt, though not a sole trader, may prove his debt against both estates and share in the dividends of each.

[Cited in Re Knight, Case No. 7,880; Re Long, Id. 8,476; Amsinck v. Bean, 22 Wall.

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

(89 U. S.) 402; Re Foot, Case No. 4,906; Re Thomas, Id. 13,886; Re Vetterlein, 44 Fed. 61.]

Proceedings in bankruptcy were instituted against Nathan M. Woodman and Clement Littlejohn individually, and as co-partners doing business under the firm name and style of Woodman and Littlejohn, and they were regularly adjudged bankrupt under the act of congress to establish a uniform system of bankruptcy throughout the United States. The petitioners represented that they were the assignees of the bankrupts, and that the corporation defendants did on the 5th of September, 1871, prove against the co-partnership estate of Woodman and Littlejohn one certain draft, and two certain promissory notes, described in the petition, and that on the 21st of October following, the said defendants did also prove said draft and notes against the individual estate of the said Nathan M. Woodman, that said defendants discounted said notes at the request of said Woodman, with knowledge that said Woodman was a member of said firm, that they had never withdrawn either of said demands, but claimed to receive a dividend from both the co-partnership and individual estates, against which said draft and notes have been proved, and they further showed that said Woodman was not a sole trader at the date of the draft or notes, and never had since been to the date of the proceedings in bankruptcy, and alleged that they were advised, and believed as matter of law, that said claims were not provable against both of said estates, and prayed that the defendants might be compelled to elect the one from which they would receive their dividends. They presented their petition to the district court, but it appearing that the district judge was so concerned in interest as to render it improper for him in his opinion to sit on the hearing of the petition, the case was removed into this court under the act of the 3d of March, 1821, which gives the circuit court jurisdiction in such cases. 3 Stat. 643. Service was made in the district court, and the defendants, before the case was removed into this court, demurred to the petition, and prayed that the same might be dismissed. Woodman and Littlejohn were the drawers and first indorsers of the draft, and they were the makers and first indorsers of one of the notes, and the payees and first indorsers of the second note. Woodman was the second indorser on each of the three instruments.

George F. Emery, and Mattocks, and Fox, for petitioners.

W. L. Putnam, for respondent.

CLIFFORD, Circuit Justice. Undoubtedly the defendants as the holders of the draft and notes might have proceeded separately against the partnership, and the individual member who had become the second indorser, and they would have been entitled to judgment in each suit, though they could have but one entire satisfaction. In the case of a mere joint and several contract, the holder must at law elect a joint or several remedy, but the rule is otherwise where there are distinct contracts, though one may be incidental or collateral to the other, as for example a party may be liable on a bill or note in two or more capacities, and in such a case he may be the object of more than one action on the same bill or note at the suit of the same plaintiff, as where a party is sued jointly with others as a drawer or promisor, and separately as indorser, which is the nature of the bankrupt's liability on the draft and notes in this case. Wise v. Prowse, 9 Price, 393; Byles, Bills, 322; Chit. Bills, 539; 2 Pars. Notes & B. 459.

Precaution was taken by the defendants in this case to secure the joint obligation of the partnership, and the several and separate obligation of one of the partners, as they might lawfully do at the time they discounted the draft and notes, and it is clear that at common law full effect is given in such a case to the respective contracts. Originally the rule established by the English courts excluded double proofs except perhaps in a limited class of cases. It was first promulgated in the case of Ex parte Rowlandson, 3 P. Wms. 405. In a case founded upon a joint and several bond, Lord Talbot at first inclined to think that the petitioner, being a joint and several creditor, ought to be at liberty to come under each of the commissions, provided he received but a single satisfaction; but finally held that the petitioner ought to be put to his election under which of the two commissions he would come. He relied, to support his conclusion, upon the rule of law, which precludes a party from proceeding jointly and severally on the same bond at the same time, and expressly distinguished the case from one decided ten years earlier, in which a creditor was allowed to prove against a firm, and also one of the members, on his separate bond for the same debt, which is the same in principle as the case before the court. Horsey's Case, Id. 23. Unsatisfactory as the reasons given for the rule are, still the rule was adopted and enforced in many subsequent cases. Ex parte Parminter, cited in 1 Atk. 99; Ex parte Bond, Id. 98; Ex parte Banks, Id. 106. Much diversity of opinion has arisen upon the subject in the courts of the parent country at different periods. It was established, said Judge Story, at an early period, but was afterwards departed from, and was again re-established, and it now stands as much if not more upon the general ground of authority and the maxim stare decisis than upon any solid ground of equity or sound reasoning. Other cases adopted the same rule and held that the creditor in such

a case must elect, and that he could not be allowed to prove his debt against both estates. Ex parte Bevan, 10 Ves. 107; Ex parte Hay, 15 Ves. 4. In the first case Lord Eldon said he never could see why a creditor having both a joint and several security should not go against both estates, but regarding the rule as settled otherwise, he denied the right. Exceptions, however, were subsequently admitted in several cases. They were of three sorts: 1. Where the joint creditor was the petitioner for a separate commission against the bankrupt partner. 2. Where there was no joint estate, and no living solvent partner. 3. Where there were no separate debts. Story, Partn. § 378; Collyer, Partn. 963; Ex parte Le Forrest, Mont. & B. 44. Double proof, however, was allowed by the commissioners, and on appeal to the court of review the four judges were equally divided; but the chancellor, on appeal to him, affirmed the judgment of the two judges who were against double proof, placing his decision upon the ground of authority. Ex parte Moult, Mont. Bankr. 337, Mont. & B. 28, Id., 2 Deac. & C. 419.

Efforts were still made to induce the courts to adopt the opposite view, and agitation upon the topic never ceased in the courts till the question was carried to the house of lords, where it was finally determined that double proof should not be allowed in any case, which had the effect to transfer the question from the courts to the legislative department. Double dividends in case of distinct firms with common members, and in case of a sole trader, who was a member of a firm, were allowed by the subsequent bankrupt act of that country, overruling to that extent the decision of the court of last resort. Provision is there made, that where any debtor shall, at the time of adjudication, be liable upon any bill of exchange or promissory note in respect of distinct contracts, as member of two or more firms, carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts. Doria & M. Bankr. App. 194. Obviously that section is confined to joint and several bills of exchange and promissory notes, and for that reason was repealed and replaced by a provision more comprehensive and better suited to give all parties their just and legal rights.

By the act of parliament to consolidate and amend the law of bankruptcy, passed the 9th of August, 1869, it is enacted that if any bankrupt is, at the date of the order of adjudication, liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts. Rob. Bankr. App. 579; Bulley v. Bund, Bankruptcy App. 18. Proof was admitted by the registrar in the case of a joint and several promissory note, which was signed by two members of a firm, and by the firm and several other persons. The firm, having become bankrupt, the holder of the note proved the same against the joint estate of the firm, and the separate estates of the two partners who had also signed the note. Appeal was taken from the order of the registrar to the court of chancery appeals, and the court held that the holder was entitled to prove against, and receive dividends from, both the joint estate of the firm and the separate estates of the two partners who had also signed the note and been adjudged bankrupt. It was insisted for the appellants that inasmuch as the last act did not contain the words, "and receive dividends," it required the creditor to elect whether he would receive his dividends from the joint estate or from the separate estates, and that he could not receive them from both; but the court held otherwise, and decided that inasmuch as there was a joint contract by the firm, and a separate contract by members of the firm, the creditor might prove his claim against both estates, and that the whole act was framed on the plan that a right of proof carried with it a right to a dividend. Mellish, J., admitted that the old rule was as contended by the appellants, and that he had some doubts at first whether the section applied to every case of a bill of exchange drawn by a member of the firm on the firm, or of a joint and several promissory note indorsed by the members of a firm, but seeing that the persons called sole traders are also called sole contractors in the same provision, he held that the two designations meant the same class of persons, and that the enactment was intended to include a joint and a several promissory note, and was not to be confined to cases where the parties had executed separate instruments. He enforced that view by various considerations, and in conclusion stated that a joint and several note, though it is one instrument, contains both a joint contract and distinct separate contracts by the several makers, and decided that it was the intention of parliament that wherever there was a joint and separate contract, and joint and separate estates being administered in bankruptcy, the creditor should be entitled to prove against both the joint and separate estates.

Beyond doubt the opposite rule was the old rule in England; but it was never adopted in this country, and it was expressly re-

pudiated by Judge Sprague in Ex parte Farnum [Case No. 4,674], in an opinion of great research and ability. Learned judges in the course of nearly a century and a half since it was first adopted, have often attempted to vindicate the old rule as consonant with the just rights of creditors, but never have succeeded to the satisfaction of the legal profession. Some have attempted to vindicate it by analogy to the inability of the creditor at common law to bring joint and several actions at the same time. Ex parte Rowlandson, 3 P. Wms. 407; Rob. Bankr. 519. Many others assign as the foundation of the rule, that if a joint and several creditor is permitted to prove against both the joint and separate estates, he would draw from the separate estate to the prejudice of the other joint creditors who ought to have an equal right with himself in that estate, which would create a preference inconsistent with the principles of the bankrupt law. Ex parte Bond, Atk. 100. Throughout that period, however, the rule has been opposed by many judges as an arbitrary one, and one not founded on any sound principle. Ex parte Bevan, 10 Ves. 107; Ex parte Hinton, De Gex, 550; Ex parte Goldsmid, 1 De Gex & J. 264. Judge Sprague said that he was not able to discover any sound principle upon which it rested, and that it had generally been admitted, even by those who enforced it, that it is as little consonant with justice as with the rules of law.

Attention is very properly called to the fact that he was expounding the bankrupt law of 1841 [5 Stat. 440]; but it is as true now as it was then that the old rule has never been adopted in this country, and that existing contracts have been made under and with reference to the rule of law which gives to a party having two valid obligations the benefit of both, and in view of that consideration he remarked that he did not think himself bound or authorized to set aside a right which he regarded as founded both on law and justice, on account of an arbitrary rule justly reprobated by some of the most eminent judges and jurists in England, and which was never recognized in this country. Story, Partn. § 382; Borden v. Cuyler, 10 Cush. 476. Power to establish uniform laws on the subject of bankruptcies throughout the United States is vested in congress, and congress having executed that power, the question under consideration must depend upon the proper construction of the provision in that behalf in the bankrupt act. Bankrupts, as all experience shows, may be liable at the time of adjudication, upon a bill of exchange, promissory note, or other obligation, in respect of distinct contracts as members of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as sole traders, and also as members of a firm, and section 21 of the bankrupt act provides that in such cases "the circumstance that such firms are in whole or in part composed of the same individuals, or that a sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts." 14 Stat. 527. Tested by the concluding part of the section as transcribed, section 21 of our bankrupt act is an exact copy of section 152 of the English bankrupt act of 1861, but the introductory parts of the sections differ, as the English act is confined to bills of exchange and promissory notes, whereas our bankrupt act extends in that behalf also to "other obligations;" showing that it was the intention of congress to give it a more comprehensive operation, as indicated by the addition of the words "or other obligation" to the words "any bill of exchange or promissory note," contained in the said English bankrupt act. Two classes of persons are mentioned in the first part of the section, as embraced in the provision, namely, any bankrupt liable upon any bill of exchange, promissory note, or other obligation, in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy. 2. Or as a sole trader, and also as a member of a firm; and the argument for the petitioners is that the term "sole trader" is used in a technical sense, and that it cannot be construed to include a sole contractor, as in the case of the indorsement of a promissory note by a separate member of the firm, which is signed by the firm as promisors. Considered separately, the first part of the section would afford strong support to that proposition; but the whole section must be construed together, and the last part provides that the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent such proof and the receipt of dividends; showing to the satisfaction of the court that the term "sole trader" is not used in a technical sense, and that its meaning was intended to be enlarged by the latter part of the section, as was held by the court in the case of Ex parte Hinton, to which reference has already been made. True, the words "sole trader" are not used in the last English bankrupt act, but they were used in the former act, and the court held in the case referred to that those words when considered in connection with the closing part of the section, which is precisely the same as the closing part of the corresponding section in our bankrupt act, meant nothing more than the words "sole contractor," and that the enactment was intended to include a joint and several promissory note, and that it ought not to be confined to cases where the parties had executed separate instruments. Much consideration has been given

to the question by several of the district judges, and in every such case which has fallen under my observation, the judge has come to the conclusion that the rule which allows a party holding two valid obligations, the benefit of both, is founded in law and justice, and that it is sustained by the true construction of section 21 of the bankrupt act. Mead v. Bank of Fayetteville [Case No. 9,366]; In re Bigelow [Id. 1,397]; In re Howard [Id. 6,750]; Mead v. Bank of Fayetteville [supra]. Creditors, before any act of bankruptcy is committed by their debtor, may acquire a right to prove their claim against the joint estate, by one contract, and against the separate estate by another, and it is not possible, it seems to the court, to assign any good reason why a subsequent act of bankruptcy should be held to deprive them of the benefit of their caution and diligence. English judges and legislators have at last come to that conclusion, and there is no good reason why the courts in this country should adopt a rule which at last has been exploded and abandoned in the tribunals where it was first adopted. Their debts are certainly provable, and the estate must, by the express terms of the act, be distributed among all creditors whose debts are duly proved. Bump, Bankr. (5th Ed.) 198; In re Downing [Case No. 4,044]. [In view of all the circumstances, the petition must be dismissed with costs.] [2]

EMERY (GERBIER v.). See Case No. 5,357.

EMERY (NUSBAUM v.). See Cases Nos. 10,380 and 10,381.

EMERY (UNITED STATES v.). See Case No. 15,052.

Case No. 4,447.

EMIGH v. CHAMBERLAIN.

[1 Biss. 367;[1] 2 Fish. Pat. Cas. 192; 1 Am. Law Reg. (N. S.) 207.]

District Court, D. Wisconsin. Sept., 1861.

ASSIGNMENT OF RAILROAD REVENUES NOT TRANSFER OF CORPORATE PROPERTY—USE BY ASSIGNEE OF PATENTED BRAKES.

1. An assignment of the revenues of a railroad, and of the use of the rolling stock of the company to a preferred creditor, is not a transfer of corporate entity or property.

2. And the use, by the assignee, of cars which have patented brakes attached to them, does not render him liable to account for infringement of the patent, when the brakes have been licensed to the company by the patentee.

[See Belding v. Turner, Case No. 1,243, note.]

3. The assignee uses the brakes as an agent of the company, and not as a purchaser.

This was a bill in equity to restrain the defendant from the infringement of letters patent, granted to Francis A. Stevens, for an improvement in railroad car brakes, November 25, 1851, and assigned to complainant [Emigh]. The facts sufficiently appear in the opinion of the court.

Ryan & Jenkins, for complainant.
Emmons & Van Dyke, for defendant.

MILLER, District Judge. The complainant,—as the assignee, for the state of Wisconsin, of a patent right to Francis A. Stevens for a combination and arrangement of levers, link-rods, and shoes or rubbers, whereby each wheel of both trucks of a car on a railway is retarded with uniform force when the brake is put in operation,—brings this bill against defendant for operating or causing to be operated, the La Crosse and Milwaukee Railroad, in this state, by the use of cars with the improved brakes attached. The defendant sets up a deed from the patentee, Francis A. Stevens, given, previously to complainant's assignment, to the said railroad company, whereby, in consideration of six hundred dollars to him paid in full satisfaction, he licensed and conveyed to the company the full and exclusive right and liberty of using the said improvement on any or all their own cars, over any part of their road. Defendant further shows that, by an instrument of writing, called by him a lease or mortgage, the company granted to him, for an indefinite time its entire railroad and road route, together with right of way and depot grounds, and all buildings and property of every description, including the rolling stock, he to operate the road and receive all the revenues, and out of them defray all expenses of operating the road, purchasing additional rolling stock, paying interest of liens, and the residue to apply toward a claim of his own against the company, and when his claim should be paid, either by the company, or out of the revenues of the road, the property to revert to the company. The company were using the patented improvement upon the cars that passed to Chamberlain, and which he continued to use. Chamberlain, after operating the road for some time, under the deed of the company, was superseded by an order of this court appointing a receiver.

The assignment to complainant excepts the license to the company. Whether Stevens would be the proper person to claim damages is not made a question by the pleadings. Can the complainant require defendant to account to him, is the only question submitted.

The deed of Stevens to the company licenses and conveys the full and exclusive right of using the improvement on their own cars. There is no power granted to the company to vest the right in any person, by conveyance or otherwise. It is simply a license.

In order to test the right set up by defendant, we must bear in mind that the railroad company is incorporated by a law of the state, and to such Stevens made the license, and as such, the company made the assignment to

[2] [From 6 West. Jur. 515.]

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

defendant. The duties imposed upon the company by its charter, were not fulfilled by the construction of the road. Important franchises were granted the company to enable it to provide the facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency was provided, as a remuneration to the community for the legislative grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the legislature. Defendant could only operate the road under and subordinate to the charter of the company, and not he, but the company, was liable for the performance of all the corporate duties to the public. He only could perform those duties in the name of the company. The franchises of the company were not, and could not be vested in him. He was nominally substituted for the company in the active use of the road and property. The corporation, as a creature of the law, must use the franchise granted it, by means of officers of its own appointment, either directly or indirectly. York, etc., R. Co. v. Winans, 17 How. [58 U. S.] 30, 39, and cases cited.

It is contended, on the part of the complainant, that defendant was a mortgagee in possession, and as such, he held under a title in the nature of a conveyance from the company. This court has uniformly considered the rolling stock of a railroad company as a fixture not liable to levy and sale apart from the realty, and we have placed liens by mortgage of those companies on the same footing as of individuals. In this state the mortgagor is the owner of the premises, until a sale is made in pursuance of a decree of court. The note and mortgage are choses in action. Sheldon v. Sill, 8 How. [49 U. S.] 441. The mortgagor may put the mortgagee in possession of the mortgaged premises, until the debt is paid by receipts of rents and issues; but the mortgagee would not hold adversely to, but under the mortgagor.

Technically, the deed under which defendant held possession of the road, was not a mortgage. The defeasance does not make it a mortgage, as without it the company would have the equitable right to regain possession upon discharging its debts to defendant, and to require him to account. The deed is an assignment of the revenues of the road to a preferred creditor, with the privilege of using the road and property of the company for the mutual interest of the debtor and creditor. The rolling stock and the road at the date of the assignment to defendant were subject to mortgages, whose accruing interest he became obliged to pay out of the revenues of the road. If he replenished the stock, he did so from the same source. The company being insolvent, devised the scheme of placing their property in the hands of defendant, for the purpose of completing the road to La Crosse, paying the annual interest on liens, and satisfying his claim.

Although this court pronounced the arrangement fraudulent and void as to creditors, yet it was valid between the parties, and this suit can be defended under it. The deed to defendant is not a conveyance of the property. The rolling stock was the property of the company in defendant's hands. It might as well be claimed that the receiver appointed by this court should account for the use of the patented improvement, which, I presume, will not be pretended. The receiver holds the property of the company for the benefit of its creditors. Defendant did so with consent of the company for the same purpose. In both cases, the company is the owner of the cars with the patented improvement attached. The company did not divest itself, by its deed to defendant, of its corporate entity or property.

Defendant is to be viewed in the light of an agent and trustee. He was a mere substitute for the company, and his use of the cars was the same as that of the company, and exclusive as to third persons, or other interests in the meaning of the license.

The bill will be dismissed.

[NOTE. For another case involving this patent, see note to Emigh v. Chicago, B. & Q. R. Co., Case No. 4,448.]

Case No. 4,448.

EMIGH v. CHICAGO, B. & Q. R. CO.

[1 Biss. 400; 2 Fish. Pat. Cas. 387; Merw. Pat. Inv. 425.] [1]

Circuit Court, N. D. Illinois. June, 1863.

PATENTS — CLAIM — NEW COMBINATION OF OLD PARTS—LICENSE—EXTENT.

1. Stevens' claim fairly interpreted means the particular combination and arrangement of lever, link-rods and rubbers in a car, as he had described it, so as to produce the described result, viz.: the retarding of each wheel of the car when the brake is applied with uniform force.

[Cited in Sayles v. Chicago & N. W. R. Co., Case No. 12,415.]

2. Though all the parts of a combination be old, a new combination, producing a new result, may be patented.

3. A license to a railroad company extends no further than the road which it used or was authorized to construct at the time of the license; it cannot use the patent on lines afterward built or leased.

[Cited in Lilienthal v. Washburn, 8 Fed. 709.]

[See Belding v. Turner, Case 1,243, note.]

This was a bill in equity filed to restrain defendants [the Chicago, Burlington and Quincy Railroad Company] from infringing letters patent [No. 8,552] for an "improvement in railroad car brakes," granted to Francis A. Stevens, November 25, 1851, and

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. Merw. Pat. Inv. 425, contains only a condensed report.]

assigned to complainant. The claim of the patent was as follows: "What I claim as my invention and desire to secure by letters patent, is the combination and arrangement of the levers, link-rods, and shoes or rubbers, substantially as herein described, whereby each wheel of both trucks of a car is retarded with an uniform force when the brake is put in operation." Stevens' improvement consisted of the addition of an intermediate lever, with which the brake-beam of each truck was connected, the two inner levers of each truck being connected by a link-rod so that a series of levers should be formed, by which the brakes were operated from either end of the car by the brake-wheel, with an equal pressure upon each brake-beam. The defendants denied the novelty of the invention, and relied upon two prior patents, one granted to Charles B. Turner, November 14, 1848, and one to Nehemiah Hodge, October 2, 1849. As a part of the history of the art they also put in evidence the Batchelder & Thompson brake, of 1846, patented to Henry Tanner, July 6, 1852, and a brake alleged to have been used by James Milholland, in 1842. The defendants also claimed the right to use the Stevens brake on their whole road, from Chicago to the Mississippi river, under a license granted to the Chicago and Aurora Railroad Company, by F. A. Stevens, dated June 15, 1853, which covered fifty-eight miles of what is now the road of defendants, two hundred and ten miles having since been created, under the new corporate name of the Chicago, Burlington and Quincy Railroad Company, by consolidation and arrangement with other independent railroad corporations under the statute of Illinois.

S. A. Goodwin, for complainant.

J. M. Walker & J. Cochran, for defendants.

DRUMMOND, District Judge. The court is of the opinion that there is something different and distinct in the combination of the Stevens brake from that of Turner, of Hodge, of Tanner, or of any of the other brakes that have been brought before the court during the hearing of this case, in this, viz.: That in the Stevens brake the levers are of the same order, and of similar proportions, so that when operated from either end, without any serious wear or strain on other parts of the machinery, it applies all the brakes of the car with equal force to the wheels, and consequently they are all uniformly retarded.

The parts of the combination—the levers, the link-rods, and rubbers,—are all old, but the combination in the manner described by Stevens, is new, and it, the new combination, producing a new result, is a subject of a patent, and this, irrespective of the fact whether or not it contains a part of the Turner or Hodge combination.

The claim of Stevens, fairly interpreted, means the particular combination and arrangement of levers, link-rods, and rubbers in a car, as he had described it, so as to produce the result, viz.: the retarding with a uniform force, of each wheel of the car when the brake is applied. This is all he claims, and this claim the court thinks is new and not too broad.

At the time the license was given, June 15, 1853, it was only to the Chicago and Aurora Railroad Company, its successors and assigns, and the reasonable construction of the license is that it extended no further than the road then used, or which the company was then authorized to construct. It did not extend to any and all lines of road which the company, under a new name and organization, might thereafter be authorized to build, to lease, or to use.

An order must be entered referring the case to a master to report the damages, which the plaintiff has sustained, according to the principles here stated.

Upon the coming in of the master's report, at a subsequent term, a decree was entered for complainant for $10,620.

[NOTE. For other cases involving this patent, see Emigh v. Baltimore & O. R. Co., 6 Fed. 283; Emigh v. Chamberlain, Case No. 4,447.]

Case No. 4,449.

EMIGH v. PITTSBURGH, FT. W. & C. R. CO.

[4 Biss. 114.][1]

Circuit Court, D. Indiana. Nov. Term, 1867.

ACTION ON THE CASE — WHEN IT LIES—EJECTION FROM RAILROAD TRAIN.

1. There are two cases of injuries on which the action on the case lies,—first, when there has been no contract, and a tort is unaccompanied by force, and is followed by a consequential injury; second, where a contract, express or implied, exists out of which a common law duty arises, and the party on whom that duty devolves is guilty of malfeasance, misfeasance, or non-feasance in regard to it.

[Cited in Pouilin v. Canadian Pac. Ry. Co., 47 Fed. 860.]

2. When a railroad company engages to carry a passenger, and, after taking him on the train, wrongfully puts him off, the action of trespass on the case will lie.

[This was a suit by Ashel Emigh against the Pittsburgh, Ft. Wayne & Chicago Railroad Company.]

Ketchum & Mitchell, for plaintiff.

Hendricks, Hord & Hendricks, for defendant.

McDONALD, District Judge. This is an action on the case for wrongfully putting the plaintiff off a train of the defendant's passenger cars.

There are two counts in the declaration, and a demurrer to the whole declaration is filed, for the cause that there is a misjoinder of counts.

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

The first count is undoubtedly in case. But the defendant insists that the second count is in assumpsit and not in case.

The charge in the second count is substantially as follows: that the defendant was a common carrier of persons from Pittsburgh through Indiana to Chicago; that for a valuable consideration paid to the defendant, the defendant agreed with the plaintiff to carry him over said road from 1866 till 1870, giving him annual passes so to be carried; that in March, 1867, the defendant received the plaintiff on the defendant's cars at Pittsburgh to be carried on said road to Fort Wayne, in pursuance of said agreement, and carried plaintiff to a point within five and one-half miles of Fort Wayne, when the defendant (having before refused the plaintiff said annual pass) by an agent of the defendant, and then the conductor on the train, refused to carry the plaintiff any further, unless he would pay fare for his passage; that the plaintiff insisting on his right under said agreement, the conductor stopped the train in the open country far from any depot, and there, by threats of violence, obliged the plaintiff to quit the train, and left him with his baggage, where he had no means of conveyance to the place whither he was bound, at the dawn of day and exposed to the cold; and that by reason of the premises he suffered, &c., and was delayed in his business, &c., and sustained damages to the amount of $5,000.

The defendant insists that this count is in assumpsit, because it is founded on a contract. It does, indeed, by way of inducement, set out a contract. But, if that circumstance necessarily destroys its character as a count in case, then the first count is in the same predicament, for it also sets forth a contract, and a contract, too, very similar to the one in the second count.

As I understand it, the subjects proper for action on the case are of two distinct classes. First, where there is a tort committed, without force, on the person, character, or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action. Thus if a lawyer or a physician is engaged by special contract to render professional services, and if, in the performance of such services he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract. So this form of action lies against agents, wharfingers, and common carriers, whether they be acting under a contract express or implied. Indeed, nothing is more common in the common law courts than the action on the case against common carriers of goods, though their engagements are always on contract express or implied. If I hire a man to carry goods from Indianapolis to Cincinnati, and he wrongfully leaves them on the way at Lawrenceburgh, no lawyer will doubt that an action on the case will lie for this breach of duty. The present case is that of a common carrier of persons; but can there be any difference on the point in question between the carrier of men and the carrier of merchandise? The authorities to this effect are numerous. I need only cite 1 Chit. Pl. 132–134, and the cases there referred to in support of the doctrine.

I entertain no doubt that both the counts in the declaration are properly counts in case. The demurrer is therefore overruled.

NOTE. That for a passenger's refusal to pay his fare he may be ejected from the train at any regular station, but not elsewhere, see Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460; Terre Haute, A. & St. L. R. Co. v. Vanatta, 21 Ill. 188; Illinois Cent. R. Co. v. Sutton, 53 Ill. 397. Consult, also, Page v. New York Cent. R. R., 6 Duer, 523; Northern R. Co. v. Page, 22 Barb. 130; Hibbard v. New York & E. R., 15 N. Y. 455; and 2 Redf. R. R. 272–275.

Case No. 4,450.

The EMILIE.

The ABRAHAM LEGGETT.

[2 Ben. 416.][1]

District Court, S. D. New York. May, 1868.

COLLISION IN NEW YORK HARBOR — VESSEL AT ANCHOR — VESSEL IN TOW.

1. Where a pilot boat was lying at anchor, off the Quarantine, with her sails up to dry, and a bark coming in from sea in tow of a tug was brought close to her, when the tug was stopped, but the bark kept on with the tide, and a collision occurred between her and the pilot boat: *Held*, that the collision was occasioned by the bark being brought too close to the pilot boat.

2. The pilot boat did not raise her anchor, and the effort on board of her, by porting her helm and getting up her jib, to let the bark go ahead of her, was caused by the approach of the bark, and was proper, under the circumstances.

In admiralty.

Beebe, Dean & Donohue, for the pilot boat.
W. Q. Morton and J. K. Hill, for the bark.

BLATCHFORD, District Judge. These are cross libels for a collision which took place about three o'clock p. m., on the 4th of September, 1866, near the quarantine ground, off Staten Island, in the harbor of New York, between the schooner pilot boat Abraham Leggett, and the bark Emilie, a Bremen vessel. The bark was coming in from sea in tow of a tug, towed behind the tug, by a hawser, and in charge of a pilot, who was on board of the bark, and who had the direction of the movements of both the bark and the tug. The tide was flood, and the

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

wind about northwest, blowing pretty fresh. The course of the channel, at the place of collision, was north and south. The bark had no sails set. The stem and bowsprit of the pilot boat came in contact with the port side of the bark, the bowsprit entering the bark, and both vessels were considerably damaged. The case set up on the part of the pilot boat is, that she was lying at anchor in a proper place, with her sails up to dry, and in plain sight of the tug and the bark as they approached, and that the bark attempted to pass too close to the pilot boat, and in consequence ran into her.

The case set up on the part of the bark is, that, as she and her tug neared the quarantine station, the tug was stopped and the bark brought nearly to a stand-still, for the purpose of waiting for the health officer to come on board; that, while she was thus so waiting, the pilot boat was lying with her sails up, apparently at anchor, and to the westward of the bark, and between her and the shore of Staten Island; that the pilot boat heaved at her chain, got under way, held her jib to port, and proceeded under full sail for the bark, heading for her foremast; that the helm of the bark was at once put hard to port, but that movement, owing to her want of steerage way, had no apparent effect on her; that the bark hailed to the pilot boat to let her jib run and put her helm hard-a-starboard, which would have avoided the collision, but the hail was not complied with, and the helm of the pilot boat was kept to port, and she came head on into the bark.

I am satisfied, on the evidence, that this collision happened solely through the fault of the bark. It is shown by the evidence of the man at her wheel, that her helm was put to port before the collision, and that her head fell off thereby a point and a half, that is, from north to north by east half east. Although her headway may have been stopped, so far as any traction of her by the tug was concerned, she was in the tide, and drifting with the tide in a direction toward the pilot boat, and the effect of putting the helm of the bark to port was to throw her head to the starboard and her hull more athwart the tide. The pilot boat was at anchor, with her sails up to dry, as could plainly be seen from the bark, and it is not claimed that the pilot boat changed her position, or got under way, until the bark had come up quite near to her. I am not at all satisfied that the pilot boat hoisted her anchor at all. She was waiting for the pilots who belonged on board of her to come down from the city, and, until they arrived, there was no occasion for her to get under way, and it is improbable that she would do so. They had not arrived at the time of the collision. Whatever the pilot boat did in the way of hoisting her jib and getting on any headway, was a consequence of the peril in which the bark put her by coming too close to her, and occurred when a collision was imminent. With the wind as it was, and the bark coming as she was with the flood tide, the manoeuvre of the pilot boat to avoid the danger, namely, porting her helm, with a view to letting her head fall off from the wind, so that she could go under the stern of the bark, was a proper one, and would, under ordinary circumstances, have been effective. It was thwarted by the fact that her anchor held her head up to the wind. The fact of her putting up her jib, or getting on whatever headway she got, or porting her helm, cannot be imputed to her as a fault tending to cause a collision. She was put into the peril by the fault of the bark in coming so close as, by stopping the tug, to drift with the tide, so as to make a collision probable.

In the suit against the bark, there must be a reference to a commissioner to ascertain the damages caused to the pilot boat by the collision, and a decree against the bark for the amount, with costs. The libel against the pilot boat is dismissed, with costs.

[NOTE. For hearing on exceptions to the commissioner's report, see Case No. 4,451, following.]

Case No. 4,451.

The EMILIE.

[4 Ben. 235.][1]

District Court, S. D. New York. June, 1870.

COLLISION—DAMAGES—DEMURRAGE—PILOT BOAT—EVIDENCE.

1. The report of a commissioner allowed, as demurrage for the detention of a pilot boat, injured by a collision with the bark E., a sum which included an allowance for the loss of time of the pilots on board. *Held*, that the sum awarded should represent only the value of the pilot boat as a vessel—what, without pilots, stores or crew, she could have been chartered for to others, to use as a pilot boat.

[Cited in Johanssen v. The Eloina, 4 Fed. 575.]

2. In the absence of evidence as to the market value of such a vessel, resort may be had to the judgment, as to such value, of persons acquainted with the business and with her earnings.

This case, which was a collision case, came up on exceptions filed by the claimants to the report of the commissioner as to the damages. The principal exception was to the allowance for demurrage. [For hearing on the merits, see Case No. 4,450.]

C. Donohue for libellant.

W. Q. Morton, for claimants.

BLATCHFORD, District Judge. The commissioner allowed to the libellant, as part of

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

his damages, "demurrage, eight days, at $50 per day, $400." This was allowed for the detention of the libellant's vessel, a pilot boat, while the repairs of the damages sustained by her, through her collision with the Emilie, were being made. I think the claimants' exceptions fairly raise the exception that this allowance was, on the evidence, excessive. I adhere to the rule laid down by me in the case of The Transit [Case No. 14,138], that, in the case of a pilot boat, the detention allowed for must be for the detention of the vessel alone, assuming her to be in a fit condition for use as a vessel in the business of a pilot boat, and that nothing can be allowed to the libellant, as owner of the vessel, for the worth of the time of the pilots on board of the vessel, or of his own time as a pilot, during the detention; that this allowance can include only the value of the use of the pilot boat as a vessel—what, without pilots, or crew, or stores being furnished with her, she could have been chartered for to others, to use as a pilot boat; and that, only in the absence of evidence as to the market value of the charter of such a pilot boat, can resort be had to the judgment of persons acquainted with the piloting business, as to the value of the time of the vessel, based upon the employment she was in when injured, its character and constancy, and its then recent results in the way of earnings. In the present case, the evidence is, that the libellant's boat was actually under charter, at the time, to the company of pilots on board of her, for one quarter of her gross earnings, the libellant taking the risk of what they would be. The commissioner allowed $50 per day, for the value of the use of the vessel. But, the evidence on the part of the libellant, especially the testimony of the pilot Henderson, shows, that that amount includes a full allowance for the loss of time of the pilots on board of the vessel. Henderson puts the value of the use of the pilot boat at about $15 per day. On the evidence, that is all that can be allowed. This is irrespective of the testimony put in on the part of the claimants, as to the earnings of the libellant's pilot boat, during the two months prior to the collision. But, if that were to be considered, it would lead to the same result. It shows, that the boat's one quarter of the gross earnings for July and August, 1866, (the collision having taken place early in September. 1866,) was $973 80, which, for sixty-two days, would be $15 70 per day.

I think, on the evidence, that an allowance for six days was as much as was warranted. I therefore allow for six days, at $15 per day, being a total of $90.

I deduct from the amount reported as damages $310. Let a decree be entered for the libellant for $550 86, with interest from February 1st, 1869, the date of the report.

Case No. 4,452.

The EMILY.

[1 Blatchf. 236;[1] 6 N. Y. Leg. Obs. 340.]

Circuit Court, S. D. New York. April Term, 1847.[2]

COLLISION BETWEEN SAILING VESSELS—FAULTS.

Two vessels came into collision under these circumstances: The V. was to the windward, and the E. to the leeward, the V. heading along the shore N. or N. by W., and the E. heading S. by E. or S. S. E., the vessels being half a mile or a mile distant from each other when the E. was first seen by the V.; the wind was W. N. W., and the V., on discovering danger of collision, bore up into the wind, but the E., instead of falling off before the wind, changed her course towards the V., and the collision ensued; it also appeared that the E. had no proper look-out: *Held*, that the E. was in fault.

[Cited in The Bay State, Case No. 1,148; The Catharine and Martha, Id. 2,512; The Northern Indiana, Id. 10,320.]

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

Benjamin W. Bedell and others, owners of the schooner Virginian filed a libel in rem. against the brig Emily, in the district court, to recover damages for a total loss of the schooner, caused by a collision with the brig. The collision took place near Sandy Hook, both vessels being bound into the port of New-York. After a decree in favor of the libellants [Case No. 4,453] the claimant appealed to this court.

Washington Q. Morton and Alexander Hamilton, Jr., for libellants.

Francis B. Cutting, for claimant.

NELSON, Circuit Justice. I have studied the facts in this case, which are voluminous, with a great deal of attention, and though the case is not without difficulty, owing to the serious conflict of the evidence in respect to almost all the material facts upon which the decision must depend, I am bound to say, that my examination has led me to the conclusion that, according to the weight of the evidence, the Emily was in fault.

1. The Virginian was to the windward, and the Emily to the leeward, the former heading along the shore, north or north by west, and the latter, south by east or south-south-east; and the two vessels were half a mile or a mile distant from each other, when the Emily was first been by the hands on board the Virginian.

2. The Virginian at no time changed her course more to the east, or in the direction of the Emily; on the contrary, immediately on discovering danger of collision, she bore farther up into the wind, which was west-north-west. She was not only not in fault at any time, but appears to have received and obey-

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

[2] [Affirming Case No. 4,452.]

ed the only order that could have availed her in the emergency.

3. If the Emily had followed her course, much more, if she had fallen off before the wind, which she might readily have done, the collision could not have occurred. It is, I think, reasonably certain, that the mistaken order of the mate to the man at the wheel, in connection with the derangement of the running rigging of the vessel, and the confusion on board among the hands, on account of the vessel's having misstayed a few minutes before, led to a change of course, and the consequent collision.

It is apparent, also, that the hands on board the Emily failed to keep a proper look-out; for, if they had done so, the Virginian might, according to the weight of the evidence, have been seen before the accident at the distance of some half a mile; and, from the relative position of the vessels, a proper precaution on the part of the Emily at that distance, or even at a less distance, would have prevented the disaster.

The facts, beyond all doubt, bring the case down to the simple question, whether the collision occurred by accident or by the fault of the Emily. It is a most unfortunate case for the parties concerned, in any aspect in which it can be viewed, or upon any conclusion that may be arrived at; but I feel bound to say that, according to the weight of the evidence, the Emily was in fault. She might have avoided the collision by the use of proper caution, skill, and vigilance. Decree affirmed.

Case No. 4,453.

The EMILY.

[Olc. 132;[1] 6 N. Y. Leg. Obs. 340.]

District Court, S. D. New York. April, 1845.[2]

PRACTICE IN ADMIRALTY—REFERENCE TO PERSONS SKILLED IN NAVIGATION — COLLISION — SAILING VESSELS WITH WIND FREE AND SAILING ON THE WIND RESPECTIVELY — LACK OF ADEQUATE LOG BOOK.

1. Where the rights of parties depend upon questions of nautical skill or seamanship in the management of a vessel, the court may refer the subject to persons skilled in navigation, and act upon their report thereon.

[Cited in The Empire, 19 Fed. 559.]

2. The want of an adequate look-out on board at sea is a culpable neglect on her part, which will, prima facie, render her responsible for injuries received from her in that condition.

[Cited in The Blossom, Case No. 1,564; Cianciminos Tow & Transportation Co. v. The Ripple, 41 Fed. 64.]

3. A vessel having the wind free and meeting another on the wind, must generally take the risk of avoiding the latter; and if the latter varies from her course, for any cause, she loses all claim to compensation in case of collision, and may, moreover, subject herself to damages.

[Cited in The Bay State, Case No. 1,148; The Maria & Elizabeth, 7 Fed. 254.]

4. So when two vessels are approaching each other in that manner, and there is danger of a collision—if the one on the wind departs from her course, but for necessary cause, she will bear the consequences of the collision which ensues.

N. F. Waring, for libellants.

F. B. Cutting and Moore & Havens, for claimants.

BETTS, District Judge. The libellants in this cause demand damages for losses occasioned by a collision occurring between the ship Virginia and the brig Emily, both vessels being on their way into the Hook from sea, and running against the wind. The case is a serious one in every aspect; it involves a loss of property of great magnitude, accompanied by a sudden and melancholy destruction of life, and the decision must inevitably tend to fasten blamable misconduct upon the party who fails to excuse himself from fault in this distressing catastrophe. Independent of the customary embarrassment attending collision cases, that of gathering the essential facts out of an entanglement of conflicting testimony, the additional one is presented here, that most of the proofs, and the reasoning touching the cause of the disaster, have relation to matters purely nautical and professional, whether proper seamanship was exhibited by the pilot of the brig on the occasion, in the judgment he adopted, and in the orders he gave as to the management of the vessel; or by the crew, in executing those orders. If, in my opinion, the rights of the parties depended upon the proper solution of these questions, I might feel it incumbent on me to invite the assistance of nautical men, in weighing and applying the proofs to these points, and to that end refer this branch of the case to competent mariners, to report their judgment upon it to the court.

I am constrained, however, to take a view of the subject which I am persuaded must prove less advantageous to the brig than to have had the professional skill of the pilot and good seamanship and conduct of the crew, in the particular manoeuvre excepted to, adopted as the turning point in the case. Both vessels were beating into the Hook, from sea, on the evening of the 18th of March, 1843. The wind was about N. N. W., and the Virginia was close hauled, or, in the language of the witnesses, jammed up to the wind, and running close in by the Sandy Hook shore. The Emily had made a tack from the Romer shoal towards the west, and the pilot judging she was but a few lengths from the shore, gave the proper directions for bringing her about on the other tack. In the attempt to do this, she mis-stayed, and orders were thereupon given to wear ship. Some slight accidents impeded bringing the sheets and sails, required to perfect this manoeuvre, into their places with promptitude. The witnesses on the brig differ widely in their

[1] [Reported by Edward R. Olcott, Esq.]

[2] [Affirmed in Case No. 4,452.]

opinions as to her situation at the moment, and the point at which the Virginia was then discovered from her. The mate of the brig says, the Emily was in the act of wearing, and had fallen off about south or south by east, but had not gained headway enough to mind her helm. The pilot says, the Emily headed about S. W. in making the tack over from the Romer shoal, and that in wearing she never fell off more than to S. S. W., with her helm hard up, and was at no time heading east of south. She was on a direct tack to the shore then, and if she had luffed must have gone ashore. She might be going two or three knots at the time of collision. Davies, at the helm, says she was making, perhaps four or five knots, and was in the act of wearing; he afterwards computed her movement at six knots, and says she steered easily. Martin thought she was going five or six knots, and, as he had judged from the lights on shore, ranged southerly towards the sea. James Smith says she was going about five knots, and names the sails that were drawing full at the time. It must, therefore, be taken as proved by the claimants, that the Emily had a sufficient steering headway on, and was bearing seaward from the Hook; the decided weight of evidence, moreover, is that she was to the leeward of the Virginia at the time.

A fact of great moment in this position of the two vessels is the want of a look-out on board the Emily. The Virginia was not discerned from her until an instant preceding the collision; and if a doubt might arise upon the evidence of those on board the Emily, whether the darkness of the night prevented their seeing an object ahead, the testimony from the Virginia puts the fact beyond question that a vessel might be seen a distance sufficiently great for the use of every precaution necessary to avoid it. This, I think, too, is the fair result of the evidence from those examined to this point, on board the Emily. No satisfactory conclusion can be formed from the estimate of minutes or yards given by witnesses at such a time, and it would be most dangerous to place the decision of important and critical questions on data so equivocal. It cannot be supposed witnesses can aver with any reasonable assurance that the time was two or ten minutes from the first effort to wear the ship to her collision, or that she was seen any definite distance in feet or yards, or for any certain number of minutes from the Virginia, having a supposed bearing S. of E., or that her distance from the shore was one or five hundred yards. Such computations must, in the nature of things, be essentially conjectural and at random, especially, when formed in the alarm of actual collision and shipwreck. Neither can we expect now to be assured by any reliable evidence how the Emily bore at the moment the Virginia was discovered almost in the act of collision with her, or what might have been the effect of the hurried and contradictory orders given her helmsman, under an impulse to ward off the impending shock or lessen its peril. It would seem, however, to be demonstrated by the evidence of pilot Ludlow, with the chart before him, and in presence of the pilot of the Emily, that the latter must have greatly misconceived his bearing, his distance from the shore and speed, when the Virginia was first seen by him, or in less than the time employed to pass the questions and answers between him and the mate, and give and countermand his orders to the helmsman, his vessel must have struck the shore. The place where the Emily anchored, and where the Virginia was found sunk, do not fix with precision the distance of the vessels from the shore at the collision, but they indicate it with more satisfactory approaches to certainty than the mere suppositions of witnesses formed under the confused and terrified state of mind and memory which must be supposed to attend the mischance on board the Emily, the darkness and roughness of the weather, and the consternation attending and following the striking of the two vessels together, and the foundering of the Virginia from the concussion.

From all the reliable facts in evidence, it seems to me proved, that the collision occurred a quarter or half a mile from the shore; and it results from the whole evidence that the Emily was pursuing a course bearing away from the Virginia, and then was seen suddenly coming down directly upon her whilst thrown up into the wind, and struck her in that position astern, and bearing S. W. or S. S. W.; it probably happened that after wearing from the shore a safe distance, by some accident or mismanagement she was put about on a tack tending to the land, and in that movement ran upon the Virginia, which was lying up in the wind between her and the shore. All the witnesses on board the Virginia assert that the Emily took the opposite direction. Her crew contradict it, but she, having no watch properly stationed on deck, is unable to meet the evidence from the Virginia with the evidence of witnesses as advantageously stationed on the Emily to observe and describe the manner in which she, being to leeward, came in contact with the Virginia, to the windward, at the time pressing out of that course so far as to luff up and leave her sails shaking in the wind. The want of a proper watch on the Emily leaves the court to derive the facts best known to the look-out, from the witnesses on one side alone; and becomes, furthermore, a fault of grave magnitude in itself. It is justly regarded by maritime courts a delinquency in the vessel which fails to keep a competent look-out properly stationed, that renders her responsible for the consequences of collision, unless the clearest proof is made that the omission was in no way the cause of the disaster. The earlier and modern cases concur in this doctrine, and establish the mainte-

nance of an adequate look-out as a necessary measure of precaution, the neglect of which casts the responsibility for accidents on the delinquent vessel and her owners. The Chester, 3 Hagg. Adm. 316; The Diana, 1 W. Rob. Adm. 131. So, also, the rule of law is explicit, that a vessel running with the wind free, must take the risk of avoiding another sailing on a wind, when the two meet on opposite courses, if the free vessel has the opportunity and means, if properly used, of so doing. Indeed, the usage for the vessel on the wind to hold her course and for the one sailing free to give way in such case, has become a rule of law, which imposes the damage and losses occasioned by its non-observance, upon the vessel which disobeys the rule, unless it be clearly proved that her misconduct in no way contributed to the injury. Story, Bailm. § 611; 3 Kent, Comm. 184; 2 Dod. 83; The Thames, 5 C. Rob. Adm. 348; The Celt, 3 Hagg. Adm. 321; The Chester, Id. 316; The Diana, 1 W. Rob. Adm. 131; The Harriett, Id. 182. In the present case, the change of the Virginia's course was not toward the Emily, and with a view to pass to leeward of her, but in the opposite direction, and more out of her path, and the one she, to that moment, had been supposed pursuing.

I find in this case the preponderance of proof is against the defence set up by the Emily; it shows she was not in the act of wearing when the collision took place, but had come round so that her sails were filled, and she was bearing away before the wind; it shows that no sufficient and proper look-out was kept on her deck at the time, and it further shows that the Virginia was on the wind, keeping a prudent look-out, and making all proper efforts to avoid the collision. The intermission for the moment of that precautionary vigilance on board the Emily, might very naturally spring out of a confusion likely to arise from the failure of the vessel to come round on the wind, the dangerous proximity to the shore, the entanglement of some of the running rigging which impeded her manoeuvre, and the distraction these circumstances were calculated to produce in the attention of the mate, who at the moment appears to have been the only one acting as look-out forward. But they do not relieve the vessel from the obligation to maintain these precautions, or from the consequences of her omission to do so; nor from the obligation in her then position before the wind, of taking and preserving a course which should carry her clear of the Virginia.

This cause having been heard, and it appearing to the court that the collision in the pleadings mentioned, and the damages and costs incurred by the libellants in consequence thereof, occurred by the negligence and fault of the said brig Emily, it is considered that the libellants are entitled to recover the damages by them sustained thereby; wherefore it is ordered that it be referred to the clerk, to ascertain and report to the court the value of the said schooner Virginia, her tackle, apparel and furniture, at the time; her cargo then on board her, belonging to the libellants, and the amount of the loss in the premises sustained by the libellants by means of such collision, and that, on the coming in and confirmation of such report, a decree be entered therefor, in behalf of the libellants, and for their costs to be taxed.

[NOTE. This decree was affirmed by the circuit court in Case No. 4,452.]

EMILY, The (BEDELL v.). See Cases Nos. 4,452 and 4,453.

Case No. 4,454.

The EMILY B. SOUDER.

[3 Ben. 159.][1]

District Court, E. D. New York. Feb., 1869.[2]

LIEN ON SHIP FOR ADVANCES—CREDIT—PAYMENT—GOLD CONTRACT.

1. Where a vessel put into the port of Maranham, in distress, being foreign to that port, her master being without means to pay for the repairs, and her owners being without credit, and thereupon the libellants advanced to the master, towards the payment of the expenses of the vessel, $4,387.70, on the request of the master, and on his promise that it should be repaid in gold, in the United States, for which sum the master gave a draft on his owners, payable in gold, which draft was not taken in payment: *Held*, that the libellants had a lien upon the vessel for the amount of the advances.

[Cited in The Union Express, Case No. 14,364.]

2. That, in conformity with the decision in Bronson v. Rodes, 7 Wall. [74 U. S.] 229, a decree must be entered in favor of the libellants, against the vessel, for $4,387.70, in gold, with interest and costs.

[This was a libel in rem by Pakenham Beatty, August Tappenbeck, and August Christiansen, trading as Pakenham, Beatty & Co., of the port of Maranham, Brazil, against the steamship Emily B. Souder (E. A. Souder, claimant), for certain advances claimed to have been made upon the credit of the vessel.]

C. Van Santvoord, for libellants.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. This is an action brought to enforce a lien alleged to exist upon the American steamer Emily B. Souder, for the amount of certain advances made to that vessel by the libellants, Pakenham, Beatty & Co., in the port of Maranham, Brazil, into which port she put in distress, in June, 1865. The amount and correctness of the advances are not seriously disputed by the claimants. The defence relied upon is, that the advance was not made upon the credit of the vessel, but upon the credit of the owners, and that the libellants accepted a draft drawn by the mas-

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

[2] [Affirmed in Case No. 4,456.]

ter upon his owners as payment therefor. The proofs fail to sustain this defence. On the contrary, the weight of the evidence is, that the advance was made upon the credit of the vessel, and that the draft was not accepted as payment. It also appears in evidence, that the vessel was a vessel foreign to the port of Maranham, and that she was compelled to put into that port, in distress, by reason of an accident to her screw; that her master was without means sufficient to pay for the needed repairs, and the owners without any credit there; that the amount of the necessary expenditures of the vessel, to enable her to proceed on her voyage, was the sum of $5,966.65, in gold, towards defraying which the libellants advanced, upon the request of the master, and upon his agreement that it should be repaid in gold, the sum of $4,387.70, for which sum the master gave the libellants his draft upon his owners, payable in gold; but such draft was not given in payment of the advances, nor received in extinguishment of the original debt, and was never paid. Upon such a state of facts, according to the maritime law, a lien was created upon the vessel, in favor of the libellants, which they are entitled to enforce by this action.

The remaining question is as to the amount of the lien, and the kind of currency in which it is payable. As before stated, it appears that the parties contracted the debt in gold and the draft was made payable in gold, in New York. The case then appears to be clearly within the principle of the decision of the supreme court of the United States, in the late case of Bronson v. Rodes, 7 Wall. [74 U. S.] 229. That case decides that there is now, and has always been, notwithstanding the passage of the currency or legal tender acts, a lawful gold and silver coined money of the United States, in use as money and a legal tender, and that an express contract to pay coin can only be satisfied by the payment of coin. In the case before me the advances were, by the agreement of the parties, to be repaid in gold in the United States. The law gave to the libellants a lien upon the vessel, to secure this advance, and according to the decision of the supreme court that obligation can be satisfied, only by a payment in gold. In accordance with these views a decree must be entered in favor of the libellants against the steamer in question, for the sum of $4,387.70 in gold, with interest. The libellants are also entitled to recover their costs.

[NOTE. On claimant's appeal this decree was affirmed by the circuit court (Case No. 4,456), whereupon an appeal was taken to the supreme court, in connection with another proceeding against the same vessel instituted by John Pritchard (Case No. 4,457). Pritchard had a decree in his favor, which was for the portion of the money advanced which was contributed by him. These decrees were affirmed by the supreme court. The Emily Souder, 17 Wall. (84 U. S.) 606.]

Case No. 4,455.

The EMILY B. SOUDER.

[7 Ben. 550.][1]

District Court, S. D. New York. Jan., 1875.[2]

SALVAGE—TOWAGE.

1. The steamship S., on her way to New York from the Pacific ocean, lost her screw and put into Maranham, Brazil, where she put in a new one. Sailing thence, she broke one blade of the new one, when about 300 miles from St. Thomas, and the other when about 30 miles from that place. She put in there, and obtained supplies, and then started under sail for New York, not having mended her screw. She prosecuted her voyage till she was about fifty or a hundred miles from Sandy Hook, when the steamer M., also bound to New York, attracted by a flag flying at the peak of the S. (which was not a signal of distress), came up and spoke her, on August 25th, 1865. The master of the S. first desired the master of the M. to take off his passengers. This the latter declined to do, on the ground that it might cause the M. to be quarantined, but he offered to tow the S. to New York. This was finally agreed upon, no price, however, being fixed, and accordingly the M. took hold of the S. and towed her to New York, the service occupying about eighteen hours, and the M. being detained eight or ten hours. After the arrival of the S. in New York, parties who held a mortgage on her foreclosed it, and bought the vessel in, as they alleged, without notice of any claim upon her, and sent her upon various voyages, till October, 1865, when the owners of the M. filed a libel against her to recover a salvage compensation for the service rendered. The S. was worth, when the service was rendered, about $200,000, the M. was worth about $200,000, and her cargo was worth about $330,000: *Held*, that the S. was not in distress, and the evidence did not show that the master of the M., in taking hold of the S. to tow her, considered that he was entering on a salvage service for a salvage compensation, or that he was entering on any other than a towage service, nor that the master of the S. had any idea that he was subjecting his vessel to a claim for salvage.

2. Both parties contemplated that the compensation to the M. would be larger than to a smaller vessel, or to a tug in the regular business of towing. These circumstances, however, did not reduce the service rendered by the M. to a mere towage service.

[Cited in McMullin v. Blackburn, 59 Fed. 178.]

3. The fact that the S. was approaching a lee shore, and was deprived of her chief means of propulsion and control—her steam power—was to be considered in fixing the amount of compensation, nor ought that to be diminished because the wind and weather continued favorable after the towing commenced.

4. The lien of the libellants for salvage was not lost.

5. The sum of $3,000 was a proper sum to be allowed. Of this, $75 to be paid to the owners of the M. for damage to a hawser, and $250 to the master of the M., and the rest ($2,675) to be divided, one half to the owners of the M. and the other half to the officers and crew, including the master, to be divided among them in proportion to their wages.

[Cited in The Colon, Case No. 3,024; Brooks v. The Adirondack, 2 Fed. 391.]

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

[2] [Modified in Case No. 4,458.]

D. B. Eaton, for libellants.
W. R. Beebe, for claimants.

BLATCHFORD, District Judge. The North Atlantic Steamship Company, as owners of the steamship Monterey, and William G. Furber, her master, for themselves and all others entitled, bring this libel against the steamship Emily B. Souder, to recover salvage, for services rendered by the Monterey to the Souder, in towing her into the port of New York, on the 25th of August, 1865.

The libel alleges that the Monterey, while on a voyage from New Orleans to New York, discovered the Souder in a disabled condition, with signal flying, whereupon the master of the Monterey hauled up for and came alongside of the Souder, and found that her propeller was gone, and that she was in a totally disabled condition, and in peril, and unable to make a port, and short of provisions, and in shoal water; that the master of the Monterey was requested by the master of the Souder to take the Souder in tow for the port of New York; that the master of the Monterey thereupon took the Souder in tow, and made for the port of New York, where he arrived with the Souder on the next day; and that the libellants are entitled to a reasonable share of the Souder, for the salvage thereof. The prayer of the libel is for reasonable and proper salvage in proportion to the value of the Souder.

The answer admits that the propeller of the Souder was broken, and alleges that the Souder was tight, staunch and strong, and well and fully supplied with masts, sails, crew and provisions for her voyage, and had proceeded on said voyage, with such injured propeller, from a place in South America to the place where she was spoken, and had passed within easy distance of many ports in the West Indies and the United States, and, having fully means and ability, had reached the place where the Monterey spoke her; that, in order to expedite the passage of the Souder to New York, the master of the Monterey was requested to tow her to New York, but she was in no peril, nor did the Monterey, or her master or crew, incur any peril in the performance of said service; that the Monterey towed the Souder to the port of New York, but, at all times during the towage, the Souder was tight, staunch and strong, and well and fully provided with men and all necessaries, except her propeller, for her voyage; that the Monterey rendered service to the Souder in the towage of her, but only towage service, and when the Souder was on ground in which pilots from the port of New York are to be found, and within a very short distance of where tugs can easily be had, and in the most direct route of the whole steam marine of the United States; that, at the time of the service, the Souder was owned by, and in the possession of, persons other than the claimants; that, after the service was performed, the Souder arrived at the port of New York, and the claimants, having a mortgage and lien thereon, proceeded to duly foreclose said mortgage, and became the owners of the vessel, without notice of the libellants' claim; and that thereafter she left the port of New York, and proceeded and completed various voyages, and any lien of the libellants, if the same ever existed, was lost.

It will be useful, in the first place, to recur to the voyage of the Souder prior to her being spoken by the Monterey. She had come from the Pacific ocean around Cape Horn. She was a screw steamer. She lost her screw about 250 miles from Maranham, in Brazil. She went, by means of her sails, to Maranham, and there a new screw was put in. She then started for New York, under steam. One blade of her new screw was broken off between 400 and 500 miles from St. Thomas, and the other blade was broken off within 40 or 50 miles of St. Thomas. She then went to St. Thomas by means of her sails. She remained there 7 or 8 days, and took in a supply of provisions, but did not put in a new screw, and left St. Thomas for New York under sail alone, intending to go under sail to New York. She had been out 28 days, under sail alone, and had arrived within some 50 to 100 miles of Sandy Hook when she was fallen in with by the Monterey. She had plenty of provisions. Her hull was tight. Her spars, rigging and sails were in good order. She was in good condition, as a sailing vessel. As a steam vessel, she was deprived of her steam power. She had some passengers on board, all of whom had come from ports beyond St. Thomas. She behaved well on her passage from St. Thomas. She was one year old. She was put upon a dry dock, after her arrival at New York, and it was found that nothing was the matter with her, except the loss of her screw, and the roughing up of the copper in two or three places on her keel. She had spare sails on board. Her suit of sails was foresail, topsail, top-gallant sail, fore staysail, jib, fore spencer, mainsail, and gaff topsail.

The Monterey, going the same way with the Souder, and bound to the same port, descried the Souder ahead and to the westward, showing what the master of the Monterey understood to be a signal. The Monterey bore down to the Souder.

There is very little conflict as to the circumstances under which the Monterey took hold to tow the Souder. The only point of difference among the witnesses is as to whether the Souder first asked to be towed, or whether the Monterey first proposed to the Souder to tow her. But all the witnesses agree that, when the Monterey hailed the Souder and asked what was wanted, the reply was that the Souder wanted the Monterey to take off the Souder's passengers. This was said in view of the fact that each vessel was informed of the destination of the other. Then, when the Monterey hesitated to take

the passengers, in view of where the Souder had come from, and the risk of quarantine, the next suggestion, by whichever it was made, was to tow the Souder to New York, the common destination of both vessels. If the flag set by the Souder was a signal, it is apparent it was a signal to have herself spoken, with a view to having her passengers taken off. Failing that, and clearly with a view on the part of the Souder solely to expediting her progress, her being towed was proposed by her or assented to by her. The master of the Monterey could have had, and did have, no idea that the Souder was, or thought she was, in distress or peril or apprehension, other than as such condition may have existed, in judgment of law, because, being a steam vessel, fitted to be propelled by both steam and sails, she had been deprived of her means of steam propulsion, leaving her means of sail propulsion unharmed. The evidence of the master of the Monterey, and of Craig, the chief engineer, shows that the former did not, before he reached the Souder, or at any time, have any idea that her flag was a signal of distress, or that she had summoned the Monterey for any other reason than because her passengers desired to reach New York sooner, or for any other purpose than to have such passengers taken to New York by the Monterey, over the short, intervening distance. Furthermore, when towing was suggested, because the passengers could not be taken off, there were negotiations opened by the Souder with a view to fixing a price for the towing. The Monterey was a large steamer, not a tug in the business of towing, and the Souder naturally desired to know what the price for towing would be. The Souder wished to make a bargain for the towing. The Monterey refused to make a bargain. Devoe and Sinsabaugh, both of them, testify that the master of the Monterey, while declining, when asked, to name a price, said to the Souder that he would not charge more than was right. The evidence is not satisfactory to show that the master of the Monterey, in taking hold of the Souder, to tow her, considered that he was entering on a salvage service, for a salvage compensation, or that he considered that he was entering on any other than a towage service. Nor is there any satisfactory evidence that the master of the Souder had any idea that he was subjecting the Souder to a claim for salvage compensation, based on the rescuing of the Souder from existing or apprehended peril. That both parties contemplated that the compensation for the service would be larger to the Monterey than to a smaller vessel or to a tug in the regular business of towing, may be assumed.

But the circumstances above referred to do not have the effect to reduce the service rendered by the Monterey to a mere towage service, although they have an important bearing on the question of the amount of the salvage compensation. It was said by this court, in the case of The Saragossa [Case No. 12,334]: "In order to make a salvage service, it is not necessary that a vessel, whether sailing or steam, should be unnavigable, or that a steam vessel should be injured not merely in her machinery, but in her hull or her sails also. * * * A steam vessel which has lost the use of her steam machinery by an accident, is not in the same condition she would ordinarily be in, although she is sound in hull and masts, and has the use of her sails, and a service rendered to her under such circumstances, by towing her, is not a mere towage service, but is a salvage service." These are well established principles. The Reward, 1 W. Rob. Adm. 177; The Charlotte, 3 W. Rob. Adm. 68, 71; The Charles Adolphe, Swab. 157.

I think, therefore, that the service of the Monterey is not to be compensated merely as a towage service. But how much shall be awarded to her as salvage is a much more difficult question.

The master of the Monterey testifies that he was about 93 or 94 miles south by west from Sandy Hook, and out of sight of land, when he took the Souder in tow; that he should judge she was in about twelve fathoms of water; that the wind was northerly and light, and she was making little or no progress through the water with her sails; that, in proportion to the size of the Souder, her canvas was not sufficient to work to windward or keep off shore, with a strong breeze on shore; that her canvas was but an auxiliary motive power, and her principal motive power was steam; that the Souder was in an unsafe or dangerous position with an easterly gale or a strong east wind; that the wind frequently blows on shore over the section of the ocean over which the Souder was towed; that the Souder was not prepared to carry the requisite amount of canvas to make her navigation safe from where she was taken in tow to New York, in case of the wind's blowing on shore; and that the place where the Souder was when he first saw her, was not a part of the ocean frequented by steamtugs towing for the harbor of New York.

Bragdon, the first officer of the Monterey, testifies, that the Souder was making very little progress with her sails, and was not heading for New York or any Northern port; that she was out of sight of land, and was about 100 miles from Sandy Hook; that when she was taken in tow, the wind was northerly and light and the weather was clear; and that the sails of the Souder were all set; and that she had not enough canvas to work off from a lee shore, or to make her safe in a gale of wind from any direction, and was not rigged with spars to carry sufficient canvas to keep her off from a lee shore, or to make her safe in a gale of wind from any quarter.

Craig, the chief engineer of the Monterey, a witness for the claimants, testifies, that the weather was pleasant and clear; that the Souder was steering about east northeast; that the wind sprang up fresher after the Souder was taken in tow, changing to the southwest, having been north to north by west and light, when she was taken in tow, and that the wind continued fair until they reached the Highlands, a five knot breeze, both ships having their sails set.

Winchester, a ship master, who superintended the building of the Souder, and went in her as master from New York to Charleston and back, on her next voyage, testifies that with the sails she had, there was no difficulty in navigating her by her sails; that there was no trouble about her sailing on the wind or wearing, but she could tack only in smooth water, being obliged to wear in rough water; that in foul weather or storms she would carry as much canvas as any other vessel, because in foul weather or storms an ordinary sailing vessel would have to reduce her canvas, and the Souder could carry her canvas longer than ordinary vessels, her sails being smaller; that he would consider it prudent and safe to go on a voyage with the Souder, with her propeller gone, in the condition she was in when she arrived at New York on this occasion; and that her hull was stronger than that of almost any sailing vessel, and she was heavier timbered than any ordinary propeller, and had diagonal iron braces, which sailing vessels do not have.

Devoe, the chief engineer of the Souder, testifies, that, when the Souder was taken in tow, the weather was calm, with a light wind from the south; that, during the towing, the weather was fine; and that the wind sprang up favorably after the towing commenced, by there coming up a good sailing breeze, it having been favorable before, but light and calm.

The Souder was approaching the coast, where danger to her, if a strong wind blowing towards the land had sprung up, might have existed. While she might have been able, with abundant sea room, to keep from peril, by the use of her sails, in case of severe winds or storms, yet she was nearing what would have been a lee shore, in case of a strong wind blowing towards the land, and the reaching her destination required her to keep nearing the shore more and more. She had been deprived of her chief means of propulsion and control—her steam power—of that which would have been effective to keep her off from a lee shore, in case of necessity. Her normal condition was to have the use of both steam and sails. The court cannot indulge a conjecture, or enter into a calculation, upon the opinions of witnesses, as to how much effective ability to keep off from a lee shore would have remained to the Souder, in case of necessity for doing so, through the use of her sails alone. It is sufficient that she had been designedly equipped with steam power as her principal power, and with sails as auxiliary, and that she had been deprived of the former, and that such deprivation necessarily left her more exposed to danger from a lee shore, on her approach to the land, than she would have been if she had not been deprived of her steam power.

Nor ought the compensation which otherwise would be awarded to the Monterey to be diminished because of the fact that the wind and weather continued to be favorable after the towing commenced. Such fact may be a good reason for not increasing the compensation, because it shows that the Monterey in fact encountered no peril from wind or weather while performing the service.

There remain to be considered the duration and particulars of the service, and the value of the respective vessels and their cargoes.

The master of the Monterey testifies that the Monterey had a short supply of coal for completing her voyage, in case of adverse winds or impediments to her, but, the weather being fine after taking the Souder in tow, she had ten or twelve tons left when she arrived in New York; that she made the Souder at noon, and took her in tow at 1.30 p. m., and cast her off at the pier in New York at 7.45 a. m., the next day; that the towing imperiled or affected the insurance of the Monterey, and added greatly to the perils of navigation, in consequence of her being near the coast and approaching a port the approaches to which were covered by many vessels, causing danger of collisions, and caused her to wait for daylight to enter the port of New York, and also added greatly to the risks of harbor and river navigation; that the towing delayed the Monterey eight or ten hours; that the Monterey was not as much at command with the Souder in tow as without; that the daily expense of navigating the Monterey, for men, coal, provisions, &c., was between $300 and $400; that, in casting off the Souder, the hawser of the Monterey got jammed, and had to be cut, and a part of it, worth $30 or $40, was lost, and the value of the remainder was impaired $40 or $50 in addition; and that the Monterey had about thirty cabin and about twenty steerage passengers, and about forty officers and men. The other witnesses make the detention of the Monterey by the towing not so long as eight or ten hours.

The master of the Monterey testifies, that the Souder was about 1,200 tons burthen, and was of the value of about $200,000; and that the value of the Monterey was about $200,000, and of her cargo about $330,000, and she was about 1,050 tons burden. This is all the testimony on that subject.

The master of the Monterey testifies, that, in his opinion, a reasonable compensation for the service, is $20,000.

There is nothing to sustain the defence set up in the answer, that the lien of the libellants for salvage was lost.

In the case of The Rebecca Clyde [Case No. 11,621], this court awarded as salvage the sum of $4,000. The allowance was affirmed, on appeal, by the circuit court, against the objections of both parties. The case was one of a disabled steamer, towed by another steamer for nine hours, the towing steamer having lost twenty-four hours of time in rendering the service. The saved vessel and her cargo were worth $70,000, and the saving vessel and her cargo were worth $275,000. The saving vessel was bound from Boston to Philadelphia, and turned aside to tow the other vessel to New York. The saved vessel had been disabled in a gale, her mainmast and smokestack were lost, her machinery was disabled, her boiler was shifted, her boats and mainhatch were swept away, one of her cargo ports was stove in, she was making no substantial progress in a direction that would have enabled her, with the sails she could command, to reach New York (her port of destination) or any other place of safety, she showed a flag of distress, union down, and she was picked up at a point which was one of danger to her, crippled as she was, because of its distance from the usual track of vessels going up and down the coast, and of the direction of the wind. Although there was no peril to life or property on the part of the saving vessel, the service was held by this court to have been, so far as the saved property was concerned, a salvage service of great merit and value. The circuit court, in its opinion in that case, says: "The balance of the evidence regarding the place where the Rebecca Clyde was taken in tow, the progress that she had already in fact made under her few sails, before she received aid, the state of the weather, and the probability of her soon reaching anchorage ground, while it does not show that she was out of danger, goes far to reduce the service rendered by the libellants to a towage service—a service, nevertheless, not of an ordinary character, since it involved, on the part of the libellants' vessel, a deviation from her proper voyage, delay in its consummation, and unusual expense in furnishing hawsers." The allowance for damage to hawsers and pilotage (as part of the $4,000) was $800, of which $140 was for pilotage. "But there was very little, and perhaps no danger incurred by the vessel, or her officers or crew. if in the vigilant exercise of competent skill. It was a valuable aid, rendered to a vessel in distress, entitling the libellants to a compensation furnishing reasonable reward, and such as will operate as an inducement to them, and to others similarly situated, to render like aid. I cannot, upon all the proofs, say that the decree does not award this."

The circumstances of the present case are even more forcible, in their tendency to reduce the service to a towage service, than were the circumstances in the case of the Rebecca Clyde; and it seems to me that a reasonable and proper allowance in this case is the sum of $3,000. Of this, the owners of the vessel will receive, in the first place, $75 for damage to hawser. The master of the Monterey will receive $250. The remaining $2,675 will be divided as follows: one-half, or $1,337 50, to the vessel; and the remaining $1,337 50 to the officers and crew, to be divided among them, including the master, in proportion to their respective monthly wages, the apportionment to be made by a commissioner, if required. The claimants will be charged with the costs.

[NOTE. On claimants' appeal, the circuit court modified this decree by reducing the compensation to $1,000 for the service rendered, which was regarded as a towage service. Case No. 4,458.]

Case No. 4,456.

The EMILY B. SOUDER.

[8 Blatchf. 337.][1]

Circuit Court, E. D. New York. April 24, 1871.[2]

MARITIME LIENS — ADVANCES FOR SUPPLIES IN FOREIGN PORT—CONTRACT PAYABLE IN GOLD.

1. If advances are made to furnish supplies to a vessel in a foreign port, where neither her master nor her owners are known or have any credit, the presumption is that credit is given to the vessel, and a lien on her for such advances is created.

[Cited in The Union Express, Case No. 14,364.]

[See The Sarah Harris, Id. 12,346.]

2. If the advances are actually made on the credit of the vessel, it is not necessary that there should be an express pledge of the vessel, or that there should be an expressed intention to give a lien, or even that the advances should be accompanied by a declaration that the advances were so made.

3. An express contract to pay in gold will be enforced, notwithstanding it was made after the passage by congress of the act declaring the paper currency issued by the United States a legal tender.

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

[This was a libel in rem by Pakenham Beatty, August Tappenbeck, and August Christiansen, trading as Pakenham Beatty & Co., of the port of Maranham, Brazil, against the steamship Emily B. Souder (E. A. Souder, claimant), for certain advances claimed to have been made upon the credit of the vessel. The district court rendered a decree for libellants for $4,387.70 in gold, with interest, whereupon the claimants appeal.]

Cornelius Van Santvoord, for libellants.

Charles Donohue, for claimant.

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

[2] [Affirmed in 17 Wall. (84 U. S.) 666.]

WOODRUFF, Circuit Judge. I am satisfied, upon an examination of the evidence, that the views expressed by me in the case of The Acme [Case No. 28], on the question of the lien claimed for advances upon the vessel in a foreign port, where neither captain nor owners were known, or had any credit, are entirely apt to the present case; and, if I were to state any difference, I should say that the claim of the libellants, Pakenham Beatty & Co., to a lien, is here less doubtful, for, in the case of The Acme, the beneficial owners of the vessel applied directly and by letter to the libellants, requesting the advance. The effect of taking bills of exchange drawn on the owners was also considered in that case.

It is true, that the testimony of the captain of the steamer is in some hostility to the libellants' claim to a lien; but, in view of the well settled and oft recognized presumption, that the credit was given to the vessel under such circumstances as are here disclosed, it is in no wise material that there should be an express pledge of the vessel, or that the terms of the advance should in very words declare that the claimant shall have a lien. When the actual advance is made on the credit of the vessel, that is enough. Here, not only such presumption exists, but, in my judgment, any other assumption is greatly improbable. The inferences of the captain are not, I presume, the result of any intended untruth, but they are drawn from the fact that nothing was said, during the negotiation for advances, suggesting, in terms, that the libellants were to have a lien upon the vessel. However this may be, I think, upon the whole tesumony, the conclusion is irresistible, that the advances were not made upon the sole credit of the captain or owners.

As to the right to recover gold, so long as the decisions of the supreme court are not overruled nor modified, I must hold, that an express contract to pay in gold will be respected by the courts, and be enforced, or its breach be redressed, according to its tenor. True, this contract was made since the act of congress declaring the currency issued by the government a legal tender. But the principles of the cases decided allow parties to discriminate between the two kinds of currency, and give effect to their agreement. It is also true, that this action is not founded upon the bills of exchange and the stipulation therein for payment in gold. But, the whole transaction shows that the advance was, in fact, made to be repaid in gold, and the contents of the bills of exchange are cumulative and conclusive evidence of the fact.

The libellants must have a decree for the amount of debt and costs awarded them in the district court [Case No. 4,454], with costs of this appeal.

[NOTE. This libel was for certain advances made by Pakenham Beatty & Co., at the port of Maranham, Brazil, to the steamship Emily B. Souder, which had put into that port in June, 1865, in distress. It seems that the captain was without adequate funds to purchase necessary supplies and make needed repairs, and that he and the owners of the vessel were unknown at Maranham, and without credit there. Under these circumstances he requested the United States consul to obtain for him a consignee who would advance the requested funds; and it was only after applying without success to several parties that he succeeded in getting Pakenham Beatty & Co., the libellants, to make the advances desired by the captain. It appears that John Pritchard agreed to advance a portion of the funds after Pakenham Beatty & Co. had agreed to advance the whole, and he also libeled the vessel for the amount of his advances. In the district court he had a decree in his favor, which was affirmed by the circuit court in Case No. 4,457. Appeals were prosecuted from this decree, as well as from the decree in the suit by Pakenham Beatty & Co., represented by the principal case, to the supreme court, where both cases were heard together, and the decrees of the circuit court in each of them affirmed, Mr. Justice Field delivering the opinion. It was held that: "1. The presumption of the law is, in the absence of collusion or fraud, that where advances are made to a captain in a foreign port upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues or for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. 2. The presumption in such cases can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry. 3. Liens for advances of funds for the necessaries of vessels in a foreign port, have priority over existing mortgages to creditors at home." The Emily Souder, 17 Wall. (84 U. S.) 666.]

Case No. 4,457.

The EMILY B. SOUDER.

[8 Blatchf. 339.][1]

Circuit Court, S. D. New York. April 24, 1871.[2]

MARITIME LIENS — ADVANCES FOR SUPPLIES IN FOREIGN PORT.

An advance of money in this case was held to be an advance, in a foreign port, on the credit of a vessel, for repairs and supplies to her, creating a lien therefor on the vessel, although the money was advanced to make good advances made, or liabilities incurred, by others, to pay for such repairs and supplies, and a bill of exchange, drawn by the master on the owners, was taken, for reimbursement, it appearing that the advance was made at the request of the master.

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

[This was a libel in rem by John Pritchard against the steamship Emily B. Souder for the

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

[2] [Affirmed in 17 Wall. (84 U. S.) 666.]

portion of the advances contributed by him and made by Pakenham Beatty & Co. on the credit of the steamship which had put in, in distress, in the port of Maranham, Brazil, in 1865. The district court rendered a decree for the libellant in the suit of Pakenham Beatty & Co. (Case No. 4,454), and also in the suit of Pritchard (case not reported). Appeals were prosecuted from both of these decrees, and are now heard together by the circuit court.]

William W. Goodrich, for libellant.
Charles Donohue, for claimants.

WOODRUFF, Circuit Judge. The appeal in this case was heard together with the appeal in Beatty against the same steamer [Case No. 4,456], which was prosecuted in the eastern district of New York. Having come to the conclusion that the libellants in that case are entitled to recover, it is here only material to notice the grounds upon which the case of this libellant, John Pritchard, is claimed to differ from that of the libellants in the other suit.

The steamer having put into Maranham, in Brazil, in distress, at which port the captain and owners were wholly without credit, Pakenham Beatty & Co. consented to make, and did make, advances for her repairs and supplies, to enable her to continue her voyage to New York, and bills of exchange were drawn by the captain on her owners, for re-imbursement, and, to the amount of one of such bills, they are, in the other suit, adjudged to have acquired a lien upon the vessel, which they, upon the non-payment of the bill of exchange, are entitled to enforce. The present libellant, after such advances had been actually made, or a personal liability to pay for such repairs had been incurred by Beatty & Co., on the day before the vessel sailed, advanced fifteen hundred mil reis, which Beatty & Co. placed to the credit of the vessel and owners, and the libellant took a bill, drawn by the captain, in his own favor, upon the owners, for his own re-imbursement, and Beatty & Co. took a bill for the balance of their account. It is, thereupon, insisted, that, when this libellant advanced his money, the vessel had, in fact, obtained all the credit which was necessary, and, therefore, the captain had, at that time, no authority to obtain or accept funds from the libellant on the credit of the vessel, and, consequently, the libellant could acquire no lien, but must rely upon the bill of exchange alone, for re-imbursement.

The principle here invoked is, no doubt, clear. The master is not presumed to borrow money on the credit of the vessel, when there is no necessity therefor, and no implied lien arises in such a case. But, upon the proofs here, I think, (notwithstanding the denials of the master, who, in various particulars, is contradicted,) the libellant, in respect of his advance, stands upon the same footing as Beatty & Co. In the endeavors made by the master, and the American consul assisting him, to procure advances for the repairs and supplies to the vessel, the libellant was applied to. He also assisted in making application to others. He consented, or, at least, gave reason to expect, that he would advance some portion of the sum required, and, finally, when the vessel was about to sail, he did, for the partial re-imbursement of Beatty & Co., advance his money. In doing this, he only complied with the request of the master, and no substantial difference should be made, to his prejudice, than could be made if he had consented to make the advance, and had paid over his money, directly in satisfaction of bills for repairs or supplies. Whether he be regarded as making the advance in pursuance of such consent, and so becoming a sharer with Beatty & Co. in the giving of the credit, and with like recourse to the vessel, or be regarded as assuming, with the master's consent, a share in the advance actually made, with its hazards and its incidents, and so becoming, pro tanto, a holder of the lien, by delegation from them, express or implied, in either case, he is entitled to the like protection.

Without discussing the testimony in detail, it must suffice to say, I think the decree in his favor was correct, and that the libellant is entitled to a decree for the sum awarded in the district court, with interest and costs, together with costs on this appeal.

[NOTE. The opinion of the circuit court in the case of Beatty et al. against this steamship is reported in Case No. 4,456. Appeals were taken from that decree, as well as from the decree represented by the principal case, to the supreme court of the United States, where both of them were affirmed, Mr. Justice Field delivering the opinion. For a résumé of the points embraced in the opinion of the supreme court, see note to Case No. 4,456.]

Case No. 4,458.

The EMILY B. SOUDER.

[15 Blatchf. 185.][1]

Circuit Court, S. D. New York. Aug. 23, 1878.[2]

SALVAGE—TOWAGE.

1. The service rendered in this case by a steamer, in towing another steamer, which had lost the use of her steam-power, but was otherwise in good order, and had the use of her sails, and was not in danger or distress, *held* to be a towage service, and not a salvage service.

[Cited in The Leipsic, 5 Fed. 113; McConnochie v. Kerr, 9 Fed. 53; The Alaska, 23 Fed. 607; The Veendam, 46 Fed. 491. Distinguished in The Leipsic, 10 Fed. 590.]

2. The sum of $1,000 allowed for such towage, with interest from the time of the rendering of the service.

3. The district court having allowed for a salvage service, the claimant, on appeal, was

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

[2] [Modifying Case No. 4,455.]

allowed his costs in this court, and the libellant was allowed his costs in the district court.

This was an appeal by the claimants from a decree of the district court [of the United States for the southern district of New York (Case No. 4,455)] in a suit in rem, in admiralty, for salvage. That court awarded $3,000 to the libellants. This court found the following facts: "The screw steamship Emily B. Souder was built in July, 1864, with steam as her chief motive power, but having sails as auxiliary. She was of about one thousand tons burthen, and rigged with a fore sail, top sail, foretop-gallant sail, jib, mainsail, main gaff topsail, and mizzen staysail. She had good sailing qualities, and was managed, without difficulty, under canvass alone. She left Callao, Peru, on a return voyage to New York, and, when near the equator, on the Atlantic side, lost her propeller, and put into Maranham, under sail, for repairs. Having supplied herself there with a new propeller, she started again upon her voyage, but, the third day out, lost one of the flanges of this propeller, and, when within about eighty miles of St. Thomas, the other. She then made St. Thomas under sail, but, being unable to obtain another propeller, laid in an additional stock of provisions and again started for New York under sail, having on board fifteen or twenty passengers, who had come with her to St. Thomas. She met with no difficulty on her way up, and made from six to eight knots an hour with an open breeze. On the 25th of August, after she had been twenty-eight days out, and when she was between fifty and one hundred miles from New York, she sighted and signalled the steamer Monterey, a steamer of about one thousand tons burthen, plying regularly between New Orleans and New York, then on her way to New York, with a valuable cargo, and about thirty passengers in the cabin and twenty in the steerage. The vessels were, at the time, from six to eight miles apart, the Souder being to the westward of the Monterey, nearer the land, and making her way slowly, as the wind was light. The land was not in sight, and the water about twelve fathoms. The signal set by the Souder was not one of distress, but the ordinary saluting flag, set at the forepeak. She was somewhat out of the ordinary track of vessels approaching New York. The master of the Monterey, discovering the Souder, and seeing her signal set, examined her through his glass, and, although he knew the signal was not one of distress, changed his course to go up and speak to her. When he arrived within hailing distance, the master of the Souder asked him to take her passengers to New York. This he declined doing, on the ground that she was from ports that might render him liable to quarantine if he had her passengers on board his vessel. He was then asked what he would tow the Souder in for. He replied that he did not know that he could tow her in, and, consequently, could not make a bargain, but would take hold of her and get her in, if possible. If he did not say that he would charge no more than was right, he purposely left that impression on the mind of the master of the Souder. The Souder was, at the time, in all respects, tight, staunch and strong, and, in no respect, disabled, except in her propeller. She was well manned and provisioned, and approaching the coast under circumstances which gave no reason to anticipate that she would not, in due time, reach New York in safety. Under these circumstances, the Souder passed her hawser to the Monterey, and was taken in tow. Soon after the vessels got under way, the wind freshened and became more favorable, and both vessels were put under sail, the Monterey being also under steam. They arrived at the lightship about one o'clock at night, and stood off and on until daylight, when they passed Sandy Hook, stopped a short time at the quarantine, and arrived in safety at New York between seven and eight o'clock in the morning. Nothing of importance transpired on the way, and there was no more detention than would naturally occur when one vessel was towing another under such circumstances. The value of the Souder did not exceed $100,000. That of the Monterey and her cargo was very much more, and estimated by her master to exceed $500,000. When the Monterey took hold of the Souder, the vessels were outside of the ordinary cruising ground of the tugs from New York, and a little out of the regular track of steamers, but the distance from both was not very great. The Monterey started to the Souder a little after noon, and took her in tow between two and three o'clock in the afternoon. The outside charge of large tugs for towing under such circumstances would not have exceeded $40 an hour, and, with small tugs, much less. The Monterey had hold of the Souder from sixteen to eighteen hours, and could not have been detained on her voyage, by the deviation and tow, more than eight hours, if as much as that. In point of fact, the Monterey was not placed in any extraordinary peril by what she did. The weather was fine, and the wind favorable. One of the hawsers of the Monterey, used in towing, had to be cut in letting go the Souder, on arriving in port, and was otherwise injured, to the value of seventy-five dollars in all. The vessels arrived in New York August 26th. The next day, the master of the Monterey called upon the agents of the Souder and made known his claim. He was referred to other parties, who asked him to wait a day or two. He then placed the matter in the hands of his owner, and went again to sea August 30th, returning September 23d. He sailed again September 27th, and returned October 19th. On his return, finding that nothing had been done towards a settlement of his demand, he caused this suit to be commenced, which was done October 24th. At the time the service was rendered by the Monterey, the Souder

was under mortgage to the claimants. Before the suit was begun, this mortgage was foreclosed, and the claimants had become the purchasers of the vessel. A reasonable compensation to the Monterey, for her detention in going to the Souder and making fast, for her towage services, under the circumstances, and for the injury to her hawser, is one thousand dollars."

Dorman B. Eaton, for libellants.
Welcome R. Beebe, for claimants.

WAITE, Circuit Justice. It is conceded that the Monterey was engaged to tow the Souder, and the only controversy is as to whether the engagement was for salvage or towage service. It is well settled, that, if there is no actual or probable danger, and the employment is simply for the purpose of expediting the voyage, such service is towage and not salvage. Care should be taken, in cases of this kind, not to establish a precedent which will tend to discourage merchant steamers from rendering assistance at sea when there is real or apparent danger, but it is equally important not to encourage claim for salvage remuneration when only towage service is required or contemplated.

In this case, there was no actual or apparrent danger. The Souder was not in distress, and she did not represent herself so to be. Her signal did not indicate anything of the kind, and the master of the Monterey did not understand that it did when he bore off towards her. To use his own language, as reported by his engineer, he went "to see what was the matter." If, when he started, he thought there was distress, his mistake must have been corrected soon after he got to the vessel, for he says he hesitated about taking off the passengers "unless he" (the Souder) "were in actual distress." The request from the Souder to take off her passengers, indicated, in the clearest manner, her desire to expedite their arrival in New York. When this was declined, the next was to propose towage and negotiate about price. There is nothing to show that there was any other reason for this arrangement, than that which led to the application for the transfer of passengers. The weather was fine, but the vessel was proceeding slowly, because the wind was light. While she was nearer the shore than vessels making her voyage usually went, she was not in any actual or apparent dangerous proximity to it. She was new, staunch and strong. Her masts and sails were in good order. Although disabled as to her propeller, she had full use of the same motive power that had brought her in safety from St. Thomas. The cruising ground of pilots and tugs in search of business was not a great way off, and the prospect was fair that she could sail into port in less than twenty-four hours. All this was known to the master of the Monterey. When asked what he would charge to make the tow, his reply was, not that he would not take hold of her under a contract simply for towage, but that he did not know as he could take her in, and consequently could not make a bargain. He said, however, he would take hold and get her in, if he could. All the witnesses on the Souder say that this was accompanied by the further statement, that he would not charge more than was right, or words to that effect; but, whether that be so or not, it is clear, that he, in no manner whatever, indicated, that, if he did undertake the tow, his charge would be for salvage and not for towage. All the surrounding circumstances go to show, most unmistakably, that the master of the Souder did not suppose that, in what he was doing, he subjected himself or his vessel to a liability for salvage service. What he wanted was to expedite the delivery of his passengers in New York, and he did not, by word or deed, indicate anything else to the Monterey. For this purpose, when he found he could not get them on board the Monterey, the negotiation for towage began. In this connection, it must also be remembered, that, under ordinary circumstances, his vessel would soon be on the cruising ground of tugs seeking towage employment, where all the assistance he required could be obtained at customary rates.

In view of these facts, if the master of the Monterey expected to claim salvage remuneration, he should have so said at the time, in order that the Souder might determine whether she would accept his services on that condition. There is no pretence of any such notice, and on that account, clearly, there could have been no express contract for such service; and, in my opinion, no such service was in fact rendered. Towage only was wanted, and that was the only service rendered or accepted. In law, therefore, the Monterey can only claim reasonable compensation for what she has done in that way.

But, while the employment was for towage alone, it does not necessarily follow that the Monterey is confined, in her recovery, to an amount which would be considered a reasonable compensation for the same service by a tug fitted for and engaged in that kind of business. She is entitled to a reasonable remuneration for what she has done. Her service was an unusual one. The towage was not ordinary but extraordinary. It interfered with the business in which she was engaged. She went out of her way to see what was wanted. This involved delay, and delay increased the expenses of her voyage. To some extent it interfered with her business and incommoded her passengers. Under such circumstances, it is clear, that neither party could have understood that the ordinary charges for towing would be a sufficient remuneration for what was to be done. As the service was to be extraordinary, it is fair to presume that it was expected the compensation would be something more than

ordinary. This, not because the service was for salvage, but because of its unusual character as towage.

The testimony taken since the appeal has changed the case somewhat, in this particular, from what it was below. Several witnesses have been examined as to the ordinary price of towage and the value of the Souder. It now appears that the value of the vessel was not more than one-half of what was testified to below, and that, if the service had been performed by a tug sufficiently large and powerful to bring her in as expeditiously as the Monterey did, the charge would not have exceeded five or six hundred dollars. Under these circumstances, I think one thousand dollars ample compensation to the Monterey, both for the towage and the damage to her hawser.

As the recovery is upon a quantum meruit for work and labor done, and not for salvage service, interest is allowed at the rate of seven per cent., from August 26th, 1869.

The claimants having been successful, in this court, in reducing the claim of the libellants from salvage to towage, which is all that was asked in the answer, they are entitled to costs in this court. The libellants should recover costs in the district court.

Case No. 4,459.

In re EMISON.

[2 N. B. R. 595 (Quarto, 179);[1] 1 Chi. Leg. News, 342.]

District Court, D. Kentucky. May 10, 1869.

BANKRUPTCY — WITHDRAWAL OF PROOF OF DEBT.

Proof of debt cannot be withdrawn from the files by the creditor. Semble—that it may be waived.

In this case Register Eginton certified to the court as follows: The Branch Bank of Kentucky, at Frankfort, by their attorney, Thomas N. Lindsey, Esq., moved to withdraw certain named proof of debts made by Mr. A. W. Dudley, president of said bank, on the ground that they had been proven through mistake and through the misapprehension of the directions of counsel, Thomas N. Lindsey, Esq., to which the bankrupt objected, and at the request of the bank the question here presented is certified for the decision of the district judge. Mr. A. W. Dudley, president of said bank, made proof of the above named debts on the 2d day of June, 1868, which proofs were on file, and voted at the first meeting of creditors, and some months afterwards, to wit, on the 10th day of October, 1868, the application for withdrawal was made. I do not feel that I would be authorized to permit these proofs to be withdrawn from the record for any cause whatever—they are as much an integral part thereof as the most important paper in the case. Because Mr. Dudley, the president of the bank, misunderstood the instructions of his counsel, is not, in my opinion, a sufficient reason to now mutilate the record, and take therefrom the authority by which Mr. Dudley's attorney in fact, voted for and assisted in electing an assignee. If the bank was in any wise to be the loser, it might furnish an excuse for their motion; but the fact of these proofs being in the case, does not preclude or prejudice any of the rights of the bank, as to any of the other parties upon said debts, and if it is to make complaint against the bankrupt that they desire to withdraw it, the objection should be made here, and not by an action in the state court, for if an action were commenced there, it could be stayed to abide the final result of this proceeding. In looking at the motion in this light, I am of the opinion that it should be denied. After the intimation from me against the withdrawal of said papers, each of the parties presented briefs, which are hereto appended, and all of which, with the new proof offered in lieu of the old ones, are submitted for the opinion of his honor, the district judge.

BALLARD, District Judge. I concur with the register. If the creditor wishes to withdraw the instrument proven, he may do so in pursuance to the provisions of the twenty-fourth section of the bankrupt act [of 1867 (14 Stat. 528)], but the proof cannot be withdrawn at all. Doubtless it may be waived, but it cannot be withdrawn.

[1] [Reprinted from 2 N. B. R. 595 (Quarto, 179), by permission.]

Case No. 4,460.

The EMMA.

[See Case No. 18,218.]

Case No. 4,461.

The EMMA.

[Blatchf. Pr. Cas. 561.][1]

District Court, S. D. New York. Oct., 1863.

PRIZE—CAPTURE BY TRANSPORT—FILING OF LIBEL BY GOVERNMENT — DESTRUCTION OF VESSEL'S PAPERS—CONDEMNATION.

1. The vessel and cargo were captured at sea by a vessel employed as a transport in the service of the United States, but not a commissioned vessel of war.

2. The filing by the United States of a libel against the vessel and cargo as prize is an affirmance by the United States of the capture, and such ratification is equivalent to an original seizure by authority of the government.

3. Destruction of the vessel's papers by her master just before capture.

4. Vessel and cargo condemned for a violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured at sea by the steamer

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

Arago, employed as a transport in the service of the United States, but not a commissioned ship-of-war, July 24, 1863, and were sent into this port, where the prize was libelled in this court, for condemnation. Such ratification of the arrest of the prize was equivalent to an original seizure by authority of the government, and the affirmance of the capture by the United States is authenticated by instituting this suit thereon. 2 Wheat. [15 U. S.] Append. notes, p. 7. The monition and attachment issued in the suit were duly returned in court August 18, 1863, with the usual proclamation. Thomas Sterling Begbie, of London, appeared, on such return, and filed his claim as owner of the vessel and cargo named in the libel, without exception of form to the regularity of the action. The cause was submitted by the United States attorney to the decision of the court, during the present term, upon the proofs produced therein, no party appearing in defence to the action and issue on the pleadings.

The master of the vessel testifies, on his examination in preparatorio, that he took possession of the Emma at Glasgow, Scotland; that he declined to answer who put her into his possession; that she was captured in the Gulf Stream, off the coast of North Carolina, he supposes, for blockade running; that he, the witness, made no resistance to the capture, but exerted himself to escape from it; that part of the crew came on board the Emma in Glasgow, and part in Nassau, Bermuda; that the voyage was from the Bermudas, and was to have ended there; that the cargo on board at the time of capture was turpentine, resin, tobacco, and cotton, put on board at Wilmington, North Carolina, about the middle of July, 1863; that he sailed from Glasgow to Nassau, and from Nassau to Wilmington; that he, the witness, declined to answer who owned the vessel; that the owner lived in England; that he, the witness, does not know the owner of the cargo; that he has no papers of any kind in his possession in relation to the vessel or cargo; that the vessel was captured near the coast of North Carolina, July 24, near 11 o'clock a. m.; that she had regular papers on board when she left Wilmington; that he burned them all on being chased, and when upon the point of being captured, to prevent their falling into the hands of the captors; that he knew that Wilmington was blockaded when he entered the port; that he evaded the blockade in going in, and was captured soon after leaving, on his way out; that he had known all about the war for many months; that his vessel entered the harbor of Wilmington covertly and secretly, whilst that port was under blockade, and sailed from it as before stated by him; and that he loses £1,000 in consequence of the capture, which was to have been his remuneration had he succeeded in completing his voyage.

The first mate concurs, in general, in the facts stated by the master. He says that he heard the latter say that he had destroyed the ship's papers, but he, the witness, did not see it done; and that the Emma had succeeded in running the blockade of Wilmington four several times.

The second officer of the vessel gives no testimony contradictory to the evidence of his fellow officers. He asserts no fact respecting this voyage, criminating the conduct of the vessel or of the parties prosecuting it. He says that he knows that the vessel had run the blockade of the same port at another time.

The steward of the vessel, on his examination, deposed to the same effect with the first and second officers of the vessel. To the 12th and 24th interrogatories he says: "She (the vessel) had run the blockade from Nassau and Bermuda into Wilmington, four times." To the 21st interrogatory he says: "I knew all about the blockade, and so did the captain."

No papers were captured with the vessel and produced in court with the prize and the witnesses taken on board.

This recapitulation of the proof demonstrates that the case is one of premeditated violation of public law, and that the vessel and cargo are plainly subject to judgment of condemnation and forfeiture. A decree will be entered accordingly.

[NOTE. For hearing on report of the prize commissioners as to what vessel or vessels are entitled to share in the proceeds, see Case No. 4,462.]

Case No. 4,462.

The EMMA.

[Blatchf. Pr. Cas. 607.][1]

District Court, S. D. New York. July 8, 1864.

PRIZE — DISTRIBUTION OF PROCEEDS — INFERIOR FORCE.

It appearing that the prize property was captured by a United States steam transport ship, no other vessel co-operating therein, or being within signal distance at the time, and that the prize vessel was of inferior force, the court, to carry into effect the act of June 30, 1864 [13 Stat. 306], allowing vessels not of the navy to share in a prize in certain cases, referred it to a commissioner to report the names and employments of the captors on board the transport ship present and engaged in the capture, and the relative compensations properly allowable to them severally.

In admiralty.

BETTS, District Judge. The above-named vessel and cargo having, by the judgment of this court [Case No. 4,461], rendered in the term of October last past, been condemned as prize of war, and the report, dated December 23, 1863, made to the court by the prize commissioners, under the order of the court, to take evidence and report to the court what public ships of the United States are entitled to share in said prize, showing that the capture was made by the

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

United States steam transport ship Arago, no other vessel co-operating therein, or being within signal distance at the time, and that the captured vessel was of inferior force, and it appearing to the court, by the provisions of the act of congress, entitled "An act to regulate prize proceedings and the distribution of prize money, and for other purposes," approved June 30, 1864, that vessels not of the navy, present at the capture of a prize and rendering actual assistance in the capture, may share in the prize, and it appearing to the court, from the report of the said prize commissioners, that the said ship Arago was the sole vessel present at the capture of said prize, and that said prize was of inferior force to the Arago, and it being moved by the counsel for the owners of the Arago, and assented to by the United States attorney, that the Arago, under the provisions of the existing law, be admitted to receive her lawful share of the aforesaid prize proceeds, and the court being further moved to refer it to a commissioner of the court, to ascertain and report to the court the persons belonging to the Arago entitled to share in the said prize, and the proportions thereof lawfully appertaining to each, it is considered and ordered by the court that it be referred to John A. Osborn, Esq., one of the commissioners holding an appointment as such by the United States circuit court within this district, to inquire and ascertain, from the report therein heretofore made by the prize commissioners, and other legal proofs, the names and employments of the several captors on board the Arago, present and engaged in the actual capture of the prize aforesaid, and the relative rewards and compensations properly allowable to them severally, and to report the same to the court with all convenient despatch. It is further ordered, that such commissioner have taxed for his service the like costs as are taxable under the fee bill of February 26, 1853 [10 Stat. 161], for similar services rendered in admiralty causes in courts of the United States.

EMMA, The (ZOLLINGER, v.). See Case No. 18,218.

Case No. 4,463.

The E. M. McCHESNEY.

[8 Ben. 150;[1] 49 How. Pr. 178; 21 Int. Rev. Rec. 221.]

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

JURISDICTION—CANAL NAVIGATION—BILL OF LADING — COMMON CARRIER — THEFT OF CARGO — MORTGAGEE.

1. A cargo of oats was shipped on a canal boat, lying in the Buffalo river, a navigable stream flowing into Lake Erie, to be carried to New York, by way of the Erie canal and the Hudson river. The master of the boat signed a bill of lading for the cargo. While passing through the Erie canal, a part of the oats were feloniously abstracted from the cargo, with the knowledge and assent of the master. On the arrival of the boat in New York, she was libelled by the consignee to recover the value of the oats not delivered. A mortgagee of the boat intervened, his mortgage being due, and defended the action, raising an objection to the jurisdiction, claiming a lien superior to that of the libellants, and claiming that the boat was not liable for the felonious action of the master. *Held*, that the admiralty has jurisdiction of an action to enforce such a contract as this, although part of the service was to be performed on the Erie canal.

[Cited in Malony v. City of Milwaukee, 1 Fed. 612.]

2. The admiralty has jurisdiction to enforce such a contract against the boat, although she was built to navigate the canal, and had no means of locomotion in herself.

[Cited in The Wilmington, 48 Fed. 567; The Ella B., 24 Fed. 508.]

3. The lien of the claimant under his mortgage was subordinate to that of the libellant.

[Cited in The Charlotte Vanderbilt, 19 Fed. 220; The Young America, 30 Fed. 797.]

4. The boat was liable for the taking of the oats by the master.

[Cited in The Daniel Burns, 52 Fed. 160.]

5. Whether the admiralty has jurisdiction of collisions upon the Erie canal, or contracts for the carriage of goods from place to place exclusively upon the Erie canal, quaere.

[Cited in The Albany, 44 Fed. 435.]

Goodrich & Wheeler, for libellants.

J. B. Elwood, for claimant.

BLATCHFORD, District Judge. The libel in this case alleges, that, in November, 1873, at the city of Buffalo, the libellants shipped on board of the canal boat E. M. McChesney, then lying in the Buffalo creek or river, a navigable stream emptying into Lake Erie, about 15,000 bushels of oats, to be transported on said boat from Buffalo to the city of New York, and there delivered to A. R. Gray & Co., the agents of the libellants, for a certain rate of freight, then agreed to be paid by the libellants; that the boat proceeded on said voyage with said oats, and, being detained by the ice in the canal, did not arrive at the city of New York till the month of May, 1874, and then failed to deliver 3,300 bushels of the oats; and that the master of the boat has concealed the oats and converted them to his own use. The libellants claim damages to the amount of $2,145.

The answer, which is put in by a mortgagee of the canal boat, as claimant, avers that this court has not jurisdiction of the subject matter of this suit, in that the boat was a canal boat, employed in transporting freight on the Erie canal, between Buffalo and Albany, in the state of New York, and was so engaged, and between those points, at the time and on the occasion of the alleged loss and conversion set forth in the libel; that the waters of said canal are not

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

[2] [Affirmed in Case No. 4,464.]

within the ebb and flow of the tide, and are not navigable waters, within the legal acceptation and understanding of that term, and the said boat is not subject to the admiralty and maritime jurisdiction of this court; that, at the time the oats were shipped on the boat, and at the time the boat was libelled and seized, and prior thereto, the claimant had a lien on the boat, of which the libellants had notice, arising from and by virtue of a chattel mortgage executed thereon for the original purchase money thereof, on the 6th of May, 1873, for the sum of $2,467.50, by Samuel Beebe and Levi Beebe to one William Foster, of Cleveland, Oswego county, New York, and duly filed by him in the office of auditor of the canal department of the state of New York, on the 8th of May, 1873; that the said mortgage was, on the 19th of May, 1873, for a valuable consideration, sold and assigned to the claimant, who, in pursuance of the requirements of the statute of New York, refiled the same in said auditor's office, with a statement of the amount due him thereon, on the 23d of April, 1874; that the claimant, at the time the oats were shipped on the boat, and at the time the boat was libelled and seized, was the owner and holder of said mortgage, and the same was then in full force, and, by virtue thereof, the claimant then had a valid and existing lien on said boat, which he is still entitled to assert, to the amount of $2,093.22, with interest thereon from May 5th, 1874; that the claim and lien of the libellants, if any they have, is subordinate to that of the claimant; and that, if any part of the cargo was not delivered, the same was feloniously abstracted therefrom, with the knowledge of the master of the canal boat, and without the knowledge, privity or consent of the claimant, and the same was not within the scope of the said master's employment, and was done while the boat was not within the jurisdiction of this court.

The bill of lading under which the oats were shipped calls itself, on its face, a "bill of lading." It is signed by the master of the boat. It says: "Buffalo, Nov. 10, 1873. Shipped by Van Buren & Co., as agents and forwarders, in apparent good order, on board canal boat E. M. McChesney, of Rome, Captain John O'Grady, the following described property, to be transported to the place of destination, without unnecessary delay, and delivered to the consignees in like good order, as noted below. * * * All damage caused by the boat or carrier, or deficiency in the cargo from quantity as herein specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. * * * Received of Van Buren & Co., shippers, $753, to be used in the transportation of above cargo and in paying the expenses of running boat from Buffalo to New York, and for no other purpose whatsoever. * * * Order Geo. Ellison, care O. E. Kent & Co., New York, 15,000 bush. No. 2, oats. * * * Fr't to New York, per bush., 7¼. $1087.50." There is no exception as to liability, in this bill of lading.

1. As to the jurisdiction of the court. It is set up in the answer, that the boat was a canal boat, employed in transporting freight on the Erie canal, between Buffalo and Albany, and was so engaged, and between those points, at the time of the loss and conversion of the oats; that the waters of said canal are not within the ebb and flow of the tide, and are not navigable waters, within the legal acceptation of that term; and that the boat is not subject to the admiralty and maritime jurisdiction of this court. The implication of the answer is, either that the boat was wholly employed in navigating the canal, and so was not subject to admiralty jurisdiction, or was, at the time of the loss and conversion of the oats, in the waters of the canal, and so was not subject to such jurisdiction. But the contract of affreightment made by the bill of lading was for the transportation of the oats from Buffalo to New York by this boat, and the bill of lading expressly says that this boat is to run from Buffalo to New York. Of course, she herself was to transport the oats in herself from Buffalo to New York all the way, and by water. She could not do so without going down the Hudson river from Albany to New York, although she was to go upon the waters of the canal from Buffalo to Albany. Moreover, the evidence shows, that the oats were laden upon the boat in the Buffalo river, a navigable stream connecting with Lake Erie, and at some distance from the entrance of the mouth of the Erie canal into such river.

In the case of The Ann Arbor [Case No. 408], in this court, before Judge Ingersoll, in December, 1854, a libel was filed against a canal boat, to recover the value of some butter alleged to have been shipped on board of her at Rome, New York, on the Erie canal, for transportation by her, by way of said canal and the Hudson river, to the city of New York. The court held that it was shown that all the butter which was shipped was delivered at New York, but went on to say: "It is, therefore, not necessary to decide the question of jurisdiction; but, without having sufficiently considered that question, the impressions of the court are against the right of the libellants to proceed against the boat. The canal boat was not built to navigate tide waters, but the Erie canal, and is not a ship, within the definition in Ben. Adm. § 215, not being a 'locomotive machine.' When a ship is libelled in an admiralty court, for a breach of a maritime contract, it is upon the ground that the ship itself contracts; and, if such a boat as this, while on the Erie canal, in Oneida county, can enter into and bind itself by a contract, so as to come within the control of a court of ad-

miralty, I do not see but that any vessel or thing capable of containing freight, built and designed to make headway on the New York Central Railroad, by means of the wheels of the railroad cars, can, in the same county, enter into and bind itself by a maritime contract, and come under the control of a court of admiralty, provided it is so constructed, that, when it arrives at Albany, it can be launched from the wheels of the railroad carriage into tide water, and be towed by a steamboat to New York." That case came before Mr. Justice Nelson, in the circuit court for this district, by appeal, in 1858 (The Ann Arbor [supra]), and, while holding that the proof as to the shipment on the boat of the merchandise alleged not to have been delivered by her was too doubtful to found a decree upon it for the libellants, he said: "I am, also, inclined to think that the canal boat is not a ship or vessel, upon the North river, or other navigable waters within the admiralty jurisdiction, subject to maritime liens in the admiralty, for breaches of contracts of affreightment. Those boats are exclusively adapted to canal navigation. Of themselves, they have no power as respects navigation upon public waters, any more than a raft, an ark, or a mud scow."

By virtue of section 563 of the Revised Statutes of the United States, this court has exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, this provision being a re-enactment of section 9 of the act of September 24, 1789 (1 Stat. 76, 77), which gave to the district courts of the United States exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. Passing over earlier decisions, it was held by the supreme court, in The Belfast, in 1868, 7 Wall. [74 U. S.] 624, that a proceeding in rem to enforce a contract of affreightment is within the exclusive original cognizance of the district courts of the United States, although the contract be one of transportation between ports and places in the same state, and all the parties are citizens of the same state, provided such contract be one for transportation on navigable waters to which the general jurisdiction of the admiralty extends.

In the case of The Eagle, in 1868, 8 Wall. [75 U. S.] 15, it was held, that the district courts have cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays and waters navigable from the sea. The effect of this decision was to hold that the admiralty jurisdiction created by the constitution and conferred by statute on the district courts is the same everywhere within the United States, and that no distinction between tide waters and other navigable waters exists in that regard.

In the case of The Belfast [supra], the contract of affreightment was for transportation between two places in the same state, and on a river which was navigable water of the United States. In the present case, the contract was for transportation a short distance on a navigable river emptying into Lake Erie, and then on an artificial canal to Albany, and then down a navigable river, 150 miles, to the city of New York. It is a well known fact that a large commerce is carried on between Buffalo and New York, by boats such as the one involved in the present case, which, to avoid transshipment of cargo at Albany, are towed from Albany to New York, on the Hudson river, by steamtugs, they having been towed from Buffalo to Albany on the canal by horses. It is also known, that, within a very recent period, skill and science have succeeded in so constructing and arranging canal boats propelled by steam that they are practically successful in carrying cargoes, both ways, between Buffalo and New York, through locomotion produced by their own steam motive power, and without the aid of external means of propulsion, their voyages being continuous through the canal and the Hudson river, and vice versa. So far as waters are concerned, there is no good reason for saying, that, if the contract of such a vessel for the transportation of cargo covers only the passage between New York and Albany on the Hudson river, the vessel shall, in respect of such contract, be subject to admiralty jurisdiction, while the fact that such contract covers, in addition to the river transit, a transit on the canal, the two transits making up one continuous voyage by one and the same vessel, with one and the same cargo, shall destroy such jurisdiction, on the idea that the canal is not a navigable water of the United States. If the instrument of transit be a vessel, its navigation of the Hudson river is a navigation on a navigable water of the United States. Because, after leaving the river, it pushes its way, by such means of propulsion as are afforded to it, through an artificial navigable canal, to points where a large commerce may be opened, and one with other states, is not a circumstance which, at the present day, and in view of the recent course of decisions by the supreme court, as to the extent of the admiralty jurisdiction, should be allowed to have the effect to destroy such jurisdiction.

In the case of The Montello, 11 Wall. [78 U. S.] 411, the question arose as to what was a navigable water of the United States, within the meaning of a statute requiring a steam vessel to be licensed in order to transport merchandise or passengers on navigable waters of the United States. The water in question was the Fox river, in the state of Wisconsin. The court said that the point to be determined was, whether the Fox river had such a connection with other waters as to form, with them, a continuous highway, over which commerce was or might be carried on with other states or foreign countries, in the customary modes in which such commerce was conducted by water; that it

was a navigable water of the United States, if it formed, by itself or by its connection with other waters, such a highway; and that, if it was not of itself a highway for commerce with other states or foreign countries, or did not form such highway by its connection with other waters, and was only navigable between different places within the state, then it was not a navigable water of the United States, but was only a navigable water of the state. These views are confirmed by the opinion of the same court, when the same case came before it again. The Montello, 20 Wall. [87 U. S.] 430. The Fox river is a river wholly within the state of Wisconsin. It connects with Lake Michigan. It formed, at an early day, in connection with the Wisconsin river, a channel for trade between the lakes and the Mississippi river, into which latter river the Wisconsin river runs. Between the Fox river and the Wisconsin river there was, for a long time, a land portage for some two miles, with no water communication across such interval. The Fox river itself, in its natural state, had, in parts of it, rapids and falls, and there were portages around these obstructions; but it was navigated in parts by loaded boats pushed with poles, propelled by oars, and dragged by animal power. In course of time, a private corporation improved the navigation of the Fox river, and constructed canals around the obstructions in it, and a canal across the land portage between it and the Wisconsin river, so that there had come to be uninterrupted water communication for steam vessels of considerable capacity, between Lake Michigan and the Mississippi river. On these facts, the supreme court held, that, although the Fox river, in its natural state, could not be navigated throughout its entire length by steamboats or sail vessels, yet, as it could be navigated through its length, by the aid of a few portages, by boats propelled by animal power, and carrying a considerable tonnage, it was navigable in fact, and was navigable water of the United States, used as a highway for useful commerce with other states. The Fox river being thus a navigable water of the United States, and, therefore, under the general jurisdiction of the admiralty, it could never be held that a contract of affreightment for the transportation of merchandise down the Fox river, from the place where the canal from the Wisconsin river enters into the Fox river to the mouth of the Fox river, would, on the authority of the Belfast, be a subject of admiralty cognizance, to be enforced by a proceeding in rem, in admiralty, against the contracting vessel, while a contract of affreightment for the transportation of merchandise by the same vessel from Portage City, on the Wisconsin river, through the short canal of two miles' length, to the Fox river, and then down the Fox river to the mouth of the Fox river, would not be a subject of admiralty cognizance. Yet, the latter contract is the contract in the present case. The fact that the canal in the one case is 350 miles long, and in the other case is two miles long, can make no difference in principle. In both cases the canal is a wholly artificial channel, and not an improvement of a natural channel.

In the case of The Avon [Case No. 680], the jurisdiction of the admiralty over a collision in an artificial canal was upheld. The case was one where a Canadian vessel, on her way from a Canadian port on Lake Ontario to a Canadian port on Lake Erie, collided in the Welland canal, a wholly artificial canal, wholly in Canadian territory, and extending from Lake Ontario to Lake Erie, with an American vessel, on her way from one American port to another American port. It is not necessary, in the present case, to inquire whether the admiralty has jurisdiction of a collision in the Erie canal, or whether it has jurisdiction of a contract of affreightment for the transportation between two points on the Erie canal, of merchandise which is not, by the same contract, agreed to be transported by water to a point beyond the terminus of such canal. But the decision is, that the admiralty has jurisdiction of the contract in the present case.

In so far as jurisdiction is questioned because the boat is a boat built to navigate the canal, and has no means of locomotion in herself, the objection cannot prevail. A large portion of the commerce of the Hudson river is carried on by vessels which are towed by steam vessels between different places on that river. Whatever narrow views may at one time have prevailed, the case of The Montello, last cited, is authority for holding that a vessel moved otherwise than by the power of the wind, or by steam power within herself, and thus carrying on commerce, is a subject of admiralty cognizance.

As to any lien possessed by the claimant by virtue of the mortgage, it is subordinate to the claim of the libellants. The respondent, with full notice, allowed the boat to be used as a general freighting boat. She was so used with his consent. If he had been the absolute owner of the boat, she would have been responsible for contracts of affreightment made by her duly appointed master. The mortgagee who allows the owner to run and use the boat as a general freighting boat, to earn compensation for the benefit of such owner, subjects her to the ordinary obligations which such boats incur through the contracts of the master. The master was pro hac vice the agent of the mortgagee. The mortgagee can have no exemptions which the owner would not have.

As to the defence that the oats not delivered were feloniously abstracted from the boat with the knowledge of her master, and without the knowledge, privity or consent of the claimant, it is sufficient to say, that the terms of the bill of lading are absolute,

that all damage caused by the boat or carrier, or deficiency in the cargo from quantity as specified in the bill of lading, is to be paid for by the carrier. It was open to the carrier to restrict his liability, but he made an absolute engagement to respond, with the boat, for any loss of cargo.

But, it is suggested that the loss was not caused by the boat or the carrier, because it was not within the scope of the master's employment to steal, or be privy to the stealing of, the oats. A master is civilly liable for the lawless act of his servant, whether the act be one of omission or commission, and whether negligent, fraudulent or deceitful, if the act be done in the course of the servant's employment; and it makes no difference that the master did not authorize, or even know of, the act or neglect of the servant, or even that he disapproved or forbade it. The test is as to whether, at the time, the alleged servant did or did not sustain the relation of servant to the master. A servant, trusted with the control and care of his master's carriage and horses, and directed by the master to drive to a certain place, disregarded the order, and drove elsewhere, and, while returning, drove against a woman and injured her. The master was held liable for the act of the servant, although, at the time, the servant was acting in disregard of the master's orders. As the master had entrusted the servant with the control of the carriage, it was held to be no answer that the servant acted improperly in managing it; and the master was held liable, on the ground that he had put it in the servant's power to mismanage the carriage, by entrusting him with it. Sleath v. Wilson, 9 Carr. & P. 607. These views are approved by the supreme court, in Philadelphia & R. R. Co. v. Derby, 14 How. [55 U. S.] 486, 487, and it is there said, that no case can be found which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. In the present case, the care of the oats on the boat was confided to the captain of the boat. The owner of the boat and her mortgagee directed the captain to deliver the oats at New York to the address given in the bill of lading, and directed him not to steal them on the way. He did steal them on the way. But they were entrusted to his control, and the owner and the mortgagee of the boat put it in the power of the captain to steal them on the way, and did it in the face of the absolute obligation in the bill of lading that the oats should all of them be delivered at New York, or the vessel should respond for the deficiency.

It can make no difference as to the jurisdiction of this court, that the oats abstracted were taken at a place not within the jurisdiction of this court. The jurisdiction depends wholly on the arrest of the vessel within the jurisdiction of this court. There must be a decree for the libellants, for the value of the oats named in the bill of lading which were not delivered, with costs, with a reference to a commissioner to ascertain such value.

[NOTE. Affirmed in Case No. 4,464.]

Case No. 4,464.

The E. M. McCHESNEY.

[15 Blatchf. 183.][1]

Circuit Court, S. D. New York. Aug. 23, 1878.[2]

ADMIRALTY JURISDICTION — CONTRACT OF AFFREIGHTMENT—PARTIAL PERFORMANCE ON ERIE CANAL—PRIORITY OF LIENS.

1. A cargo of oats was shipped on a canal boat lying in Buffalo creek, a navigable stream flowing into Lake Erie, to be carried to New York by way of the Erie canal and the Hudson river. The master of the boat signed a bill of lading for the cargo. While passing through the Erie canal, a part of the oats was feloniously abstracted from the cargo, with the knowledge and assent of the master. On the arrival of the boat in New York, she was libelled by the consignee, to recover the value of the oats not delivered. A mortgagee of the boat intervened, his mortgage being due, and defendant the action, raising an objection to the jurisdiction, claiming a lien superior to that of the libellant, and claiming that the boat was not liable for the felonious action of the master. *Held*, that the admiralty had jurisdiction of an action to enforce such contract, although part of the service was to be performed on the Erie canal.

2. The admiralty had jurisdiction to enforce such contract against the boat, although she was built to navigate the canal and had no means of locomotion in herself.

[Cited in The Ella B., 24 Fed. 508.]

3. The lien of the claimant, under his mortgage, was subordinate to that of the libellant.

4. The boat was liable for the taking of the oats.

This was an appeal by the claimant from a decree of the district court [of the United States for the Southern District of New York, Case No. 4,463,] in favor of the libellants, in a suit in rem, in admiralty. This court found the following facts: "The canal boat E. M. McChesney was engaged in transporting freight between Buffalo and New York, by the way of Buffalo creek, the Erie canal and the Hudson river. The distance between Buffalo and New York is about 508 miles, and the entire route traversed by the boat on her voyages is within the territorial limits of the state of New York. Buffalo creek and the Hudson river are navigable streams, the one emptying into Lake Erie, and the other into the Atlantic ocean, and the commerce upon them is very large. The Erie canal is an artificial water way, not within the ebb and flow of the tide, of about

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

[2] [Affirming Case No. 4,463.]

363 miles in length, and extending from Lake Erie, at Buffalo, to the Hudson river, at Albany. On the 10th of November, 1873, while the boat was lying in Buffalo creek, she received on board, from the libellants, 15,000 bushels of oats, to be transported to New York, and there delivered to the order of George Ellison, care of O. E. Kent & Co. After the cargo was on board, and while the boat was still in Buffalo creek, a bill of lading was made out, which contained, among others, the following clause: 'All damage caused by the boat or carrier, or deficiency in the cargo from quantity, as herein specified, to be paid for by the carrier, and deducted from the freight; and any excess in the cargo to be paid for to the carrier by the consignee.' The boat proceeded upon her voyage by the usual route, passing through Buffalo creek into the canal, but, before getting out of the canal, was frozen in and detained until the spring of 1874. Upon the opening of navigation, she passed on and arrived in New York May 18th. While frozen in the canal, and within the county of Oneida, the captain of the boat took out a part of the cargo and unlawfully converted it to his own use. After the arrival of the boat in New York, all of her cargo, except 1,559.28 bushels, was delivered to the consignees, in accordance with the terms of the bill of lading. This part of the cargo has never been delivered, although demanded. The damages for the non-delivery are $827 68. The claimant is the holder and owner of a mortgage upon the boat, executed May 6th, 1873, to secure the payment of $2,467 50, balance of the purchase money of the boat, which has not been paid. This mortgage was a valid and subsisting lien on the boat, her tackle, &c., when the cargo was taken on board and the bill of lading made out, and when the undelivered portion of the cargo was converted by the captain. By the terms of the mortgage, it was understood and agreed that the boat might be navigated within the waters and harbors of the state of New York, and both the claimant and his assignors consented to her use and employment in general freighting business in such waters. The captain, owners and mortgagee of the boat were, at the time, residents of the state of New York, as were also the libellants."

William W. Goodrich, for libellants.
Franklin A. Wilcox, for claimant.

WAITE, Circuit Justice. The decree of the district court was right. The action was brought to recover for the breach of a contract of affreightment, and not for a marine tort. The well-considered opinion of the district judge, in which I fully concur, makes it unnecessary for me to attempt to add to what he has so well said.

EMMA GRAHAM, The (MURDOCK v.). See Case No. 9,940.

Case No. 4,465.

The EMMA JOHNSON.

[1 Spr. 527.][1]

District Court, D. Massachusetts. Oct. 1860.[2]

CARRIERS — DAMAGED GOODS — "PERILS OF THE SEA" — BURDEN OF PROOF — LEAK OCCASIONED BY ACTION OF THE ELEMENTS.

1. When goods, shipped under a common bill of lading, are damaged, and the carrier seeks to exonerate himself from liability, by reason of perils of the sea, the burden of proof is upon him.

2. Such burden is not sustained, by showing that the damage was occasioned by a leak, and suggesting that it arose from some inexplicable action of the elements, without negativing other causes for the leak, which would leave the carrier liable.

H. A. Scudder, for libellant, cited Story, Bailm. § 496; Ang. Carr. 46, 67, 153–157, 202; Forward v. Pittard, 1 Term R. 33; Coggs v. Bernard, 2 Ld. Raym. 909; Hastings v. Pepper, 11 Pick. 41.

T. H. Russell, for claimants, cited 3 Kent, Comm. 216, 217; Ang. Carr. §§ 166, 182; Abb. Shipp. (5th Am. Ed.) 470; Bowman v. Teall, 23 Wend. 306; Amies v. Stevens, 1 Strange, 128. See, also, Hazard v. New England Marine Ins. Co. [Case No. 6,282]; Id., 8 Pet. [33 U. S.] 557.

SPRAGUE, District Judge. For ten years last past, this schooner has been regularly plying between Boston and Chatham, in this state, as a packet, for the transportation of merchandize, for all customers. She was, therefore, a common carrier.

In July, 1859, Doctor Carpenter, the libellant, by his agents, put on board of her, at Boston, a piano forte, to be conveyed to Chatham, and took the following receipt: "Boston, June 28th, 1859, received from Hallett & Cumston, on board schooner Emma Johnson, one boxed piano forte, marked E. W. Carpenter, Chatham." Such receipts are common, on these short coasting voyages, and it is contended by the claimants, that the undertaking, in this case, is to be deemed the same as if a common bill of lading had been signed, and for this case I shall so consider it. On the arrival of the vessel at Chatham, the piano forte was found to have been much damaged by sea-water; and compensation for that injury is now sought by this suit. The goods not having been delivered by the carrier in like good order and condition, as when received, the burden is upon him to exonerate himself from liability. This he has attempted to do, insisting that the loss was occasioned by perils of the sea. This vessel sailed from Boston on the evening of the first of July, and had a pleasant run, with a fair leading breeze, and arrived off Chatham in about ten hours, and was then found to have

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

[2] [See Case No. 2,430.]

water in her hold, by which much damage was done to this piano, and other parts of the cargo. Upon subsequent examination, it was found, that from one of the seams, being the third or fourth from the garboard, the oakum was entirely gone, to the length of eight or ten inches, and that other seams in her bottom were defective, being found, as expressed by the caulker, to be "soft."

What perils of the sea caused this defective condition of the seams, and particularly the aperture through which the water was admitted? To this question the respondent has given no answer, except by introducing evidence that ships not unfrequently spring a leak at sea. But no witness has stated that such an occurrence as a seam in the bottom of a vessel, being without oakum for eight or ten inches, occurs at sea, without previous violence of wind or wave, or stress of weather, or accident, even on long voyages, much less that such a phenomenon occurs in a pleasant and easy run of only ten hours from port. The respondents are compelled to ascribe the accident to some inexplicable action of a treacherous element; in other words, to say that it is one of the mysteries of the sea. The burden of proof is upon the respondents; and before they can expect the court to listen to the suggestion, that the loss arose from inscrutable agency of the elements, they must, at least, by proof, negative all other causes; and in particular, they must show, by full and satisfactory evidence, that the vessel was in good condition, and suitable for the voyage, at its inception. It is always the duty of the owners to provide such a vessel. It is a part of their contract, that the vessel, when she enters upon the voyage, is seaworthy, so as to be suitable for the undertaking. It is not sufficient that they honestly believe her to be so, she must be so in fact.

This vessel has been running between Boston and Chatham for ten years, and yet the owners have introduced no evidence to show when, in what manner, or by whom, her bottom had been caulked. They have, indeed, shown, that on the 12th of May, 1859, she was hauled out at East Boston, and her wales and upper works caulked, and her bottom, after being cleaned, was examined by the caulker.

But this examination was a mere inspection, with the exception of trying some of the butts; and it was further in evidence, from the seamen, that the vessel had performed well, and carried her cargoes safely on previous trips. All this may be true, and yet the very defective condition in which the seams were found may have been, and probably was, owing to the caulking being too old, or improperly done; and if, from either of these causes, the vessel was defective, the owners must be responsible.

In my opinion, the owners have not shown that this loss was occasioned by a peril of the sea, and the libellant is entitled to recover.

The view which I have taken precludes the necessity of considering the questions, as to stowage, and due attention to the pumps, which were much contested at the hearing.

[NOTE. An appeal was taken to the circuit court where the pleadings were so amended as to bring in issue the jurisdiction of the court over the contract which was for transportation to begin and end in the same state. The plea to the jurisdiction was not sustained. Case No. 2,430.]

EMMA JOHNSON, The (CARPENTER v.). See Case No. 2,430.

Case No. 4,466.

The EMMA L. COYNE.

[11 Chi. Leg. News, 98.]

District Court, E. D. Michigan. 1878.

On Libel for Towage.

1. Where a claim for towage was assigned as collateral security for a debt, *held*, that the legal title still remained in the original owner, who could sustain a libel in his own name, and that (the debt having been paid) the claim would pass to his assignee in bankruptcy.

2. The assignment of a maritime claim does not extinguish the lien incident thereto.

3. Simply filing a libel is notice to no one, and will not prevent a claim becoming stale, but taking out an attachment, placing it in the hands of the marshal of the district where the vessel is owned, and keeping it alive by successive renewals, will have that effect.

4. Where the lien holder and owner of a vessel are both residents of the same district, there is no obligation on the part of the former to pursue the vessel in another district to prevent his claim becoming stale.

[Cited in The C. N. Johnson, 19 Fed. 784.]

This was a claim for $91, alleged to be due libellant, as the assignee of the owner of the tug Geo. N. Brady, for towage services rendered October 25th, 1875, in taking the schooner from Lake Huron to Lake Superior. The libel was originally filed in the name of James M. Jones, subsequently he was declared a bankrupt, and Francis G. Russell was appointed his assignee. The defenses were: 1. That the claim had been assigned before suit commenced, to one, John Hatt, the mate of the tug, and that Jones had not then, and his assignees have not now, any interest therein. 2. That the claim as against the mortgagee, who defends this suit is stale.

In support of the first defense, it was shown that when the tug was laid up at the close of the season of 1875, the master, not having money enough to pay off his crew, turned the tow bill in question over to Hatt, telling him that if he succeeded in collecting it, he might apply it in part payment of his wages, which amounted to about $128, at the time he gave Hatt the bill, he indorsed, "Payable to John Hatt, A. C. Smith, master of the tug Brady." The master testified that he did not turn the bill over to Hatt, in part pay-

ment of his wages, but simply to collect; and if he could not collect it, he was to return it. He did not charge Hatt on the books of the boat with the amount of the bill, and Jones never gave him authority to make the assignment. At the time the bill was given to Hatt, the schooner was laid up at Chicago. The evidence further showed, that Hatt put his claim against the tug in the hands of an attorney for collection; that Jones stated to him his inability to pay the bill, and authorized this libel to be filed in his name. It further appeared that in the fall of 1876, or the following winter, the master obtained the bill from Hatt's attorney, it would seem, for the benefit of Jones. It appears afterwards, to have been re-delivered to the attorney, with further instructions to collect, although there is some conflict as to the person from whom the attorney received it. In March, 1877, Jones was adjudicated a bankrupt. In his schedules he made no mention of this claim, but on the other hand, put Hatt in the list of his creditors, to the amount of $128, secured by a lien on the tug Brady. In April, 1877, Mr. Russell was appointed assignee of Jones, and in October an order was entered allowing him to prosecute this suit. The facts proven to support the defense of stale claim are stated in the opinion of the court.

H. W. Montrose, for libellant.
F. H. Canfield, for claimant.

BROWN, District Judge. Conceding the master had authority to assign to Hatt the account in question, there was no such absolute assignment as to pass the title to the assignee. It is clear he did not receive it in payment of his claim, as the master did not charge him with the amount upon the books of the boat, and Jones, in his schedule, set forth Hatt's wages as a valid debt against his estate. It is scarcely probable, too, that Hatt, having a valid lien upon the tug for his wages, would have taken in payment therefor the assignment of a claim against a vessel, which, at that time, and for several months thereafter, was out of the jurisdiction of this court. His conduct also confirms this view. He did not sue the account until he had obtained Jones' consent to do so, and finding his suit likely to prove ineffectual, he returned the bill to Jones or the master, filed his libel against the tug, and collected his claim. No notice was given of the assignment to Coyne, the owner, who might at any time have discharged the debt by payment to Jones. I regard the transfer, at most, as an equitable assignment to Hatt, who held the claim as collateral security for his wages. When he had collected his own bill from the Brady he lost all claim whatever to this account, the property in which, if it ever passed to him, at once reverted to the owner. In this aspect, the question of redelivery is immaterial. It is true that Jones did not include this claim among his assets, and afterwards stated to Pridgeon, the mortgagee, that he had no interest in any claim against the Coyne, but in view of the admitted facts in the case, I think this was clearly a misapprehension on the part of Jones. The case is not dissimilar to that of The Napoleon [Case No. 10,011], in which the libellants took a note for towage, and after indorsing it, transferred it to a bank. It was not paid at maturity, and they paid and took it up. It was held that the transaction by which the note was discounted and again taken up, was not such a transfer of the original claim as to amount to an assignment and an extinguishment of the lien.

I see no objection to filing the libel in the name of Jones, who was the owner of the tug, and held the legal title to the bill. The fact that the libel was filed in the interest of another, is of no consequence. In such case the suit may be prosecuted in the name of the assignor or of the assignee. It is an every day practice in admiralty to file libels in the name of the holder of the legal title in realty for the benefit of others more or less interested in the claim. The Wasp, L. R. I. Adm. & Ecc. 367; Fretz v. Bull, 12 How. [53 U. S.] 466; The Monticello, 17 How. [58 U. S.] 152. Indeed, there has scarcely been an important collision case commenced in this court for years, in which the underwriters of the injured vessel had not an interest. I regret that I am unable to concur in the opinion of my learned predecessor in the case of The Champion [Case No. 2,583], that a lien for supplies or towage is not assignable. The question has been so exhaustively discussed in a recent opinion by Judge Lowell, in The Sarah J. Weed [Id. 12,350], that I deem it quite sufficient to announce my concurrence in his views, without an examination of authorities. In no case in which the opposite rule is maintained, except that of Patchin v. The A. D. Patchin [Id. 10,794], is the question discussed upon principle. Judge Conkling, in that opinion, assumes an analogy between a maritime lien and a common law lien, which I think does not exist. It is because a common law lien is dependent upon possession, that when possession is lost by an assignment or transfer of the thing, the lien falls with it. By parity of reasoning, inasmuch as a maritime lien is not dependent upon possession, an assignment or transfer of the debt should not destroy the lien. Because in one case the transfer of the res or pledge destroys the lien, it by no means follows that in the other the assignment of the debt should have the same effect. The reasoning seems to me not only illogical, but the result one that must often be productive of injustice. That a creditor who desires to realize his money immediately, should be obliged to sacrifice the security for his debt, which gives it its principal and possibly its only value, by an act which can result in no injustice to its debtor, seems to me a hardship which ought not to be imposed

without the strongest reason for its necessity. The rule contended for would operate with peculiar harshness upon sailors, who are proverbially the neediest and most improvident of men, and those to whom an immediate payment is most necessary. It is true, as Judge Conkling observes, that the ability to purchase seamen's liens may occasionally be made use of to annoy the owners, but the same power to enforce the lien would still exist if the claim had never been assigned. I apprehend cases of this kind are much rarer than those where sailors themselves combine together to attach a vessel and make costs, out of some spite and ill-will to the master. It seems to me a matter of practical indifference to the owner whether the lien be enforced by the original holder or his assignee.

The case of The Champion [supra] was decided by Judge Longyear, rather upon authority than reason, and it is to be regretted that the learned judge did not bring to bear upon the question, his usual thoughtful and independent consideration. Indeed he remarks that he had not the time to devote to a discussion of the soundness of the decisions upon which he relied. The opinion in this case was followed without argument in The Napoleon, above cited, though the case was distinguished from The Champion, and the point was not necessary to its determination. A like ruling was made by the learned judge for the southern district of Ohio, in the recent case of The R. W. Skillinger [Case No. 12,181], in which the opinion of Judge Leavitt, in Logan v. The Aeolian [Id. 8,465], and Rusk v. The Freestone [Id. 12,143], was adopted without comment, as the settled law of the court. But see, contra, The Norfolk and Union [Id. 10,297]. It must be confessed that so far as the question depends upon authority, there is large liberty of choice; but upon principle I see no reason why a maritime lien may not be assigned as well as a mortgage, a judgment debt, a mechanic's lien, or that of a vendor of real estate. It seems to be now settled, by a large preponderance of authority, that liens of these descriptions are assignable: Phil. Mech. Liens, c. 6; 2 Washb. Real Prop. 91, 92. The second depends upon the question whether due diligence was used in the enforcement of the claim. Pridgeon, the claimant, held a second mortgage, dated December 16th, 1874, as a continuing security for any indebtedness then due from Coyne, and for any future indebtedness which might become due by way of liens or indorsements. The services were rendered in October, 1875, the advances in respect of which Pridgeon claims to be a bona fide purchaser, were made after this time and before February, 1876. He is a bona fide purchaser, if at all, from the time these advances were made. Ladue v. Detroit & M. R. Co., 13 Mich. 380. In February, 1876, he foreclosed this mortgage, and bought in the property. In August he bought up a prior mortgage of $4,000, held by Ralph & Burt, for one-half its nominal value. The libel was filed February 16th, 1876, but no attachment seems to have been issued until October 26th of the same year, when a writ was issued upon other libels. While I think the issuing of an attachment, placing it in the hands of the marshal of the district where the vessel is owned, and keeping it alive by successive renewals, would be sufficient diligence under the circumstances, simply filing a libel was notice to no one, and answered no requirement of the law. Wade, Notice, § 348; Games v. Stiles, 14 Pet. [39 U. S.] 322. But it appeared that during the winter of 1875–6 the vessel was laid up in Chicago. During the season of 1876, she ran between Sarnia and Chicago, making monthly trips, stopping at Port Huron, in this district, only long enough upon each trip to get her clearance at the custom house. As an attachment was issued in October, 1876, and kept alive by renewals, no laches are attributable to the libellant after that time. Prior to that date it does not seem to me there was that reasonable opportunity for the enforcement of the claim which is required to put the libellant in default. The inability of the marshal to find the vessel for ten months after the writ was issued (the vessel was in fact never actually seized), would seem to indicate that it would have been useless to issue it sooner. As the vessel was owned in this district, and libellant was also a resident of Detroit, I think he was under no obligation to have her arrested in Chicago, to which port she made her regular trips. Beside, I am satisfied that Pridgeon had notice of this claim shortly after he purchased the vessel upon foreclosure, and before he bought the Burt & Ralph mortgage. Mr. Montrose, libellant's proctor, swears positively that he gave him notice of this claim, in the spring of 1876. Pridgeon swears simply that he does not recollect, but admits that several persons spoke to him about their claims at or near this time. At any rate, if Pridgeon was not informed of this specific debt, I have no doubt he was sufficiently apprised of the amount of claims against the vessel, to put him upon inquiry, and that the advances were made without reference to the amount of claims against her.

There must be a decree for the libellant.

EMMA PETERSON, The (HILL v.). See Case No. 6,490.

Case No. 4,467.

EMMA SILVER MIN. CO. v. PARK et al.

[14 Blatchf. 411.][1]

Circuit Court, S. D. New York. March 2, 1878.

NEW TRIAL — MOTIONS — PRACTICE—EVIDENCE—FRAUDULENT INTENT — STATEMENTS BY THIRD PARTIES—REBUTTAL—LETTERS WRITTEN BY ONE DEFENDANT TO HIS CO-DEFENDANT.

1. The trial before a jury of an action at law, in this court, occupied nearly four months, being portions of three terms of the court. After the final adjournment of the term at which the verdict was rendered, which was for the defendant, a stay on the verdict was granted, and, by order, the time for the plaintiff to make a case was extended, and the stay was continued, by order, until the hearing and decision on a motion for a new trial: *Held*, that the motion for a new trial, on a case, before judgment, could be entertained after the expiration of the term at which the action was tried; and that the practice pursued was regular.

2. All motions, in a suit at common law, which are required, by the practice of the state courts of New York, to be made at a special term of a state court, may be made at a stated term of a federal court.

3. In a suit to recover damages for the alleged fraudulent sale to the plaintiff by two defendants, of a mine, the plaintiff introduced evidence to show a fraudulent intent in the vendors, consisting of statements made to them, or one of them, unfavorable to the character and value of the mine: *Held*, that the defendants, in reply, had a right to show the statements of third persons, made to them, prior to the sale of the mine, in regard to its character and value.

4. P., one of the defendants, was a director and a shareholder in the plaintiff corporation. At the trial, the plaintiff offered in evidence the minutes of a meeting of the plaintiff's board of directors, held in England, nearly a year after the sale of the mine, and at which P. was not present, and when he was absent from England, with a view to charge him with knowledge of the contents of a telegram sent to the directors by the president of the company, and of the action of the directors thereon: *Held*, that the evidence was not admissible.

5. Letters written by P. to his co-defendant, while they owned the mine, and during the period when it was claimed by the plaintiff they were getting up a fraudulent scheme to sell the mine to the plaintiff, the letters purporting to state what was transpiring at the time, and speaking of its development and value, were admissible in evidence in favor of both defendants.

6. The verdict of the jury was upheld, as not contrary to the evidence, and the charge of the court to the jury was upheld, as not unjust to the plaintiff.

7. The suit being one in which it was alleged that the directors of the plaintiff corporation were induced to purchase the mine by the fraudulent representations or concealments of the two defendants, as vendors, regarding material facts, and they being two of such directors at the time of the sale of the mine, it was held, that if the defendants withheld from their co-directors any information as to material facts affecting the mine, intending thereby that their co-directors should be misled, their conduct was actionable concealment, if it operated to induce the purchase.

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

[This was a suit by the Emma Silver Mining Company against Trenor W. Park and H. Henry Baxter to recover damages for the alleged fraudulent sale of a mine to the plaintiff by the two defendants. A verdict was rendered for defendants, and the cause is now heard on motion for new trial.]

Edwin W. Stoughton, for plaintiff.

Edward J. Phelps and Lucius E. Chittenden, for defendants.

WALLACE, District Judge. Preliminary to the consideration of the merits of the motion now made for a new trial, the question arises whether the proper practice has been pursued here for the purpose of a review. The trial of the action was commenced in the October term and occupied nearly four months, being protracted throughout the October term and after the February term and the April term had intervened. As soon as the verdict of the jury was rendered, the term was adjourned without day. After this, a stay of proceedings upon the verdict was granted, and, by order, the time for the plaintiff to make a case was extended. By a subsequent order, the stay was continued until the hearing and determination of a motion for a new trial. It is now insisted, on behalf of the defendant, that a motion for a new trial, upon a case, cannot be entertained after the expiration of the term at which the action was tried; that the only method of review is by a petition, after the entry of judgment; that the orders staying proceedings upon the verdict were unauthorized and of no effect; and that all the proceedings towards a review should be dismissed. I am not of this opinion, and hold that the motion is properly here and must be entertained and determined upon its merits. Whether the practice upon such a motion has been changed by section 5 of the act of congress of June 1, 1872 (17 Stat. 197, now section 914, Rev. St.), conforming the forms and modes of proceeding in civil causes, other than equity and admiralty causes, "as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state," or remains as it was before that act, is not material. The motion is properly here under the former practice, and also under the practice of the courts of this state.

The power "to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," is expressly conferred upon the courts of the United States. Act Sept. 24, 1789, § 17; 1 Stat. 83, now section 726, Rev. St. But the procedure for a motion for a new trial has not been prescribed by any statute, except where the application is made after judgment, in which case the application is required to be made by petition. Act Sept. 24, 1789, § 18, 1 Stat. 83, now section 987, Rev. St. The courts of

the United States had been accustomed to grant new trials according to the practice of courts of common law, prior to the enactment of the statute allowing motions to be made after judgment; and the effect of that statute was not to abridge any remedy theretofore existing, but, as theretofore such reviews could not be had after judgment generally, but only in exceptional cases, the true interpretation of the statute is, that it enlarged the existing remedy, so that, in furtherance of justice, the technical rule by which a review was precluded after judgment should no longer obtain. It would be opposed to every principle of construction, to decide that a statute which confers a new remedy, by implication abrogates a pre-existing remedy, where no language from which such intent can be plainly inferred is used. It is not to be doubted, therefore, that a motion for a new trial need not be based upon petition, except when made after judgment.

But, it is strenuously contended, that this court has no authority to permit a case to be made, or to stay proceedings upon a verdict, after the expiration of the term at which the action has been tried. The authority has been so uniformly exercised by this court, that it hardly seems necessary, at this late day, to discuss the propriety of the practice. The right to control their own process and judgments, so as to promote justice, has always been recognized as one of the inherent powers of every court of general jurisdiction, in the absence of any statutory limitation or prohibition; and the practice of granting new trials took its origin from this authority. It is a mistake to suppose that such motions could only be entertained at the term when the action was tried. According to the later common law practice, although the motion was usually made pending the four days of the rule nisi, it was also entertained for good cause after the expiration of the four days, and, if the delay was sufficiently excused, such motions were entertained at the next term, or even at subsequent terms. There was never any question of the power of the court to grant a new trial at a term other than that of the trial. As the motion could only be made before judgment, the power to stay proceedings on the verdict was necessarily included, and, in the control over their own judgments, the granting of stays upon verdicts and of motions for a new trial rested simply in judicial discretion. Originally, motions for a new trial were made on the notes of the judge who tried the cause, and out of this practice grew that of making a case; and the time for making a case was always subject to the discretion of the court, and there was never any doubt but that leave to do so could be granted after the term had expired.

As judgment has not been entered in this case, the motion is regular, and, even if it should be determined that the stay of proceedings was irregularly granted, or was granted without authority, as it was not set aside when the motion for a new trial was made, if it should now be set aside, it would not avail the plaintiff.

It is urged, that the practice relative to new trials is now regulated by the Code of Procedure of this state, by force of the act of congress of June 1st, 1872, before referred to; and that, under the Code, the motion for a new trial must be made at a special term. Conceding, for argument, this to be so, inasmuch as this case was heard by consent before the judge who tried the cause, at chambers, before the regular term, for the convenience of the counsel for the parties, it is to be considered as though made at the regular term; and I entertain no doubt, that, if made at a stated term, the motion could be entertained, and the practice would "conform, as near as may be," to that prescribed by the Code. and that all motions which, by the Code of Procedure, must be made at a special term of the state courts, may be properly made at the stated terms of the courts of the United States.

Passing now to the consideration of the motion upon its merits, the first questions to be disposed of are those arising upon the rulings at the trial, in the admission and exclusion of evidence. The defendants were permitted to show, against the objection of the plaintiff, the statements of third persons made to the defendants prior to the sale of the mine, in regard to its character and value. Under the declaration, it was essential for the plaintiff to show a fraudulent intent on the part of the defendants at the time of the sale of the mine. It was alleged, that the defendants originally purchased their interest in the mine for the purpose of a fraudulent sale; that they worked the mine to promote this scheme; and that they sold it to the plaintiff by fraud and deceit, and in consummation of their original fraudulent scheme. A large part of the evidence introduced by the plaintiff was received for the sole purpose of showing a fraudulent intent on the part of the vendors, and a part of this evidence consisted of statements made to them, or one of them, by various persons, unfavorable to the character and value of the mine. To meet this, the defendants introduced evidence consisting of the statements of various persons, whose knowledge of the property entitled them to speak with more or less weight, made to the defendants prior to the sale of the mine, relative to its character and value. The belief of the defendants was one of the vital issues of fact to be determined. It is not material how such belief originated or was induced, if it was honestly entertained. If it had been induced by the formal reports of experts employed by the defendants for the express purpose of ascertaining the character and value of the mine, it would have been entitled to more weight than when predicated upon less reliable informa-

tion, but the weight of the evidence, how far the information was influential with the defendants, was for the jury to determine, and not for the court. The inquiry related to the state of mind of the defendants, and that could only be arrived at by presenting to the jury all the information, irrespective of its source, which could reasonably have influenced the judgment of the defendants. It would have been error to exclude the evidence. Ponsony v. Debaillon, 6 Mart. (N. S.) 238.

The next ruling impugned, is the exclusion of the minutes of a meeting of the board of directors of the plaintiff, held nearly a year after the sale of the mine. It was sought, by this evidence, to charge the defendant Park with knowledge of the contents of a telegram sent to the directors by the president of the company, and with knowledge of the action of the directors upon the receipt of the telegram. Without discussing the relevancy of the evidence, it suffices to say, that, while Park, as a director and shareholder, was bound by the acts of his co-directors, to the same extent as if he had been present at the meeting, the entry in the minute books affords no presumption of knowledge of what transpired at a meeting held after he had left England, and where the circumstances repel all inferences of personal knowledge.

The two rulings thus adverted to are the only ones in the course of the long trial which are now pressed as erroneous. It is not claimed that any error of law was committed in the instructions to the jury, except, that, incidentally, in commenting upon the facts, certain letters written by the defendant Park to the defendant Baxter, which had been admitted as evidence in favor of Baxter, were treated by the court as evidence generally in the case, and, consequently, as evidence in favor of the defendant who wrote them. If the attention of the court had been called to this inadvertence at the time, it would have been promptly corrected, and the jury would have been advised in conformity with the ruling when the letters were received in evidence. But, treating the instruction as one which, though not excepted to, should, if erroneous, be regarded, for the purposes of a motion for a new trial, as a misdirection, it can be sustained as correct, upon the broad ground that the letters were entitled to be received and considered as evidence in favor of Park. These letters were written from Park, at Salt Lake, to Baxter, in New York, in the course of a frequent correspondence between them, after the defendants had purchased their interests in the mine, and during the period when, upon the theory of the plaintiff, the defendants were engaged in manipulating the mine for the purpose of a fraudulent scheme which was consummated by the sale to plaintiff. The letters purported to convey information of what was transpiring at the time, advices of the developments, indications and value of the property, and suggestions as to future operations. It was conceded, upon the argument, that these letters would have been admissible as against Baxter, irrespective of the fact whether he had ever received them or not, as the declarations of a confederate, as verbal acts pending the criminal enterprise and in the accomplishment of its objects. If this is correct, if they were admissible, not as admissions of a party to the record, and, therefore, competent against him, within one of the exceptions to the rule excluding hearsay, but as verbal acts, and, therefore, not hearsay at all, it would seem entirely clear that they were competent in favor of Park, to the same extent and in the same manner that proof of any acts or conduct on his part, indicative of good faith or inconsistent with a fraudulent purpose, would be competent. Declarations of one conspirator are admissible against another conspirator, only as part of the res gestae of the criminal enterprise, and, when declarations are admissible as res gestae, they are always admissible in favor of the party making them as well as against him. From their nature, they are evidence, though emanating from the party who seeks to use them for his own benefit. Fellowes v. Williamson, 1 Moody & M. 306; Atwood's Case, 4 City H. Rec. 91; Mezzara's Case, 2 City H. Rec. 113; Shenck v. Hutcheson, 2 N. C. Law Repos. 432; Taylor v. Church, 4 Seld. [8 N. Y.] 452. It is upon this rule that the character of the possession of real estate may be explained by the declarations of the possessor, the occupancy being the principal act, and the declarations accompanying it a part of the res gestae. Yet these declarations are evidence in favor of the party making them. Martin v. Simpson, 4 McCord, 262; Turpin v. Brannon, 3 McCord, 261. So, where letters were written by the defendant in respect to property which he claimed to hold as an agent of the government, they were received in evidence in his own favor, and the court said, that "his contemporaneous correspondence on the subject, in that character, with the American government, was certainly proper evidence to show the original nature and complexion of the facts in controversy." Bingham v. Cabbot, 3 Dall. [3 U. S.] 19, 39. Upon the same rule, letters written by the owners of a vessel to the master, giving instructions as to the objects and character of a voyage, are admissible as part of the res gestae, in their own favor, to disprove an unlawful enterprise. U. S. v. Libby [Case No. 15,597]. An interesting case illustrating the rule is Tompkins v. Saltmarsh, 14 Serg. & R. 275, where a gratuitous bailee, who sued for the loss of a deposit, was permitted to show his own letters and declarations to third persons, after the loss and prior to any claim made upon him, in support of the theory that the

money had been stolen from him, upon the ground that they were a part of the res gestae. Numerous other illustrations of the rule are furnished by the cases, but it is sufficient to refer to one only, that of Rex v. Whitehead, 1 Car. & P. 67, which is directly in point here, where the defendant, on trial for a conspiracy to defraud, was permitted to introduce letters written to him and by himself to an alleged confederate, for the purpose of showing that he believed the truth of the facts which it was charged he had fraudulently represented.

Having thus reached the conclusion that the motion for a new trial, in so far as it is predicated upon errors of law, cannot prevail, it only remains to determine whether the verdict of the jury should be set aside as contrary to the evidence, or because the charge of the judge, so far as it dealt with the evidence and theories of fact, was unjust to the plaintiff. The vast volume of evidence and the great length of the charge preclude an analysis or consideration of either in detail, although the great importance of the controversy demands and has exacted a careful re-examination of the whole case. After a thorough review of the evidence and of the charge, my conclusion is, that a case is not presented for a new trial, within any of the rules which authorize a verdict to be set aside. In hard actions, a new trial will not be granted, if the verdict be for the defendant, although against evidence; and actions where fraud is imputed are within this rule. Grah. N. Tr. 523. But, irrespective of the character of the action, a case is not presented here where the verdict is so manifestly against the weight of evidence as to raise a presumption of partiality or misapprehension on the part of the jury. Inasmuch as there was evidence on both sides, upon the several issues of fact, if there were a preponderance against the verdict, the court should not reverse the conclusions of the jury, in the exercise of that discretion which is a judicial and not an arbitrary one. It would be unfair to the defendants not to say, further, that the case presentd a fair question of fact for the jury to determine, depending upon the credibility of witnesses and the probabilities to be deduced from circumstantial evidence, and is not one where the intelligence or impartiality of their verdict can fairly be impugned.

I am unable to discover any fair ground for the complaint, that the drift of the charge was adverse to the plaintiff, and that the comments on the evidence were calculated to mislead the jury in their consideration of the facts. The charge must be judged in its entirety and not in detached parts. After it has been dissected, it requires no astuteness on the part of counsel to discover parts which are obnoxious, when disconnected from the rest. That inaccuracies and omissions in the recapitulation of the testimony are to be found, is, doubtless, true; that theories and suggestions upon the facts were advanced, some of which could have been modified or qualified to meet other theories and suggestions fairly presented by the testimony, is, also, doubtless, true; but, in view of the great length of the trial, the vast mass of oral and documentary evidence to be considered, and the unusual number and variety of the issues of fact, primary and collateral, involved, it is hardly to be expected that a presentation of the case could be made, that would not, in some respects, be inadequate or inaccurate. These inaccuracies were not challenged at the time, none of them, in my present judgment, were serious ones, the prominent issues in the case were quite carefully enforced upon the consideration of the jury, and, as a whole, the charge was a fair and careful presentation of the case.

In conclusion, it is proper to say, that the evidence discloses many circumstances connected with the sale of the Emma mine, which strongly impeach the honor and morality of the transaction, but which are to be eliminated from the case, except so far as they bear upon the question of fraud in law. The controversy, in the form and forum in which it was brought, and upon the evidence adduced, resolved itself into the naked issue, whether or not the directors of the plaintiff were induced to purchase the mine by the fraudulent representations or concealments of the vendors regarding material facts. If the question had been, whether those individuals who became shareholders of the plaintiff, were led to invest their money in the company by fraud, or, if not by fraud, by instrumentalities which the law does not tolerate, a very different case would have been presented. Upon the issue tried, the plaintiff was given the benefit of a ruling which has never been advanced, to my knowledge, in any action at law, but which, however severe it may be upon the vendors, in the situation of these defendants, I have no doubt, is sound in principle, and was just in its application here. The jury were instructed, that, "inasmuch as the defendants were directors of the plaintiff at the time of the sale of the mine, and, for that reason, bound to exercise the utmost good faith in their dealings with their co-directors, a more rigorous rule should be applied, than that which obtains between vendor and vendee ordinarily. If, therefore, in the particulars detailed in the declaration, the defendants withheld from their co-directors any information as to material facts affecting the property, intending thereby that their co-directors should be misled, their conduct was actionable concealment, within the meaning of the law, if it operated to induce the purchase; and, to the extent that the plaintiff has sustained loss thereby, it is entitled to recover." Whether, under this instruction, the finding of the jury for the defendants was based on the theory, that the defendants honestly imparted to their co-directors all the information they possessed

relative to the property, which they deemed material to be known, or whether it was based on the theory that the directors relied, not on the good faith of the vendors, but upon their own investigations in reference to the property, is not material. Upon either theory, there was sufficient evidence to authorize the verdict, and, upon either theory, the plaintiff's cause of action failed.

The motion for a new trial must be denied.

Case No. 4,468.

The EMMA V.

[2 Hask. 374.][1]

District Court, D. Maine. Dec. 1879.

MARITIME LIENS—SERVICES OF CARPENTER IN FOREIGN PORT.

A maritime lien attaches in favor of carpenters for services in lining a vessel to prepare her for receiving cargo.

In admiralty. Libel in rem promoted by six carpenters to recover wages for services performed in lining a freight vessel, not in her home-port, to make ready for taking in cargo. The owners made claim, and answered that one Dimmock employed the libellants and had received payment for their services.

James O'Donnell, for libellants.

Thomas H. Haskell and Nathan Webb, for claimants.

FOX, District Judge. I am satisfied from the evidence that the libellants made no contract to labor for Dimmock, and that they did not rely upon his credit, but looked to the vessel for their wages. The service was necessary to enable the vessel to take in cargo, and incident to a completion of the voyage. It bears the same relation to the vessel as outfits and supplies necessary for ship's use, and, like these, is secured by lien upon the vessel. Decree for libellants.

Case No. 4,469.

EMMERSON v. BEALE.

[2 Cranch, C. C. 349.][2]

Circuit Court, District of Columbia. Oct. Term, 1822.

COSTS — PROCEEDINGS ON JUDGMENT FOR COSTS AFTER DEFENDANT'S DISCHARGE UNDER THE INSOLVENT LAWS.

1. Costs must share the fate of the principal debt.

2. A debtor whose person is discharged under the insolvent act of the District of Columbia [2 Stat. 237], as to the debt, is not liable to a ca. sa. for costs, on a judgment for costs, confessed after his discharge in an action pending at the time of his discharge.

Motion to quash a ca. sa. issued against the defendant for costs on a judgment confessed for costs, after his discharge under the insolvent act of this district, in an action pending at the time of his discharge.

THE COURT (nem. con.) said that the costs must share the fate of the principal debt; and ordered the ca. sa. to be quashed.

EMMERT (THOMPSON v.). See Case No. 13,953.

EMMETT (WHITNEY v.). See Case No. 17,585.

EMMONS (KENDRICK v.). See Cases Nos. 7,694–7,696

Case No. 4,470.

EMMONS et al. v. SLADDIN et al.

[2 Ban. & A. 199;[1] 9 O. G. 352.]

Circuit Court, D. Massachusetts. Dec., 1875.

PATENTS — INCHOATE RIGHT OF INVENTOR TO HIS INVENTION —CONVEYANCE WITHOUT LIMITATION AS TO TIME OR PLACE—RIGHT TO A PATENT.

1. The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires. Such inchoate right, not only to the original letters patent that may issue, but to any renewals or extensions or to any letters patent which may thereafter be issued at any time or in any place, may be conveyed by an instrument containing apt terms to show an intention to convey all the rights springing from the invention.

[Cited in Hendrie v. Sayles, 98 U. S. 555.]

2. Whenever a patentee conveys his "invention," without and other language in the deed of conveyance restricting the right to use the invention by a limitation of time or place, he must be considered to have granted the right to any letters patent which may be issued thereon.

3. The patentees of a British patent conveyed to B. "the said recited invention and letters patent," and "all and singular other the letters patent and extension of time thereof to be hereafter obtained on account thereof," and "all models, patterns and other matters and explanations thereof in the possession of the inventors, anl all the right, title, interest, claim and demand of the said inventors and each of them, in, to, or out of, or upon the said several premises and also the said machine." The habendum clause was for the unexpired term of the British letters patent and "of every other term and interest and extensions thereof to be hereafter granted therein," and in the covenants, wherever the British patent was referred to, it was supplemented by expressions "for and during any other term or interest hereby assigned or intended so to be," and "all other the term, right and interest therein hereby granted or intended so to be." The inventors, after making this conveyance, procured patents of the United States for the same invention and brought suit for infringement against the representatives of B. who had previously deceased: *Held*, that the conveyance operated to convey and transfer to B. and his legal representatives the right to the United States patent, and that upon the patent being granted, the equitable title thereto, by force of the conveyance, vested in B. or his legal representatives.

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

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

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

[This was a bill in equity by Thomas A. Emmons and others against Joseph Sladdin and others to restrain the alleged infringement of letters patent No. 80,774, granted to J. Sladdin, August 4, 1868, reissued July 8, 1871 (Nos. 4,509 and 4,510). Heard on demurrer to the bill.]

A. K. P. Joy, for complainants.
W. W. Swan, for defendants.

SHEPLEY, Circuit Judge. Letters patent of Great Britain were duly granted to James Ellis, of Bradford, in the county of York, England, and the respondent, Joseph Sladdin, then of Halifax, in the same county, now of Lawrence in the commonwealth of Massachusetts, for an invention of Joseph Sladdin, in improvements in machinery for the manufacture of healds.

Sladdin and Ellis, the patentees, after the grant of said letters patent, by an instrument under seal, dated December 17, 1864, after reciting the grant and enrolment of said letters patent, and of an agreement with one David Bowlas for a sale to him of "the said invention and letters patent and also of all letters patent or extensions to be hereafter obtained on account of the said invention," and also of a machine constructed on the principle of said patented invention, and of the models, patterns, and other appurtenances granted, assigned, and confirmed to Bowlas, his executors, administrators, and assigns, "all that and those the said recited invention and letters patent, and also all and singular the benefits, privileges, and advantages arising out of or to be derived from the said invention and letters patent, and also all and singular other the letters patent and extensions of time thereof to be hereafter obtained on account thereof, and all models, patterns, and other matters, explanations thereof in the possession or power of the said James Ellis and Joseph Sladdin, and all the right, title, interest, claim, and demand of the said James Ellis and Joseph Sladdin, and each of them in, to, out of, or upon the said several premises, and also the said machine."

The habendum clause in the indenture is absolute as to the machine, models, patterns, and appurtenances, and as to the invention and letters patent "for all the remainder, now to come and unexpired of the said term granted by the said letters patent, and of every other term and interest and extension thereof to be hereafter granted therein."

Sladdin and Ellis, after the usual covenants of title, covenant, among other things, that they "will not at any time or times hereafter during the residue or remainder of the said term of fourteen years, or for or during any other term or interest hereby assigned or intended so to be, make, do, or execute, or knowingly or willingly permit, or suffer any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said letters patent and privileges, or any part thereof, can, shall, or may be revoked, repealed, canceled, avoided, determined, or prejudicially affected in any manner howsoever, or whereby, or by reason or means whereof the said David Bowlas, his executors, administrators, or assigns, may, can, or shall be in any wise prevented or hindered from or impeded in or about the having, receiving, taking, exercising, or enjoying the said privileges, letters patent, and premises hereby assigned, or intended so to be, or any part thereof, to and for his and their own use and benefit for and during all the residue and remainder of the said term of fourteen years, and for and during all other the term, right, and interest therein hereby granted or assigned, or intended so to be, and every part thereof."

Then follows a covenant for further assurance at the request and cost of said Bowlas to execute and perfect all acts, deeds, and assurances for more effectually assuring the said invention, letters patent, and premises, and also for extending the time, and also for enabling him to prosecute necessary suits in the event of any infringement. They further covenant that they will not, nor will either of them, during the time for which said patent was granted, or during any extended time which may be granted therefor, make, sell, or cause to be made or sold, any other machine for the purposes to which the said machine is applicable, all or any of them, and that they and each of them will, until the said patent and any extension thereof be fully expired, refer to the said David Bowlas, his executors, administrators, and assigns, all inquiries having reference to the said patent and to machines to be made thereunder or with reference thereto, and that they or either of them will not, without the consent and permission of the said David Bowlas, his executors, administrators, or assigns, make any more machines of a like character, or invent or introduce any machine or invention to supersede or compete with the invention of the said letters patent, or in any way to disadvantage the patent right or privileges hereby assigned.

Afterward, on or about August 4, 1868, Joseph Sladdin procured letters patent of the United States to be issued to himself and Lord, the other respondent in this case, for improvement in machines for making loom-harness, which letters patent were afterward, for defective and insufficient description and specification, surrendered, and new letters patent for the same invention, on two separate amended specifications, were reissued in two divisions, numbered, respectively, 4,509 and 4,510.

Subsequent to the assignment of the English patent to Bowlas, and before the issuing of the letters patent of the United States, the complainants, Emmons and Nichols, respectively, each purchased of David Bowlas, the owner of the invention and letters pat-

ent, machines for making loom-harness, embracing in their construction the principles of said invention, with the right to use said machines, and imported them into the United States, and have since severally used said machines in their respective manufactories. Thereupon, during the year 1872, Sladdin and Lord, named as patentees in the letters patent of the United States, filed bills of complaint in this court against Emmons and Nichols, respectively, alleging infringement of the letters patent of the United States by the use of the machines purchased of Bowlas and "built in England, embracing the same improvements which are patented in this country, as aforesaid in said reissued patents."

While these suits for infringement were pending, David Bowlas, having deceased in 1874, his executors and personal representatives executed an instrument under seal purporting to convey to the complainants, Emmons and Nichols, the reissued letters patent of the United States Nos. 4,509 and 4,510, and the original letters patent on which they were reissued, the invention in said letters patent described, and all the rights, powers, privileges, benefits, advantages, and all and every other matter, interest, and thing which were conveyed by the assignment from Ellis and Sladdin to David Bowlas.

The bill of Emmons and Nichols, the complainants, alleges these facts, and avers that, by force of the assignment to Bowlas of the invention and of the covenants and agreements in that indenture, the interest in the letters patent of the United States, and the reissued letters patent Nos. 4,509 and 4,510, was vested in Bowlas and his legal representatives, and secured to him and them the exclusive right and liberty of making, vending, and using in the United States the invention specified and claimed in the amended specifications Nos. 4,509 and 4,510; and that, in virtue and by force of the assignment and conveyance from the executors of the estate of Bowlas to the complainants, the reissued letters patent of the United States and the invention therein recited, and the English patent and the invention therein recited, became the property and letters patent of the complainants.

The bill further charges that the institution of the suits in equity against the complainants severally, by Sladdin, is an interference with the use and enjoyment by Bowlas and his assigns of the invention and letters patent conveyed to him, which the complainants aver to be in violation of the covenants not to impede, hinder, interrupt, or interfere with said use and enjoyment; and further, that defendants, without right and without license from Bowlas or his assigns, and in violation of the covenants in the indenture, have made, used, and sold machines to which the said invention is applicable, and machines of like character, and are still wrongfully making and using such machines against the rights of the complainants.

The bill prays that respondents may be enjoined and restrained from the further prosecution of the suits against Emmons and Nichols respectively, and that they may be restrained from making, using, or vending, without the consent of the complainants, machines embracing the invention aforesaid, or any substantial part thereof, and from doing any act whereby complainants shall be hindered in the free enjoyment of the said invention and letters patent.

To this bill the defendants have demurred, and for causes of demurrer assign in substance the following:

1. Because the assignments from Ellis and Sladdin conveyed to Bowlas only the invention and letters patent for the unexpired term of the patent and any extensions and renewals thereof for Great Britain only.

2. Because the assignment was not recorded in the Patent Office of the United States within ninety days from the execution thereof, and not till after the letters patent of the United States were granted to Sladdin and Lord, and after Lord had become the owner of one-half of the patent and the reissues thereof.

The third and fourth reasons present in different form substantially the same question presented in the first ground of demurrer.

The fifth ground is "because the said reissued patent of the United States granted to this defendant and the defendant Lord, No. 4,510, is not for any invention recited, described, or claimed in said letters patent of Great Britain, but is for other and different inventions."

6. Because it is not alleged in said bill that said several letters patent were obtained at the request or cost of said Bowlas, or that he in his lifetime ever claimed any interest therein.

The discovery of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires. Such inchoate right, not only to the original letters patent that may issue, but to any renewals or extensions, or to any letters patent which may thereafter be issued at any time or in any place, may be conveyed by an instrument containing apt terms to show an intention to convey all the rights springing from the invention. Clum v. Brewer [Case No. 2,909]; Nesmith v. Calvert [Id. 10,123]; Gayler v. Wilder, 10 How. [51 U. S.] 477; Nicolson Pavement Co. v. Jenkins, 14 Wall. [81 U. S.] 452.

In this last case, the patentee having taken out letters patent of the United States, granted to an assignee in the words following: "all the right, title, and interest which I have in the said invention and letters patent for and in the said city of San Fran-

cisco." There were no other words of grant in the instrument. The habendum clause was "the same to be held and enjoyed by the said Taylor for the use and behoof of him and his legal representatives to the full end of the term for which the said letters patent are or may be granted as fully," etc.

It was contended that the words in the habendum clause could not be construed to enlarge the grant by extending the contract to a subject-matter not before embraced in the recitals or in the granting portions of the deed. It was also argued that the words in the habendum clause, "for which the said letters patent are or may be granted," could be satisfied by making them embrace any reissue of "the said letters patent." But the supreme court held that "it would be a narrow rule of construction to say that they were designed to apply to a reissue merely when the invention itself, by the very words of the assignment, is transferred," and that the assignment transferred the extension and renewal of the patent subsequently made. The law must, therefore, be considered as settled by this decision, that whenever a patentee conveys his "invention" without any other language in the deed of conveyance restricting the right to use the invention by a limitation of time or place, he must be considered to have granted the right to any letters patent which may be issued thereon.

Applying these principles to the consideration of the assignment from Ellis and Sladdin to Bowlas, let us examine it to see what it purports to convey, and whether it does or not evince an intention to invest the whole interest in the assignee. It grants "the said recited invention and letters patent." In a subsequent clause it grants "all and singular other the letters patent and extensions of time thereof to be hereafter obtained on account thereof," and "all models, patterns, and other matters and explanations thereof in the possession of the said James Ellis and Joseph Sladdin, and all the right, title, interest, claim, and demand of the said James Ellis and Joseph Sladdin, and each of them, in, to, or out of, or upon the said several premises, and also the said machine."

Words of broader signification, or more fully indicative of an intention to invest the grantee with the whole interest in the invention, could hardly have been used; nor is there to be found in the subsequent parts of the instrument any language expressive of an intention to limit or restrict the right to use the invention to the duration of the English patent. The habendum clause is not only for the unexpired term of the letters patent of Great Britain (the said letters patent) but "of every other term and interest, and extensions thereof, to be hereafter granted therein."

Wherever after in the covenants the term of the English patent is referred to, it is supplemented by such expressions as "for and during any other term or interest hereby assigned or intended so to be," and "all other the term, right, and interest therein hereby granted or intended so to be."

There is but one exception to this, and that is that the covenants not to make or cause to be made any other machine for the purposes to which said invention is applicable, and to refer to Bowlas all inquiries respecting the machine, and not to make any machines of like character, or make any invention to supersede or compete with the one assigned, are limited to the time for which the said patent is granted, or during any extended time which may be granted therefor.

Upon the authority of the cases before cited it must be held that the terms of the grant to Bowlas were sufficiently broad to divest Ellis and Sladdin of any interest in the invention described, and to vest the same in Bowlas. Under these circumstances it would be the most flagrant injustice to sustain a claim for infringement on the part of Sladdin against Emmons and Nichols by reason of the use by them of the machines purchased of Bowlas; nor is it perceived how Lord, who acquired his rights of Sladdin, who had nothing to convey so far as any invention of his was embodied in the English machine, could have acquired any rights as against such machines as were purchased of Bowlas, and therefore, are held under a title from Sladdin, which is prior and paramount to any title he could have conveyed to Lord.

It is objected against the claims of Emmons and Nichols to the equitable title to the letters patent of the United States, that such patents were not obtained at the request and cost of Bowlas. This objection cannot avail, for the reason that Ellis and Sladdin, having conveyed all their interest in the invention and to any letters patent that might be obtained therefor to Bowlas and his assigns, and being under obligation by their covenants to take out such other letters patent at his request and cost, could not take out such letters patent for their own benefit without a fraud on the rights of Bowlas, although not requested to take them out for his benefit. They had a right to the advance of the expenses by Bowlas before taking out other letters patent; but, if they or either of them took them out without requiring such advance, and without any grant or authority from Bowlas, the title of Sladdin, and probably the title of Lord also, must be held to be only in trust for Bowlas and his assigns so far as the letters patent of the United States embraced any invention made by Sladdin before the conveyance to Bowlas, and incorporated either in the English machine or in the letters patent of Great Britain.

It is clear that one division of the reissued letters patent claims in substance only what is claimed in the English patent, and the

same is true of part of the claims in the other division, so far at least as claiming inventions, which were embodied in the English machine and described in the English patent as parts of the combinations referred to in the claims, even if not separately claimed. As the answer sets up a license or authority from Bowlas to Sladdin, the full determination of the rights of the respective parties to the letters patent of the United States cannot be made until the final hearing of the cause.

The cases of Sladdin and Lord against Emmons, and the same against Nichols, must, therefore, stand to await the final decree to be made after a full hearing in this case.

The demurrer in this case is adjudged bad, and is overruled, and the case stands for further proceedings under the rules.

E. MORRIS, The. See Case No. 799.

Case No. 4,471.

EMORY v. GREENOUGH.

[3 Dall. (3 U. S.) 369.]

Circuit Court, D. Massachusetts.

BANKRUPTCY — PLEADING DISCHARGE UNDER THE LAWS OF ANOTHER STATE.

The defendant was a native of Massachusetts, formerly resident in Boston, where he contracted the debt in question to the plaintiff, who was also a native, and had always continued a resident, of that state. Some years afterwards the defendant removed into Pennsylvania, became a resident citizen of the state, took the benefit of her bankrupt law (which, in its terms and operation, was analogous to the bankrupt laws of England), and duly obtained a certificate of conformity from the commissioners. Subsequent to this discharge, he returned, on a transient visit, to Boston; and, being there arrested by the plaintiff for the old debt, he caused the suit to be removed from the state into the circuit court, and pleaded his certificate in bar to the action; but the court (consisting of IREDELL, Circuit Justice, and the District Judge) overruled the plea, and gave judgment for the plaintiff.

[Cited in Banks v. Greenleaf, Case No. 959.]

[NOTE. On writ of error this case was heard by the supreme court in 1797, but the cause was dismissed for the reason that the process did not set forth that the parties were citizens of different states. Emory v. Grenough, 3 Dall. (3 U. S.) 369.]

EMPEROR, The (LIEBART v.). See Case No. 8,340

Case No. 4,472.

The EMPIRE.

[1 Ben. 19.][1]

District Court, E. D. New York. Jan., 1866.

MOTION TO REMAND VESSEL INTO CUSTODY AND CANCEL STIPULATION.

1. Where a vessel and cargo were libelled for salvage, and bonded in their full value, and thereafter the owners of the cargo filed a libel against the vessel, claiming to recover the damages occasioned to the cargo by the disaster out of which the salvage claim arose, to an amount equalling the value of the vessel, and thereupon, before this process was returned, the stipulators for value in the salvage case applied to have their stipulations cancelled, and the vessel remanded to custody, under the process in the salvage case: *Held*, that the application was premature, and could not be entertained before the process was returned, and notice published as required by the rules, because till then all parties were not before the court.

[Cited in The Hope, 4 Fed. 96.]

2. Whether relief could be given in such a case,—quere.

[3. Cited, with other cases, in United States v. Mackoy, Case No. 15,696, as to the effect of the release of property on bond.]

On June 23d, 1865, a libel was filed against the ship Empire and her cargo by Nathan E. Edmonds and others, representing the steamer Andrew Fletcher, to recover salvage for having pulled the ship off from the shoals near Cape Hatteras. On the same day another libel was filed by Samuel Greenwood, who was on board the steamer, on behalf of all persons interested, for the same cause of action. The two actions were consolidated by order of the court. Moses Taylor & Co. appeared as claimants of the vessel, and John F. Schepeler appeared as claimant of the cargo, and they gave stipulations respectively for the value of the vessel and the cargo, whereupon both vessel and cargo were discharged from custody. On Nov. 22d, Schepeler, the owner of the cargo, filed a libel against the ship, alleging that the vessel was got on shore by the wrongful negligence of the master of the ship, and that the vessel was liable for the damages occasioned to the cargo thereby to an amount exceeding the value of the vessel. The vessel was again seized under process issued in this action, and while she was in custody, yet another libel was filed against her by Prince S. Borden, on behalf of all persons interested in the steamer Arkansas, claiming to have been also active in rendering salvage services to the Empire on the same occasion. Process was also issued against the vessel in this action. Before the notices required under these processes had been returned as duly published, the agent of the owner of the ship who had given the stipulation for her value in the first cases, applied to the court on notice to all the libellants, on a petition setting forth that the owner was a non-resident, and that he had given the stipulation in question for the owner's account, with no security except the vessel herself, and that that security was endangered by the filing of the latter libels, and praying that the marshal might be directed to hold the vessel under the processes issued in the first salvage action, as well as under the latter processes, and that the stipulation which he had given for the value of the vessel might be cancelled. The motion came on to be heard on Jan. 5, 1866. The cases of

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

Henderson v. The Union [Case No. 14,346], and Gardiner v. The White Squall [Id. 5,-239], decided by Judge Nelson in the circuit court, were referred to on the argument.

Miller, Peet & Nichols, for the motion.

Mr. Whiting and Mr. Choate, in opposition.

BENEDICT, District Judge. The present motion, if it can be entertained at any time, is at this time premature, inasmuch as the processes issued upon the latter libels have not been returned. When they have been returned, and notice shall have been published in the usual way, the motion may be renewed, but in the present position of the actions, it must be denied.

I think it proper to add for the information of counsel, that in addition to the cases cited, there exists a case bearing upon the question involved, which was decided by Judge Betts. I allude to the case of The Jewess [Case No. 8,412].

[NOTE. The case of The Jewess, Case No. 8,412, was published as a note to this case in 1 Ben. 19.]

EMPIRE FIRE INS. CO. (STILLWELL v.). See Case No. 13,449.

EMPIRE SEWING-MACH. CO. (POTTER v.). See Case No. 11,326.

Case No. 4,473.

The EMPIRE STATE.

[2 Ben. 178.][1]

District Court, E. D. New York. Feb., 1869.

COLLISION—DAMAGES.

1. Where a vessel injured by collision, was sold at auction, and afterwards repaired by the buyers: *Held*, that the damages to be allowed in an action for the collision were to be arrived at by a reference to the cost of those repairs, instead of the result of the sale.

2. That interest was to be allowed on the value of the cargo and freight and on the repairs.

This case came up on exceptions to the report of a commissioner to whom it had been referred, to ascertain the damages occasioned to the schooner Goldfish by a collision with the Empire State. [Case No. 17,586.] The vessel, after the collision, was raised, and was then found to be greatly injured, both by the blow and by a fire which was caused by the burning of the lime with which she was laden, and she was thereupon sold at public auction in her damaged condition. She was afterward repaired by the buyers at a cost of $6,282.86. This included, however, replacing rigging, sails, anchors, and boat, which it appeared were not injured, and were not sold at auction with the vessel. The commissioner allowed the full cost of the repairs and interest, with the value of the cargo lost, and the freight, but excluded the sum of $300, proved to have been the value of the time of the purchaser, who superintended the repairs himself, and excluded interest on the cargo and freight.

BENEDICT, District Judge. Under the decision of the supreme court in the case of The Catharine, 17 How. [58 U. S.] 170, the rule adopted by the commissioner of ascertaining the damage by a reference to the cost of repair, instead of the result of the sale of the vessel before repairs, was correct. But from the cost of repairs should be deducted the value of anchors, sails, rigging, boat, &c., which were not injured or sold, and which are included in the amount reported; while, on the other hand, there should be added the sum of $300, that being the proved value of the time of the person engaged in superintending the repairs. Aside from these items, the report appears to me to be correct, under the rule given by the case of The Catharine, which is there laid down as a positive rule, without exception. As to interest, it would seem that it must be allowed upon the value of the cargo and freight.

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

Case No. 4,474.

The EMPIRE STATE.

[2 Biss. 216;[1] 1 Chi. Leg. News, 393.]

District Court, N. D. Illinois. Jan., 1870.

LIGHTS OF SAILING VESSEL—LOOKOUT — DUTY OF APPROACHING VESSEL.

1. A green and red light placed in the center of a schooner, forward, and separated only by a board, do not fulfill the requirements of the act of congress of April 29, 1864 [13 Stat. 58]. The lights must be placed at the sides of the vessel.

2. When at the time of a collision with a propeller the mate was near the wheelsman, and they were the only persons on deck, there was, properly speaking, no lookout, and the schooner was in fault.

3. But when they had seen the propeller, and recognized her as such, it being their duty to keep their course, it cannot be said that this want of a lookout in any degree contributed to the collision.

4. Those on board the propeller having seen the schooner, but being uncertain as to her course, and not having clearly distinguished her lights until just before the collision, it cannot be said that they had all the information in regard to the course of the schooner which the proper lights would have furnished, and that their absence did not contribute to the collision.

5. The propeller, however, was bound to exercise the greatest care and vigilance, and, if necessary, check her speed; and also to watch the schooner with constant vigilance; if by doing this she could have avoided the collision, she is guilty of contributory negligence.

[6. Cited in Vanderbilt v. Reynolds, Case No. 16,839, to the point that, when both vessels are in fault, the damages must be divided, each party paying his own costs.]

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

[7. Cited in The Kallisto, Case No. 7,600, to the point that the loss must remain where it has fallen, when there is a reasonable doubt as to which vessel was in fault.]

This was a libel against the propeller Empire State filed by Thomas O'Connor and others, the owners of the schooner H. Spencer, for damages sustained by a collision between the schooner and the propeller which occurred about 3 o'clock on the morning of the 25th of September, 1867, near the western shore of Lake Michigan, about twenty miles from Chicago.

D. Goodwin and A. L. Rockwell, for libellants.

McAllister & Stiles and Geo. B. Hibbard, for respondents.

DRUMMOND, District Judge. This case has been very full and ably argued by the counsel of the respective parties, and abstracts of the pleadings and evidence furnished, so as to assist the court greatly in its examination.

The facts in the case are that the schooner was coming up the lake, heading nearly south. It was a clear, star-light night, with a light wind about west south-west. The propeller was proceeding down the lake, heading about north north-west. Each saw the other when they were a considerable distance apart. Those on board of the schooner saw the lights of the propeller, and those on board of the propeller saw the schooner, but, as the say, did not in the first instance observe the lights, and supposed that the schooner was on the same course with themselves, namely, proceeding down the lake. On board the schooner there were only two men on deck at the time, the wheelsman and the mate, and immediately before and about the time of the collision the mate was not in the forward part of the schooner, but was somewhere near the wheelsman, so as to be able to give occasional directions to him if necessary. Therefore, there was not on the schooner what could properly be called a lookout at the time, and in this respect there was undoubtedly a fault on the part of the schooner.

As already stated, those on board of the propeller did not, as they allege, at first see the lights of the schooner, and supposed for this reason that the schooner was proceeding down the lake. The first direction given to the wheelsman was (the schooner being seen on the propeller's starboard bow) to starboard the helm; and the schooner not opening much, after steadying her for a short time, the order was given to starboard her a little more, which was done, and she was headed accordingly; and it was not until the schooner was observed to be crossing the bows of the propeller, as they allege, that the lights of the schooner were seen. The order was then given to port the helm, and, immediately after, the collision occurred, the schooner being struck on her port side, not far from the stern, and being badly smashed up, the quarter, more or less of it, carried away, the helmsman carried away with it, and the schooner substantially disabled.

When those on board of the schooner saw the propeller, understanding it to be their duty to keep their course, they did so, until it was thought that a collision was imminent, when an order was given to luff up. The schooner did accordingly luff up to the wind, immediately preceding the collision; but inasmuch as this was done under the apparent pressure of an immediate collision, perhaps it is hardly to be adjudged as a fault against the schooner. Some of the officers and men on board of the schooner were more or less injured, or thrown into the water, and a boat was sent by the propeller to take off those on board the schooner and pick the others up, and they were taken on board the propeller. Some of the sails were taken in, but the mainsail was left standing with a view of keeping the schooner's head to the wind. The captain of the schooner requested the propeller to take the schooner in tow, which the master of the propeller declined to do, on the ground that he had not fuel enough, and that there might be a change in the weather. Shortly after the officers and crew of the schooner were taken on board of the propeller (the schooner being thus left upon the lake without any one on board), the propeller encountered the propeller Orion, bound to Chicago. The officers and crew of the schooner were placed on board of the Orion, and arrived at Chicago the next morning. A tug was procured, and they went down the lake with a view of finding the schooner. They found her ashore, the wind having increased with a pretty heavy sea, and were unable to do more than to dismantle her of what they could remove, amounting to perhaps $800 or $1,000, which they took to Chicago. The rest of the schooner was a total loss.

The first question is whether there was any fault on the part of the schooner which contributed to the collision. As I have said, there was no proper watch or lookout on the schooner at the time, but, inasmuch as the propeller was distinctly seen and known to be a propeller, and as it was the duty of the schooner to keep her course, it does not appear that the want of a lookout contributed in any degree to the collision.

But I am of the opinion that the schooner was in fault, in not having her lights properly located, in conformity with the act of congress of April 29, 1864, and in such a way as to furnish the kind of light contemplated by that act. Under that law it was the duty of the schooner to have on her starboard side a green light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw a light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a

dark night, with a clear atmosphere, at least a distance of two miles; and on the port side a red light, so constructed as to show also a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw a light from right ahead to two points abaft the beam on the port side, and to be visible on a dark night, with a clear atmosphere, a distance of two miles.

Had the schooner these lights as thus required by the act of congress? It seems to me that she had not. The lights were, in point of fact, fixed on the pawl-bight, which is the center of the vessel, forward, and the lights were separated, the red from the green, by a board placed between them, and as I understand from the evidence, this was the only separation between the two lights. There was a lantern with a green light on one side, and a lantern with a red light on the other side of this board. These lights, thus placed on the pawl-bight amid-ships, and so that, in point of fact, the two lights were together, not being separated save in the manner described, the question is whether, within the meaning of this law, they were upon the sides of the vessel. It seems to me clear that they were not; and obviously one of the reasons why the law requires the lights to be placed, one on the starboard and one on the port side of the vessel is, that the lights may be separated, and thus greater facilities for observation be furnished to approaching vessels, so that if there should be any obstacle which for a moment might obscure the one, it might not necessarily obscure the other light; whereas, it is apparent that if these lights are both together, the one light could be hardly darkened without at the same time affecting the other. From the testimony it seems to me clear that these lights thus placed on board of the schooner could not fulfill the demand of the law, and in fact it is not certain that they did throw a light over an arc of ten points, and from right ahead to two points abaft the beam. If they did not, and could not, from their position, accomplish this object, then it is also clear, independent of all other considerations, that there were not such lights as are required by the act.

Admitting that the act does not prescribe the precise part on the side of the vessel where the light is to be located, still they must be substantially on the sides of the vessel and, as already stated, separated with a view of furnishing greater facility to observation. The safer course, as it would seem to me, would be for those managing sail vessels to place their lights as near the outside of the vessel as may be convenient, so as to meet the demands of the law.

For this reason I think the schooner had not a proper light at the time, located in the manner required by the act of congress, and therefore was in fault.

The next question is, did this fault contribute in any degree to the collision? It is claimed on the part of the libellants, conceding the lights were not properly located, that those on the propeller saw the schooner; that before the collision they knew that their first impression was wrong; that the schooner was coming up the lake instead of going down, and therefore, that if the lights had been properly located, and they had seen them the object was accomplished by the observations which were actually made, and all the information communicated which the lights themselves would have furnished.

If this was clear, then it would be true that this fault did not necessarily contribute to the collision, and the consequences of it would not be visited upon the schooner. But, in view of the evidence, it is impossible for me to say that the absence of proper lights did not contribute, in some degree, to this collision. In other words, I cannot say that the absence of the lights had nothing whatever to do with the result. If we take the testimony of those on board of the propeller as true, they did not, for a considerable time see any lights on the schooner, and their action was influenced by this circumstance, and the course of the propeller was affected. Therefore, it cannot be said that there would have been the same action, and that the propeller would have taken the same course, if they had seen the lights, and the court cannot say but if the lights had been properly placed they would have seen them before they actually did, and thus that there would have been a difference in the course of the propeller.

Again, I should have been much better satisfied, if the officers and crew of the schooner had not abandoned her altogether, as they did. She was loaded with lumber. There was no danger of her sinking. There was no immediate indication of rough weather, and I think some of the officers or crew might have remained in safety on board of the schooner, to give some direction to her course. But in view of the great damage done to the schooner by the collision carrying away part of her quarter, the time of night, the fact that so many were asleep and the natural feeling of alarm that would arise from the circumstance, I do not feel inclined to visit upon this desertion the consequences of a serious fault, but rather am disposed to palliate the act. Then there was fault on the part of the schooner. Was there fault on the part of the propeller which contributed in any degree to the collision? I think there was.

According to their own showing they had reason to believe that the schooner was going down the lake ahead of them. The wind was light. Not being able to distinguish by the sails the precise course of the schooner, the propeller going at the rate of nine knots an hour, would naturally, upon the hypothesis assumed by them, very soon approach the schooner. It was the duty, therefore, of those on board of the propeller to exercise the greatest possible care and vigilance, and,

if necessary, to check the motion of the propeller. Nothing of this kind was done. The propeller kept on her course with unabated speed, and the result was that when the actual fact was ascertained that the schooner was meeting the propeller instead of proceeding on the same course with her, there was not, it would seem, the opportunity or time, under the aspect of the case, as presented to those on board of the propeller, to avoid the collision, whereas if the propeller had been under proper command the collision might have been avoided, and I think it is apparent from the whole of the testimony, that there was not that degree of vigilance and care on the part of the propeller that there ought to have been under the circumstances.

The rule is, that every possible precaution and care should be taken, and the utmost skill used to avoid a sail vessel by a propeller. It seems by the evidence, that the mate of the propeller, whose watch it was on deck at the time, not being able to make out by the naked eye alone the course of the schooner, used a glass without success. Now, being ignorant, as it is conceded they were, on board of the propeller of the course of the schooner, they should not only have guarded their own vessel and had her under complete command, but should have watched with constant vigilance the schooner. If that had been done, I am satisfied that they could have ascertained in sufficient time, the course of the schooner, and thus have avoided the collision. I think, therefore, there was this fault on the part of the propeller, which contributed to the loss.

Again, I am not satisfied with the conduct of the propeller after the collision took place. Here was a schooner run down in the lake in the night, seriously damaged, some of the crew coming very near being drowned, not far off from shore, not far from Chicago. The propeller was bound down the lake, intending to stop at Milwaukee. It seems to me that the least that the propeller could have done under the circumstances was to try and save the property which had been injured—to tow the schooner into some safe harbor where the damages could be repaired. It was rather harsh treatment thus to abandon this disabled craft upon the lake, leave her to her fate, and, I think, not justified by the facts. If the propeller had taken the schooner in tow and carried her to a safe haven, although it might have delayed the propeller, still the detention would have been inconsiderable, and it is clear much loss would have been avoided to the owners of the schooner. So that looking at the case on the whole, I think that both parties were in fault, and that the loss must be divided.

The only remaining question is as to the amount of damage. Some of the witnesses state that the schooner was worth $6,000. One of the owners states that he was offered $5,000 and refused it; what the terms were, whether it was cash, or whether on time he does not state. One of the witnesses states that the schooner is only worth $5,500. Another witness says that the schooner was worth $5,000 to $6,000. The schooner was a very old vessel; was built as long ago as 1847; she had been repaired from time to time, and was stated to be in very good condition, but it is manifest that in estimating her value, we must be influenced greatly by the fact of her being so old a vessel, and I have thought, on the whole, that $5,000 cash, taking the whole evidence and looking at all the circumstances which bear upon the question of value, would be a fair estimate to place upon her. Her owner says there was saved from the wreck from $800 to $1,000, and that in this salvage there was expended between $200 and $300. So that I have called the net value of the property saved $650. That would make the loss occasioned by the collision $4,350, which divided would cause to pass against the claimants a decree for $2,175, which will accordingly be rendered. Each party to pay their own costs.

NOTE. Consult The Gray Eagle [Cases Nos. 5,734 and 5,735], also 9 Wall. [76 U. S.] 505, in all of which cases it is held that the neglect by one vessel to show proper signal lights, does not absolve the other from obligation to observe the usual laws of navigation, or such reasonable and practicable precaution as the circumstances allow. See opinion of Blatchford, J., in Sears v. The Scotia [Case No. 12,591]; The Scotia [Id. 12,513]. In the case of Chamberlain v. Ward, 21 How. [62 U. S.] 548, the supreme court ruled (page 567) that although a vessel which does not carry lights as prescribed by acts of congress, is in fault, such neglect does not discharge an approaching vessel from the obligation to adopt all reasonable and practicable precautions to prevent a collision; nor does it confer any right upon the other vessel to disregard or violate the rules of navigation, and the obligation to perform her duties to prevent collision remains unaffected by the provisions of the act. A steamer should have constant and vigilant and experienced lookouts stationed in proper places, and actually engaged in the performance of their duties. Id. No reason is perceived why first-class steamers on the lakes should not take equal precautions with ocean steamers. Id. In the case of Nelson v. Leland, 22 How. [63 U. S.] 55, collision on the Yazoo river between a steamer and flat boat, although the latter was in fault, it was held that the captain of the steamer, seeing the light ahead, should have stopped his boat, and it was no excuse that he mistook the light for a place of landing. The rule of the supreme court is that when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done, prima facie the steamer is chargeable with fault. The Oregon v. Rocca, 18 How. [59 U. S.] 570. The rules of navigation are obligatory upon vessels approaching each other, from the time when necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. New York & L. U. S. S. Co. v. Rumball, 21 How. [62 U. S.] 372. These rules require sailing vessels, when approaching a steamer, to keep their course; and steamers, as a general rule, under such circumstances, are required to keep out of the way. Id. Nautical rules require

that where a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact. The Carroll, 8 Wall. [75 U. S.] 302. Porting the helm a point when the light of a sailing vessel is first observed, and then waiting until a collision is imminent, before doing anything further, does not satisfy the requirements of the law. Id. Fault on the part of the sailing vessel at the moment preceding collision does not absolve a steamer which has suffered herself and a sailing vessel to get in such dangerous proximity as to cause inevitable alarm and confusion, and collision as a consequence. The steamer, as having committed a far greater fault in allowing such proximity to be brought about is chargeable with all the damages resulting from the collision. Id. Although the duty of vessels propelled by steam is to keep clear of those moved by wind, yet these latter must not, by changing their course instead of keeping on it, put themselves carelessly in the way of the former, and so render ineffectual the movements to give the sailing vessels sufficient berth. The Potomac, 8 Wall. [75 U. S.] 590. See, also, The Pilot [Case No. 11,168]. As to rate of speed justifiable during a fog, duties of the lookout, and duties of a steamer in meeting other vessels, see The Northern Indiana [Id. 10,320]. Consult, also, The Kentucky [Id. 7,716]; The Hermann [Id. 6,408]; The John Stuart [Id. 7,427]. The respective rights and obligations as to keeping and changing their courses of steamers and sailing vessels approaching each other, examined, and rules stated; also regulations as to lights. The Scotia, 14 Wall. [81 U. S.] 170. Rules which govern vessels sailing on intersecting lines at different rates of speed. The Cayuga, Id. 270. As to absence of lookout being unimportant, see The Farragut, 10 Wall. [77 U. S.] 334; also, The Fannie, 11 Wall. [78 U. S.] 238. The supreme court has lately decided that although one vessel may be sailing with other than the prescribed lights, and, by actually misleading another vessel, tend to cause a collision, yet this will not discharge another vessel if she by intelligent vigilance would have discovered or suspected from other indications that the vessel was not what her lights indicated. The Continental, 14 Wall. [81 U. S.] 345.

Case No. 4,475.

The EMPIRE STATE.

[12 N. Y. Leg. Obs. 259; 33 Hunt, Mer. Mag. 330.]

District Court, S. D. New York. July 18, 1854.

COLLISION IN HELL GATE—DUTY OF ONE VESSEL IN PASSING ANOTHER.

1. A steamboat having a vessel under canvas in full view is *held* prima facie responsible for steering clear of her.

2. Under the circumstances, *held* that a steamboat was wrong in persisting in her course, under the expectation that the sailing vessel would change hers; the latter not having given any indication of her intending to do so, up to the last moment.

In admiralty.

W. Q. Morton and W. J. Hasket, for libellants.

D. Lord, for claimants.

INGERSOLL, District Judge. This libel is filed by the owners of the sloop New York against the steamboat Empire State, to recover damages which they have sustained by a collision between their sloop and the Empire State, which took place in the month of July, 1853. The collision occurred at a little before six o'clock in the afternoon, at a point in the East river a little to the east of Pot rock, in Hell Gate, at about the middle of the river, between Negro point on Ward's Island, and Woolsey's dock, near the bath house on Long Island shore. The sloop was loaded with a cargo of coal on freight, and the collision, soon after it took place, caused her to sink with the coal on board. She was bound from New York up the Sound to New Haven. The steamer was also bound from New York up the Sound to Fall River. The guards of the steamboat came in contact with the shrouds of the sloop as she was passing her on the starboard side, which forced out her bolts, thereby causing an opening in the side of the sloop, by which she soon filled with water. The wind at the time was high and baffling, and was from the eastward of south, and was at the rate of from one to two knots. The tide was flood, at the rate of from four to seven knots. At the time the sloop was heading with the tide from a place nearly opposite Negro point, to a point near Woolsey's dock, on the Long Island shore. From the time the boat was opposite Hallet's point the sloop had not altered her course. From Negro point the tide sets over to Woolsey's dock. Often there will be two contrary whirls of the tide near the place where the collision happened. When the two vessels came together, the sloop was not far from the middle of the true tide. The sloop, when she was approaching near to Negro point, was seen by the captain and pilot of the boat, before the boat passed Hallet's point. The sloop had a little steerage way on her. From the time the sloop was first seen by the boat, she continued to keep her course. When the sloop was first seen by those having charge of the management of the boat, they assumed that she could bear away after passing Negro point, and hug the shore of Ward's Island. Whether she could, or not, in season to have got out of the way of the steamboat, with the wind high and baffling as it was, and the tide strong as it was, does not satisfactorily appear. She did not, however, hug the shore of Ward's Island, but kept on without altering her course in the true tide. When the pilot of the boat first saw the sloop, before the boat passed Hallet's point, he made up his mind to pass the sloop on her starboard side, and directed the movements of the boat with that view. In passing Hallet's point, the boat was slowed, and approached the sloop nearly in her wake, towards her starboard side. As the boat came near the sloop, the engine of the boat was stopped. The headway which she had on brought her up broadside to the sloop. The bells of the boat were then rung to go

ahead, and in passing the sloop the boat crowded the sloop; her guards pressed against the standing rigging of the sloop with such force that the injury was occasioned which caused her to sink. The captain of the boat thought he could pass the sloop without touching her, and supposed at the time that he had done so. At the time the bells of the boat were rung to go ahead the boat was drifting with the tide towards the shore, and there was danger that she would have gone on shore if she had continued to drift with the tide. The boat could have passed the sloop in safety on her larboard side, if the captain of the boat, when he passed Hallet's point, had directed the movements of the boat with that view. He did not, however, so direct her movements, supposing that the sloop would hug the shore of Ward's Island, though the captain of the sloop gave no indications that he would do so. The ordinary course of navigation for sailing vessels in going up the Sound, with the wind from a point east of south, was, after passing Negro point, to bear away some if they could. The captain of the sloop did not see the boat until the boat had passed Hallet's point and was approaching the sloop. The sloop was in no fault, unless keeping her course in the true tide is to be considered as a fault.

In the case of The Jamaica, a steam ferry boat [Case No. 7,173], the district judge, in giving his opinion, says: "A steamboat having had a sailing vessel in full view, time enough to have avoided her, is to be held responsible prima facie for steering clear, without requiring the latter to do anything." In the case under consideration, the steamboat had the sloop in full view before the boat came up to Hallet's point, and in time to have avoided her, by pursuing a different course, and the sloop did nothing but keep her course. In the case of Naugatuck Transp. Co. v. The Rhode Island [Id. 11,743], tried before Judge Nelson, which was a case of collision happening near the place where this collision occurred, the judge, in giving his opinion, remarks as follows: "Upon the evidence I should feel bound to hold any vessel responsible for a collision that occurred in attempting to pass another while struggling in this dangerous strait, there being no fault on the part of the leading vessel." It is claimed on the part of the Empire State, that after she came near the sloop she could not with safety back, or remain with her engine motionless, and that the only course she could pursue with safety to herself was to go ahead. The remarks of Judge Nelson in the case of The Rhode Island are a sufficient answer to his claim. He says, "The pretext set up for exposing the Naugatuck to the hazard is, that the slowing or stopping the Rhode Island after she had passed Flood rock would greatly endanger her own safety and the safety of the lives of the passengers. The answer is, if this be admitted, it was her own fault that she was brought into the dilemma. The Naugatuck was seen in time to have avoided it. Neglecting to avoid it, subjects the Rhode Island to all the consequences that followed." And as there was no fault on the part of the sloop in this case—her keeping her course while close-hauled not being considered a fault—the Empire State must be holden responsible for all the consequences which followed the collision.

The order of the court, therefore, is, that the libellants recover the damage which they have sustained by the collision, and that it be referred to a commissioner to ascertain and report what that damage is.

EMPIRE STATE, The (RUSSEL v.). See Case No. 12,145.

EMPIRE STATE, The (WHITNEY v.). See Case No. 17,586.

EMPIRE STATE LIFE INS. CO. (ROWLAND v.). See Case No. 12,097.

EMPIRE TRANSP. CO. (WILLIAMS v.). See Case No. 17,720.

EMPIRE WINDMILL CO. (CONTINENTAL WINDMILL CO. v.). See Case No. 3,142.

Case No. 4,476.

The EMPRESS.

[Blatchf. Pr. Cas. 146.][1]

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

PRIZE—REQUISITES OF LIBEL — PRACTICE—HEARINGS—DEFENCE.

1. The requisites of a libel in prize stated.

2. The proper form of a libel in prize is a mere general allegation of prize.

3. The practice in prize proceedings stated, as to the claim and test oath, the interest of the claimant in the property, and the inspection by the claimant of the ship's papers, and the proofs in preparatorio.

[Cited in The John Gilpin, Case No. 7,343.]

4. The defence, in the claim, must be limited to a contestation of the allegations of the libel.

[Cited in The Napoleon, Case No. 10,012.]

5. The first hearing is limited to the inquiry, whether the captured property is prize of war or not.

6. It is irregular to subjoin to the claim anything besides a test oath.

7. Such irregularities will be corrected on motion, without formal exceptions.

In admiralty.

BETTS, District Judge. A libel was filed in this suit, January 22, 1862, alleging that the vessel and cargo were captured, as lawful prize, in the Gulf of Mexico, off the mouth of the Mississippi, by the United States sloop-of-war Vincennes, November 21, 1861, Captain Marcy, of the navy, commanding; that the prize had been brought into this port, and is now within the jurisdiction of the court; that, by reason of the

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

premises, all such property has become liable to condemnation and forfeiture, as lawful prize to the libellants; and that, therefore, process of the court is prayed against the captured property, and a condemnation thereof, as prize, by the decree of the court.

This is a regular and adequate method of pleading on the part of the libellants, and legally exacts all the answer which can be propounded to the charge that the property captured is lawful prize. Mariatt, Formula, 159, 211; The Fortuna, 1 Dod. 81; 2 Wheat. Append. [15 U. S.] 19. The true form of libel ought to be a mere general allegation of prize, and such as is used in undoubted cases of hostile property. "Prize," by Judge Story, 10 Am. & Eng. Enc. Law, p. 364, § 15; The Adeline, 9 Cranch [13 U. S.] 244, 284, 285; Hal. Int. Law, c. 31, §§ 20, 22, 24.

By the general practice in prize proceedings, a party entitled to claim the property captured may file his claim, accompanied by an affidavit stating briefly the facts respecting it, and averring the verity of the claim. A valid interest must subsist in the claimant. A mere stranger will not be permitted to interpose a claim, to speculate upon the chances of an acquittal. Nor, as a general fact, are parties permitted to examine the ship's papers or the preparatory proofs, in order to shape their claims, for that might lead to great abuses. But the court, on special application and sufficient evidence, will allow so many of the papers to be inspected as may be necessary to ascertain the particulars which should be embraced in the claim intended to be filed. This, however, would not import that the defence was, in form, to be shaped in reference to particulars. Its only effect would be to enable a claimant, before interposing a suit, to become informed whether his interests would be embraced within the scope of the libel and his claim. The general doctrine with respect to the structure of the claim is readily gathered from the general principles which govern the line of defence allowed to claimants, and which are very clearly indicated by Judge Story in his treatise on Prize Proceedings. 10 Am. & Eng. Enc. Law, art. "Prize," and especially article 15. See, also, 1 Wheat. Append. [14 U. S.] 500, 501; 2 Wheat. [15 U. S.] Append. 20, 21; The Aina, 1 Spinks, Pr. Cas. 11; The Abo, Id. 47. It is plain that the court, in adopting the prize rules regulating the practice of the court (rule 24, May term, 1861), understood that while the defence to be exhibited on the claim filed was simply a contestation of the allegations contained in the libel (district court rule in admiralty, 189), and merely authorized the party to appear in court, and make opposition to a decree, on the allegations and proofs, on the first hearing, that hearing is limited to the inquiry, whether, upon the proofs drawn from the ship's company and her papers, with concomitant facts of which the court must take judicial cognizance equally with the principles and the rules of law, the captured property is prize of war or not. The Amiable Isabella, 6 Wheat. [19 U. S.] 1.

I think that all other matters than the test oaths subjoined to the claims filed by Pearson, Hopkins, and Jackson are surplusage and irregular in practice. They are inadmissible as evidence on the trial, and cannot be made the foundation for further proof by either party in the present stage of the suit; nor without a special order of the court to that end could they be so used in any future form of proceeding between the parties.

The claim interposed by Moore and De Castro is unexceptionably brief in its form, but it is nugatory and irrelevant because it presents no issues for trial before the court, and on file before the claim was interposed, even were it competent for the parties to raise, on a first hearing in a prize court, a triable issue of facts to be supported by proof outside of those in preparatorio, or found on the vessel. It is also vitally defective and irregular, because the right of the parties to intervene is not supported by test oaths, nor are the allegations set forth in that pleading either demurrers or pleas in bar to the action. The libellants might have excepted to these modes of pleading, but they are also entitled to a remedy more summarily, by motion, because of the palpable inaptitude and irregularity of these modes of proceedings in a prize suit.

The motion on the part of the libellants is accordingly granted. The parties are now entitled only to file claims verified by test oaths, establishing the interests they set up to the property captured. Order accordingly.

[NOTE. The vessel and cargo were afterwards condemned (Case No. 4,477), but on appeal this decree was reversed by the circuit court.]

Case No. 4,477.

The EMPRESS.

[Blatchf. Pr. Cas. 175.][1]

District Court, S. D. New York. June 10, 1862.[2]

PRIZE—VIOLATION OF BLOCKADE — INTENT—SAILING FOR BLOCKADED PORT — INQUIRY AS TO BLOCKADE—CONDEMNATION.

1. Formerly the act of sailing for a blockaded port, with knowledge of the blockade, was itself evidence of an attempt to evade the blockade; but now the law is that some overt act, denoting the forbidden attempt, must be shown in addition to the intention.

2. Sailing purposely for a blockaded port, with the intention properly notified on the ship's papers or otherwise fairly disclosed, may be excused in a neutral vessel if the object is honestly to inquire elsewhere whether the blockade

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

[2] [Reversed in Case No. 4,478.]

still continues, and, if so, to avoid the blockaded port and complete the voyage at a lawful one.

3. The inquiry cannot lawfully be made at the blockaded port if it can be made elsewhere.

4. Under the president's proclamation of April 19, 1861, establishing a blockade pursuant to "the law of nations," a neutral vessel knowing a port to be under blockade, and sailing towards it with intent to evade such blockade, is subject to capture without being warned off by the blockading vessel.

5. In this case, the vessel, with knowledge of the blockade and of its continuance, entered within the line of the blockading vessels with intent to pursue her voyage towards the blockaded port until she should be warned off. Vessel and cargo condemned.

[Cited in Stokely v. Smith, Case No. 13,473.]

In admiralty.

BETTS, District Judge. This vessel and cargo were captured on the 7th of November, 1861, off the mouth of the Mississippi river, in the Gulf of Mexico, by the United States ship-of-war Vincennes, and were sent to the port of New York for adjudication as prize. The libel was filed on the 22d of January, 1862, charging, in general allegations, that the vessel and cargo were lawful prize. Claims were thereafter interposed by separate claimants of the vessel and cargo, all claiming to be neutrals, some British and some Spanish subjects. These claims were accompanied by minute and elaborate averments of various matters wholly irrelevant to the issue of the prize or no prize, and which are altogether irregular, either as pleadings or otherwise, in a prize proceeding. By a decision of the court, on a preliminary motion to strike out all these averments, it was ordered that everything be stricken from the claims except the ordinary averments of ownership, and any special circumstances as to such ownership, if any such existed, and a general denial of the validity of the capture; all else being irrelevant and irregular.[1]

There is no material contrariety in the proofs which develop the facts in the cause, and the arguments of counsel have proceeded upon a common construction of the evidence.

The papers of the vessel show that she is of British build, and was employed by her owners on a voyage to Rio Janeiro, and was at that port chartered by the master to afreighters, partly British and partly Brazilian subjects, for the transportation of a cargo of coffee "to New Orleans or Mobile, as may be ordered by the charterers; and if the vessel, on arrival, be warned off by a blockading squadron, to proceed either to New York, Baltimore, or Philadelphia, which second port of destination is likewise to be named by the charterers previous to the departure of the vessel from Rio de Janeiro." This charter was executed in Rio on the 5th of September, 1861, between Joseph Hopkinson, the master of the vessel, and William Moore & Co., of Rio, it being then and there known to the parties and publicly notorious that New Orleans and Mobile were under a blockade established by the United States government.

On the 14th of September instructions were given to the master to proceed to New Orleans with his cargo, and, if the port should be open, to deliver the same to the indorsement of the bill of lading made by the charterers; it being added, "Should the port be blockaded, you will be warned off, and will then proceed direct to your discharge port of New York, where indorsed bill of lading also awaits for such contingency."

The vessel sailed from Rio de Janeiro on the 18th of September. A few days after leaving that port the ship spoke a vessel, and received from her the information that all the southern ports continued to be blockaded. Subsequently, and about nine miles off Cape Antonio, which is the westernmost point of the island of Cuba, the ship spoke another vessel from New York, from which the same information was received, together with the latest newspapers. This was but nine or ten days before the capture. The ship pursued her course direct from Rio towards New Orleans, without deviation to any port to make inquiries whether the blockade of New Orleans continued, and on the 26th of November, 1861, struck upon a bar within the mouth of the Mississippi river, and inside of the blockading squadron, in the night-time, and was captured by boats sent from one of the blockading vessels on the following morning. It is contended by the captors that the vessel and cargo should be condemned as lawful prize:

1. Because she left the port of Rio de Janeiro with full knowledge by the master and all parties interested that the port of New Orleans was blockaded, on a voyage direct for that port, without intending to inquire, and without inquiring, at any intermediate point or place, as to the continued existence of said blockade.

2. Because the vessel left the port of Rio de Janeiro upon a voyage to the blockaded port of New Orleans knowing the same to be blockaded, with the unlawful intent to enter said port and deliver her cargo there in violation of said blockade, if an opportunity to do so should occur, and without intending to make any inquiry anywhere as to the continuance of the blockade.

3. Because the vessel, with knowledge of the blockade of the port of New Orleans before the commencement of the voyage, confirmed by information and warning twice received upon the voyage, and once only nine days before the capture, pursued her course with the fraudulent intent to violate said blockade, and actually made the attempt in the night-time, and so far succeeded as to get inside the blockading vessel, where she was captured.

The claimants controvert these several prop-

[1] [See Case No. 4,476.]

ositions, and insist that as matter of fact the honest intent was to make inquiry at the blockaded port, without previously attempting to enter, and that as matter of law they had a right to do so, and especially because of the clause in the president's proclamation of April 19, 1861, declaring that "if with a view to violate such blockade a vessel shall approach or shall attempt to leave any of the said ports, she shall be duly warned off by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port she will be captured," by reason of which they were, as they claim, entitled to enter the blockaded port, unless warned off.

This document or proclamation has been passed by the counsel for all the claimants as a controlling point against the right of capture, and the various particulars gathered from the proofs have been scrutinized minutely on both sides, with eminent ability and learning, in the effort to deduce from the facts evidence tending to show the guilt or the innocence of the transaction.

Before expressing the views of the court upon the effect of the evidence it is proper to dispose of the legal points raised in the case.

First. Was it lawful for the vessel, knowing of the blockade of the port of New Orleans prior to the commencement of the voyage, and with that information repeatedly confirmed upon the voyage, to proceed direct to the mouth of the blockaded port, under pretence of inquiry, or with the actual intent to inquire there, as to the continued existence of the blockade?

The earlier decisions of the prize courts indicated that the act of sailing for a blockaded port, with knowledge of the blockade, was itself evidence of an attempt to evade the blockade; but the state of the law upon that point now is that some overt act denoting the forbidden attempt must be shown, in addition to an intention to commit such infraction, however strongly the latter may have been indicated and persisted in. 1 Phil. Ins. 459, art. 832, and cases cited; The Columbia, 1 C. Rob. Adm. 154; 1 Caines, Cas. 7; Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 198, 200; 1 Kent, Comm. 148, 150. The rule is also so far mitigated in its application that sailing purposely for a blockaded port, with the intention properly notified on the ship's papers, or otherwise fairly disclosed, may be excused in a neutral ship, if the object is honestly to inquire elsewhere whether the blockade is still in continuance; and if so, to avoid the blockaded port, and complete the voyage at a lawful one. The hazard of allowing such privilege, and the necessity of observing the utmost ingenuousness in its indulgence, are emphatically noted in the authorities; and accordingly the courts take heed, in administering it, that the neutral be not permitted, under cover of that relaxation of prize law, to smother the principle by placing himself out of reach of its restraints. An adherence to the old rule would therefore seem to be still exacted in its full simplicity in one of its cardinal features, which is, that the neutral vessel shall make her inquiries so plainly clear of the blockaded port that she shall not acquire the ability (as Chancellor Kent phrases the act) to slip herself into it. Phillimore states the general result of the authorities to be "that it has never, under any circumstances, been held legal that the inquiry shall be made at the mouth of the river or estuary" of the blockaded port. 3 Phillim. Int. Law, 398, § 304. Dr. Lushington says, in the case of The Union, 1 Spinks, Pr. Cas. 164: "The claimants allege the vessel was chartered for Riga, and, being uncertain whether the place was blockaded or not, they sent her to Riga to inquire of the blockading force whether Riga was blockaded." The court inquires, "Is this justifiable?" and remarks, in reply, "under particular circumstances, perhaps it may be justifiable, where information cannot be otherwise procured, to inquire of the blockaded squadron," and denies that the excuse can prevail if a neutral port was accessible, though an inquiry there might be attended with great loss and expense to the neutral ship.

It is clear, therefore, to the court, that the claimants cannot lawfully, under claim of making inquiry whether a port known to have been under blockade when the voyage was set on foot, and after the vessel had been prosecuting it towards the port, is still under blockade, go forward to the entrance of the port, and within the actual line of the blockading force; and that such act, according to the law of nations, subjects the vessel to condemnation as prize of war. The same doctrine was recognized and upheld by this court in its decisions in the cases of The Delta [Case No. 3,777] and The Cheshire [Case No. 2,655], and must continue to be the law of the court until overruled by the appellate tribunals.

The second question is, whether, by the terms of the executive proclamation, a neutral vessel has a right to undertake and pursue a voyage direct to a blockaded port, knowing it to be blockaded, and to enter the port itself, without liability to capture, unless she be previously warned off by a commander of one of the blockading vessels, and the warning be indorsed on the vessel's register.

The paramount fact announced by the executive proclamation of April 19, 1861, is the establishment of the blockade pursuant to the laws of the United States and the law of nations. Now, the law of nations is explicit and indubitable that a neutral vessel, knowing a port to be in a state of blockade, and sailing towards it with intent to evade such blockade, commits a fraud upon the belligerent rights of the blockading power,

and is subject to forfeiture therefor. 3 Phillim. Int. Law, 397; Wheat. Int. Law, 541, 550; 1 Kent, Comm. 148, 149; 1 Duer, Ins. 663, 669; Fland. Mar. Law, 168, 225, note 3; 2 Arn. Ins. 747. It was obviously with this understanding of the character of the blockade proclaimed that the commodore of the Atlantic naval squadron, whose duty it was to direct the naval force in obedience to the executive mandate, in announcing, on the 30th of April, 1861, the effectiveness of the blockade, declares that vessels "passing the capes of Virginia, and coming from a distance, in ignorance of the proclamation, will be warned off," &c. This was precisely the belligerent blockade, under the law of nations. The United States had never insisted that a neutral vessel approaching a blockaded port was entitled to receive notice of a blockade, and to be warned off, unless she approached in ignorance of the blockade. Treaty with England (8 Stat. 125, art. 18); Treaty with France (Id. 184, art. 12). And the supreme court regards these treaty compacts as the true exposition of the law of nations in regard to blockades. Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 199.

The warning and immunity from capture provided by the proclamation of April 19, 1861, must, therefore, be understood to refer to and embrace only those vessels which approach a port in ignorance of its being under blockade. The Columbia, 1 C. Rob. Adm. 154.

The third question is one of fact: Did the vessel, knowing of the blockade of the port of New Orleans before the commencement of the voyage, and with that knowledge confirmed by information and warning twice received during the voyage, and once only nine days before the capture, persistently pursue her course direct to the mouth of the blockaded port with the fraudulent intent to violate the blockade, and did she, in fact, actually attempt to do so?

Neither the testimony of the witnesses taken in praeparatorio, nor the papers found on board, furnish any evidence whatever which tends to show that any ground for a supposition, or any supposition in fact, existed, that the blockade had been or might have been discontinued. On the contrary, all the evidence before the master tended to confirm the notice and knowledge under which his voyage was begun, that the port remained invested. The evidence of the dishonest intent of the vessel in her approach to the passes of the Mississippi is clearly deducible from a great number of circumstances established by the testimony.

It is not designed, nor is it necessary, to enter here upon a review in detail of this evidence. Suffice it to say, that it leaves no doubt whatever upon the mind of the court that the vessel was to go into New Orleans as her real port of destination, and that she continued, till her arrest, to be navigated with that purpose, unless she should be prevented by a warning given to her by the blockading squadron. Every step taken by her on the voyage was an attempt to fulfill that purpose. She avoided calling at Cuba, a neutral island, nearly on the line of her course from Rio to New Orleans, to seek the information she pretended to want. She omitted to lie to off the port to await an opportunity to speak a blockading vessel. She ran directly in for the port in the darkness of the night without making signals or manifesting any expectation of attracting the attention of vessels at all aside of her course of entrance. Had she been honestly in search of information of the state of the markets, or of that of the tide, then it would be unreasonable to suppose she would have run blindly into the shore without taking active measures to be assured of like particulars needful to be known by her, unless she was governed by a desire to keep her movements concealed.

The court can put no other interpretation upon her proceedings than that she meant that the course she was pursuing should take her into the port of New Orleans. This may have been under a mistake of law, in the idea that she might do so excusably if the United States failed to intercept the attempt and turn her away. A misapprehension of the law in that respect can be of no avail to her whilst acting under a clear understanding of the facts.

Upon these several grounds a decree of condemnation is ordered of both vessel and cargo.

This decree was reversed by the circuit court, on appeal, July 17, 1863 [Case No. 4,478]. The libellants have appealed to the supreme court, as regards the vessel, but not in respect to the cargo. [No report of the case in the supreme court can be found.]

Case No. 4,478.

The EMPRESS.

[Blatchf. Pr. Cas. 659.][1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—VIOLATION OF BLOCKADE—INTENT—INQUIRY AS TO BLOCKADE—REVERSAL OF DECREE OF CONDEMNATION.

1. Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, reversed.

2. The purpose of the master in approaching the blockaded port was to inquire whether it was actually blockaded. Under the circumstances of this case, the master was justified in making such inquiry.

3. The master thought he would be entitled to a warning from a blockading vessel before a forfeiture would be enforced, and acted on such a construction of the president's proclamation of blockade, and on directions to that effect contained in the charter-party for the voyage, and in the instructions to him from the charterers, although he had good reason to be-

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

[2] [Reversing Case No. 4,477.]

lieve that the port was in a state of actual blockade.

4. Although the terms of the proclamation afford no justification for the act of the master, they are entitled to consideration on the question of the intent with which the master was sailing for the blockaded port.

5. Although the general rule may be that, even in the case of a blockade de facto, such as the present was, the inquiry must not be made at the blockaded port, if it be reasonably practicable to ascertain the fact by inquiry at a neutral port; yet there are exceptions to that rule, and this case is one of them.

In admiralty.

NELSON, Circuit Justice. This vessel and cargo were captured on the morning of the 28th of November, 1861, by the sloop-of-war Vincennes, at the mouth of the Mississippi river, off the Southeast Pass, some three miles from the Belize. The vessel was under a charter-party, entered into by the master, at Rio Janeiro, on the 5th of September, 1861, to ship a cargo of coffee to "New Orleans or Mobile, as may be ordered by the charterers, and if the vessel, on arrival, be warned off by a blockading squadron, to proceed either to New York, Baltimore, or Philadelphia, which second place is likewise to be named by the charterers previous to the departure of the vessel from Rio de Janeiro. If warned off New Orleans or Mobile, the master to deliver at the port of discharge the order from the officer warning him off," &c.

On the 14th of September, 1861, the master was instructed by the charterers to proceed to New Orleans with his cargo, (6,185 bags of coffee,) and should the port be open upon his arrival, the bill of lading indorsed would advise him to whom to deliver the cargo, but should the port be blockaded, he would be warned off, and would then proceed direct to New York.

The vessel belonged to a British subject residing in Hull, England, and had sailed from that port in May, 1861, with a cargo of coal and cast-iron buildings for Rio Janeiro. On discharging her cargo, she was put up for freight by the master, which led to the charter above referred to. The cargo on board belongs to the charterers, William Moore & Co., British and Brazilian subjects.

The only question in the case is, whether or not the vessel and cargo are subject to condemnation for attempting to break the blockade of the port of New Orleans. Upon a perusal of the testimony in praeparatorio and the documentary proofs, I am satisfied that there was no such intent on the part of the master or of the owners of the cargo; but that, on the contrary, their purpose was to ascertain, at the mouth of the Mississippi river, by personal inquiry, whether or not the port of New Orleans was actually blockaded. This was, I think, the bona fide intention of the parties. There was no disguise of the purpose, as it was avowed in the charter-party, and in the written instructions from the owners of the cargo, and repeatedly by the master himself; and the only question is, whether the master was justified, under the circumstances disclosed in the case, in making such inquiry.

It is quite apparent that these parties adopted that construction of the proclamation of the president announcing an intent to set on foot a blockade of the southern ports, which is indicated by its terms—that a vessel sailing for a port in a state of blockade would be entitled to a warning from one of the blockading vessels before a forfeiture would be enforced; and that, acting upon such construction, and the consequent directions found in the charter-party, and the instructions from the charterers, the master persevered in the purpose of making the inquiry, although, at the same time, he had good reason for the belief that the port was in a state of actual blockade. This interpretation of the proclamation was overruled by a majority of the supreme court in the case of the Hiawatha [2 Black (67 U. S.) 635], and must be regarded, therefore, as affording no justification to either vessel or cargo.

But, although the terms of the proclamation furnish no justification for the act, yet I think they are entitled to consideration when we are inquiring into the intent with which the master was sailing for the blockaded port. These terms may have honestly misled him; and the fact that the vessel was found at a place which would, under other circumstances, be suspicious, may, in view of those terms, be consistent with her entire innocence.

There was no official notice of the blockade of the port of New Orleans given by this government to the British or the Brazilian government. There is no evidence in this case at what time it was established. The case must stand upon a blockade de facto, as it respects foreign neutral traders at the belligerent port. No doubt a general notoriety prevailed at Rio Janeiro, at the time of the sailing of the vessel from that place, that the mouths of the Mississippi were blockaded; and the master of the vessel was advised, in the course of the voyage, by a vessel which he hailed, that he would be stopped at the Belize. There are, undoubtedly, cases which hold, as a general rule, that, even in the case of a blockade de facto, the inquiry must not be made at the blockaded port, if it be reasonably practicable to ascertain the fact by inquiry at a neutral port. There are, however, exceptions to this rule, and, under all the circumstances and proofs in the case, I am inclined to think that the present is one of them.

The decree of the court below is reversed.

Case No. 4,479.

The EMULOUS.

[1 Gall. 563.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.[2]

WAR — ENEMY PROPERTY SUBJECT TO CONFISCATION—EFFECT OF DECLARATION OF WAR—PRIZE—PROPERTY CAPTURED IN PORT.

1. A cargo belonging to enemies, and found in our ports at the breaking out of a war, is confiscable jure belli without any special act of congress authorizing the seizure.

[Cited in Seventy-Eight Bales of Cotton, Case No. 12,679. Applied in U. S. v. Two Hundred and Sixty-Nine and One-Half Bales of Cotton, Id. 16,583.]

[Cited in Kershaw v. Kelsey, 100 Mass. 566, 567.]

[See note at end of case.]

2. If the party filing a libel against property, as prize of war, is not entitled to it, condemnation will go to the United States.

[See The Amiable Isabella, 6 Wheat. (19 U. S.) 1; The Dos Hermanos, 10 Wheat. (23 U. S.) 306.]

3. The like law prevails on a suit in rem, by an informer, whose title fails, under a municipal seizure.

4. All property captured in time of war belongs to the government, unless granted by them to other persons.

5. No subject can legally commit hostilities, where the sovereign has either directly or constructively prohibited such acts.

6. An alien enemy cannot sustain a claim in a prize court; nor can a citizen claim the property of an enemy in a prize court, upon an alleged sale since the war.

7. By the law of nations, the debts, credits, and corporeal property of an enemy, found in the country on the breaking out of war, are confiscable.

[See note at end of case.]

8. The courts of the United States have jurisdiction over all prizes made in ports, as well as on the high seas, by virtue of the delegation of admiralty and maritime jurisdiction.

[Cited in Two Hundred and Eighty-Two Bales of Cotton, Case No. 14,291; U. S. v. Two Hundred and Sixty-Nine and One-Half Bales of Cotton, Id. 16,583. Distinguished in Seventy-Eight Bales of Cotton, Id. 12,679.]

9. Upon a declaration of war, the president has an authority, as incident to his office, to employ all the usual and customary means, acknowledged by the law of nations, to carry it into effect.

10. He may therefore lawfully authorize the capture of enemy property, wherever by the law of nations it is liable to capture.

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

G. Blake, for United States.

William Prescott and William Sullivan, for claimant.

STORY, Circuit Justice. This is a prize allegation, filed by the district attorney in behalf of the United States and of John Delano, against five hundred and fifty tons of pine timber, part of the cargo of the American ship Emulous, which was seized as enemies' property about the 5th day of April, 1813, after the same had been discharged from said ship, and while afloat in a creek or dock at New Bedford, where the tide ebbs and flows. From the evidence in this case, it appears that the ship Emulous is owned by the said John Delano, John Johnston, Levi Jenny, and Joshua Delano, of New Bedford, and citizens of the United States. On the 3d day of February, 1812, the owners, by their agents, entered into a charter party with Elijah Brown, as agent of Messrs. Christopher Idle, Brother & Co., and James Brown, of London, merchants, for said ship to proceed from the port of Charleston, S. C. (where the ship then lay) to Savannah, in Georgia, and there take on board a cargo of timber and staves, at a certain freight stipulated in the charter party, and proceed with the same to Plymouth in England, "for orders to unload there, or at any other of his majesty's dock-yards in England." The ship accordingly proceeded to Savannah, took on board the agreed cargo, and was there stopped by the embargo laid by congress on the 4th of April, 1812. On the 25th of the same April, it was agreed between Mr. E. Brown, and the master of the ship, that she should proceed with the cargo to, and lie at New Bedford, without prejudice to the charter party. The ship accordingly proceeded for New Bedford, and arrived there in the latter part of May, 1812, where, it seems, that the cargo was finally (but the particular time is not stated) unloaded by the owners of the ship, the staves put into a ware-house, and the timber into a salt water creek or dock, where it has ever since remained water-borne, under the custody of said John Delano, by whom the subsequent seizure was made for his own benefit and the benefit of the United States. On the 7th of November, 1812, Mr. Elijah Brown, as agent for the British owners (one of whom, James Brown, is his brother), sold the whole cargo to the present claimant, Mr. Armitz Brown (who it would seem is also his brother), for $2,433.67, payable in nine months, for which the claimant gave his note accordingly. The master of the ship, Captain Allen, swears that at the time of entering into the charter party, Mr. Elijah Brown stated to him, that the British owners had contracted with the British government to furnish a large quantity of timber to be delivered in some of his majesty's dock-yards. Besides the claim of Mr. Brown, there is a claim interposed by the owners of the ship Emulous, praying for an allowance to them of their expenses and charges in the premises.

A preliminary exception has been taken to the libel, for a supposed incongruity in blending the rights of the United States, and of the informer, in the manner of a qui tam action at the common law. I do not think this exception is entitled to much consideration.

[1] [Reported by John Gallison, Esq.]

[2] [Reversed in Brown v. U. S., 8 Cranch (12 U. S.) 110.]

It is, at most, but an irregularity, which cannot affect the nature of the proceedings, or oust the jurisdiction of this court. If the informer cannot legally take any interest, the United States have still a right, if their title is otherwise well founded, to claim a condemnation. Nor would a proceeding of this nature be deemed a fatal irregularity in courts having jurisdiction of seizures, whose proceedings are governed by much more rigid rules than those of the admiralty. It is a principle clearly settled at the common law, that any person might seize uncustomed goods to the use of himself and the king, and thereupon inform of the seizure: and if, in the exchequer, the informer be not entitled to any part, the whole shall, on such information, be adjudged to the king. For this doctrine we have the authority of Lord Hale (Harg. Law Tracts, 227) and the solemn judgment of the court in Roe v. Roe, Hardr. 185, and Malden v. Bartlett, Parker, 105. And see The Betty Cathcart, 1 C. Rob. Adm. 220. The same rule most undoubtedly exists in the prize court, and as I apprehend is applied with greater latitude. All property captured belongs originally to the crown, and individuals can acquire a title thereto in no other manner, than by grant from the crown. The Elsebe, 5 C. Rob. Adm. 173; 11 East, 619; The Maria Francoise, 6 C. Rob. Adm. 282. This, however, does not preclude the right to seize; on the contrary, it is an indisputable principle in the English prize courts, that a subject may seize hostile property for the use of the crown, wherever it is found; and it rests in the discretion of the crown, whether it will or will not ratify and consummate the seizure by proceeding to condemnation. But to the prize court it is a matter of pure indifference, whether the seizure proceeded originally from the crown, or has been adopted by it; and whether the crown would take jure coronae, by its transcendent prerogative, or jure admiralitatis, as a power annexed by its grant to the office of lord high admiral. The cases of captures by non-commissioned vessels, by commanders on foreign stations anterior to war, by private individuals in port or on the coasts, and by naval commanders on shore on unauthorized expeditions, are all very strong illustrations of the principle. The Aquila, 1 C. Rob. Adm. 37; The Twee Gesuster, 2 C. Rob. Adm. 284, note; The Rebeckah, 1 C. Rob. Adm. 227; The Gertruyda, 2 C. Rob. Adm. 211; The Melomane, 5 C. Rob. Adm. 41; The Charlotte, Id. 282; The Richmond, Id. 325; The Thorshaven, 1 Edw. Adm. 102; Hale in Harg. Law Tracts, c. 28, p. 245.

And, in cases where private captors seek condemnation to themselves, it is the settled course of the court, on failure of their title, to decree condemnation to the crown or the admiralty, as the circumstances require. The Walsingham Packet, 2 C. Rob. Adm. 77; The Etrusco, 4 C. Rob. Adm. 262, note; and cases cited supra. Nor can I consider these principles of the British courts a departure from the law of nations. The authority of Puffendorf and Vattel is introduced to show, that private subjects are not at liberty to seize the property of enemies without the commission of the sovereign; and if they do, they are considered as pirates: but when attentively considered, it strikes me, that taking the full scope of these authors, they will not be found to support so broad a position. Puff. bk. 8, c. 6, § 21; Vattel, bk. 3, c. 15, §§ 223–227. Vattel himself admits (section 224) that the declaration of war, which enjoins the subjects at large to attack the enemy's subjects, implies a general order, and that to commit hostilities on our enemy without an order from our sovereign, after the war, is not a violation so much of the law of nations, as of the public law applicable to the sovereignty of our own nation. Section 225. And he explicitly states (section 226) that by the law of nations, when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorized by the state of war. All that he contends for is, that though by the declaration all the subjects in general are ordered to attack the enemy, yet that by custom this is usually restrained to persons acting under commission, and that the general order does not invite the subjects to undertake any offensive expedition, without a commission or particular order (section 227), and that, if they do, they are not usually treated by the enemy in a manner as favorable, as other prisoners of war (section 226). And Vattel (section 227) explicitly declares, that the declaration of war "authorizes indeed and even obliges every subject, of whatever rank, to secure the persons and things belonging to the enemy, when they fall into his hands;" and he then goes on to state cases, in which the authority of the sovereign may be presumed (section 228).

The whole doctrine of Vattel, fairly considered, amounts to no more than this, that the subject is not required, by the mere declaration of war, to originate predatory expeditions against the enemy; that he is not authorized to wage war contrary to the will of his own sovereign, and that, though the ordinary declaration of war imports a general authority to attack the enemy and his property, yet custom has so far restrained its meaning, that it is in general confined to persons acting under the particular or constructive commission of the sovereign. If, therefore, the subject do undertake a predatory expedition, it is an infringement of the public law of his own country, whose sovereignty he thus invades; but it is not a violation of the law of nations, of which the enemy has a right to complain. But if the property of the enemy fall into the hands of a subject, he is bound to secure it. For every purpose applicable to the present case, it does not seem necessary to controvert these positions.

And whatever may be the correctness of the others, I am perfectly satisfied, that the position is well founded, that no subject can legally commit hostilities, or capture property of an enemy, where either expressly or constructively the sovereign has prohibited it. But suppose he does, I would ask, if the sovereign may not ratify his proceedings, and thus, by a retro-active operation, give validity to them? Of this there seems to me no legal doubt. The subject seizes at his peril, and the sovereign decides in the last resort, whether he will approve or disapprove of the act. The Thorshaven, 1 Edw. Adm. 102.

The authority of Puffendorf is still less in favor of the position of the claimant's counsel. In the section cited (book 8, c. 6, § 21), Puffendorf considers the question, to whom property captured in war belongs; a question also examined by Vattel, in the 229th section of the book and chapter above referred to. In the course of that discussion, Puffendorf observes, "that it may be very justly questioned, whether every thing taken in war by private hostilities, and by the bravery of private subjects, that have no commission to warrant them, belongeth to them that take it. For this is also a part of the war, to appoint what persons are to act in a hostile manner against the enemy, and how far. And in consequence, no private person hath power to make devastations in an enemy's country, or to carry off spoil or plunder, without permission from his sovereign. And the sovereign is to decide, how far private men, when they are permitted, are to use that liberty of plunder, and whether they are to be sole proprietors in the booty, or only to share a part of it. So that all, a private adventurer in war can pretend to, is no more than what his sovereign will please to allow him; for to be a soldier, and to act offensively, a man must be commissioned by public authority." As to the point, upon which Puffendorf here expresses his doubts, I suppose that no person, at this day, entertains any doubt. It is now clear, as I have already stated, that all captures in war enure to the sovereign, and can become private property, only by his grant. But is there any thing in Puffendorf to authorize the doctrine, that the subject so seizing property of the enemy is guilty of a very enormous crime, of the odious crime of piracy? Or is there, in this language, any thing to show, that the sovereign may not adopt the acts of his subject in such a case, and give them the effect of full and perfect ratification?

It has not been pretended, that I recollect, that Grotius supports the position contended for. To me it seems pretty clear, that his opinions lean rather the other way, namely, to support the indiscriminate right of captors to all property captured by them. Grot. lib. 3, c. 6, §§ 2, 10, 12. Bynkershoek has not discussed the present question in direct terms. In one place (Bynk. Pub. Jur. c. 3) he says, that he is not guilty of any crime by the laws of war, who invades a hostile shore in hopes of getting booty. It is true, that in another place (Id. c. 20) he admits, in conformity to his doctrine elsewhere (Id. c. 17), that if an un-commissioned cruiser should sail for the purpose of making hostile captures, she might be dealt with as a pirate, if she made any captures, except in self-defence. But this he expressly grounds upon the municipal edicts of his own country, in relation to captures made by its own subjects. And he says, every declaration of war not only permits, but expressly orders, all subjects to injure the enemy by every possible means, not only to avert the danger of capture, but to capture and strip the enemy of all his property. And looking to the general scope of his observations (Id. cc. 3, 4, 16, 17), I think it may, not unfairly, be argued as his opinion, that independent of particular edicts, the subjects of hostile nations might lawfully seize each other's property, wherever found. At least, he states nothing, from which it can be inferred, that the sovereign might not avail himself of property captured from the enemy by non-commissioned subjects.

On the whole, I hold that the true doctrine of the law of nations, found in foreign jurists, is, that private citizens cannot acquire to themselves a title to hostile property, unless it is seized under the commission of their sovereign; and that, if they depredate upon the enemy, they act at their peril, and may be liable to punishment, unless their acts are adopted by their sovereign. That, in modern times, the mere declaration of war is not supposed to clothe the citizens with authority to capture hostile property; but that they may lawfully seize hostile property in their own defence, and are bound to secure, for the use of the sovereign, all hostile property, which falls into their hands. If the principles of British prize law go further, I am free to say, that I consider them as the law of this country.

I have been led into this discussion of the doctrines of foreign jurists further than I originally intended, because the practice of this court in prize proceeding must, as I have already intimated, be governed by the rules of admiralty law disclosed in English reports, in preference to the mere dicta of elementary writers. I thought it my duty, however, to notice these authorities, because they seemed greatly relied on by the claimants' counsel.

In my judgment, the libel is well and properly brought, at least for all the purposes of justice between the parties before the court, and I overrule the exception taken to its sufficiency.

Having disposed of this objection, I come now to consider the objection made by the United States against the sufficiency of the claim of Mr. Brown; and I am entirely satisfied, that his claim must be rejected. It is the well known rule of the prize court, that

the onus probandi lies on the claimant. He must make out a good and sufficient title, before he can call upon the captors to show any ground for the capture. The Walsingham Packet, 2 C. Rob. Adm. 77. If, therefore, the claimant make no title, or trace it only by illegal transactions, his claim must be rejected, and the court left to dispose of the cause, as the other parties may establish their rights. In the present case, Mr. Brown claims a title by virtue of a contract and sale made by alien enemies since the war. I say by alien enemies, for it is of no importance, what the character of the agent is; the transaction must have the same legal construction, as though made by the aliens themselves. Now, admitting, that this sale was not colorable, but bona fide, which however I am not at present disposed to believe, still it was a contract made with enemies, pending a known war, and therefore invalid. No principle of national or municipal law is better settled, than that all contracts with an enemy, made during war, are utterly void. This principle has grown hoary under the reverent respect of centuries (19 Edw. 4, 6, cited Theol. Dig. lib. 1, c. 6, § 21; Ex parte Boussmaker, 13 Ves. 71; Bristow v. Towers, 6 Term R. 45), and cannot now be shaken, without uprooting the very foundations of national law. Bynk. Quest. Pub. Juris, c. 3; The Santa Cruz, 1 C. Rob. Adm. 50, 76. I therefore altogether reject the claim interposed by Mr. Brown.

What then is to be done with the property? It is contended on the part of the United States, that it ought to be condemned to the United States, with a recompense in the nature of salvage to be awarded to Mr. Delano. On the part of the claimant's counsel, (who, under the circumstances, must be considered merely as arguing, as amici curiae, to inform the conscience of the court) it is contended, 1. That this court, as a court of prize, has no proper jurisdiction over the cause; 2. That if it have jurisdiction, it cannot award condemnation to the United States, for several reasons; 1. Because by the law of nations, as now understood, no government can lawfully confiscate the debts, credits, or visible property of alien enemies, which have been contracted or come into the country during peace. 2. Because, if the law of nations does not, the common law does, afford such immunity from confiscation to property situated like the present. 3. Because, if the right to confiscate exists, it can be exercised only by a positive act of congress, who have not yet legislated to this extent. 4. Because, if the last position be not fully accurate, yet, at all events, this process being a high prerogative power, ought not to be exercised, except by express instructions from the president, which are not shown in this case.

Some of these questions are of vast consequence, and most extensive operation;—and I am exceedingly obliged to the gentlemen, who have argued them with so much ability and learning, for the light, which they have thrown upon a path so intricate and obscure. I have given these questions as much consideration, as the state of my health and the brevity of time would allow; and I shall now give them a distinct and separate discussion, that I may at least disclose the sources of my errors, if any, and enable those, who unite higher powers of discernment with more extensive knowledge, to give a more exact and just opinion.

And first, as to the jurisdiction of this court in matters of prize. This depends partly on the prize act of 26th of June, 1812, § 6 [2 Stat. 761], and partly on the true extent and meaning of the admiralty and maritime jurisdiction conferred on the courts of the United States. The act of the 26th of June, 1812, c. 107, provides, that in all cases of captured vessels, goods and effects, which shall be brought within the jurisdiction of the United States, the district court shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction. The act of 18th of June, 1812 [2 Stat. 755], declaring war, authorizes the president to issue letters of marque and reprisal to private armed ships against the vessels, goods and effects, of the British government and its subjects, and to use the whole land and naval force of the United States, to carry the war into effect. In neither of these acts is there any limitation, as to the places where captures may be made, on the land or on the seas, and of course it would seem, that the right of the courts to adjudicate respecting captures would be coextensive with such captures, wherever made, unless the jurisdiction conferred is manifestly confined by the former act to captures made by private armed vessels. It is not, however, necessary closely to sift this point, as it may now be considered as settled law, that the courts of the United States, under the judicial act of 30th of September, 1789 [1 Stat. 73], have, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all causes of prize, as the admiralty in England. Glass v. The Betsy, 3 Dall. [3 U. S.] 6; Talbot v. Janson, Id. 133; Penhallow v. Doane, Id. 54; Jennings v. Carson, 4 Cranch [8 U. S.] 2.

Over what captures then has the admiralty jurisdiction, as a prize court? This is a question of considerable intricacy, and has not as yet, to my knowledge, been fully settled.

It has been doubted, whether the admiralty has an inherent jurisdiction of prize, or obtains it by virtue of the commission usually issued on the breaking out of war. That the exercise of the jurisdiction is of very high antiquity, and beyond the time of memory, seems to be incontestable. It is found recognized in various articles of the Black Book of the Admiralty, in public treaties and proclamations of a very early date, and

in the most venerable relics of ancient jurisprudence.[3] In Lindo v. Rodney, Doug. 613, note, Lord Mansfield, in discussing the subject, admits the immemorial antiquity of the prize jurisdiction of the admiralty, but leaves it uncertain, whether it was coeval with the instance jurisdiction, and whether it is constituted by special commission, or only called into exercise thereby. After the doubts of so eminent a judge, it would not become me to express a decided opinion. But taking the fact, that in the earliest times the jurisdiction is found in the possession of the admiralty, independent of any known special commission; that in other countries, and especially in France, upon whose ancient prize ordinances the administration of prize law seems in a great measure to have been modelled,[4] the jurisdiction has uniformly belonged to the admiralty; there seems very strong reason to presume, that it always constituted an ordinary and not an extraordinary branch of the admiralty powers. And so I apprehend it was considered by the supreme court of the United States in Glass v. The Betsy, 3 Dall. [3 U. S.] 6. However the question may be, as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, as to which I give no opinion, it is very clear, that its jurisdiction is not confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject matter. The words of the prize commission contain authority to proceed upon all, and all manner of captures, seizures, prizes and reprisals, of all ships and goods, that are and shall be taken. The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens and rivers, but also of all captures made on land, where the same have been made by a naval force, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications.[5]

Such then being the acknowledged extent of the prize jurisdiction of the admiralty, it is, at least in as ample an extent, conferred on the courts of the United States. For the determination, therefore, of the case before the court, it is not necessary to claim a more ample jurisdiction: for the capture or seizure, though made in port, was made while the property was water-borne. Had it been landed and remained on land, it would have deserved consideration, whether it could have been proceeded against as prize under the admiralty jurisdiction, or whether, if liable to seizure and condemnation in our courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points I give no opinion.[6]

Having disposed of the question, as to the jurisdiction of this court, I come to one of a more general nature, viz. whether, by the modern law of nations, the sovereign has a right to confiscate the debts due to his enemy, or the goods of his enemy found within his territory at the commencement of the war. I might spare myself the consideration of the question, as to debts; but as it has been ably argued, I will submit some views respecting it, because they will illustrate and confirm the doctrine applicable to goods.

It seems conceded, and indeed is quite too clear for argument, that in former times the right to confiscate debts was admitted as a doctrine of national law. It had the countenance of the civil law (Dig. lib. 41, tit. 1; Dig. lib. 49, tit. 15), of Grotius (De Jure Belli et Pacis, lib. 3, c. 2, § 2; Id. c. 6, § 2; Id. c. 7, §§ 3, 4; Id. c. 13, §§ 1, 2), of Puffendorf (De Jure Nat. et Nat. lib. 8, c. 6, § 23), and lastly of Bynkershoek (Quest. Pub. Juris, lib. 1, c. 7), who is himself of the highest authority, and pronounces his opinion in the most explicit manner. Down to the year 1737, it may be considered as the opinion of jurists, that the right was unquestionable. It is then incumbent on those, who assume a different doctrine, to prove that since that period it has, by the general consent of nations, become incorporated into the code of public law. I take upon me to say, that no jurist of reputation can be found, who has denied the right of confiscation of enemies' debts. Vattel has been supposed to be the most favorable to the new doctrine. He certainly does not deny the right to confiscate. And if he may be thought to hesitate in admitting it, nothing more can be gathered from it, than that he considers, that in the present times a relaxation of the rigor of the law has been in practice among the sovereigns of Europe. Vattel, lib. 3, c. 5, § 77. Surely a relaxation of the law in practice cannot be admitted to constitute an abolition in principle, when the principle is asserted as late as 1737 by Bynkershoek, and the relaxation shown by Vattel, in 1775. In another place, however, Vattel speaking on the subject of reprisals, admits the right to seize the property of the nation or its subjects, by way of reprisal; and, if war ensues, to confiscate the property so

[3] See Rob. Coll. Marit. Introd. pp. 6, 7; Id. Instructions, 3 Hen. VIII. p. 10, art. 18, etc.; Id. p. 12, note; Letter Edw. III., A. D. 1343; Treaty Hen. VII. and Charles VIII., A. D. 1497; Rob. Coll. Marit. p. 83, etc., p. 98, art. 8; Rob. Coll. Mar. p. 189, note; Roughton, arts. 19, 20, etc., passim.

[4] Vide Ord. France A. D. 100; Rob. Coll. Marit. p. 75; Ord. France A. D. 1584; Id. p. 105; Treaty Hen. VII. and Car. VIII.; Id. p. 83, and Robinson's note, Id. 105.

[5] Key v. Pearse, cited in Le Caux v. Eden, Doug. 606; Lindo v. Rodney, Id. 613, note; The Capture of The Cape of Good Hope, 2 C. Rob. Adm. 274; The Stella del Norte, 5 C. Rob. Adm. 349; The Island of Trinidad, Id. 92; The Thorshaven, 1 Edw. Adm. 102; The Capture of Chinsurah, 1 Act. 179; The Rebeckah, 1 C. Rob. Adm. 227; The Gertruyda, 2 C. Rob. Adm. 211; The Maria Francoise, 6 C. Rob. Adm. 282.

[6] See The Ooster Eems, 1 C. Rob. Adm. 284, note; Hale de Portubus Maris, etc., in Harg. Law Tracts, c. 28, p. 245, etc.; Parker, 267.

seized. The only exception he makes is of property, which has been deposited in the hands of the nation, and entrusted to the public faith; as is the case of property in the public funds. Vattel, lib. 2, c. 18. §§ 342, 343, 344. The very exception evinces pretty strongly the opinion of Vattel, as to the general rule. Of the character of Vattel, as a jurist, I shall not undertake to express an opinion. That he has great merit is conceded, though a learned civilian (Sir James MacIntosh) informs us, that "he has fallen into great mistakes in important practical discussions of public law." Discourse on the Law of Nations, p. 32, note. But if he is singly to be opposed to the weight of Grotius and Puffendorf, and, above all, Bynkershoek, it will be difficult for him to sustain so unequal a contest.

I have been pressed with the opinion of a very distinguished writer of our own country on this subject. Camillus, Nos. 18–23, on the British Treaty, 1794. I admit in the fullest manner the great merit of the argument, which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure, not as of strict right, but of sound policy and national honor, I have no hesitation to say, that the argument is unanswerable. He proves incontrovertibly, what the highest interests of nations dictate, with a view to permanent policy, but I have not been able to perceive the proofs, by which he overthrows the ancient principle. In respect to the opinion of Grotius, quoted by him in No. 20, as indicating a doubt by Grotius of his own principles, I cannot help thinking, that the learned writer has himself fallen into a mistake. Grotius, in the place referred to (L. 3, c. 20, § 16), is not adverting to the right of confiscation, but merely to the general results of a treaty of peace. He says (section 15) that after a peace, no action lies for damages done in the war; but (section 16) that debts due before the war are not by the mere operation of war released, but remain suspended during the war, and the right to recover them revives at the peace. It is impossible to doubt the meaning of Grotius, when the preceding and succeeding sections are taken in connexion; Grotius, therefore, is not inconsistent with himself: nor is "Bynkershoek more consistent;" for the latter explicitly avows the same doctrine, but considers it inapplicable to debts confiscated during the war, for these are completely extinguished. Bynk. Ques. Pub. Jur. c. 7. It is supposed by the same learned writer, that the principle of confiscating debts had been abandoned for more than a century. That the practice was intermitted is certainly no very clear proof of an abandonment of the principle. Motives of policy and the general interests of commerce may combine to induce a nation not to enforce its strict rights, but it ought not therefore to be construed to release them. It may however be well doubted if the practice is quite so uniform as it is supposed. The case of The Silesia Loan, which exercised the highest talents of the English nation, is an instance to the contrary, almost within a half century. (In 1752.) In the very elaborate discussions of national law, to which that case gave birth, there is not the slightest intimation, that the law of nations prohibited a sovereign from confiscating debts due to his enemies, even where the debts were due from the nation; though there is a very able statement of its injustice in that particular case. And the English memorial admits, that, when sovereigns or states borrow money from foreigners, it is very commonly expressed in the contract, that it should not be seized as reprisals, or in case of war. Now it strikes me, that this very circumstance shows in a strong light the general opinion, as to the ordinary right of confiscation.

The stipulations of particular treaties of the United States have been cited, in corroboration of their general doctrine, by the claimant's counsel. These treaties certainly show the opinion of the government, as to the impolicy of enforcing the right of confiscation against debts and actions.[7] But I cannot admit them to be evidence, for the purpose for which they have been introduced. It may be argued with quite as much, if not greater force, that these stipulations imply an acknowledgment of the general right of confiscation, and provide for a liberal relaxation between the parties. I hold with Bynkershoek (Ques. Pub. Jur. c. 7), that where such treaties exist, they must be observed; where there are none, the general right prevails.

It has been further supposed, that the common law of England is against the right of confiscating debts. And the declaration of Magna Charta, c. 30, has been cited to show the liberal views of the British constitution. This declaration, so far as is necessary to the present purpose, is as follows: "If they, (i. e. foreign merchants) be of a land making war against us, and be found in our realm, at the beginning of the war, they shall be attached without harm of body or goods (rerum) until it be known unto us, or our chief justice, how our merchants be entreated there, in the land making war against us; and if our merchants be well entreated there, theirs shall be likewise with us." I quote the translation of Lord Coke. 2 Inst. 57. This would certainly seem to be a very liberal provision, and if its true construction applied to all property and persons, as well transiently in the country, as domiciled and fixed there, it would certainly be entitled to all the encomiums, which it has received. Montesq. Spirit of Laws, bk. 20, c. 14. How far it is now considered as binding, in relation to vessels and goods found within the

[7] See Treaties with Great Britain, 1794, art. 10; with France, 1778, art. 20; with Holland, 8th Oct., 1782, art. 18; with Prussia, 11th July, 1799, art. 23; with Morocco, 1787, art. 24.

realm at the commencement of a war, I shall hereafter consider. It will be observed, however, that this article of Magna Charta does not protect the debts or property of foreigners, who are without the realm. It is confined to foreigners within the realm, upon the public faith, on the breaking out of the war. Vide The Santa Cruz, 1 C. Rob. Adm. 50, 63. Now it seems to be the established rule of the common law, that all choses in action belonging to an enemy are forfeitable to the crown; and that the crown is at liberty, at any time during the war, to institute a process, and thereby appropriate them to itself. This was the doctrine of the Year Books, and stands confirmed by the solemn decision of the exchequer in Attorney General v. Weeden, Parker, 267; Maynard's Edw. II., cited Id. It is a prerogative of the crown, which I admit has been very rarely enforced. See Lord Alvanley's Observations in Furtado v. Rogers, 3 Bos. & P. 191. But its existence cannot admit of a legal doubt. Antoine v. Morshead, 6 Taunt. 237, 1 Marsh. 558; Albretcht v. Sussmann, 2 Ves. & B. 323, 327.

On a review of authorities, I am entirely satisfied, that by the rigor of the law of nations, and of the common law, the sovereign of a nation may lawfully confiscate the debts of his enemy, during war, or by way of reprisal. And I will add, that I think this opinion fully confirmed by the judgment of the supreme court in Ware v. Hylton (3 Dall. [3 U. S.] 199), where the doctrine was explicitly asserted by some of the judges, reluctantly admitted by others, and denied by none.

In respect to the goods of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius and Puffendorf, and Bynkershoek, and Burlemaqui, and Rutherforth, and Vattel.[8] Such also is the rule of the common law. Hale in Harg. Law Tracts, p. 245, c. 18. Vattel has indeed contended, and in this he is followed by Azuni (2 Az. p. 2, c. 4, § 7), that the sovereign declaring war can neither detain the persons nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration, because they came into the country upon the public faith. This exception (which in terms is confined to the property of persons who are within the country) seems highly reasonable in itself, and is an extension of the rule in Magna Charta. But even limited as it is, it does not seem followed in practice, and Bynkershoek is an authority the other way. Bynk. Quest. Pub. Jur. cc. 2, 3, 7. In England the provision in Magna Charta seems in practice to have been confined to foreign merchants domiciled there, and not extended to others, who came to ports of the realm for occasional trade. Indeed, from the language of some authorities, it would seem that the clause was inserted not so much to benefit foreign merchants, as to provide a remedy for their own subjects in cases of hostile injuries in foreign countries. See the opinion of Lee, C. J., in Key v. Pearse, Doug. 606, 607. However this may be, it is very certain that Great Britain has uniformly seized, as prize, all vessels and cargoes of her enemies, found afloat in her ports, at the commencement of war. Nay, she has proceeded yet further, and, in contemplation of hostilities, laid embargoes on foreign vessels and cargoes, that she might at all events secure the prey. It cannot be necessary for me to quote authorities on this point. In the articles respecting the droits of admiralty in 1665, there is a very formal recognition of the right of the crown to all vessels and cargoes seized before hostilities. The Rebeckah, 1 C. Rob. Adm. 227; Id. 230, note a. This exercise of hostile right, of the summum jus, is so far indeed from being obsolete, that it is constant operation, and in the present hostilities has been applied to the property of citizens of the United States. Of a similar character is the detention of American seamen, found in her service at the commencement of the war, as prisoners of war; a practice, which violates the spirit, though not the letter, of Magna Charta, and certainly can, in equity and good faith, find few advocates.

Of the right of Great Britain thus to seize vessels and cargoes found in her ports on the breaking out of war, I do not find any denial, in authorities which are entitled to much weight. And I therefore consider the rule of the law of nations to be, that every such exercise of authority is lawful, and rests in the sound discretion of the sovereign of the nation.

The next question is, whether congress, (for with them rests the sovereignty of the nation, as to the right of making war, and declaring its limits and effects) have authorized the seizure of enemies' property afloat in our ports. The act of the 18th of June, 1812, c. 102, is in very general terms, declaring war against Great Britain, and authorizing the president to employ the public forces to carry it into effect. Independent of such express authority, I think, that, as the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act, it seems to follow, that the executive may authorize the capture of all enemies' property, wherever by the law of nations it may be lawfully seized. In cases, where no grant is made by congress, all such captures, made under the authority of the executive, must enure to the use of the government. That the executive is not restrained from authorizing captures on land is clear from the provisions of the act. He may employ, and actually has employed, the land forces for that purpose; and no one has

[8] See Grotius and Puffendorf and Bynkershoek, ubi supra, and Bynk. Quest. Pub. Jur. cc. 4, 6; 2 Burlem. p. 209, § 12; Id., p. 219, § 2; Id., p. 221, § 11; Ruth. bk. 2, c. 9, pp. 558–573.

doubted the legality of the conduct. That captures may be made within our own ports by commissioned ships seems a natural result of the generality of expression, in relation to the authority to grant letters of marque and reprisal to private armed vessels, which the act does not confine to captures on the high seas, and is supported by the known usage of Great Britain in similar cases. It would be strange indeed, if the executive could not authorize or ratify a capture in our own ports, unless by granting a commission to a public or private ship. I am not bold enough to interpose a limitation, where congress have not chosen to make one; and I hold, that by the act declaring war, the executive may authorize all captures, which by the modern law of nations are permitted and approved.

It will be at once perceived, that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. This, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of congress would satisfy my mind, that it ought to be included among the fair objects of warfare; more especially, as our own government have declared it unjust and impolitic. But, if congress should enact such a law, however much I might regret it, I am not aware that foreign nations, with whom we have no treaty to the contrary, could on the footing of the rigid law of nations complain, though they might deem it a violation of the modern policy.

On the whole, I am satisfied, that congress have authorized a seizure and condemnation of enemy property found in our ports, under the circumstances of the present case; and the executive may lawfully authorize proceedings to enforce the confiscation of the same property before the proper tribunals of the United States. The district attorney is for this purpose the proper agent of the executive, and of the United States. From the character and duties of his station, he is bound to guard the rights of the United States, and to secure their interests. Whenever he chooses to institute proceedings in behalf of the United States, it is presumed by courts of law, that he has the sanction of the proper authorities; and that presumption will avail, until the executive or the legislature disavow the proceedings, and sanction a restoration of the property.

I have taken up more time, than I originally intended, in discussing the various subjects submitted in the argument; an apology will be found in their extraordinary importance. If I shall have successfully shown, that the principles of prize law, as administered in England and in the United States, have the sanction of the principles of public law and public jurists, I shall not regret the labor that has been employed, although in this particular case I may pronounce an erroneous sentence.

I reverse the decree of the district court, and condemn the five hundred and fifty tons of timber to the United States; subject however to the right of the owners of the Emulous, to a reimbursement of their actual charges and expenses for the custody of the property, which I shall reserve for further consideration; and I shall order the said property to be sold, and the proceeds brought into court, to abide the further order of the court.

[NOTE. Armitz Brown, the claimant, appealed from this decision to the supreme court, where the judgment of condemnation was reversed, and an order made that the sentence of the district court be affirmed. Opinion of the court was written by Mr. Chief Justice Marshall, and rested upon the modern rule "that tangible property belonging to an enemy, and found in the country, ought not to be immediately confiscated, * * * but that reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation." The learned justice remarked that the declaration of war is not the expression of the will of the nation to that effect, but that as the act prohibiting trade with the enemy, in this instance, expressly authorized the giving of passports within six months after its passage for the safe transportation of any property belonging to British subjects then within the United States, it seems that the property of a British subject was not considered by the legislature as being vested in the United States by the mere declaration of war. Mr. Justice Story and one of his associates dissent. Brown v. U. S., 8 Cranch (12 U. S.) 110.]

Case No. 4,480.

The EMULOUS.

[1 Sumn. 207.]

Circuit Court, D. Massachusetts. Oct. Term, 1832.

SALVAGE—DERELICT—WHAT IS SALVAGE SERVICE—CONTRACTS — COMPENSATION — HOW DETERMINED—SUBSEQUENT STORMS—APPEALS.

[1. A case of derelict can arise only when there has been an abandonment by the master and crew, without any intention of returning to the wreck.]

[Distinguished in The Boston, Case No. 1,673. Cited in Mesner v. Suffolk Bank, Id. 9,493; The John Gilpin, Id. 7,345; The H. B. Foster, Id. 6,290; The John Perkins, Id. 7,360; Cromwell v. The Island City, Id. 3,410; Harley v. 467 Bars of Railroad Iron, Id. 6,068.]

[2. Wherever services have been rendered in saving property on the sea, or wrecked on the coast of the sea, there is a salvage service in the sense of the maritime law.]

[Cited in The Centurion, Case No. 2,554; The John Gilpin, Id. 7,345; The Narragansett, Id. 10,020; The A. D. Patchin, Id. 87; The Independence, Id. 7,014; The Cheeseman v. Two Ferry-Boats, Id. 2,633; Maltby v. Steam Derrick-Boat, Id. 9,000; McMullin v. Blackburn, 59 Fed. 178.]

[3. The fact that the parties have voluntarily entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt, does not alter the character of the service as a salvage service, but only fixes the rules by which the court is to be governed in awarding the compensation.]

[Cited in The Narragansett, Case No. 10,017; The A. D. Patchin, Id. 87; The Inde-

pendence, Id. 7,014; Collins v. The Ft. Wayne, Id. 3,012; The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 477; The Silver Spray, Case No. 12,857; The Williams, Id. 17,710; The Louisa Jane, Id. 8,532; The Roanoke, 50 Fed. 577.]

[4. It is impracticable to lay down rules to govern the courts in ascertaining the proper rate of compensation, farther than to assign some general limits to its discretion in certain cases approaching nearly to the same average merit, such as cases of derelict. And in general the amount of the reward must be left largely in the discretion of the court, upon a just estimate of all the circumstances of the particular case.]

[Cited in Bearse v. 340 Pigs of Copper, Case No. 1,193; The Connemara and The Joseph Cooper, Jr., 108 U. S. 359, 2 Sup. Ct. 758; The Dupuy De Lome, 55 Fed. 95.]

[5. The circumstances entitled to most consideration in all cases are the value of the property saved, the extent of the labor and services, and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to with uncommon favor.]

[Cited in The Fairfield, 30 Fed. 702.]

[6. Contracts for salvage services are not ordinarily held obligatory by the courts of admiralty, upon the persons whose property is saved, unless the court can clearly see that no advantage has been taken of their situation, and the rate of compensation is just and reasonable.]

[Cited in The A. D. Patchin, Case No. 87; Eads v. The H. D. Bacon, Id. 4,232; Williams v. The Jenny Lind, Id. 17,723; Post v. Jones, 19 How. (60 U. S.) 160; The J. G. Paint, Case No. 7,318; The W. D. B., Id. 17,306; Harley v. 467 Bars of Railroad Iron, Id. 6,068; The Clotilda, Id. 2,903; Brooks v. The Adirondack, 2 Fed. 393; The C. & C. Brooks, 17 Fed. 550; Chapman v. Engines of The Greenpoint, 38 Fed. 672; The Alert, 56 Fed. 724.]

[7. Persons who, on the request of the master, merely render services in assisting to get out cargo from a wrecked vessel and set her afloat, with the understanding that they are to be compensated on a basis of daily wages, cannot afterwards elect to turn their services into a higher grade, without any supervening circumstances changing either the perils or the contract.]

[8. As different minds, exercising the most enlightened discretion, will not arrive at precisely the same results, it is the disposition of the appellate courts to discourage appeals in salvage cases as mischievous and expensive. They therefore adhere to the rate of salvage allowed below, unless the evidence clearly calls for a different proportion.]

[Cited in The Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 479; Lubker v. The A. H. Quinby, Case No. 8,586; The Baker, 25 Fed. 773; Scott v. The City of Worcester, 45 Fed. 122.]

[9. Salvage compensation should not be increased because of subsequent storms or other contingent events which might have increased the peril, or even occasioned a total loss; and they can only enter as ingredients in the case, when they were foreseen at the time, for the purpose of showing the promptitude of the assistance, and the activity and sound judgment with which the business was conducted.]

[Approved in The Saragossa, Case No. 12,335. Cited in The Hesper, 18 Fed. 692; The Fannie Brown, 30 Fed. 221.]

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

Libel for salvage. The district court, upon the hearing [case unreported], decreed to the libellants the sum of twelve hundred dollars; the value of the schooner and cargo saved, was ascertained to be five thousand seven hundred and twenty-two dollars and thirty-eight cents. From this decree the claimant [Michael H. Simpson] appealed to the circuit court.

The facts, as they appeared at the trial in the district court, (and they were not materially changed by the evidence on the appeal,) were as follows: The Emulous, laden with mahogany, logwood, coffee, and hides, on a homeward voyage from —— to Boston, struck on a reef at "Robinson's Hole," (so called,) on Nashaun island, in the Vineyard sound, early on Wednesday morning, the 8th of February, 1832, and was so much injured, that she very soon filled with water. Immediate assistance was obtained from the shore by the captain, and the coffee, hides, provisions, and clothing were landed on that day. Anchors were carried out, and the schooner left at night nearly full of water. The next day was a stormy day, (a snow storm.) The vessel, however, was on that day hove off from the reef by the captain and his assistants, and left at five o'clock in the afternoon at anchor. She capsized during the night; and on the next morning, (the 10th,) she was found in that situation by the captain. He had previously made a contract with the owner of the sloop Hero, to tow her into Wood Hole for fifty dollars or to Edgartown for seventy-five dollars, as the captain of the Emulous should choose. On finding, however, the vessel capsized, the parties considered that contract at an end. Soon afterwards the pilot boat Superior, commanded by Captain Daggett, (the principal libellant,) came to their assistance, and in her then perilous situation, with the consent of the master of the Emulous, she was committed to his charge and superintendence, and he, together with his associates, and the master and the crew of the Hero, undertook to tow the Emulous into the port of Edgartown, which was at the distance of from twenty to twenty-five miles. After sawing off the chain cable, and disengaging the Emulous from her anchor, and securing the latter by a buoy, they proceeded to tow her across the sound to Edgartown, without attempting to right her. There is a strong current in the Sound, from three to four and a half miles an hour; and, after having towed the schooner a considerable way, she was carried back again a considerable distance by the force of the current. In the course of her towage she struck on a shoal, (the middle shoal,) and there righted. With a good deal of exertion and perseverance, and some considerable risk, during that day and the following night and a part of the next day, they succeeded in bringing her safely into the harbour of Edgartown. The vessel was there repaired, and finally came to Boston, and completed her voyage.

The original libel was filed in behalf of the masters and crews of the Superior and Hero; but it was afterwards amended by adding the claims of fourteen other persons, who, it is alleged, were employed in getting the schooner off the rocks and anchoring her, before possession was taken by the Superior and Hero.

At this term the cause was argued by Dunlap, Dist. Atty., for the libellants, and by Peabody and Webster, for the claimants.

The former cited Harrison v. Sterry [Case No. 6,144]; [Peisch v. Ware] 4 Cranch [8 U. S.] 347; 4 C. Rob. Adm. 194; Tyson v. Prior [Case No. 14,319]; Rowe v. The Brig [Id. 12,093]; 1 Dod. 421; 2 Dod. 75; 4 C. Rob. Adm. 108; 5 C. Rob. Adm. 323; 2 Parl Deb. 1688, p. 191.

The latter cited The Blaireau, 2 Cranch [6 U. S.] 240; Schutz v. The Nancy [Case No. 12,493]; Taylor v. Twenty-Five Thousand Dollars [Id. 13,807]; Abb. Shipp. (4th Am. Ed.) 433, note; St. 43, Geo. III.; Jac. Sea Laws, 530, 559, 560; 4 C. Rob. Adm. 217; 6 C. Rob. Adm. 272.

STORY, Circuit Justice. This is clearly, in my judgment a case of meritorious salvage, for which the salvors, and especially the masters and crews of the Superior and Hero are entitled to a fair recompense. It is not, as has been suggested, (rather than argued,) at the bar, a case of derelict; for that can arise only, when there has been an abandonment by the master and crew, without any intention to return to the wrecked property. Here was not only the animus revertendi, but the actual presence of the master, at the time when the salvage service was performed.

The court has been asked upon this occasion to lay down some clear and definite rule, as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear, that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances, which establish, that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt; in either case, it does not alter the nature of the service, as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. It is true, that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons, whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence, purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act, demanded by Christian and public duty, into a traffic of profit, which would outrage human feelings, and disgrace human justice. The salvors, who, at the request of the master of the Emulous, assisted in taking out her cargo and getting her afloat, are certainly entitled to a compensation. But their services are of a nature belonging to the lowest grade of salvage, such as may ordinarily be compensated by daily wages. They understood themselves, if we are to believe the testimony of the master of the Emulous, to enter upon the service for such a compensation; and if they did, they cannot afterwards elect to turn it into a higher grade of service, without any supervening circumstances, changing either the perils or the contract. My judgment is, that a much smaller sum will be an ample remuneration for their services.

In respect to the masters and crews of the Superior and Hero, their services commenced exactly where those of the other salvors terminated. The assistance given by them was prompt and cheerful; their labors arduous, and constant, and persevering; and, at times, not without considerable peril to life, and some hazard to their own vessels. The season of the year was that, in which the weather is usually boisterous and variable; and of course the chances of a successful termination of the enterprise, upon which alone they could entitle themselves to salvage, were proportionably more unfavorable. It has been suggested, that a different course of operations might have been better, and less hazardous. The attempt should have been made, (it is said,) to right the vessel, where she lay; and it is hinted, that perhaps a nearer port might have been reached. But it appears to me that, these suggestions ought not to have any weight in the cause. The parties appear to have acted with good faith, and reasonable skill, and sound discretion. The master himself made no complaint, and the enterprise was completely successful. Under such circumstances, it would be too much for the court to act upon mere afterthoughts and calculations, when the events are known, and other judgments at a distance from the scene of action have intervened. It is far from being certain, that any attempts to right the Emulous would have been successful. And it is certain that they must have occasioned delays, if they had been undertaken. Now, at such a season of the year, on such a coast,

delay itself is often equivalent to loss. Speed and activity in reaching a port are the means, and the only means, of safety. In this very case, if the vessel had remained out another day, there is much reason to believe, that, from the succeeding storm, she would either have been totally lost, or have suffered far more damage. It might, therefore, be truly said, that, here, prompt action was the price of safety. But I put the case upon the common ground of a fair exercise of reasonable skill and discretion; and if another course would have been (as I am not satisfied it would have been) better, I do not think, under such circumstances, it could be permitted to vary the rights of the salvors. I think, then, the salvors are entitled to a liberal salvage, not upon the narrow ground of a mere compensation for labor and services, but upon the larger policy of the maritime law, looking to merit, and effort, and peril, and the duty of encouraging assistance in cases of distress. See The Sarah, 1 C. Rob. Adm. 313, note; The William Beckford, 3 C. Rob. Adm. 355; Rowe v. The Brig [Case No. 12,093].

The question is, what would be a proper salvage under all the circumstances of the case? And here, again, the court is asked to lay down some rules, by which to guide the parties in interest, underwriters as well as owners, in the ascertainment of the proper rate of salvage. That is asking the court to do, what it is utterly impracticable to do, to lay down rules, in cases admitting of an indefinite diversity of circumstances, and endless considerations of value, of perils, of services, and of merit. The subject is necessarily one, in which the reward must depend upon a just estimate of all the circumstances of each particular case. The court may, indeed, assign some general limits to its discretion in certain classes of cases approaching nearly to the same general average merit. For instance, it may say, and indeed it has said, that generally, in cases of derelict, it will not allow more than one half of the value as salvage. But extraordinary cases of great danger and gallantry may occur, in which the court would even desert this rule. On the other hand, it may say, that it will not generally award less than one eighth, (a sum fixed by statute, as a minimum in certain cases of recapture, —salvage act of 1800 [2 Stat. 17],) unless under very peculiar circumstances. Indeed, looking to the general current of decisions, it will be found, that the courts have not commonly allowed less than one third, unless where the services have been quite inconsiderable, or the amount of the property has been very great.[1] Still, this must be subject to many qualifications; and it will be found very difficult in practice to lay down any rules which, would furnish a just guide to limit the discretion of the court. The court must endeavor to work its own way through every case, upon a comprehensive survey of all the circumstances.

The circumstances entitled to most consideration in all cases of salvage are, the value of the property saved; the extent of the labor and services; and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to by the court with uncommon favor. Lord Stowell has spoken on this subject with his accustomed force and elegance. "The principles," says he, "on which the court of admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look, not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature. The fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill and dexterity, which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most, is the actual danger which they have incurred. The value of human life is that which is, and ought to be, principally considered in the preservation of other men's property; and, if this is shown to have been hazarded, it is most highly estimated." The William Beckford, 3 C. Rob. Adm. 355. On the other hand, the value of the property saved must always form a very important ingredient, since that proportion would be a very inadequate compensation in cases of small value, which would be truly liberal in others of great value.

As the allowance of salvage necessarily rests very much in the discretion of the court, it is hardly possible, in many cases, that different courts, exercising independent judgment, should arrive at precisely the same conclusion. Each may exercise the most enlightened discretion; and yet, from the necessary differences of the human mind, they may differently adjust the salvage to the circumstances. On this account it has always been the disposition of the appellate courts of the United States, in all salvage cases, to discourage appeals, as mischievous and expensive to all parties. And, therefore, they generally adhere to the rate of salvage allowed in the court, from which the appeal is taken, unless the evidence clearly calls for a different proportion. The Sibyl, 4 Wheat. [17 U. S.] 98; Tyson v. Prior [Case No. 14,319]; The Dos Hermanos, 10 Wheat. [23 U. S.] 306. No judge has been more inclined to adhere to this doctrine than myself. Still, when the question is made, it becomes my duty to examine the case with all the just deference belonging to the judgment of others; but at the same time with some regard to the rights of the

[1] See the cases referred to in Abb. Shipp. (4th Am. Ed. 1829, by Story) p. 3, c. 10, pp. 397, 398, note 1; Id. p. 400, note 1; Rowe v. The Brig [supra].

parties in respect to my own. The allowance of the district judge in this the present case, exceeded, in a small degree, one fifth of the whole property saved. It cannot certainly be pronounced an extravagant proportion; at the same time, with reference to the value of the property, and the duration and peril of the service, it must be admitted to be large. The time employed was less than two days; the weather was not boisterous; the peril to life, if it existed in any considerable degree, was not long, nor exceedingly critical; the season of the year was unfavorable, but the voyage was in a Sound full of ports or anchorages, where assistance might, in case of necessity, be procured, or a harbour made; the vessel was upset, but the principal cargo (logwood and mahogany) was buoyant; so that there was little danger of the wreck and loss of both, unless by some severe storm. And it may be added, that numerous vessels are perpetually passing through the same Sound; so that extraordinary hazards would have been, under common circumstances, accompanied by extraordinary means of assistance. A suggestion has been made, that the storm of the succeeding day, after the arrival at Edgartown, would have very probably occasioned a total loss of the vessel and cargo, if they had not then been in port. Admitting that to be true, still it cannot constitute a material ground, in a case like the present, for enhancing the salvage. Salvage is a compensation for the rescue of the property from present, pressing, impending perils; and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry actually exerted, and not for the possible exercise of them, which under other circumstances might have been requisite. It is allowed, because the property is saved; not, because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter, as an ingredient, into the case, when they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted; but they can scarcely avail for any other purpose. Ought the salvage to be diminished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the estimate of salvage, which were neither foreseen, nor acted upon, would compel the court to deliver itself over to conjectures, resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off of soundings; to desert the facts; and to be guided by speculations, always questionable, and sometimes deceptive.

After weighing all the circumstances, I have with great reluctance come to the conclusion, that the decree assigns too high a rate of salvage. No person can entertain a higher respect for the sound judgment and ability of my learned brother, the district judge, than myself. Nor should I incline upon slight differences of opinion to vary his decree. But a full review of all the facts has not enabled me to arrive at the conclusion, that, consistently with my duty, I ought to affirm the decree. In the case of The William Beckford, 3 C. Rob. Adm. 355, where the property was in great distress, and the circumstances more perilous than those of the present case, though somewhat resembling them, Lord Stowell deemed a salvage of £1,000, out of a property worth more than £17,000, to be an ample remuneration. I am not sure, that I should have arrived at a result so moderated and measured. But the decree of the district court, in the present case, has more than trebled the proportion, under circumstances, however, of greatly diminished value.

My opinion is, that eight hundred and fifty dollars, which is a little more than one seventh of the property saved, will be a liberal compensation, looking to the value of the property at hazard, and the nature of the services performed. Of this sum, I shall decree one hundred dollars to be paid to Bartemus Luce and the thirteen other persons, whose claims were brought forward by the supplemental libel, instead of the sum allowed them by the decree of the district court. The remaining sum is to be paid to the original libellants, belonging to the pilot boat Superior, and the sloop Hero; and these sums are to be apportioned and distributed among the salvors respectively, according to the distribution made by the decree of the district court. The costs of the district court are to be paid by the claimants; and the costs of this court are to be borne by the respective parties, who have incurred them. Decree altered accordingly.

Case No. 4,481.

The ENDEAVOR.

[See Case No. 12,297a.]

Case No. 4,482.

ENDICOTT et al. v. RENAULD et al.

[10 Ben. 582.][1]

District Court, S. D. New York. Oct., 1879.

BILL OF LADING—DAMAGE TO CARGO—DUNNAGING THE CENTRE-BOARD WELL—TENDER.

1. The owners of a vessel filed a libel to recover freight on a quantity of sugar brought by her from Havana to New York. The consignees set up as a defence damage to the sugar on the voyage, and that there was only the sum of $286.32 due for freight, which they

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

had tendered to the libellants. It appeared that they had offered to pay that sum in full discharge of the claim for freight. The sugar was partly in bags and boxes and partly in hogsheads. The damage to the sugar was caused by sea water, and it was in the sugar that was stowed near the centre-board-well. There was a contest on the evidence whether there was any dunnage by the well. The master of the vessel thought the damage was caused by sweat and had refused to make a declaration for the consignees that it was caused by sea water: *Held*, that there was dunnage by the centre-board-well, but that it was not sufficient to protect the cargo near it from damage by the ordinary and usual leakage in that part of the vessel; that there was no proof of such weather as to constitute peril of the sea, and that however difficult it might be to protect cargo near the centre-board-well from damage by such ordinary and usual leakage in the well, that was a duty which devolved on the ship.

2. The damages sustained by the sugar must therefore be deducted from the amount of freight.

3. The tender was insufficient.

In admiralty.

R. D. Benedict, for libellants.

H. E. Davies and I. Phillips, for respondents.

CHOATE, District Judge. This is a libel in personam by [Charles G. Endicott and others] the owners of the schooner Susan B. Ray against [Peter A. G. Renauld and others] the consignees of the cargo to recover a balance of freight moneys alleged to be due upon the delivery of the cargo in New York. The cargo consisted of 236 hogsheads, 488 boxes and 2,510 bags of sugar. It was shipped in Havana under bills of lading by which it was to be delivered "in the like good order and condition" as when shipped, "the dangers and accidents of the seas and navigation of whatever nature or kind excepted." The libel alleges that the sugars were "duly delivered in like order in which they were received, the dangers and accidents of the seas only excepted." The answer avers "that the sugars were delivered reduced in quantity and in a damaged condition; that the loss and damage were not caused by perils of the sea" but by the "carelessness, unskillfulness and wrongful acts of the master, officers and seamen of the vessel" and "by defective dunnage, stowage and improper handling and want of care of the sugars" on the voyage. The loss thus attributed to the fault of the vessel is stated in the answer to be $640.68. The whole amount of the freight is admitted to be $1827, and the amount already paid to be $900. The answer further avers that defendants are "willing to pay in discharge of their liability for the freight, the further sum of $286.32," which sum they "have hitherto tendered" to the libellants. On the trial it was admitted that the respondents offered to the libellants this sum of $286.32, if accepted in full discharge of libellants' claim, and that libellants refused to accept it on that condition. There was no other proof of a tender.

It appeared by the proofs, that when the cargo was discharged, there were found to be one hundred and ninety-three bags damaged; of these twelve were empty, or nearly so, and the rest more or less reduced in quantity or wet with salt water. There were also twelve boxes damaged, one being empty and others partly empty. There was really no doubt upon the evidence, that the injury was caused by sea water. The vessel had two decks and the sugar that was damaged was stowed in the lower hold. The hogsheads were stowed at the bottom. On top of the hogsheads were the bags and boxes. The hogsheads were not damaged.

The vessel had a centre-board, and the damaged bags and boxes were found adjoining to or near the trunk of this centre-board, which rose about nine feet high in the hold.

The question to be determined is whether the damage was caused by a peril of the sea or by insufficient dunnage.

The vessel arrived in July, 1877. The master and the second mate and one of the seamen of the vessel were examined before the trial in April, 1878. The testimony of the master was to the effect that there were eleven inches of dunnage at the bottom by the keelson, and that it extended up to the bilges, but not so deep; that the dunnage consisted of pine wood and boards; that there was dunnage along each side of the centre-board trunk, pine wood standing up and down and boards against the wood running fore and aft; that this dunnage was kept in place by the pressure of the cargo against it. The master also testifies that a part of the passage was very rough and the rest good weather; that the vessel did not leak more than usual; that the pumps were tried every two hours; that during the rough weather there was a great deal of steam from the sugar, making it very hot in the cabin; that he saw no signs of water in the vessel from leak; that he and the second mate superintended the discharge of the cargo; that he thought then, and still thought, at the time of the discharge, that the damage was caused by sweat. The second mate testified to the same effect as to the dunnage; also that they had "a middling rough passage home sometimes, and sometimes pleasant weather;" that she leaked no more than usual; that the pumps were attended to every two hours; that the hatches were well secured, caulked tight, soaked and tarred; that they showed no appearances of a leak in or around them; that the deck was tight and showed no indication of leak; that she hardly ever leaked enough for the pumps to catch it. One of the crew also testified that he helped stow the cargo; that there were some boards used as dunnage; that the boards were placed on the wood along the well of

the vessel; that they had a rough passage occasionally; that the vessel did not leak any to speak of; that she leaked some; that the pumps were tried every hour; that they did not show that she leaked much; that she leaked "no more than common;" that there was dunnage between the centre-board trunk and the cargo, consisting of pine wood and boards; that the wood was Virginia pine wood about four feet long.

Upon the trial the stevedore who discharged the cargo testified that there was dunnage along the sides of the centre-board trunk and in front of it from the bottom to the top, consisting of wood up and down and boards across the wood; that this dunnage was from eight to ten inches thick. He also testified that he found, when they came to break down the cargo by the forward part of the centre-board trunk, that the oakum had started and that there were indications of a leak. The cooper employed by the vessel in New York also testified that there was dunnage against the centre-board trunk, consisting of wood and boards. He could give no positive testimony as to its thickness.

The claimants called two witnesses, the cooper employed by the consignees of the cargo and his journeyman, who testified, positively, that there was no dunnage against the centre-board trunk; that there was nothing between this trunk and the cargo. I think, however, that the weight of evidence is decidedly with the libellants on this point, and that these two witnesses are mistaken. But the question still remains whether that dunnage was sufficient. That there was dunnage there, consisting of wood up and down, with boards across the wood, may be assumed as a fact proved. Its thickness is not proved. In judging of its sufficiency, it is necessary to consider, not only what is the proof as to the dunnage being there, but, also, how far it protected the cargo, and whether the cargo was in fact exposed to any peril of the sea which will account for the injury to the cargo. For, if it was exposed to no such peril, then, from the fact that the cargo was wet, it might be inferred that the dunnage was insufficient.

In the present case there is not sufficient evidence that there was any peril of the sea. It is true there was some leakage around this centre-board trunk, but it is obvious that it was very trifling. The very fact that it was thought necessary to have dunnage there at all, shows that it is regarded as possible that some water may get in to the vessel at this place. But the evidence of the master, second mate and seaman, is explicit that there was no more leak than usual upon this voyage; that in fact the vessel was remarkably tight and free from leak. There was no leak of any account, as shown by the pumps. A ship must be dunnaged so as to protect the cargo even in rough weather, if the vessel springs no serious leak. And if the construction of a vessel with a centre-board is such that the cargo lying next to it is liable to be damaged in rough weather by water oozing in through the seams of the centre-board, but without springing any serious leak, the dunnage against and around the centre-board trunk must be sufficient to protect it, if it has to be dunnaged two feet deep. As the ship rolls, undoubtedly the water so oozing in is liable to be thrown off from the trunk one way and the other. But the vessel must be prepared for rolling in rough weather, and in this case the weather was not exceptionally bad. I think it clear that the dunnage was insufficient to protect the cargo against ordinary leakage at this point and such as should be expected in almost any ocean voyage, and that there was no other leakage. This part of the cargo may be very difficult to protect against even a slight leak, but this is not the fault of the shipper. It may be the misfortune of the ship in having this peculiar construction, and this is a danger against which the ship has undertaken to guard the cargo.

That there was no serious or unusual leak is, I think, shown, not only by its description so far as testified to by the witnesses, but also by the conduct of the master, who, when he claimed the balance of his freight, declined to make a declaration that the damage was caused by sea water. He thought then that the damage was caused by sweat, a theory which has been entirely disproved. The sugar was shown to be dry centrifugal sugar. The libel sworn to by the master merely states that the sugars "were delivered in like good order, the dangers and accidents of the seas only excepted." Whether they were delivered without damage, or being damaged, that damage was caused by sea peril, was left wholly uncertain on the libel; it left the libellants at liberty to prove either of these two states of the case. The transaction between the master and the agent of the consignees, as testified to by the master himself, shows that he was unwilling to take the ground that they were injured by sea peril. And in his testimony he did not take this ground. Springing a leak in rough weather may be a peril of the sea which will exonerate the ship, but it must be a leak more serious than what is here described as the usual or common leak and as one which the pumps would hardly reach.

Therefore there must be a decree giving the respondents their damages, to be deducted from the balance of freight due.

The tender made is insufficient under rule 72 of this court, because not made good by depositing the amount in court, if it was any tender at all. The question of costs, however, is reserved till the respondents' damages have been assessed. Decree accordingly.

Case No. 4,483.

ENEAS v. The CHARLOTTE MINERVA.

[39 Hunt, Mer. Mag. 73.]

District Court, S. D. New York. April, 1858.

BOTTOMRY BOND—VALIDITY—LACHES—INTERVENTION BY SHERIFF.

[1. A sheriff who, after attaching a vessel in a suit by a creditor against her owner, permits, without opposition, her seizure by the marshal under admiralty process, is a competent party to intervene in the admiralty suit, and claim the proceeds in the registry.]

[2. A bond which hypothecates the vessel for a particular voyage, and a specific period beyond its termination, is good as a bottomry bond, the money loaned having been put at risk under the contract.]

[3. A bottomry loan need not be for the necessities of the vessel, or cargo, or voyage. When the bond is made by the owner, he may employ the money at his discretion, the lender retaining his lien so long as the ship bears the risk.]

[4. A delay of a few weeks after the right to enforce a bottomry bond has accrued does not impair the remedy, or enable a junior creditor to take precedence by reason of a prior attachment.]

This was a libel filed to recover the amount of a bottomry bond, executed on June 27, 1856, by the master and owner of the British schooner Charlotte Minerva, to secure a loan of $4,000 made to him by the libelant [Joseph Eneas], by which that sum was to remain as a lien and bottomry upon the vessel, at the premium of five per cent., and lawful interest for the voyage. The condition of the bond was, that the loan and the premium should be paid at or before the expiration of 350 days after the arrival of the vessel at Harbor Island, Bahamas. She arrived there on July 12, 1856, after which she made two other voyages to New York, and one to Philadelphia. The last one to New York was about the middle of August, 1857. On the 8th of September she was seized by the sheriff of New York, under an attachment against her owner. On September 16th the libel in this case was filed, and the marshal seized the vessel under the process, without opposition on the part of the sheriff, and the vessel was sold by order of this court, its proceeds being less than the amount of the bottomry debt. Judgment was obtained in the action in the state court, and execution issued. The sheriff intervened in this action, claiming that the proceeds of the vessel are bound by the judgment and execution of the state court, and should be applied first to satisfy it.

Benedict, Burr & Benedict, for libelant.
Larocque & Barlow, for sheriff.

HELD BY THE COURT: That the sheriff is a competent party to intervene in this action, upon his official interest and possession in respect to the vessel, and claim the proceeds in the registry of the court. The Panama [Case No. 10,703]. That the bond, though anomalous and singular in its provisions, yet in substance constitutes a maritime hypothecation of the vessel for a particular voyage and a specific period beyond its termination, and the money so loaned has been put in risk under the contract. That this lien is paramount to and supersedes the attachment of the sheriff. That the remedy in this court might be lost for want of definiteness and certainty in the bond, or by laches of the bottomry creditor. That a bottomry loan is equally valid when made on the lapse of a definite period of time, as if on the expiration of a specific voyage. That the loan need not be for the necessities of the vessel, or cargo, or voyage. When the bond is made by the owner, he may employ the money at his discretion, and pledge the ship for its security, the lender retaining his lien so long as the ship bears the risk. That there was no laches in the delay of a few weeks after the libelant's right of action was matured, which can impair his remedy. Nor does the prior attachment of a junior lien creditor supersede his right. Decree for libelant for $4,000, with the marine interest thereon to August 15th, and interest at 7 per cent. from that date, and costs.

Case No. 4,484.

ENEAS v. SCHIFFER et al.

[N. Y. Times, April 19, 1865.]

District Court, S. D. New York. April 19, 1865.

SHIPPING—CHARTER-PARTY—CHANGE OF DESTINATION WITHOUT CONSENT OF SHIPPER—EFFECT OF ACQUIESCENCE.

[1. In a contract of affreightment, a stipulation giving a shipper the privilege of a change of destination because of blockade does not authorize the carrier to make such change on the advice of the consignee, because of a poor market.]

[2. Acquiescence by a shipper in an unauthorized change of destination renders him liable for the price agreed upon for the voyage, but not for the especial premium agreed to be paid upon delivery of cargo at the port designated in the contract.]

[In admiralty. Libel by Joseph Eneas against Samuel Schiffer and others to recover upon a contract of affreightment. Decree for libelant.]

Before BETTS, District Judge.

The libel in this case was filed to recover the amount due on a charter of the schooner Wm. Smith. The vessel was chartered to the respondents on March 12, 1863, for a voyage from New York to Matamoras and back, for which they agreed to pay $3,000 in specie on discharge of the outward cargo in Matamoras, and $3,000 in current funds on discharge of the homeward cargo in New York. And the libelant alleged that the vessel had performed the voyage under the charter, and claimed to recover the value of the specie payment at Matamoras and the amount due in New York, making $9,000 in

all. The answer denied the performance of the voyage by the vessel, and alleged that nothing was therefore due on the charter.

The evidence showed that there was indorsed on the charter an agreement, signed by the libelant, that if Matamoras should be blockaded, the respondents might "have the privilege of a second safe Mexican port on the Gulf of Mexico or the West India Islands," they paying all additional port charges, and the time used in making the change of port to be counted as lay days. The respondents sent out on board the vessel a supercargo to act in case Matamoras was blockaded. The vessel went out and found the port not blockaded, and G. W. Schiffer, the respondents' agent at Matamoras, certified that the vessel arrived at Matamoras April 28, 1863. But on her arrival there, the market being very unfavorable, the consignee of the cargo, with the supercargo, deemed it advisable not to have the cargo landed at Matamoras, and on their request the master agreed to carry it to New Orleans. This was done, and the cargo was there landed and sold, and the proceeds transmitted to the respondents. This proceeding was claimed by the respondents to be unauthorized by them, but they gave no proof of any dissent or repudiation of it on their part.

HELD BY THE COURT: That as there was no blockade of Matamoras, the agreement indorsed on the charter gave no authority to go to another port. That no other change of voyage could be enforced without full assent of both parties thereto, as it would be to place the cargo and adventure of the freighter subject to hazards outside of those expressly specified in the contract of affreightment. That the libelant is not entitled to recover the charter money, because he did not complete the voyage according to the terms of the articles of shipment.

But it appears that the respondents, after they had notice of the alteration of the voyage at Matamoras, and the destination of the vessel to New York, by way of New Orleans, and her reception and entry at New Orleans, through the assent and intermission of persons assuming to act in behalf of the respondents without any disavowal by the respondents of their acts or authority in countenancing the change of the voyage of the vessel, they must be held in equity to have acquiesced in that change.

It is tantamount to a consent by the shippers that, because of the unfavorable state of the market, the ship may be excused from unlading the outward cargo, and may be permitted to retransport it to its home port of New Orleans, receiving the stipulated compensation of $6,000 for the round voyage, but losing the premium on the $3,000 specie payable on delivery of the outward cargo, because he failed to discharge it as provided in the charter. Decree for the libelant for $6,260.15, with costs.

Case No. 4,485.

The ENERGY.

[10 Ben. 158.][1]

District Court, S. D. New York. Nov., 1878.

IMPROPER MOORING—VESSELS AT PIER—ICE.

The steamboat W. was moored outside of another steamboat, the O., alongside of a pier at Hoboken, other steamboats lying astern of them. All the steamboats were laid up for the winter, the W. being securely fastened to the O. and the pier. The owner of two barges, desiring to take them up into the slip to lie up, and not being able to do so on account of ice, made them fast for the night alongside of the W., being told to moor them there by a harbormaster who was not shown to have any official authority as to the mooring of vessels. At that time it was known that, with a flood tide and an easterly wind, ice was liable to come into the slip with great force. During the night, the tide being flood, and the wind easterly, the ice did come in, and carried the barges, and the two steamboats alongside of which they lay, away from the pier and against the steamboats lying astern, and the W. was injured by such collision: *Held*, that the injury did not arise from inevitable accident; that the barges were not properly moored to guard against a danger which was then to be apprehended; that the injury to the W. resulted from the mooring of the barges alongside of her and that they were liable for the damages.

[Distinguished in The Transfer No. 2, 56 Fed. 314. Cited in The Anerly, 58 Fed. 795.]

In admiralty.

D. & T. McMahon, for libellant.

W. W. Goodrich, for claimants.

CHOATE, District Judge. This is a libel brought by Henry B. Crossett, the owner of the steamboat Wyoming, against two ice barges, the Energy and the M. F. Winch, for damages alleged to be caused by the improper and insecure mooring of the barges by the side of the Wyoming. It appears by the evidence that on the 18th day of January, 1876, the steamboat Olyphant was moored on the south side of South Fifth street pier, Hoboken, lying with her bow towards the North river, and some distance inside the head of the pier. The Wyoming was moored outside of the Olyphant, and astern of the two steamboats were two other steamboats, the Syracuse and the Austin, with a space between the sterns of the forward boats and the bows of the others of eight or ten feet. These steamboats were laid up for the winter and were properly and securely fastened to the pier, the Wyoming being fastened to the Olyphant and to the pier. The weather had been severe, and ice had been running in the North river and crowding into the slip the night before. On the afternoon of the 18th of January, the ice barges Energy and Winch were brought to the pier and moored alongside of the Wyoming. They were not quite as long as the Wyoming, but stood much higher out of the water, presenting to the wind a much

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

larger surface. The Energy was laid alongside of the Wyoming with her bow towards the river and her stem about on a line with the stem of the Wyoming. The Winch was laid alongside of the Energy, her stern being out and about on a line with the stem of the Energy. The Energy was securely fastened to the Wyoming, and the Winch to the Energy, by breast lines and spring lines, and there were lines from the Energy to the Austin and Syracuse, but there was at first no line from either of the barges forward to the pier. In the evening and after the man who superintended the mooring of the barges had left, at the suggestion of the shipkeeper on the Austin, a line was run from the bow of the Energy across the bows of the Wyoming and the Olyphant to the pier and there fastened to a spile. About two o'clock in the mornng, the wind being about south-east and blowing a fresh breeze, and the tide flood, the ice which filled the river half across to the New York shore was driven into the slip, against the port quarter and stern of the Winch, and the bows of the Energy, Wyoming and Olyphant with great force, and the lines between the Wyoming and Olyphant and between them and the pier gave way, and all four vessels were driven back into the slip with such force that the sterns of the Wyoming and Olyphant coming in contact with the bows of the Austin and Syracuse, tore them from their moorings and crowded them back and threw their bows out from the pier and separated them from each other, and about 30 or 40 feet of the joiner work aft on the port side of the Wyoming and the rail and joiner work on the starboard side of the Wyoming were crushed in and broken. The bows of the four vessels were driven in together towards the pier, and the upper works of the Wyoming on the port side were thus injured by grinding and crowding against the Olyphant, and the rail and joiner work aft by being driven against the other steamboats. The fastenings between the barges and those between the Energy and the Wyoming did not give way, and the line between the bow of the Energy and the pier either slipped, or was slackened up by the crowding of the bow of the Energy towards the pier.

The situation at the time these barges were moored required the greatest caution in securing them. The danger from the ice was imminent and well known to the parties who brought these barges to this place. It was well known that upon the flood tide, and especially with an easterly wind, the ice was liable to come in to this slip with great force. It hardly needs any evidence to show that the risk of damage from the ice to the steamboats moored at the pier would be greatly increased by having the two barges moored alongside of them, especially if they presented, as they did, a much larger surface to the wind than the steamboats; and the evidence is conclusive not only that the risk was increased, but that the barges were not properly nor securely moored as against this danger. There should have been lines leading from the barges to the pier both forward and aft, or forward to the pier and aft to the steamboats astern, so as to hold the barges without trusting to the fastenings between the barges and the steamboats, and to relieve the fastenings, by which the steamboats were held, from the increased strain caused by the barges being there. The line that was put out to the pier was of little or no use. It did not lead forward. It was no protection against a force applied in front and tending to crowd the barges further back into the slip. What happened was the natural consequence of the way in which the vessels were moored. It is obvious that with the two barges firmly secured to the Wyoming, the force of the ice and wind to cause the Wyoming and the Olyphant to work upon each other and to strain the fastenings between them and the pier, and between themselves, was greatly increased. That force was applied upon a different part of the Wyoming, at a higher level than it would have been if the barges had not been there. It was also applied with an increased weight and greater leverage.

It is claimed by the owners of the barges that there was no mooring spile on the pier to which they could have carried a line further forward than they did. This is clearly no excuse. The Wyoming was under no obligation to furnish them a mooring place, and if they could not safely moor there they should not have gone there at all. It is also no excuse that a person called a harbor master told them to moor alongside of the Wyoming. He is not shown to have had any official authority to direct the laying of these barges by the steamboats, so as to excuse those in charge of the barges from securing them properly and with safety to the Wyoming.

It is not made out by the evidence that the injury done was inevitable or would have been sustained if the barges had not been there.

It appears that the purpose of those having the barges in charge was to lay them up for the winter, further inside the slip, but they were prevented from getting them further in that day by the ice in the slip. Accordingly they tied up by the Wyoming as they did, thinking that that would do for the night, intending the next day, or as soon as the ice inside broke up, to take them further in. They are clearly responsible for the damage done. The claim of the libellant is sustained by the cases of Van Tine v. The Lake [Case No. 16,878]; The Johannes [Id. 7,332]; The Louisiana, 3 Wall. [70 U. S.] 164.

Decree for libellant with costs, with reference to compute damages, etc.

Case No. 4,486.

In re ENGEL et al.

[Cited in Flower v. Greenebaum, 50 Fed. 192. Nowhere reported; opinion not now accessible.]

ENGEL (STORRS v.). See Cases Nos. 13,492–13,494.

Case No. 4,487.

ENGLAND v. THOMPSON et al.

[3 Cliff. 271.][1]

Circuit Court, D. Massachusetts. May Term, 1869.

PATENTS—LICENSEES—LIMITATIONS AS TO TIME AND PLACE OF USE.

1. The provision in a license to use a patented invention on machinery used in tanning was, that the defendants might enlarge their vats, or increase the number by paying an additional patent-fee in the same proportion as that stipulated in the license for the vats constructed at the date thereof. The defendants enlarged their tannery after license, and in the new part made new vats, in twelve of which they used the patented improvements. By the terms of the license the defendants acquired the right to make and use the improvement to the capacity of their tannery, embracing one hundred and sixty-nine bark vats, and containing sixteen thousand seven hundred cubic feet. They did not put the improvement into a third of the vats in their tannery at the date of the license, or use it in vats containing in the aggregate one half the cubic feet authorized. *Held* that the plaintiff could not recover damages for the use of the improvement in the new part, as the defendants had not used the improvement to an extent greater than provided for in the license at the date thereof or greater than the capacity of the tannery before it was enlarged.

2. The defendants were empowered by the license to use the patened improvements up to the date of the expiration of the patent of earlier date. They continued, however, the use of the patented improvements after that time against the protest of the plaintiff. The defendants insisted that they had a right so to continue the use of the improvements covered by the first patent under the provision of the license to the effect that if they wished to continue to use such improvement during what remained of the term of the second letters-patent, after the first had expired, they might do so by paying an additional patent-fee equal to one half the amount agreed to be paid for the term which expired with the older patent, and that the only remedy for the plaintiff was assumpsit to recover the additional patent-fee; but the court *held* otherwise, because (1) the license expired with the term of the first patent; (2) the stipulation in question was only an agreement to grant an extension of the license which the defendants might accept or not; (3) if they elected to refuse the license and did not use the improvement, the plaintiff would have no cause of action. Therefore, if defendants elected to take the license, they must pay the required additional patent-fee before they could acquire the right to use the improvement beyond the term of the first patent.

At law. Trespass on the case for infringement of letters-patent. Certain improvements in machinery used in tanning, and also in the construction of vats used for the same purpose, were invented by the plaintiff prior to May 17, 1851, for which he held letters-patent, issued in due form of law, securing to him the exclusive right and liberty, for the respective terms therein mentioned, to make and use those improvements and vend the same to others to be used; and the evidence, as reported, showed that the plaintiff on that day, by an instrument in writing of that date, authorized and licensed the defendants to make, construct, and use in the tannery then occupied by them, situated at Woburn, in this district, his said "improvements in tanning to the extent and capacity of the present size of their tannery," which then had one hundred and sixty-nine bark vats, the whole containing sixteen thousand seven hundred cubic feet. Letters-patent for the first-named improvement were granted to the plaintiff on June 19, 1847, and for the other improvement on December 24, 1850 [No. 7,854], as recited in the instrument of license. Provision was made in the license that if the defendants should thereafter extend the size of their tannery "by enlarging or increasing the number of vats," the plaintiff should have the right to demand an additional patent-fee in the same proportion as that charged for the then existing number of vats and their contents. By the terms of the license the plaintiff granted, sold, assigned, and transferred to the defendants the exclusive right and liberty to make, construct, and use his improvement in their tannery for the period of fourteen years from the date of the first patent; but the stipulation in the same instrument was that if the defendants wished to continue the use of the improvements in their tannery for the additional time of three years and six months to the end of the term of the second letters-patent, they should have a right to do so by paying an aditional patent-fee equal to one half the amount agreed to be paid for the license granted as stipulated in the instrument. They did continue to use the improvement described in the second letters-patent for the additional period of three years and six months, but they neglected and refused to pay any additional patent-fee for such use, although the same was duly demanded of them by the plaintiff, who seasonably requested them to take a license for that period, insisting at the same time that they had no right to use the improvement under the license to which reference has been made. He also claimed that they had built a new tannery, and that they were infringing his letters-patent by using the patented improvements in such new tannery. Unable to find redress by other means, the plaintiff brought the present action for damages for the alleged infringement of his patent. The writ was dated April 29, 1867, and the declaration was founded on the patent of December 24, 1850, and the reissued patent December 17, 1864, as extended from the date of the original patent. Infringement

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

was alleged on January 2, 1865, with the usual allegation claiming damages, both before and after that day, so that damages were claimed as well upon the original as the extended term of the patent. Before the hearing the parties filed a stipulation in writing with the clerk, waiving a jury, and submitting the cause to the court to be heard, as provided in the act of congress upon that subject. 13 Stat. 5. Subsequent to the submission of the cause, the evidence was taken in open court, and was fully reported to the acceptance of both parties.

T. L. Wakefield, for plaintiff.
Converse and Kelly, for defendants.

Before CLIFFORD, Circuit Justice, and LOWELL, District Judge.

CLIFFORD, Circuit Justice. The theory of the plaintiff is that the defendants constructed another tannery, in addition to the one occupied by them at the time the license was executed, and he alleges that they have wrongfully constructed and used his patented improvements in their new tannery, and claims damages on that account. He also claims damages for the use of the same, from the expiration of the first letters-patent to the end of the original term of the second letters-patent, embracing a period of three years and six months, and also from the date of the renewal of the second letters-patent to the date of the writ. Denied as the several claims are by the defendants, they will be separately considered, and also because they are based upon entirely different facts and circumstances.

No question is made as to the validity of the patent, and the defendants virtually admit that they have used the improvements of the plaintiff during the whole period, as alleged in the declaration. Considered in the order adopted at the argument, the first question presented for decision is, whether the defendants have used the patented improvement in any tannery other than the one they occupied at the date of the license. They never had but one license, and they deny that they ever used the patented improvement in any tannery other than the one therein described, and the plaintiff, in the view of the case taken by the court, fails to sustain any such claim. Undoubtedly the defendants enlarged their tannery subsequently to the date of the license, and the evidence shows that they constructed in the new part of the same some twenty-eight or thirty new vats, in twelve of which they used the patented improvements belonging to the plaintiff. Indefinite as the evidence is, it is not possible to give any precise description of the location of the old part of the tannery, except that it bordered upon a brook, which flowed past it, on one side, and that the new part or enlargement was constructed on the opposite side of the stream, some fifty or a hundred feet distant, but it appeared that when the enlargement was made, the engine and beam-house in the old part were moved to a new locality, for the use of both, showing to the satisfaction of the court that what was done by the defendants was properly to be regarded as an enlargement of the old tannery and not as the construction of a new one, as supposed by the plaintiff. When the license was granted, the defendants had in their tannery one hundred and sixty-nine bark vats, and by the terms of the license they acquired the right to make, construct, and use the patented improvement to the extent and capacity of their tannery, embracing one hundred and sixty-nine bark vats, containing sixteen thousand seven hundred cubic feet, and the provision was, that they might enlarge the vats, or increase the number, by paying an additional patent-fee, in the same proportion as that stipulated in the license for the vats previously constructed, but they never put the improvement into one third part of the vats which were in the tannery at the date of the license, nor did they ever use the improvement in vats containing in the aggregate one half the number of cubic feet, as authorized by the terms of that instrument. Viewed in any light, the first ground of claim set up by the plaintiff is not supported by the evidence.

Authority to make, construct, and use both the patented improvements of the plaintiff was granted to the defendants by the license to June 19, 1861, when the term of the first letters-patent expired, but the term of the second letters-patent, as originally granted, extended for three years and six months longer, and the evidence shows to a demonstration, that the defendants continued to use that improvement throughout that entire period without consent or license of the plaintiff, and in spite of his objections and repeated remonstrance. Although informed by the plaintiff that their license had expired, and requested to take a new one, the defendants refused so to do, or in any manner to recognize the right of the plaintiff, insisting that they were still protected in using the improvement under the old license by virtue of the stipulation therein contained, that if they wished to continue to use the improvement in their tannery, for what remained of the term of the second letters-patent, when the term of the first letters-patent expired, they might do so by paying an additional patent-fee, equal to one-half the amount agreed to be paid for the term which expired with the term of the first letters-patent, and they still insist that they lawfully continued to use the improvement under that stipulation in the old license, and that the only remedy for the plaintiff is an action of assumpsit to recover the additional patent-fee; but the court is of a different opinion, for several reasons: Because the license expired with the term of the first letters-patent. Because the stipulation in question is but an agreement to grant an extension of the license which the defend-

ants might take or refuse. Because, if they elected to refuse the license, and did not use the improvement, the plaintiff would have no cause of action, and consequently if they elected to take it, they must pay the required additional patent-fee before they could acquire the right to use the improvement beyond the time of the first letters-patent. Regarded as a license, there is much force in the suggestions of the defendants that the payment of the patent-fee is not a condition precedent to the right to use the improvement, but the stipulation is nothing more than an agreement to grant a license, should the defendants elect to take one, on the conditions therein specified, and when viewed in that light it is clear that the plaintiff is right, and the defendants liable as infringers, as they refused to take the license or to pay the additional patent-fee as stipulated in the old license.

Extended remarks upon the third ground of claim set up by the plaintiff is unnecessary, as the use of the improvement under the extended term of the letters-patent to the date of the bill of complaint is admitted, and as it appears that all right of the defendant to use the improvement under the license had ceased three years and six months before the certificate of renewal took effect. Suggestion was made at the argument that the case is controlled by the rule laid down in the case of Chaffee v. Boston Belting Co., 22 How. [63 U. S.] 222, but it is obvious that the two cases are wholly unlike, as the instrument in this case is a license, and not an assignment, and also because the right of the defendant to use the improvement in question had terminated three years and six months before the certificate of renewal was granted.

Referred to a commissioner to report the actual damages sustained by the plaintiff, subject to the revision of the court, and when the amount of the damages is ascertained the plaintiff to be entitled to judgment

Case No. 4,488.

In re ENGLE et al.

[1 Hughes, 592.] [1]

Circuit Court, D. Maryland. Feb. 1877.

FEDERAL ELECTION LAW — CONSTITUTIONALITY—DUTY OF DEPUTY MARSHALS TO PRESERVE PEACE AT THE POLLS—ACT OF FEBRUARY 28, 1871.

1. The act of congress of the 28th of February, 1871 [16 Stat. 433], as amended and embodied in title 26 of the Revised Statutes of the United States, more particularly sections 2021 and 2022, is constitutional, being authorized by section 4 of article 1 of the national constitution; and special deputy marshals of the United States will be protected by the federal courts in discharging their duty under those sections of the Revised Statutes.

2. Such deputy marshals are clothed with discretion in the exercise of their duties under those sections.

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

[In the matter of John Engle, Alexander S. Ross, John G. Stitcher, George Hobbs and Henry Hampe. On petitions for writs of habeas corpus.]

BOND, Circuit Judge. The facts in these cases important to their decision are within a very narrow compass. The statements made by the petitioners differ little from the statements made by the respondents respecting them. The petitioners were appointed special deputy marshals at the late election for representatives in congress, under section 2021, tit. 26, Rev. St. U. S. While in the performance of their duties as such deputies at the fourth precinct of the twentieth ward, in the city of Baltimore, they arrested two persons and took one of them before a United States commissioner, where he was immediately discharged on bail and returned to the poll. The other person arrested was taken to the chief marshal of the ward, where he was by him released. There was no unnecessary violence, or, indeed, any rough usage whatever used in making these arrests. If guilty at all, the special deputy marshals are guilty of a mere technical assault and battery. The one party arrested was charged with conduct at the poll tending to a breach of the peace, being intoxicated and noisy. The other was arrested for holding tickets having the heads of President Grant or the late President Lincoln thereon, which he was offering to approaching voters—these tickets having the name of the nominee of the Democratic party for congress printed on them, while the cuts indicated that they were Republican tickets. This was conceived to be an attempt to deceive the colored men there offering to poll, of which class of voters there was a large number in that ward who could not read. The special deputy marshals were charged with assault and battery by the parties whom they had arrested, before the proper state officers. Warrants were issued for them and, having been taken into custody, they filed petitions for writs of habeas corpus. These writs were issued, and the special deputy marshals were discharged on bail by the judge of the circuit court of the United States. The grand jury of the criminal court of Baltimore city subsequently indicted them for assault and battery and for intimidating voters, and being again arrested they were again released on habeas corpus on bail. The act for which the petitioners were first arrested and subsequently indicted, it was proved at the hearing and admitted in the argument, were simply the arrests made by them at the polls of the congressional election, while acting as deputy marshals as above stated.

This is a motion to quash the writs of habeas corpus so issued. Under this state of facts two questions arise which have been elaborately and well argued by the state's attorney of Baltimore city on the part of the respondents, and by the district attorney on the part

of the petitioners. The first is, are the acts of the 28th of February, 1871, and the amendments now contained in sections embraced under title 26 of the Revised Statutes, constitutional; and, more particularly, was it within the power of congress to enact section 2021 of the Revised Statutes, which provides for the appointment of special deputy marshals, to attend the election of representatives and delegates in congress; and section 2022, which defines the duties of such deputies, requiring them, among other things, to keep the peace and preserve order at the polls? And the second question is, supposing these questions to be constitutional, were the deputy marshals justified in arresting these parties for the causes above noted? Section 4 of the first article of the constitution of the United States provides that "the time, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may, at any time by law, make or alter such regulations, except as to the places of choosing senators." Under this section of the constitution, the legislatures of the states for a long time proceeded by law to determine the time, places, and manner of choosing the representatives in congress, but by the act of the 2d of February, 1872 [17 Stat. 28], congress, in the exercise of its authority under this fourth section, provided by law the time of holding the election of representatives throughout the United States. The state legislatures had likewise provided the time and manner for the election of senators until congress, in the exercise of the same power, by the act of July 25th, 1866 [14 Stat. 243], determined by law the time and manner of the election of senators of the United States.

It will not, we suppose, be disputed that the clause of the constitution which in the same words grants power to two distinct bodies, must grant the same power to each, and that if, under section 4 of article 1 of the constitution of the United States above quoted, state legislatures have from the foundation of the government, and without objection, provided the judges and inspectors of elections for federal officers, and have determined that the vote shall be viva voce or by ballot, as they thought best, that the congress of the United States, under the same clause, may do the same thing. The constitution provides that there shall be a house of representatives, and further, that congress may regulate the manner of election of the members of it. An election, within the meaning of the constitution, is the result of the free expression of the choice of the electors at the time and place appointed by law, and the declaration of the result by those appointed for the purpose. The manner of an election is nothing more nor less than the mode of effecting this purpose. This includes the power to appoint the persons to hold it; for if the election is determined by law to be by ballot, they must be duly authorized to receive the vote. If it be viva voce there must be some one to record the names of those whom the electors announce as their choice. There must be some one to count the votes, else the choice of the electors could never be ascertained. The states prescribe the qualifications of the electors. To receive the votes of such qualified voters only, and to provide that all such qualified persons who offer to vote do so, is to hold an election. The mode of effecting this result is the manner of the election, which the states have all along regulated, and do in many particulars now regulate, but which regulation, to some extent, congress has itself undertaken to make and alter. But it is argued that even admitting the power of congress to appoint, as the states have heretofore done, the officers to conduct a congressional election, there is no power given to congress to appoint peace officers to keep the peace upon the soil of the states. Yet section 2022 provides that these marshals and deputies shall keep the peace and preserve order at the polls. To regulate the manner of an election is to provide the means by which each elector expresses his choice freely and without hindrance or obstruction. To say that the states may, under this provision of the fourth section, appoint judges of federal elections, designate the place where they shall sit during the day of the election, and that they cannot remove obstructions which on that day prevent the electors from reaching them, would be strange indeed. If the states can do so the congress may, for the same powers by the constitution are given to each, as to congressional elections. As an election, as we have above said, is the declared expression of the choice of the qualified electors, it is quite as necessary that no one but qualified electors should, as that they should themselves be able to do so. Hence the regulations respecting registration are a part of the manner of the election, for they furnish a method by which those who hold the poll may discriminate between qualified and disqualified voters.

The extent of the power given to the congress by this fourth section is readily seen from the reasons given for its adoption at the time of framing the constitution. Alexander Hamilton, in No. 59 of the Federalist, gives as a reason for its adoption, "that every government ought to contain in itself the means of its own preservation." According to his view, whatever was necessary to be done to enable the qualified voters of a state to freely express their choice for a representative in congress, the congress under the fourth section has a right to provide. If, by any reason of hostility, the state determined to destroy the federal government by preventing the election of representatives in congress, either by a law forbidding its citizens to vote for such representatives, or by failing to regulate the time, place, and manner of

such election, since the federal government could not exist without a house of representatives, the power was given to congress to make and alter such time, place, and manner. The federal government has as much right to exist since the adoption of the constitution which created it as the state governments have; whatever the latter may do to secure a full and free expression of the choice of state electors for candidates for state officers, the United States may do in respect to representatives in congress. Whether the hindrance or obstruction to a free expression of the choice of qualified electors for representatives in congress comes from an open act of hostility of the state or from the neglect to provide such a manner of election as to guard against such hindrance and obstruction, or from organized bands of its inhabitants conspiring together for the purpose, or from the act of one evil-disposed person only, the congress has the right, by virtue of the power given by this section, for the preservation of the national existence, which depends, as the life of all representative forms of government must, upon the freedom and purity of elections, to establish such regulations respecting the manner of conducting the election as will, in its judgment, prevent and remove them.

The marshal, therefore, and his special deputies were constitutionally charged with the duty of keeping the peace and of preserving order at the polls of this congressional election, and the question which arises is, were they justified, upon the facts, in arresting Anton Schlauch, who was charged with being intoxicated, turbulent, and noisy? We think the offence of Schlauch, even as stated by the deputy marshals, was but slight, but a large discretion must be given to an officer charged with the duty of keeping order at an election precinct. His duty is to prevent a disturbance as well as to suppress disorder after it has arisen, and as in this case the deputy used no harsh measures, and might well have supposed that the facts proved respecting the conduct of Schlauch would create a breach of the peace then, though at another time, at a place where there was less excitement, such conduct would have done no harm, and might have been passed over as the boisterous mirth of a jovial man excited by drink, yet the polling-place was not a proper place for its display. We are of opinion that the deputy was justified in his removal from the vicinity of the polling-place. The exercise of the elective franchise is not a frolic; it is the highest and most solemn duty of the citizen, and the deputy marshals appointed to keep the peace and preserve order at the time and place of its exercise will be sustained in preserving such a state of affairs at the polls as will enable the oldest, weakest, most infirm, or timid of the electors to perform that duty. But by section 2022 of the Revised Statutes, the marshal and his special deputies are not only charged with the duty of keeping the peace and preserving order, but they are to prevent fraudulent voting.

Harris, one of the parties arrested, was a colored man. He was holding tickets headed by the devices of the Republican ticket, with the names of the Democratic candidates imprinted on them, and offering them to the colored voters as they approached the poll. Many of the voters were colored men who could not read. They were guided in their knowledge of the ticket by the pictures upon them, and they were offered to them by one of their own color. To give an ignorant elector a ticket with this device was, if he desired to vote for the Republican and not the Democratic candidate, to deprive him of his vote and to put a vote in the box for the opposing candidate by fraud. The deputy, we think, was justified in removing this cheat from the vicinity of the polling-place, not only because he was directed to prevent fraudulent voting, but because had this trick been discovered by the opposing party, it might then have led to an attempt to take his tickets from him, and to a consequent breach of the peace. We have come to the conclusion that the act of congress under which these marshals and deputies were appointed is abundantly authorized by the fourth section of article 1 of the constitution of the United States, and that the conduct of the deputy marshals in the exercise of the powers conferred on them was both justifiable and discreet.

We shall refuse the motion to quash, and enter an order discharging the petitioners.

Case No. 4,489.

ENGLEHART et al. v. The PEDRO.[1]

District Court, S. D. Florida. Feb. 24, 1879.

SHIPPING—UNAUTHORIZED SALE OF CARGO BY MASTER—DAMAGES.

[Sale of cargo by the master at a port where the vessel stops during the voyage renders the vessel liable for the full value thereof, unless some justification is affirmatively proved.]

[In admiralty. Libel by F. Englehart & Co., by E. M. Stoddard, agent, against the American brig Pedro (S. J. Moulton, claimant), for damage to cargo.]

G. Bowne Patterson, for libellants.

W. C. Maloney, Jr., for respondent.

LOCKE, District Judge. This is a cause on a contract of affreightment, brought by the consignee of cargo shipped on board the libelled vessel, for loss and damage. The libel alleges that there were shipped on board the said brig at Ponce, P. R., 280 hhds. and 85 bbls. of sugar to be carried to Queenstown, and a bill of lading signed by the master; that the vessel went into Nassau, N. P., where the master sold one hundred hogsheads of the sugar; that after leaving Nassau with the rest of the cargo he willfully and completely deviated from his course and brought his vessel

[1] [Not previously reported.]

into this port, where the voyage was abandoned, her owners refusing to carry the cargo to its destination, whereby it has suffered loss and damage. The shipment of the cargo and the sale as alleged in Nassau is admitted. The loss, damage and delay at this port is sought to be justified by the fact that the vessel was under attachment in a salvage suit [Case No. 8,995], and that the master was dispossessed of it; and it is claimed that the accounting for the proceeds of the cargo sold at Nassau is a matter of general average and not of contract, and that the master is but waiting the decision of this cause to forward the accounts to average adjusters in New York for adjustment. The admissions of the answer, without any testimony in support of the libel, are sufficient to determine the cause. It admits the sale of a hundred hogsheads of sugar, but does not offer any excuse for said sale, nor tender any account of the proceeds. From the moment of the sale the vessel and her owners became liable to the owners of the cargo for its value, and could be called upon by them to account immediately upon the termination of the voyage. It is a matter of contract, and damage resulting therefrom, and is in no way shown by allegations or testimony to be a question of general average. It is not shown that there was any necessity for the sale, or that the proceeds were expended or used, and the burden of proof rests entirely upon the carrier to justify his action. In this case nothing of the kind has been attempted, and the vessel is unquestionably liable for the full value of the cargo so sold, which has been shown to be fully four thousand dollars.

There is no question but what, if the allegations of the libel in regard to an unnecessary deviation of the voyage and coming into this port are sustained by the testimony presented, the entire damages caused by such deviation and delay would also be chargeable to the vessel; but I have considered it unnecessary to examine that question, as by the admissions of the answer the damages resulting from the sale of cargo are shown to far exceed the proceeds of sale of vessel in the registry of the court, to which any judgment herein must be limited. This cause having been fully heard, and the court being duly advised in the premises, and the vessel having been sold upon application of the master and order of the court for the sum of one thousand nine hundred and seventy-five dollars, it is hereby ordered, judged and decreed that the libellant have and receive the entire proceeds of said sale of said vessel now remaining in the registry of the court after the payment of the costs, expenses and charges taxed and allowed against said proceeds in the case of Malone v. The Pedro and Cargo [Case No. 8,995] in a cause of salvage, the amounts paid wages of crew upon petition, and the costs of this suit, and that the bond filed by E. M. Stoddard in the case of Malone v. The Pedro and Cargo [supra] be cancelled and annulled.

ENGLEHART (UPTON v.). See Case No. 16,800.

ENGLISH (BELL v.). See Case No. 1,250.

ENGLISH (McELROY v.). See Case No. 8,782.

Case No. 4,490.

ENGLISH v. OCEAN STEAM NAV. CO.

[2 Blatchf. 425.][1]

Circuit Court, S. D. New York. Oct. 1, 1852.[2]

CARRIERS—DELIVERY OF DAMAGED GOODS — PRESUMPTION.

1. Where goods in cases are shipped by sea, and, on being opened, after delivery, are found to be injured, it will, in an action by the owner of the goods against the carrier, to recover damages for the injury, be presumed that they were properly packed, in a fit state for transportation, by the manufacturer or shipper, unless there is something in their appearance or condition to afford ground for a contrary inference, or unless some evidence to that effect is given. [Cited in Harp v. The Grand Era, Case No. 6,084.]

2. And this will be the presumption, although the bill of lading contains the clause, "weight, contents and value unknown."

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

In admiralty. George B. English filed a libel in personam, in the district court, against the Ocean Steam Navigation Company, to recover for damage done to gloves, ribbons, &c., in cases, shipped by one of their steamers, on a voyage from Havre to New York. The principal question in the case, both in the court below and here, was one of fact—whether the injury to the goods was caused by dampness and heat in the hold of the vessel, occasioned by rough weather and severe storms in the course of the voyage, and was thus within the exception, "accidents of the seas," in the bill of lading, or whether it was caused by the excessive heat of the boiler, and want of sufficient ventilation of portions of the lower part of the vessel occupied by the cargo. The bill of lading contained a memorandum at the foot, "weight, contents and value unknown." The district court decreed in favor of the libellant [Case No. 4,490a], and the respondents appealed to this court.

Daniel Lord, for libellant.

Thomas W. Tucker, for respondents.

NELSON, Circuit Justice. It is insisted, on the part of the respondents, that, as the bill of lading contains the usual clause, "weight, contents and value unknown," the burden lies upon the libellant to show, in the first instance, that the goods were put up in the cases, by the manufacturer or shipper, in good order and condition; and that, in the absence of such proof, the court are bound

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

[2] [Affirming Case No. 4,490a.]

to presume that the injury to the goods arose from defects existing when they were packed for shipment, or which occurred previous to the shipment. The law is otherwise. Unless there is something in the appearance or condition of the goods, on their being opened after delivery, affording ground for reasonable inference that they were improperly packed, or packed in an unfit state for transportation, or unless some evidence to that effect is given, the contrary will be presumed. Cowen & Hill's Notes to Phil. Ev. 1439; Price v. Powell, 3 Comst. [3 N. Y.] 322; Barrett v. Rogers, 7 Mass. 297; Clark v. Barnwell, 12 How. [53 U. S.] 272.

The main question in the case is one of fact, namely, whether or not the damage was occasioned in the course of the voyage, by one of the perils of the navigation within the bill of lading; and I am quite satisfied with the conclusion arrived at upon the proofs by the court below. Decree affirmed.

Case No. 4,490a.

ENGLISH v. OCEAN STEAM NAV. CO.

[18 Betts, D. C. MS. 99.]

District Court, S. D. New York. April 1, 1851.[1]

CARRIERS—DELIVERY OF DAMAGED GOODS—PRESUMPTION—BURDEN OF PROOF.

[1. In a bill of lading, an acknowledgment that goods were shipped in good condition raises an inference that damage thereto, discovered on unloading, happened by the fault of the carrier.]

[2. In a bill of lading the words "contents unknown" merely require the shipper to prove that the goods were actually laden on board, not that they were in good condition when shipped.]

[In admiralty. Libel by George B. English against the Ocean Steam Navigation Company for damage to cargo. Decree for libellant. This was afterwards affirmed by the circuit court in Case No. 4,490.]

BETTS, District Judge. The libel seeks damages for the non-delivery in good order of several cases of gloves and silks, shipped at Havre for New York on board the steamer Herman, belonging to the respondents. The fact that the goods were in a damaged condition when delivered here is fully proved. Two grounds of defence are set up. First, that there is no proof that the goods were shipped in good order, and second, that if they were injured in the transportation, the injury arose from one of the causes excepted in the bill of lading. The bill of lading signed by the agent of the respondents at Havre acknowledges to have received the cases of merchandise in question, in good order and condition, to be delivered at New York in the like good order and condition, (the acts of God, enemies, pirates, restraints of princes and rulers, fires at sea and on shore, accidents from machinery, boilers, steam or any other accidents of the seas, rivers and steam navigation of whatsoever nature or kind excepted,) with a memorandum at the foot "weight and contents and value unknown, and not to be answerable for leakage or breakage." The libel avers the receipt of the goods on board the Herman and their transportation to the city of New York and delivery here to the libellants, and alleges they were damaged on the voyage in the ship, to the amount of $1,950.03 not arising from any of the causes excepted in the bill of lading and were not delivered in like good order as when shipped. The answer admits the receipt of the said cases of merchandise and the execution of the bill of lading therefor, at Havre, but avers the contents of the cases were then unknown to the respondents or their agents, nor did they know whether the contents thereof were or were not in good order and condition. The answer asserts that the goods were safely, securely, prudently and properly stowed; and avers that no notice whatever was given them by the shippers of the goods, of the contents of the cases, and they and their agents were ignorant thereof until after the delivery of the cases to the libellant, when they were informed the cases contained kid gloves and cravats, "a species of goods and merchandise requiring great and unusual care and caution and particularly sensitive to injury from a slight degree of heat and exposure," and insists, the goods if damaged on the voyage, were not so by means of negligence or omission on the part of the respondents, but from causes named in the exception to the bill of lading.

The libellant proved that the goods were damaged by spots or stains, by being crisped or stiffened, baked and rotted to an amount estimated by appraisers at $1,950.03, and that the injury was apparently caused by exposure to excessive heat. That when the cases were opened in libellant's store the goods were found so hot as to render it uncomfortable to handle them. He proved that heat would have the like effect on goods of that description, put up and shipped in good order. It was also proved that similar goods had been imported in steamships without receiving injury, and evidence was given tending to show that the apartment of the Herman in front of the engines and boilers, was kept overheated on that voyage from the want of sufficient ventilation. The libellant proved that these goods were carefully put up first in paper boxes, and then in cases or packages, which were secured against wet and external injury, in the manner usually employed in packing those description of goods for exportation, and that all the external envelopes appeared in good condition. The respondents proved that these goods are subject to stains, and spotting, if packed in a damp state, or exposed to external dampness on the voyage, from their

[1] [Affirmed in Case No. 4,490.]

delicate character and the natural effect of such state of moisture upon them when confined in packages.

It was proved by the master, engineer and other officers of the ship, that the voyage was exceedingly rough, the weather being tempestuous to an unusual degree. That the dashboard in the boiler gave way from the pitching of the ship, in a heavy sea, during a violent and protracted gale of wind, and that steam escaped from the boiler through rivet holes worked loose into the body of the ship, and would naturally force itself forward. This gale and its consequences were experienced early in the voyage and long enough before the arrival of the ship in New York to have all extra heat occasioned by it disappear. The whole testimony, however, renders it very clear that if these goods had been stowed aft the machinery and boilers, or if the forward apartment had been sufficiently ventilated, the escape of the steam which occurred would have occasioned no damage; nor is it made to appear that the extra escape of steam during the storm at all increased the heat of the forward room of the ship beyond what was experienced in the ordinary condition of the ship. Extra ventilators were supplied that room, after this voyage. The captain testified he has brought out similar goods in the ship without injury to them, and the mate says the heat from steam was not in his opinion such as would bake the gloves. The forward room, used for stowing goods, was separated from the boilers by an inner bulk-head, made of boiler iron rivetted together and extending across the ship and from deck to ceiling, leaving a space of about 9 inches between it and the boilers, so that with proper ventilation that room would be always a suitable place for the stowage of cargo. On this voyage, as usually, cargo was not intended to be stowed against the bulk-head, but 8 or 9 inches from it. There was no proof as to the particular part of the ship in which these cases were stowed.

The libellant having proved by satisfactory evidence, that the goods were delivered damaged at the close of the voyage, the law imposes on the respondents the burthen of showing it was occasioned by some of the causes enumerated in the exception to the bill of lading, unless means were used to conceal the character of the goods and impose on the carriers at the time they were laden on board. The law casts on the ship owner the burthen of proving that the loss has so arisen as to exempt him under the exceptions in his bill of lading, otherwise he stands absolutely bound for the safe delivery of the goods on his general responsibility as carrier. Story, Bailm. § 529. If the injury in this case has been caused by radiation of heat from the bulk-head of the stowage room or boilers, it would not be within the exceptions of the bill of lading, and it devolved upon the respondents to show the goods so stowed that the damage could not be so incurred, or in any other way attributable to negligence, or want of due precaution in their stowage. So also they are required to prove satisfactorily that the species of injury received by these goods, the baking, stiffening, etc., would be the probable effect of the action of steam in its usual state in steamships or especially as it was found in the ship during this voyage. Those proofs are not made. On the contrary the evidence shows that before and since this voyage the ship has carried like goods without their receiving injuries from steam or the usual heat of the vessel and it fails to make it appear that the extra discharge of steam during the gale, on this voyage, pervaded the ship so as to produce any damage; and accordingly the liability of the respondents is not discharged, if the preliminary evidence given by the libellant is sufficient to charge them.

It is strongly insisted for the respondents, that the libellant must prove the goods claimed by him were put on board the ship in good order, before he can call on them to account for the injury or pay his loss. The law is not so. Even as against underwriters the bill of lading is prima facie sufficient proof of the interest of the shipper, and that the goods were received on ship-board in good order. Some nisi prius cases in England for a time questioned this doctrine in respect to underwriters, but it is now considered settled by deliberate adjudications in that country, where the master makes the acknowledgment absolute, without the saving of "contents unknown." 2 Parks, Ins. (8th Ed.) 859, § 10; 2 Phil. Ins. 489, 490. The effect of the latter reservation is only to require proof beyond the bill of lading, that the goods were actually laden on board. Of that fact there is no question in this case. To the other particular, that the goods were in good order and condition, when shipped, the acknowlegment of the bill of lading is unqualified, and, as against the owners or master, it is an admission obligatory upon them at law, and excuse the shipper giving any other evidence in the first instance. Cow. & H. Notes to Phil. Ev. 1439; Price v. Powell, 13 Comst. [13 N. Y.] 322. The case of Barrett v. Rogers, 7 Mass. 297, is a direct authority upon this point. The question was raised and argued before the supreme court of Massachusetts whether the plaintiff holding such an admission in the bill of lading was required to give further evidence that the goods when shipped were in good order, and the court decided he was not. Such I am satisfied is the general acceptation of the relation of shipper and master or owner, and the general usage of trade in this respect. It seems to me founded in good policy also, for if the master does not intend to assume the

risk of the proper package of the goods, it is no less proper he shall qualify his responsibility in this particular than that of contracts, so that the shipper may have notice to be provided with proof to the fact, if an after controversy should render it necessary. The acknowledgment shall have against the owner and master the ordinary effect of an admission or receipt, open to explanation on his part, but prima facie evidence of the fact in favor of the party holding it. Decree for the libellant for $1950.03 and interest at 6 per cent. from the day of the delivery of the goods subject to all proper allowances of freight, etc., to respondents. If the balance is not adjusted by agreement between the parties, a reference to a commissioner must be had to state the amount.

Case No. 4,491.

ENGLISH v. RUSSELL.

[Hempst. 35.] [1]

Superior Court, Territory of Arkansas. Oct., 1825.

VENDOR'S LIEN—UNPAID PURCHASE-MONEY.

A vendor who has not parted with the legal title, has a lien on the land for the unpaid purchase-money, and may subject the land to the payment of it, either against the vendee, his representatives, or assigns.

[This was a bill in equity by Simeon English, administrator of John English, deceased, against William Russell.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. On the 21st day of June, 1821, the intestate, John English, and the defendant, William Russell, entered into a contract in writing by which the former purchased a tract of land of the latter, containing three hundred and twenty-five acres, at the price of five dollars per acre. Five hundred dollars of the purchase-money was paid down, and for the remainder English executed two notes to Russell, one payable the 20th June, 1822, the other the 20th June, 1823, and bearing ten per cent. interest per annum from maturity until paid. Russell bound himself to convey the land with general warranty, as soon as the purchase-money should be paid. An action of law was brought by Russell on the first note, and judgment recovered against the present complainant, as administrator of John English, deceased, to enjoin which this bill has been filed, alleging that John English died insolvent, and praying for a sale of the above-named land, to pay debts. To the sale of the lands as prayed for in the bill, no objection has been made by Russell; but he claims that the proceeds must be applied to the payment of the purchase-money due him on the land. We have no doubt Russell has a right to the proceeds of such sale, as claimed by him. Taylor v. Alloway's Heirs, 3 Litt. [Ky.] 216. He never parted with the legal title, and according to well-settled principles, the vendor has a lien upon the land for the purchase-money. Mackreth v. Symmons, 15 Ves. 329, 349; Hughes v. Kearney, 1 Schoales & L. 132; Garson v. Green, 1 Johns. Ch. 308.

The proceeds of the sale, therefore, must first be applied to discharge the debt due Russell on account of the purchase-money, and the over-plus, if any, will belong to the estate, and go to the administrator. Decreed accordingly.

[1] [Reported by Samuel H. Hempstead, Esq.]

ENGLISH v. TYLER. See Case No. 16,955.

ENGLISH, The BENJAMIN. See Case No. 1,306.

ENGLISH, The ELIZABETH. See Cases Nos. 4,359 and 4,360.

ENNIS (CONYERS v.). See Case No. 3,149.

Case No. 4,492.

ENNIS v. HOLMEAD.

[5 Cranch, C. C. 509.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

JUSTICE OF THE PEACE — JURISDICTION OF SUITS AGAINST EXECUTORS AND ADMINISTRATORS.

A justice of the peace has jurisdiction against executors and administrators under the act of congress of March 1, 1823 [3 Stat. 743].

Appeal from the judgment of a justice of the peace against the appellant, upon a promissory note of Mary Byrne for $40, due July 10th, 1834.

THE COURT affirmed the judgment, which was for $40, "with interest from date;" meaning, probably, the date of the judgment, namely, April 14th, 1838, and costs, one dollar and ten cents.

CRANCH, Chief Judge, dissented. The question is whether a justice of the peace has jurisdiction in suits against executors and administrators where the debt and damages do not exceed the sum of fifty dollars, exclusive of costs. It seems to me very clear that justices of the peace had no jurisdiction in causes against executors and administrators under the Maryland act of 1791 (chapter 68).

1st. Because they were not liable to arrest; and the only process given by that statute to bring the defendant before a justice of the peace, was a warrant of arrest in the nature of a capias ad respondendum.

2d. Because an executor or administrator is not a debtor. He is always charged in the

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

detinet only, not in the debet; and the act gives jurisdiction only to a justice of the county "wherein the debtor doth reside;" and he is "to hear and determine the matter in controversy between the creditor and debtor," "and if need be, charge the constable with the body of the debtor in execution."

3d. Because the justice of the peace has no authority to ascertain the amount of assets, and the debts due to other persons, so as to render judgment only for the plaintiff's proportion of the assets, according to the Maryland act of 1798 (chapter 101); nor to appoint an auditor to ascertain the sum for which judgment shall be given; nor to give judgment for such further sum as the court should thereafter assess on discovery of further assets.

This point was decided by this court in the case of Ritchie v. Stone [Case No. 11,864], in October, 1821. This construction was also given by the courts of Maryland, and it was found necessary to pass a statute, after 1801, to give the necessary powers to justices of the peace, to enable them to exercise jurisdiction in such cases. But it is said that the act of congress of the 1st of March, 1823, authorizes the justice of the peace "to try, hear, and determine the matter in controversy between the creditor and debtor, their executors and administrators," and that as the jurisdiction is given, all the means necessary for the exercise of that jurisdiction, must be given also. But the question arises, whether the words, "creditor and debtor, their executors and administrators," give the justice of the peace jurisdiction of cases against executors and administrators. There can be no objection to the justice's jurisdiction in cases where executors or administrators are plaintiffs, and such jurisdiction would be sufficient to give effect to the words, "their executors and administrators," in that clause of the statute. It seems to me evident that the legislature of Maryland, by the act of 1791 (chapter 68), intended to give jurisdiction to a single magistrate, only in the simple case of contract; and did not trust him with cases of tort or trespass, sounding in damages, or in cases against executors and administrators, where the plea of plene administravit might be pleaded, and the administration account examined and settled; involving questions of property to a vast amount, and questions of law of great importance. The Maryland act of 1798, c. 101, subc. 8 (sections 6–9), provides, that no executor or administrator "shall be compelled to put in special bail;" nor "to plead plene administravit, or any thing relative to the assets;" "and when the debt or damages which the deceased (if he or she were alive,) ought to pay, shall be ascertained by verdict, or confession, or otherwise, the court, before whom the action was brought, shall thereupon assess the sum which the executor or administrator ought to pay, regard being had to the amount of assets in his hands, and the debts due to other persons;" or, the court may "refer the matter to an auditor, to ascertain the sum for which judgment shall be given; and in case the judgment shall be for a sum inferior to the real debt, or damages and costs, it shall go on and say that the plaintiff shall be entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the defendant; and the court at any time afterwards, when applied to by the plaintiff, on three days' notice to the defendant, or his attorney, may assess and give judgment for such further proportionable sum as the plaintiff shall appear entitled to, regard being had, as aforesaid, to the amount of the debt and other claims."

From the purview of these provisions, it is evident that they are applicable only to courts of general jurisdiction; courts having power to appoint an auditor, and to compel the settlement of an administration account. No such power is given, by the Maryland act of 1791 (chapter 68), nor by the act of congress of the 1st of March, 1823 (3 Stat. 743), to a justice of the peace. The jurisdiction of this court (the circuit court) is general, with the exception only of cases within the jurisdiction of a justice of the peace. If the justice has not jurisdiction of cases against executors and administrators, this court has; so that there will be no failure of remedy.

Although the act of congress of March 1, 1823 (3 Stat. 743), authorizes a justice of the peace to try, hear, and determine the matter in controversy "between the creditor and debtor, their executors and administrators," yet it is to be "in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do, when the debt or damages do not exceed the sum of $20, exclusive of costs." The object of this act was to extend the jurisdiction of the justices of the peace from $20 to $50, and to exercise that extended jurisdiction "in the same manner, and under the same rules and regulations, to all intents and purposes," as they were then authorized to do, when the debt or damages did not exceed $20. It does not alter the nature or character of the causes submitted to their jurisdiction, but only the value of the matter in controversy. For these reasons, I think the justices of the peace have not jurisdiction of causes against executors or administrators.

ENNIS (HUNT v.). See Case No. 6,889.

ENNIS (ROGERS v.). See Case No. 12,010.

ENOCH MOORE, The. See Case No. 6,331.

Case No. 4,493.

ENOCH MORGAN'S SONS' CO. v. HUNKELE.

[10 Reporter, 577;[1] 16 O. G. 1092.]

Circuit Court, D. New Jersey. 1879.

TRADE-MARK—PLEADING—FRAUDULENT INTENT—DEMURRER—INJUNCTION.

Where the bill charges a fraudulent infringement of a trade-mark, the fraudulent intent, as charged, must be taken as confessed upon demurrer to the bill, and complainant is entitled to an injunction.

In equity. Bill for infringement of a trade-mark, charging that defendant has fraudulently simulated and sold a manufactured soap of complainant known as "Sapolio." On demurrer to bill.

J. H. Hull and A. Q. Keasbey, for complainant.

E. More and Wm. Cummins, for defendant.

NIXON, District Judge. The demurrer admits all the allegations of the bill of complaint. The only question, therefore, before the court is, whether a sufficient cause of action appears upon the face of the bill. The complainant, a corporation created and organized under the laws of the state of New York, avers that it is the successor of the firm of "Enoch Morgan's Sons;" that the said firm invented and prepared a new manufacture of soap, especially designed for cleaning and polishing; that to indicate the genuineness of their manufacture, they devised and for the first time applied as a trade-mark the word "Sapolio," a device of a human face reflected by a polished pan; an uniform size, form, and color of cake; the stamp thereon of the words "Enoch Morgan's Sons Sapolio;" an envelope or wrapper therefor of Argentine foil colored manilla paper, having printed on the inside thereof, certain words and devices in black type, upon a cream-colored ground; a band of ultra-marine blue paper for encircling the cakes, when so enveloped and wrapped, with printing in gold letters; that large sums of money were expended by the firm in advertising the said manufacture whereby it became widely known under the trade-marks aforesaid; and was so largely purchased and used by the public that its manufacture and sale under the said marks became pecuniarily valuable to the complainant; that, well knowing these facts, certain manufacturers in New York, and elsewhere, since January 1, 1874, have fraudulently endeavored, and are still endeavoring, to avail themselves of the benefits of the said advertisements, and of the popularity and reputation of the said manufacture, and of the trade-marks under which the same is sold, by fraudulently simulating the cake and appropriating the trade-marks, and are daily engaged in unlawfully and fraudulently selling the same as for the genuine manufacture of the complainant; that said simulated manufacture and appropriated trade-mark have a tendency to deceive and do deceive the public, exercising all the caution which purchasers usually exercise, and induce it to purchase said simulated manufacture, as and for the genuine manufacture of the complainant, to the deception of the public and to the injury of complainant; that the defendant designing to aid the manufacturers in their attempt to defraud the complainant, and deceive the public, has purchased soap of these fraudulent manufacturers and kept the same on hand as the genuine Sapolio made by complainant, with the design to impose the same upon purchasers as the genuine article, and when applied to by customers for Sapolio, which was well known to them and the public as an article manufactured by the complainant, has sold and delivered to such customers, without explanation, the simulated cake, and has given to them bills for the same as Sapolio, so that customers, deceived by the general appearance thereof, and not observing the difference, which might be detected on a closer observation, have accepted the same as the genuine article of the complainant; and that the said acts have been intentional, wilful, and fraudulent. Stripped of all verbiage the charge is that the defendant has fraudulently simulated the manufacture of the complainant, and that he has successfully deceived the public, by inducing it to purchase the simulated for the genuine article. It is not a question, whether the defendant has in all respects imitated the trade-marks of the complainant, but whether he has so imitated it that the purchaser has been imposed on.

The defendant insists that there are such differences in his mode of using and combining the colors on the wrapper, that no careful purchaser need be deceived, if he exercise ordinary care and prudence. This may be true, and in the absence of fraud, and upon the merits, the court may not be willing to hold that an infringement has been shown. But the fraud has been confessed by the demurrer, and such confession entitles the complainant to an injunction. The counsel for the defendant says that the demurrer was filed, after duly considering the authority of Ellis v. Zeilen, 42 Ga. 91, and Barrows v. Knight, 6 R. I. 434, and yet it was held, in both of these cases, that where a fraudulent intent was admitted, the imitation need only be partial to sustain the action. The demurrer is overruled, and twenty days time is given to the defendant to answer the complainant's bill on the merits. Ordered accordingly.

[1] [Reprinted from 10 Reporter, 577, by permission.]

ENRIGHT (UNITED STATES v.). See Case No. 15,053.

Case No. 4,493a.

The ENRIGHT.

[See 12 Fed. 157.]

Case No. 4,494.

ENSIGN v. The PEERLESS.

[12 Chi. Leg. News, 41.]

District Court, E. D. Wisconsin. Oct. 18, 1879.

ADMIRALTY—SALVAGE.

In cases of assistance rendered to vessels in distress, the court holds that it will hardly do to adopt, as applicable to salvage service upon the inland waters of the great lakes, a measure of compensation which might prevail or be deemed proper when applied to such service upon the ocean, unless an exceptional case should seem to demand it.

In admiralty.

H. H. & Geo. C. Markham, for libellant.

Geo. Gardiner, for respondent.

DYER, District Judge. This is a libel for salvage. Libellant's claim is based upon a service rendered September 2, 1877, by the propeller Scotia to the propeller Peerless, on an occasion when the Peerless was temporarily disabled by an accident to her machinery, on Lake Michigan; the service performed being that of taking the Peerless in tow and towing her into harbor at South Manitou, from the point where she was found, a distance of from forty to forty-five miles. Many witnesses have been examined, and the testimony which has been taken is very voluminous. But upon a careful and thorough examination of the evidence, I find the material facts to be considered to lie within narrow compass.

On the 31st day of August, 1877, the Peerless, a one-wheel screw steamer, then classed A 1, left the port of Chicago on a voyage to ports on Lake Superior, laden with passengers, and a full cargo of grain, live stock and general merchandise. Touching at the ports of Milwaukee, Sheboygan and Manitowoc, she left the last named port at 10:45 p. m., Sept. 1st, and at 11 o'clock, was put on her course to South Manitou passage, steering northeast quarter east. She pursued her voyage without interruption until about five o'clock the following morning, when her air pump was suddenly broken. The accident was of a very serious character, since it not only wholly disabled the steamer by depriving her of the use of her motive power, but enabled a large volume of water to pour through the discharge pipe of the pump from the lake into her hold. Measures were at once taken by the engineer and his assistants to arrest the flow of water through the discharge pipe, by shoring up the top of the pump, but they were unavailing. Meantime, the vessel's pumps were put in operation, and it being found that the only way to prevent the influx of water through the discharge pipe was to fill up the aperture from the outside, and as this aperture was below the surface of the water, and was on the starboard side of the vessel, orders were given by the master to throw overboard a quantity of the heavy freight lying on that side, including live stock, so as to list her to port, and thus bring the aperture above the surface of the water, thereby making it accessible from the outside. A flag of distress was also hoisted. In obedience to the orders of the master, so much of the deck load of freight on the starboard side of vessel was thrown overboard as lightened her on that side sufficiently to bring the external orifice of the discharge pipe above the water of the lake. The small boat was then lowered, and the mate and some of the deck hands from this boat succeeded, by filling the discharge pipe with bags of flour, blankets and bedding, in stopping the flow of water into the vessel, but the steamer remained powerless to proceed on her voyage or to enter port without the assistance of another vessel. The Scotia, a propeller, laden with a valuable cargo, left Chicago on Saturday morning, Sept. 1, destined for the port of Buffalo. In the evening of that day, she was, as her master testifies, northward of Little Point Au Sauble, in the middle of the lake, and about thirty miles westward of her regular course. At ten o'clock that night her course was changed to north by west, upon which course she continued until daylight Sunday morning, Sept. 2. At about 6:30 o'clock that morning, the Peerless was discovered, from the deck of the Scotia, bearing to the northwest, flying a flag of distress, and as the master of the Scotia estimated the distance, about nine miles away. Necessarily changing her course somewhat, the Scotia went to the relief of the Peerless, reaching her in about an hour, and after the operations on the latter vessel by which the flow of water through her discharge pipe had been stopped, as heretofore detailed. The Scotia approached the Peerless on the leeward side, took her line and towed her to South Manitou harbor, a point about two and a half miles off the course vessels generally take in going through the south passage; and it was through that passage the Scotia was bound on her voyage from Chicago to Buffalo. At South Manitou the clerk of the Peerless and about fifteen of her passengers went aboard the Scotia, and were taken to Sheboygan, Mich., where the clerk engaged the tug Leviathan to proceed with him to South Manitou, and tow the Peerless to Milwaukee for repairs. While the Peerless was lying at South Manitou awaiting the arrival of a tug, and within the space of nine hours, the engineer, by disconnecting the air pump from the engine, and by constructing a wooden exhausting pipe, by means of which the process of ex-

hausting could be effected through one of the windows on the side of the vessel, succeeded in putting the boat in condition for propulsion by her own motive power. On Tuesday, the 4th day of September, the tug took the Peerless in tow, and the testimony of the engineer is, that the engine of the Peerless was in temporary working operation; that when a short distance from South Manitou, the tug became partially disabled; that the Peerless proceeded for some distance under her own steam; that the tug again took the propeller's line, but after a time let it go, and the Peerless went on to Milwaukee by her own power, making nine miles an hour between Sheboygan and Milwaukee. The value of the Peerless, which was a vessel of 1,200 tons burthen, was between $50,000 and $60,000. She was valued for insurance at $54,000. The value of her cargo was $30,000, and the value of that part jettisoned was $6,600. The Scotia was an iron bound vessel of 1,502 tons burthen, of the value of $150,000, and the value of her cargo was $48,800. The distance which the Scotia towed the Peerless was from 40 to 45 miles. The clerk of the Peerless testifies that the time covered by the service was about 8½ hours. The master of the Scotia fixes the time at 10 hours. The distance from the point where the Scotia varied from her course to go to the Peerless, to the point where the latter vessel was lying, was about nine miles, and about an hour was spent in passing that distance.

Very important elements in the case are the actual peril in which the Peerless was at the time the Scotia took her in tow, and the hazards incurred by the Scotia in affording her relief. Concerning the state of the weather, the crews of the two vessels, as is usual, differ as widely as possible; some of the witnesses for libellant testifying that the wind was almost a gale, causing a heavy sea, and some of the witnesses for respondent testifying that there was neither wind nor sea sufficient to put a yawl-boat in jeopardy. All agree that whatever wind there was, was from N. W. or N. N. W., and the various expressions of officers and men on the Peerless, as given in their testimony are, that it was "a breeze of wind, but nothing serious"; that it was "blowing a little"; "an 8 or 9 mile breeze"; that "there was very little sea"; that it was "a little lump of a sea"; "not what anybody would call a big sea"; that the Peerless "didn't roll any"; "may have rolled a little, but not much"; "lifted a little but didn't roll"; "rolled a little, but didn't lift up and down." This is the character of respondent's testimony, and there appears to be agreement on both sides that the wind and sea did not increase after the Scotia took the Peerless in tow. The officers of the Scotia say that the wind was blowing hard all through Saturday night, and the morning of Sunday, with rain squalls; that there was quite a heavy sea running; and the master of the Scotia testifies that when about half a mile from the Peerless, he noticed that she was lying on her beam ends in the troughs of the sea.

The testimony of some of the passengers on the Peerless, who have been sworn for libellant, is to the effect that there was a violent wind and a high sea, and that the motion of the boat was so great that it was difficult to walk the deck or in the cabin. But their testimony is evidently to be taken with allowance, for the consternation among the passengers was so great at the time that many of them put on life preservers, and were in such a state of alarm as would lead them to exaggerate in their own minds every possible element of danger. Soon after the accident, and while efforts were being made on board the Peerless to relieve her from her most immediate peril, she was sighted by the schooner Lucerne, which went to her relief. The testimony of the captain of this schooner, and of Wm. Robson, a passenger on the Peerless, who seems to have fully retained his self-composure throughout the affair, and to have been a good observer, has been taken; and the testimony of these witnesses bears intrinsic evidence of being entirely trustworthy. Captain McLeod, of the Lucerne, says that the vessel was about 40 miles south of the South Manitou Islands, and about 17 miles from the east shore, when he discovered the Peerless four miles away, flying a flag of distress, and apparently lying in the troughs of the sea. The wind was about N. N. W., had been from that point all night, and was a strong, heavy wind. He took in all light sails, turned around and proceeded to the steamer. On arrival, he asked the captain of the Peerless what was the matter, and the captain replied: "We are all right now; there is a steamer coming up from the eastward" (meaning the Scotia). The Lucerne then passed on. Capt. McLeod says his vessel was then carrying all her lower canvass; that they had just clewed up her top-sails, taken in her square sails, raffee and three gaff top-sails, and that upon resuming his course he set his light sails. He describes the Peerless as lying in the troughs of the sea, drifting to leeward, and the weather as not pleasant; that it was blowing quite fresh, with cold, heavy rain squalls. He says: "There was quite a lump of a sea on"; that there was danger of injuring his vessel had he not taken in his light canvass after turning about to go to the Peerless; that the Peerless did not look to be in a very good position"; that she was drifting from 2 to 2½ miles an hour; that her small boat was in the lee of the propeller, with men in it who were endeavoring to fill the discharge pipe, and that others were keeping this boat off the guards of the steamer. The witness, Robson, details with minuteness, the efforts made to stop the influx of water through the discharge pipe, both in the engine room

and outside the vessel, and his testimony shows that it was with considerable difficulty the small boat could be kept away from the guards of the steamer, as the latter rose and fell with the waves. He says that it took fifteen or twenty minutes to fill the discharge pipe so as to stop the flow of water into the vessel. In his judgment there was not a very heavy wind blowing, nor a sufficient sea to cause much disturbance to passengers, though there was a slow roll in the motion of the boat. He says he was very much astonished to see the Lucerne and Scotia come so close to the Peerless, and that their officers seemed to manage their vessels as well as he (an Illinois farmer) would a pair of horses; which testimony is of value as indicating, at least to some extent, whether it was easy or difficult in the weather and sea prevailing to approach the Peerless and take her in tow. The witness, James Dunne, a passenger on the Peerless, states there was some wind, and "somewhat of a sea," but not so much as he had seen before, and that the vessel rolled some, but not so as to affect passengers very perceptibly in walking through the cabin. The clerk of the Peerless and some other of her officers, swear that when the Scotia arrived, her captain inquired what was the matter, and that the captain of the Peerless replied: "That the air pump was broke, and that he was all right now, but wanted a tow to the islands." This is contradicted by the men on the Scotia and by some other witnesses, and it seems probable that the witnesses who have testified to this remark have confused what was said at that time with the remarks made in response to the hail of the Lucerne when the master of the Peerless said, "We are all right now, there is a steamer coming."

Clearly the court would not be justified in adopting the extreme views of witnesses on either side, as to the state of the wind and sea at the time of and after the accident. But the testimony that has been referred to, and that of masters of other vessels which were on the lake that night and morning, shows that the weather was unfavorable and capricious; that the wind was blowing with considerable force, and somewhat gusty, and that there was some sea. In short, I am satisfied that no vessel disabled and helpless, and in the condition of the Peerless, could lie in that locality, which was not very distant from the east shore, and drift in the troughs of the sea, without considerable peril. It is true that the officers of the boat say, that after the passage of water into the vessel was stopped, she was in no danger, but this cannot in the nature of things, be so. Her flag of distress was kept flying after that time, and there can be no doubt that the master and crew of the Peerless looked anxiously to the Scotia for relief. Before they succeeded in arresting the passage of water through the discharge pipe, the vessel was in the greatest peril, for in some parts of the hold the water was from 15 to 18 inches in depth, and aft of the crank room it was over three feet in depth; and the testimony is, that unless the efforts made to prevent the flow of water into the vessel had been successful, she would have sunk in an hour. And at best the relief obtained was temporary and precarious. She was 18 or 20 miles off shore and was drifting to leeward. Of course in considering this question of peril, there is to be taken into account the probability of the engineer being able to put her machinery in condition to enable her to get into some port by use of her own motive power, as it seems he was able to do while she was lying at South Manitou, but within what time this could have been done when the vessel was at sea is uncertain. In fact it was done in nine hours.

Although, as the Scotia went to the Peerless, she had to run in the troughs of the sea, I do not find from the evidence that the service was attended with any peculiar danger to the former vessel. The approach to the Peerless seems to have been readily accomplished, and her line taken without difficulty. Nothing occurred while the Peerless was in tow to place either vessel in unusual jeopardy. That the service rendered by the Scotia was not mere towage service is too plain for argument. Indeed, it is not seriously contended that it was not a salvage service. What compensation should be allowed, cannot be determined by any absolute rule. Libellant claims a much larger sum than the court can allow. Respondent insists upon a sum much below what seems compensatory for such a service. Counsel on both sides have referred to numerous cases in the books, and upon the data which they furnish, have submitted mathematical comparisons between values of property, time consumed, and salvage allowed in such cases, and values, and time employed in service, in the present case, for the purpose of aiding the court in arriving at a basis for a proper allowance here, but these comparisons are not entirely satisfactory.

Many cases may be found in which very large sums have been allowed as compensation for salvage service, but so far as I have observed, they were cases arising on the ocean, and disclosed services which were peculiarly and unusually meritorious. It would hardly do to adopt, as applicable to salvage service upon these inland waters, a measure of compensation which might prevail or be deemed proper when applied to such service upon the ocean, unless an exceptional case should seem to demand it. I shall award to libellant, as a reasonable salvage, $2,000.

Case No. 4,495.

ENSLOW v. The SARAH AND ABIGAIL.

[N. Y. Times, May 25, 1852.]

District Court, S. D. New York.

MARITIME LIENS—SUPPLIES FOR FOREIGN VESSEL —SALE TO DOMESTIC PURCHASERS WITH NOTICE —DELAY IN ENFORCING LIEN.

[1. A maritime lien arising upon supplies furnished to a foreign vessel is of force against her in the hands of subsequent domestic purchasers with notice.]

[2. Notice to purchasers of a vessel that her previous owners are indebted for a set of sails furnished to her is notice of a lien therefor against her.]

[3. Long delay in enforcing a maritime lien does not affect libelant's right to interest from the time the debt fell due.]

[In admiralty. Libel by Isaac Enslow against the schooner Sarah and Abigail, for supplies furnished to the schooner.]

BETTS, District Judge. This was an action for a suit of sails furnished to the schooner in September, 1838, she being at that time a foreign vessel belonging to citizens of the state of New Jersey. In September, 1839, the schooner was sold to citizens of New York, for a valuable consideration and registered in New York the purchasers having notice at the time of purchase that her previous owners owed the libelant for a set of sails, about $600, but without knowledge that the demand was a lien upon the vessel. The action was commenced in November, 1839, and the vessel attached.

Held: That the demand was a lien on the vessel when the action was instituted. That the fact that the schooner was a domestic vessel when arrested, and had performed several voyages from this port after she became so, previous to the attachment, does not extinguish the lien which attaches to the vessel under the general maritime law, and not by force of any state statute. That the purchasers had sufficient notice of the lien at the time of purchase to put them on inquiry. That the delay of twelve years in bringing the cause to a hearing after its commencement restricts the litigant parties to their strict legal rights, but does not take away from the libelant his right to interest upon his demand. Decree for libelant for value of sails with interest at six per cent. from Nov. 21, 1839, and costs.

Case No. 4,496.

ENSWORTH v. NEW YORK LIFE INS. CO.

[1 Flip. 92;[1] 7 Am. Law Reg. (N. S.) 332; 1 Bigelow, Ins. Cas. 645.]

Circuit Court, N. D. Ohio. Jan. Term, 1868.

DIVISIBLE AND INDIVISIBLE CONTRACTS—AGENCY.

1. A suit brought in assumpsit for breach of contract between an insurance company and its agent, whereby it was agreed that the latter should receive a percentage on all renewals of policies procured by him so long as they should remain in force: *Held*, that such action may be sustained as upon an indivisible contract; and testimony, showing the probable expectancy of the duration of the policies is admissible.

[Cited in Aetna Ins. Co. v. Nexsen, 84 Ind. 349.]

2. It is competent, also, to introduce an established custom among insurance companies giving an agent property in lists of policies procured by him, for the purpose of explaining such contract.

Plaintiff brought his action in a state court, from which it was removed, at the instance of the New York Life Insurance Company, the defendant, (by virtue of the provisions of the act of 1789) into the circuit court for this district. In 1861 the plaintiff [Jeremiah Ensworth] was appointed agent at Cleveland, in Ohio, for the defendant, and was to receive 10 per cent. on first premiums on policies procured by him, and 5 per cent. on renewal premiums as long as they continued in force. He was dismissed from the agency in February, 1865, because he was engaged in procuring policies for another company, although there was nothing in his contract which forbade his so doing. While acting as agent for the defendant he procured fifty policies, a majority of them being for the lives of the insured, and as to the remainder, the premiums were to be paid up in ten years. Some of these expired by forfeiture; others by the death of the insured. On the termination of the agency, the plaintiff was deprived of the right of collecting the renewal premiums against his consent, and the same was given to his successor. The probable expectancy of the lives in the policies so procured, it was shown in the proof, would be from eight to thirteen years; and they would remain in force for at least ten years, making allowance for all contingencies of deaths and forfeitures. Besides, among insurance companies and agents a custom existed by which a property in lists of policies, was acquired by the agents, who procured them. Plaintiff claimed that defendant was liable for breach of contract, in withholding the collection of such premiums on renewals from him, and estimated his damages at $2,337.

Wyman & Barlow, for plaintiff, contended that the damages for breach of contract are definite and immediate, and a matter of mathematical calculation; that such list of policies procured by the agent has an intrinsic and market value, and that the damages in consequence of breach of contract are recoverable at once. They cited, 2 Bl. Comm. 590; 31 Vt. 582; 3 Pars. Cont. 189.

F. J. Dickman and S. J. Andrews, for defendant, argued that the plaintiff had forfeited his right to commissions by misconduct, and that such as were on renewal premiums to be paid in the future, were not to be taken into the account for damages;

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

and that actions, for such commissions could only be brought yearly.

SHERMAN, District Judge, recited the contract, and, after instructing the jury as to the mode of weighing the testimony, said: That if an agent should grossly misconduct himself in the course of his agency, and should prove unfaithful to his trust, he would forfeit his claim to his compensation or commission, but his misconduct and infidelity must be gross and aggravated before such consequences would follow; ordinary or slight misconduct would not work a forfeiture of his commissions, although it might be a good cause for a revocation of his agency.

In this case the contract is claimed by the plaintiff to be an entire contract, and that there may be an entire breach; that the damages can be readily ascertained from well known principles derived from long-used life tables. On the other side, it is claimed to be a divisible contract, and that the breach can be severed into several parts. I know of no general rule of law that would absolutely and definitely determine into which class this particular case would fall, nor can any adjudicated case, similar in all respects to this, be found. If any existed, it would undoubtedly have been found by the learning and research of the counsel. This contract may be said to be a continuing contract; but whether it is an entire or divisible contract depends upon its terms. When a contract is made for the building of a house, and a party refuses to fulfill, it may be considered an entire contract; and one refusal may properly be treated as an absolute breach, and one suit may cover all the damages. On the other hand, a contract to deliver the crops of a farm for several successive years is one capable of division, and several actions may be brought—one for each year—for the refusal to deliver the crops.

Again, it has been held and decided, that a continuing contract to pay a sum of money by installments, or the hire of a laborer by the month for a whole year, is a divisible contract, and may be sued on from month to month, or when the installments become due and payable. On the other hand, it is well settled that a contract to board, clothe, and support old people during their lives, is one entire contract; and one suit may be brought for the whole damages sustained by the breach. The principle deduced from these cases is, that if a contract is formed of parts which are so far inseparable, that if any one is taken away there is a completed and final breach, then all must be included in the damages; but if the contract is such that it can be separated and divided into one or more distinct and separate breaches, then an action will lie and damages be had for those breaches.

If it be found from the evidence that this contract contemplated that the plaintiff should have the absolute right and ownership in the policies obtained by him, to the extent of five per centum on their renewals during the life of them, and that this right became fixed at the moment and could not be divided from other duties and other matters, then it is one entire contract, and you must find and fix his damages from the evidence given as to the value of such an interest in the policies. But if the contract contemplated that he was entitled to the commissions on the premiums, only as the policies were renewed from year to year and the premiums paid to the life insurance company, then the contract is divisible, and he can only sue and recover damages after those premiums for renewals are paid in. In this case the plaintiff would be entitled to recover the amount of the commissions on the renewals only down to the day on which he brought his suit.

In this connection, it may be said that a well-established custom among life insurance companies and their agents, as to the kind and extent of the property that agents may possess in the lists of policies they procure, may be considered as explaining the contract as claimed, because the parties are presumed to make the contracts in reference to that custom.

NOTE. The plaintiff recovered $1,000 damages. This was the full value of commissions on the renewal premiums which were to become due during the estimated probable lifetime of the assured, after deducting costs for collection. See, as to divisible and indivisible contracts, Perkins v. Hart, 11 Wheat. [24 U. S.] 251; Badger v. Titcomb, 15 Pick. 409; Machette v. New England Mut. Life Ins. Co., Pittsb. Leg. Int. May 3, 1867; Logan v. Caffrey, 6 Casey [30 Pa. St.] 200; Sickels v. Pattison, 14 Wend. 257; Rodemer v. Hazlehurst, 9 Gill, 289; Sterner v. Gower, 3 Watts & S. 136; Andover Sav. Bank v. Adams, 1 Allen, 28; Lord v. Belknap, 1 Cush. 279; Secor v. Sturgis, 16 N. Y. 548; Colburn v. Woodworth, 31 Barb. 381; Thompson v. Wood, 1 Hilt. 93; Fowler v. Armour, 24 Ala. 194; Congregation of the Children of Israel v. Peres, 2 Cold. 620; Lowry v. Naff, 4 Cold. 370; Coleman v. Hudson, 2 Sneed, 463; Carraway v. Burton, 4 Humph. 108; Tarbox v. Hartenstein, 4 Baxt. 78.

Case No. 4,497.

The ENTERPRISE.

[2 Curt. 317.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

PRACTICE IN ADMIRALTY — REFUSAL OF DISTRICT COURT TO ALLOW APPEAL — APPLICATION TO CIRCUIT COURT—SEAMAN'S WAGES — DECLARATIONS OF MASTER—SUIT AGAINST OWNERS.

1. In a cause of subtraction of wages, in rem, one of the owners having claimed and answered, the district court decreed in favor of the wages amounting to more than fifty dollars; the vessel having been sold, produced less than fifty dollars, after paying charges. The claimant was denied an appeal by the district court. *Held*, that as the decree would conclude the owner in a suit in personam, the wages were

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

the matter in dispute, and the appeal should be allowed.

[Cited in The Zodiac, 5 Fed. 223; The Monte A., 12 Fed. 338. Explained in Starin v. The Jessie Williamson, Jr., 108 U. S. 310, 2 Sup. Ct. 671. Cited, in brief, in Heney v. The Josie, 59 Fed. 782.]

2. The erroneous refusal of an appeal by the district court, can have no effect here, save to impose on the party claiming the appeal, the burden of moving this court to allow it, and on this court the duty of seeing that the proper security is given.

[Cited in Snow v. Edwards, Case No. 13,145; U. S. v. Adams, 6 Wall. (73 U. S.) 107.]

3. In the admiralty, the declarations of the master concerning the contract of the seamen, are admissible in a suit against the owners, though not strictly part of the res gestae.

[Cited in Bedell v. The Potomac, 8 Wall. (75 U. S.) 594; The Fanwood, 61 Fed. 525.]

4. Whether the district court can entertain a libel of review, quaere. But the appellee in whose favor both the original decree and the decree in review were made, cannot raise the question here.

[Cited in Snow v. Edwards, Case No. 13,145; Northwestern Union Packet Co. v. Clough, 20 Wall. (87 U. S.) 541.]

Mr. Webb (with whom was R. H. Dana, Jr.), for appellants.

C. G. Thomas, contra.

CURTIS, Circuit Justice. This is an application to this court for leave to enter an appeal, the district court having refused to allow it. The transcript of the record of the district court, which is produced, shows that James Hagan and two other seamen, filed their libel in that court, in a cause of subtraction of wages, alleged to have been earned on board the schooner Enterprise; and prayed that the court would pronounce for the wages claimed, and for a warrant to arrest the vessel, and for relief, generally. The vessel having been arrested, Stephen Pember, intervened for his interest in the vessel, stipulated, with sureties, in the sum of two hundred dollars, to pay costs and expenses which might be awarded against him on the final, or any interlocutory decree, and thereupon was admitted to contest the suit, and answered the libel. Upon a hearing, a decree was made in favor of each of the libellants for wages, amounting to the sum of more than fifty dollars. On the same day, namely, the 11th day of December, 1854, an appeal was claimed by and allowed to the claimant Pember. Two days afterwards, the libellants moved for an order of sale, the claimant assented, and the court ordered it, and a sale was made for the sum of one hundred dollars, the expenses of the sale being eleven dollars, and the other fees and charges of the marshal in arresting, keeping, and giving notices concerning the arrest of the vessel, amounting to seventy-five dollars 10-100. Deducting all these, the marshal paid the balance, thirteen dollars 90-100, into court. Thereupon the libellants moved that, as it then appeared that the vessel sold for only one hundred dollars, and that all but thirteen dollars 90-100 of this was exhausted in costs and charges, the order allowing an appeal should be rescinded, and it was rescinded accordingly. The claimant now insists on his right to an appeal, and moves this court to direct the clerk to enter it, and produces a transcript of the record of the district court, made out pursuant to the late rule of the supreme court in that behalf.

The right to an appeal, being conferred by an act of congress, an erroneous refusal by the district court to allow it cannot deprive a party of that right. This court must review such refusal, and ascertain whether it was lawful; and if it finds the right exists, effect must be given to it, by directing the clerk to enter the appeal, on proper security being given, when required, and by proceeding, in due course, to hear and consider it. Indeed, the action of the district court in allowing or refusing to allow an appeal, should have no effect in this court, except to impose on the party against whose claim such order is made, the burden of moving this court on the subject. If the appeal was unlawfully allowed below, it must be dismissed here; if its allowance was unlawfully refused below, it must be allowed here, on motion being made. In the case of The New England [Case No. 10,151], Mr. Justice Story seems to have thought a mandamus to the district court might be necessary; but it does not seem to me to be so, except for the purpose of staying an execution where a party is entitled to a supersedeas, and I should doubt its necessity even then. I apprehend that what is in dispute in this case, is not the vessel, or even the existence of a lien thereon as a security for any wages which may be due; but it is whether any wages are due, and if any, what is their amount. It is true, the libellant cannot, in this case, have a decree in personam. But the record shows that Pember, the claimant, was an owner of the vessel during the voyage for which wages are claimed. In that character, he contests the right of wages by his answer. The decree of the district court pronouncing for wages exceeding fifty dollars, binds him personally as res judicata. A libel in personam, against him, would lie to execute that decree. The very celebrated case of Penhallow v. Doane's Adm'rs, 3 Dall. [3 U. S.] 54, was a libel in personam, to enforce a decree in rem. Indeed, where there appears upon the record a clear right to recovery against one who has appeared and contested the suit, it has been in conformity with the practice of some courts of admiralty to allow the libellant to proceed to a decree in personam. Ben. Ad. 301. A suit for wages may be both in rem and against the master personally, by force of the 13th rule prescribed by the supreme court; but, I should understand, not against the vessel and the owner in personam. But after a decree in rem in a suit contested by an owner personally liable, I should hold him bound, in a suit in personam

founded on the decree, and showing that the proceeding in rem failed to procure payment. And therefore I think, in this case, the wages, which exceeded fifty dollars, were the matter in dispute, and that the claimant had a right to appeal.

This appeal having been entered, was heard, in connection with another appeal, in a suit instituted by the same libellants and one other seaman, against the owners in personam to recover the same wages which were the subject of the suit in rem. The reason for the libel in personam was, that the proceeds of a sale of the vessel left only thirteen dollars, after the payment of expenses, to be divided among the libellants.

CURTIS, Circuit Justice. In both these suits the same question arises, whether the libellants are entitled to wages, or are bound by the articles which they signed, and under which they were to receive lays or shares of the proceeds of the fishing voyage. If the confessions of the master are admissible in evidence, it is shown, as to all the libellants, that they shipped on wages and signed the articles, only because the agent of the owners requested, without their being read to them, and with no intention of varying the oral contract for wages. If these confessions are not admissible, the proof, as to some of the libellants, fails. I am of opinion they are admissible. It has been argued that the master is but the agent of the owner, and that to render his admissions evidence against the owner they must be made in the course of the execution of his lawful authority, and as part of the res gestae. This is the ordinary rule. But the admiralty treats the master's declarations as standing on different ground from those of a common agent. He is himself liable personally for the wages. He thus stands in the relation of a principal debtor, liable for the same debt to which the owner is subject. And even where there is no liability ex contractu, I apprehend the confessions of the master, though not those of a mate, pilot, or seaman, have been constantly received in evidence by courts of admiralty. In The Manchester, 1 W. Rob. Adm. 63, Dr. Lushington allowed them to be pleaded in a cause of collision, and he made a similar decision in The Midlothian, 5 Eng. Law & Eq. 556, distinguishing in this latter case between the master and the seamen. See, also, The Lord Seaton, 2 W. Rob. Adm. 391, 394; The Europa, 13 Jur. 856. I am not aware that the question has been discussed in this country, but I am quite sure the practice has been to admit declarations made by the master, while in command, concerning any matters which came under his authority as master, though not part of any res gestae strictly speaking. I have therefore looked at the testimony of the master's declarations, made before any lis mota, and bearing in mind that the owners have not called him, either to deny or explain them, and considering the surrounding circumstances, as well as the direct and positive evidence which is applicable to the contracts of three of them, I am of opinion the libellants are entitled to wages, and the decrees of the district court in both cases must be affirmed, with costs. In the suit in personam damages at the rate of six per cent. per annum should be added.

In the suit in rem, numerous technical objections were taken to the admissibility of the depositions sent up to this court from the district court. I consider these depositions to have been taken as further proof, under the rule of the supreme court on that subject. The captain rightly describes the suit as pending in the district court, for the order allowing an appeal had been rescinded, when the depositions were taken. The proctor for the respondents appears to have had all the notice to which he was entitled, and the depositions were begun on the day named in the notice, and finished on the next day.

In the suit in personam, it appears by the record that a decree was originally made to take the libel for confessed, and for the wages, upon a default to appear and answer on the 29th of December, 1854; and that on the 28th day of February, 1855, after the court had adjourned without day, leave was given to file a libel of review, which was answered, the decree by default set aside, and the respondents allowed to answer and contest the claim. And it was made a question by the libellants at the hearing before me, whether the district court had power to entertain the libel for a review. It is certainly a very grave question (The New England [supra]; Adm. Rules xxix., xl.), but I do not perceive how the libellants, who did not appeal, can raise it. The decree finally made by the district court was the same as the decree made on the default. The libellants, therefore, had no cause to complain; at all events they did not appeal from any part of the proceedings. Upon the appeal of the respondents I do not think I can inquire into the correctness of these preliminary proceedings, when I am satisfied that the only decree appealed from, was correct and should be affirmed.

Case No. 4,498.

The ENTERPRISE.

[1 Lowell, 455.] [1]

District Court, D. Massachusetts. July, 1870.

COLLISION—WAGES.

A British vessel was libelled for collision, and her master, who was a part-owner, admitted the liability, and the vessel was sold. The proceeds were insufficient to pay the damage in full. The owners were solvent. *Held*, the seamen's lien on the proceeds would be postponed

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

to that of the libellant in conformity to the rule adopted by the British courts towards our vessels in like circumstances.

[Cited in The Orient, Case No. 10,569; Covert v. The Wexford, 3 Fed. 579; The Maria and Elizabeth, 12 Fed. 631; The Brantford City, 29 Fed. 384.]

The schooner Enterprise, owned in one of the British North American Provinces, was libelled in a cause of collision by the owners of an American vessel, and the master, who was the owner of three-eighths of the schooner, appeared and admitted the liability, and the damages were agreed at eleven hundred dollars. The gross amount realized from the sale of the schooner was eight hundred dollars. The master and one seaman now applied by petition to have their wages paid them out of the fund in the registry.

C. G. Thomas, for petitioners.

J. Lathrop, for libellants.

LOWELL, District Judge. By the law of the flag the master has a lien for his wages, which this court will enforce by comity: The Havana [Case No. 6,226]. But by the same law the lien of the seamen of a foreign vessel is postponed to that of a libellant in a cause of damage where the owners are solvent as in this case, and the proceeds are insufficient for the payment of both: The Linda Flor, Swab. 309; The Duna, 13 Ir. Jur. 358; Abb. Shipp. (11th Ed.) 621; The Benares, 7 Notes of Cas. Supp. L. The reasons assigned for this rule are that the seamen have other available remedies for their wages, while the injured vessel has, practically speaking, only this, and that the mariners of a wrong-doing ship may be supposed to share in the fault of the vessel. The argument is the stronger in this case because the seamen have a lien on the freight which has not been proceeded against in the collision cause, and so far as the master is concerned, being an owner, he is liable to the injured vessel to make good, to the extent of the freight, pending at the time of the disaster, the deficiency which the libellants suffer of a full restitutio in integrum. I believe no admiralty court of the United States has decided the general question of the order of priority of these liens, but in the case of a British ship, sold here, it is enough to know what law the courts of Great Britain administer in similar cases to our vessels. Petition dismissed.

Case No. 4,499.

The ENTERPRISE.

[1 Paine, 32;[1] 4 Hall, Law J. 115.]

Circuit Court, D. New York. Sept. Term, 1810.

CONSTRUCTION OF PENAL STATUTES — OFFENSES NOT CLEARLY DESCRIBED—INTENTION OF LEGISLATURE—AMBIGUITY — EMBARGO ACT OF APRIL 25, 1808.

1. The rule that penal statutes are to be construed strictly, means that they ought not to be extended by their spirit or equity to other offences than those which are clearly described and provided for. But courts are not prevented by this rule from inquiring into the intention of the legislature.

[Cited in Harrison v. Vose, 9 How. (50 U. S.) 379; U. S. v. Athens Armory, Case No. 14,473; U. S. v. Mattock, Id. 15,744; U. S. v. One Raft of Timber, 13 Fed. 798; The Lizzie Henderson, 20 Fed. 529; Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 876; Tozer v. U. S., 52 Fed. 920.

[Cited in State v. Wilson, 47 N. H. 108.]

2. Where there is such an ambiguity in a penal statute, as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty.

[Cited in U. S. v. The Reindeer, Case No. 16,145; Harrison v. Vose, 9 How. (50 U. S.) 379. Followed in U. S. v. Three Railroad Cars, Case No. 16,513.]

[Cited in Wood v. Adams, 35 N. H. 37; Beckham v. Nacke, 56 Mo. 547; Com. v. Standard Oil Co., 101 Pa. St. 150.]

3. The language of the 2d section of the embargo law of the 25th of April, 1808 [2 Stat. 499], is so loose that it is impossible to determine whether any offence and forfeiture were intended to be created. At any rate the reference as to the penalty to the collection law [of 1799 (1 Stat. 665)] is not to the 50th section of that law which provides against unloading goods in the night.

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

[This was a libel by the United States against the schooner Enterprise and cargo, John Yellowly, claimant, for having been laden in the night, without a license. From a decree of the district court condemning the vessel and cargo, the claimant appeals.]

[2] [The facts being admitted, the attorney of the United States contended that the penalty for loading in the night season, or even in the day-time, without a permit from the collector, was the forfeiture of both vessel and cargo. That although the forfeiture of vessel and cargo was not declared in so many terms by the second section of the embargo act, yet that it clearly intended to refer to and adopt certain of the regulations and penalties contained in the collection law; and that the regulations and penalties thus referred to and adopted are to be found in the 50th section of that law; which in substance provides, that goods, wares and merchandize imported into the United States from a foreign country shall not be unladen or delivered in the United States but in open day, except by special license from the collector, nor at any time without a permit from the collector; and punishes every person who may be engaged in the prohibited unlading of such foreign goods, wares, or merchandize, with a forfeiture of four hundred dollars respectively, and a disability to hold any office of trust or profit under the United States for a term not exceeding seven years; and directs the collector of the district to advertize their names in a public newspaper; and subjects to forfeiture the goods, wares and merchandize so

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [From 4 Hall, Law J. 115.]

unladen; and further declares that if the value of such goods, wares or merchandize shall amount to four hundred dollars, the vessel from which they are unladen, with her tackle, apparel and furniture, shall be subject to the like forfeiture. The attorney of the United States stated that the construction of the law for which he contended, had received the judicial sanction of most of the district courts in the United States. That in this district in particular, a number of condemnations had been pronounced under circumstances similar to those of this case, in all of which the adverse counsel had acquiesced, except in those where his present client was engaged. That the question now agitated was one of great importance, as by far the major portion of seizures under the embargo laws had been made under this very section. The attorney of the United States concluded his argument by expressing a very confident expectation that the decree of the district court would be affirmed.

[The counsel for the appellant observed that as the cases alleged to have been decided in other districts of the United States did not come before the court in the definite form of regular reports, it was impossible for him to answer or explain them. That they might or might not have corresponded in all their parts, with the case now in controversy. That this district, as he was well aware, abounded with condemnations under this section of the law; but that in all of those cases where he was engaged, he had entered his protest against their authority by an immediate appeal. That if the other counsel engaged in similar prosecutions had omitted to pursue the same course, he was confident, from his knowledge of the sentiments of those gentlemen, that the omission had not arisen from their conviction of the correctness of the condemnations. That their clients, already deprived of their vessels and cargoes, probably of their all, by the rigor of the law, rendered more rigorous by judicial interpretation, might have been unable to find the necessary security for the prosecution of appeals; or they might have shrunk from a contest, where they were threatened not only with the loss of the property in controversy, but also with the most formidable personal disabilities and penalties. Under these circumstances, the counsel for the appellant trusted that the cause would come before this court unprejudiced by what had been said to have taken place elsewhere. He was anxious that the question should be fairly met, and decided on its merits. He contended that the only consequence of lading a vessel contrary to the provisions of this section of the law, was the refusal of a clearance. That the subject of a clearance was the thing chiefly in contemplation of the legislature in the sections immediately previous and subsequent, as well as the one in question. That in this section there was no absolute prohibition against lading a vessel in any manner which the owner might elect; but simply a provision that if the lading was not under the inspection of a revenue officer the vessel should be deprived of the privilege of a clearance. That the construction is harsh and to be avoided, which imputes to the legislature an intention of converting into a crime, the exercise of the privilege which every citizen enjoys of employing his vessel as a storehouse, or for any purpose not immediately connected with navigation, whenever he pleases, without permission from any revenue officer whatsoever; but that the argument of the opposite counsel not only imputes this intention to the legislature, but also supposes that the legislature intended to attach to this new created crime, the most severe set of penalties to be found in the whole range of our revenue system; and that under this section, if a merchant, from motives of convenience, and perhaps with no design to depart from the wharf, has the audacity to place a single article on board his vessel without the permission and superintendence of the revenue officers, he is not only liable to enormous penalties and forfeitures, but is also under a seven years disability to hold any office of trust or profit in this country, and is in the meantime to be advertised in public newspapers as a culprit and outlaw. That if such an intention indeed possessed the minds of our national legislature, they had not, fortunately for the honor of the country, ventured to express it in clear and intelligible language: the despotic mandate had been happily couched in terms of so much darkness and mystery, that our courts were not bound to understand and enforce it. The counsel of the appellant insisted on the rule of the common law that penal statutes are not to be construed strictly against the accused, nor was he aware of any privilege which the embargo act and its supplements could reasonably claim to be exempted from the operation of this benevolent and wholesome maxim. But if any forfeitures over and above the penalty of being refused a clearance are created by this section, what are those forfeitures?—and from what part or parts of the collection law, are they to be taken? That the answer of the attorney of the United States on this subject ought to have been very explicit and satisfactory; for although it be admitted that a penal statute may by reference incorporate and adopt the penalties and forfeitures of some other penal law, yet that the terms of such reference and adoption should be exceedingly clear and unequivocal. That the attorney of the United States had referred to the 50th section of the collection law, as containing the restrictions, regulations, penalties and forfeitures intended to be adopted by the clause of the embargo law now in question; but that it would be borne in recollection that the clause now in question speaks of such restrictions, penalties, and forfeitures "as are provided by law for the inspection of goods, wares and merchandise imported into the

United States," and that it will be found on examination that the 50th section of the collection law treats, not of the "inspection" of goods, wares and merchandize, but of their unlading and delivery; and that neither the word "inspection," nor any word of corresponding import, is to be found throughout the whole section; nor could the counsel for the appellant discover the semblance of a reason why the 50th section of the collection law was thus endeavored to be pressed into the service of the embargo acts and its supplements, except that there was no other part of the collection law which could be tortured into a bearing on the subject, and except also that the 50th section of that law is more rigorous in its penalties and denunciations than any other portion of our antient revenue system.—The counsel for the appellant concluded by observing that the language of the legislature is involved in such obscurity as at least to leave room for doubt; and that in the construction of the criminal or penal laws, doubt should be tantamount to acquittal.][3]

G. Griffen, for appellant.

N. Sanford, Dist. Atty., for respondent.

LIVINGSTON, Circuit Justice. Although the libel in this case contains a variety of articles, it is agreed that if any violation of law have been committed, it consists in lading of certain merchandise, of the value of more than four hundred dollars, on board of the schooner Enterprise in the night, without a license or permit from the collector and naval officer, and without the inspection of any officer of the revenue. This allegation being fully proved, it only remains to decide whether this act worked a forfeiture of vessel and cargo. The law, which is supposed to attach these consequences to conduct of this kind, is the supplementary embargo act which passed the 25th of April, 1808. Of this law, reliance is placed on the second section, which declares—"That during the continuance of the act laying an embargo, no ship or vessel of the character of the Enterprise shall receive a clearance, unless the lading shall be made under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties, and forfeitures, as are provided by law for the inspection of merchandise imported into the United States, upon which duties are imposed, any law to the contrary notwithstanding." This section, it is conceived, implicates a vessel loaded in this manner, and its cargo, in the same penalties which are imposed by the 50th section of the collection law on the landing of goods imported contrary to its directions; which are, "that no goods brought from a foreign port shall be unladen but in open day, between the rising and setting of the sun, except by special license from the collector and naval officer of the port, nor at any time without their permit." The penalties for an infraction of either of these directions are, a forfeiture by the master, and every other person knowingly concerned, or aiding therein, of the sum of four hundred dollars; a disability from holding any office of trust or profit under the United States, for a term not exceeding seven years, with an advertisement of their names by the collector in one of the public newspapers. The goods so landed are also declared to be forfeited, in which fate the vessel is likewise involved, if their value at the port where landed, shall amount to four hundred dollars.

On the argument much aid was attempted to be derived by each party from the rules which have been applied to the construction of penal statutes, and although the counsel differed greatly in their understanding of these rules, the common law has not left us in the dark on this subject. The act, and particularly that part of it under which a forfeiture is claimed, is highly penal, and must therefore be construed as such laws always have been and ever should be. But while it is said that penal statutes are to receive a strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly described and provided for. A court is not, therefore, as the appellant supposes, precluded from inquiring into the intention of the legislature. However clearly a law be expressed, this must ever, more or less, be a matter of inquiry. A court is not however permitted to arrive at this intention by mere conjecture, but it is to collect it from the object which the legislature had in view and the expressions used, which should be competent and proper to apprize the community at large of the rule which it is intended to prescribe for their government. For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where ne labours under the same uncertainty as to the meaning of the legislature. If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary—especially if the consequences be so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation. It will at once be conceded that no man should be

[3] [From 4 Hall, Law J. 115.]

stripped of a very valuable property, perhaps of his all,—be disfranchised, and consigned to public ignominy and reproach, unless it be very clear that such high penalties have been annexed by law to the act which he has committed. If these principles be correct, as they are deemed to be, a court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favour of the party accused. "It is more consonant to the principle of liberty," says an eminent English judge, "that a court should acquit when the legislature intended to punish, than that it should punish, when it was intended to discharge with impunity." Some of these principles have been overlooked altogether, or but little attended to in the argument of the cause. They are, therefore, now brought into view, and will govern the court in deciding on the present appeal.

The attention of the court has been called to a history of the progress of the several laws relating to the embargo, and to the mischiefs which were unprovided for, at the time of the passage of the one under consideration, in order to show what was intended by the legislature. Almost every possible evasion, it is said, had been previously guarded against by adequate sanctions, except that of loading clandestinely or by night, and then watching an opportunity of going to sea without a clearance, or giving bonds—which was the evil to which it was intended to apply a remedy. Be it so. This may have been in the contemplation of congress, but we are not bound to conclude that they have done what was intended, unless fit words be used for the purpose.

In examining the act, the first difficulty which occurs, is that no words of prohibition are to be found in this section. There is no interdiction to load at any time, nor without the intervention of the revenue officers. Penal laws generally first prescribe what shall or shall not be done, and then declare the forfeiture. This course is pursued in all the other offences created by this statute, and very generally by all the other penal laws of the United States. The court will not say that an offence can be created in no other way, but when we perceive such a departure from one almost universal, and from other parts of the same law, it suggests strong doubts whether the legislature intended to prevent in any other way than by the withholding of a clearance what it is supposed they had so much at heart. The word "subject," it is presumed, supplies this deficiency, and is sufficient to inflict a penalty. This may be the case when it follows a prohibition not to do a particular act. If it had been declared that no vessel should be loaded but in a certain way, subject to certain consequences, such form of expression might be liable to no objection. But the embarrassment is, what meaning to assign to this word, as it is here used. Is the inspection to be made subject to certain regulations, penalties, and forfeitures, to entitle the vessel to a clearance? Or are vessel and cargo rendered liable to confiscation if these ceremonies be omitted? But of what use then, it is asked, are the terms "penalties" and "forfeitures?" Or are they to be rejected as surplusage? If no sense can be discovered for them, as they are here introduced, the court had better pass them by as unintelligible and useless, than to put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed. The court is not without its doubts whether it was meant to punish the mere act of loading secretly, in any other way than by the denial of a clearance—and to this consequence these words may have been intended to have reference. This doubt which is produced by the unusual and not very luminous phraseology of this section, is greatly increased by a consideration of the very heavy and disproportionate punishment which will follow, if the construction of the respondents be correct. This section, whatever was intended by it, seems to contain nothing more than a direction to the custom-house officers not to grant clearances in particular cases; which understanding of it derives some support from the expression of "any law to the contrary notwithstanding;" which not only closes the whole sentence, but most obviously refers, and exclusively, to prior laws respecting clearances, and which permitted the granting of them to vessels, although laden in the night and in the absence of a revenue officer. It is more reasonable to believe that the refusal of a clearance was to be the only consequence of loading in this way, than to suppose the legislature so inconsiderate as to punish a bare intention to violate these laws, if a mere loading in this way be evidence of such intention and which might be abandoned, with so much more severity than an actual and open infraction of them by sailing with a valuable vessel and cargo to a foreign port. The court is not disposed to impute to any public body so great an inconsistency, unless manifested in a way to leave no doubt of its being chargeable on them.

But if it were designed to prohibit the act in question under certain penalties, another and greater difficulty occurs, and that is to ascertain what these penalties are. They are to be the same in the language of the act, as are provided by law for the inspection of merchandise imported into the United States upon which duties are imposed. That penalties may be fixed by a reference to those which have already been established for other offences, is not disputed. The question here is, whether the designation be so certain as to enable the court to discover what penalties were intended to be embraced by it?—Before effect be given to this part of the law, it must be ascertained what penal-

ties are provided by law "for the inspection of goods brought into the United States." To aid us in this research, the court is referred to the 50th section of the act to regulate the collection of duties. It was natural to expect, therefore, that some provision would be here found relating to such inspection, but instead of this, it contains only a regulation as to the time and manner of landing goods, and the penalties for landing them in any other way. The word inspection is not found in the whole section. Before, therefore, it can be said that these are those to which the appellant is become subject, the court must be satisfied that landing and inspection are convertible terms, which they are not pretended to be. Goods may be inspected and yet never landed—or they may be landed without any previous inspection, and not forfeited. To obviate this difficulty, the court is desired to bear in mind that the term "inspection" has two significations—that it means the particular inspection or examination which certain articles, such as spirits, wines, and teas undergo—and also, that general superintendence and care which take place on the part of the revenue officers on the arrival of every vessel with a cargo in the United States. If it be used in these different senses, how is the court to ascertain in which it is to be taken here? If in the first sense, which is its most usual and appropriate signification, then other sections of the collection law must be those which are referred to, where the penalties for neglect of inspection, or rather for landing without such inspection, are very different from those prescribed by the 50th section for landing in the night, or without a permit. If the latter sense be adopted, in order to give effect to a penal statute, of such doubtful import, it is not seen how it will bring home to the appellant the penalties of this section, which is relied on, one offence against which is the landing, even with an ordinary permit in the night time, which if done under the inspection and view of every officer of the customs, would not save the property from confiscation. It is certain that this section is silent as to any kind of inspection, and that a forfeiture might accrue under it, although every species of inspection mentioned in the collection law had been performed. It is the want of a special or common permit, as the case may be, not the want of inspection, which makes the landing an offence. The court, therefore, cannot, without great hazard of mistake, select from a law of great length, containing no less than one hundred and twelve sections, and a very great variety of provisions and penalties, any particular part, where the reference is so uncertain, and apply it to the case of the appellant.

It is said that more prosecutions are depending for forfeitures under this clause of the law, than for any other violations of the embargo laws. This, while it is an incentive to greater caution, furnishes some proof that the law has not generally been understood in the sense now put upon it. For certainly these laws might have been broken at much less hazard, and with greater prospect of impunity.

It was also mentioned that in several of the districts the law had received this interpretation. Without a full report of these decisions, it is impossible to say on what grounds the courts proceeded—or where these appear on the record, the sentence may have passed sub silentio, or by default. In the case of U. S. v. The William and Samuel [Case No. 16,701], from the district court of Pennsylvania, it is admitted there was no argument on this point; so that this sentence can afford no evidence of the opinion of the learned judge who presides there; whose decisions are in such general and high estimation, and will always receive the most respectful consideration from this court.

Upon the whole, it is so doubtful whether any offence were created by this section of the act of the 25th of April, 1808; and still more so, what are the penalties for its commission, if any were created, that the court cannot persuade itself there is ground for this prosecution. The sentence of the district court must therefore be reversed.

NOTE. See the case of The Paulina, 7 Cranch [11 U. S.] 52, where the same point was decided.

Case No. 4,500.

The ENTERPRISE.

The NAPOLEON.

[3 Wall. Jr. 58.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1855.

PRACTICE IN ADMIRALTY — POWER OF CIRCUIT COURT TO ISSUE MANDAMUS TO DISTRICT COURT —OR TO GRANT REHEARING OR ALLOW APPEAL —COLLISION — LIABILITY OF TWO VESSELS TO A THIRD—SUIT AGAINST BOTH—DAMAGES—TUGS AS CARRIERS.

1. The circuit court has no power to issue a mandamus to the district court, to compel it to set aside its decree in admiralty, or to grant a rehearing, or to allow an appeal after the time has elapsed in which it might have been taken; not even in cases where this court thinks that the district court should have reheard the case, or allowed an appeal under the circumstances.

[Cited in Snow v. Edwards, Case No. 13,145.]

2. In a question of collision between a "tow" on the one side, and a steam tug and a steamboat on the other, where it is difficult for the owner of the tug to ascertain who has been in fault, the owner of the tow may "implicate both vessels, demanding a decree against one or both, and thus compel them to interplead and settle the question of their respective liabilities;" and he need not run the risk of losing his suit first against the tug, because her owner can show that the steamer was in fault, and then against the steamer, because her owners

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

can show, upon new evidence in their power, that the tug was in fault.

[Quoted in The Hudson, 15 Fed. 167.]

3. Where a boat in charge of a tug, whose owners have contracted to tow her, is lost by a collision between the tug and a steamer—the boat towed being clearly in no fault—the court will not, on a libel against the tug, be astute to inquire whether as between the tug and the steamer, the one or the other of these last was to blame for the collision. In a case of doubt—and especially if by an error of the court below, not remediable here, it has lost its remedy against the steamer—it will rather give the boat towed reparation against the tug which has contracted to carry it, leaving this last to recover the whole or a quantum of damages from the steamer.

4. Steam tugs are not liable as common carriers for the safety of vessels which they are towing, or of their cargo.

Mandamus to district court. Appeal in admiralty and rehearing. These two cases, though the points adjudged in each are different, grew originally out of the same transaction, and were decided in this court, as they are here reported, together. The cases arose on libels in admiralty, filed by one Hitner. The transaction was thus: The libellant, Hitner, contracted with the steam tug Enterprise, to tow his canal boat, loaded with iron, along the Delaware. While going up the river with her tow, the tug met the steamer Napoleon. A collision took place, by which the iron became a total loss. The collision was not an inevitable accident, but arose from the fault of either the tug or the steamer, or of both. But whether it was the fault of one, or of the other, or of both, Hitner did not, himself, know; and instead of "implicating both vessels by demanding a decree against one or both, and thus compelling them to interplead and settle the question of their respective liabilities" (which this court said expressly, he should have done), he suffered himself to be persuaded by the owners of the tug, that the fault was all the steamer's, and so filed his libel in the court below against it alone; the owners of the tug conducting the suit in fact, but not being in any way parties to it on the record. The district court had thought that the fault was exclusively the tug's, and so dismissed the libel. Without taking an appeal from this decree within the time prescribed by the rules of the district court, but relying on the decree as showing conclusively that the steamer was not in fault, and therefore that the tug must be, Hitner then filed his libel below against the tug; and the owners of the tug, producing better evidence when their own interests were involved, than they had done when the steamer's were, the district court now decided that the fault was exclusively the steamer's, and dismissed the libel against the tug. Finding himself in this dilemma, the libellant next petitioned the district court to rehear his suit against the steamer, or to allow an appeal on it nunc pro tunc. This was refused by the court, and the question in the second of the cases in this court, st. the case of the steamer Napoleon, was, therefore, not upon the action of the district court upon the original libel against the steamer, but upon the action of that court in refusing to grant an appeal, or to rehear. It involved the question of the right of this court, the circuit court, to entertain an appeal from the district court in admiralty on a petition to grant an appeal or to rehear, when such petition was refused. The question in the other, the first case, st. that of the steam tug, was an ordinary appeal. The evidence was conflicting. The tug, it was certain, had fewer lights than she ought to have had, but that omission, in the opinion of the court below, did not contribute to the collision. The collision was off the larboard side of the tug, against the starboard quarter of the wheel-house, and as the steamer had shut off her steam, and endeavored to sheer to the larboard, when the two vessels were some hundred yards apart, the district court had thought it "almost certain that the steamer, if she had ported her helm, would have passed clear of the tug; and that she would also have gone clear even after starboarding her helm, if she had kept up her headway." And there having been, as that court thought, "time enough, seemingly, for either resort, she did neither; but, on the contrary, violated the cardinal rule, which required her to port her helm, and then by slacking her speed, increased the probability of her being run into by the tug." When the proceeding against the steamer had been before him, the district judge, on the evidence in that case, had been of a different opinion. The tug, his honor thought, had been "clearly in delict," and it was "clear that her irregularly placed light misled the Napoleon." Where there was "no want of a look-out, no recklessness, no purpose of wrong manifested by a plainly wrong manoeuvre," he would "not hold that a manoeuvre, because it turned out to be unfortunate, should divert the responsibility from a party that had clearly been in the wrong." His honor was himself "inclined to think that the steamer would have done more judiciously if she had ported instead of starboarding her helm;" but he would "not question too zealously the nautical propriety of a manoeuvre made in good faith and upon an emergency induced by the misconduct of the other party." The libel against the tug was drawn rather loosely, and with a good deal of verbiage; and it was, perhaps, not quite clear whether tort or contract was the basis of the allegation. It set forth that libellants were owners of fifty tons of pig iron, in a canal boat called the General Marion. That on the 29th of July, 1851, the master of the Enterprise "undertook to tow said canal boat," &c. That by gross negligence

in the management of the Enterprise, the Marion was sunk and the iron lost, in consequence of being brought into collision with the steamboat Napoleon, and because the Enterprise "made no effort to avoid the collision."

St. George T. Campbell, for libellant.
Mallery & Gowan, contra.

GRIER, Circuit Justice. The libellant, who has lost his iron without any fault of his own, and who should have had nothing to stake in the game, has been compelled to play the cards of both parties in succession, and has lost the second game with what was the winning hand in the first. The case is obviously peculiar.

The only appeals known to courts of admiralty are in open court, sedente curia. In England the application must be made within fifteen days after the decree. Godolphin in Sea Laws, 208. By the act of congress of 3d March, 1803 [2 Stat. 244], it must be "allowed to the ciruit court next to be holden in the district." Within this limit the district court may prescribe the times and modes of making them. Norton v. Rich [Case No. 10,352]. The 45th rule of the supreme court requires the appeal to be made while the court is sitting, or within such other period as shall be designated by the rules of the court, or by an order specially made in the particular suit.

Whether a court of admiralty can entertain a bill or libel in the nature of a bill of review, according to the principles and practice of a court of equity, where there is newly discovered evidence or other matter touching the conscience of the court, is a question not raised by the case; nor do I know of any precedent for such a practice. But the same purpose may be effected by a motion or petition for a rehearing. By the 68th rule of the district court, such a petition may be exhibited any time before execution executed. But such an application being to the conscience and discretion of the court who made the decree, it is not the legitimate subject of appeal. And the same may be said of any application to allow an appeal nunc pro tunc. If this court were of opinion that in a proper use of its discretion, the district court should have reheard this case, or should have allowed an appeal under the circumstances, they have no power to give a remedy to the appellant. We have no power to issue a mandamus to the district court, or compel the judge to set aside his decree, or grant a rehearing, or allow an appeal after the time has elapsed in which it might have legally been taken. When a case is before us on appeal, we must hear and decide it, but we have no mode of compelling the district court to allow an appeal or send up the record where it is not allowed. If the party has neglected to appeal in proper time, it is his own fault, and if he suffers in consequence, it is as much a "gravamen irreparabile" as where he suffers his goods to be adjudged to another. This appeal must, therefore, be dismissed.

We come now to the case of the tug, the Enterprise. The libel in this case neglects to set forth in its caption whether it is a suit for a tort or on contract, as required by the 23d rule. But as by the 24th rule, amendments in the matter of form may be made at any time, we shall consider the libel as amended in that behalf to suit the cause of action actually set forth in it. The complaint is clearly not for a maritime tort or collision, but for a breach of the contract to tow or carry the boat of libellants safely. Its averments, if established by the testimony, are sufficient to support the action. It is true, the libel contains much other useless and superfluous matter, which has justly subjected it to the imputation of appearing to be a suit for collision between the Napoleon and Enterprise. But in order to support his case against the tug, the libellant is not bound to justify the steamer, or show that, as between that boat and the tug, the latter was wholly in the fault. If the steamer was recklessly dashing along at full speed, after night in the harbor of Philadelphia, or near to it, seeing and hearing the tug more than a mile off, crossed her bows unnecessarily, and stopped her headway when right in front of the tug, she may not be in a situation to impute fault to the tug in a suit between them. And as such a controversy may possibly arise hereafter, it is not the intention of this court to intimate any opinion on this question till both parties have been heard. It is enough for the purposes of this case, that the steamer was found in front of the tug; that the tug did not back her engine or make any effort to avoid the collision, and that in consequence thereof, the libellants' boat was sunk and their property lost. It is true, a tug is not liable as insurer, as carriers for hire are, but it is bound to use all the care and diligence which prudence and caution require, to avoid bringing the tow in collision with objects which may cause its injury or destruction. The answer charges no fault to the tow or those who managed it. It was not lost by inevitable accident; but by being brought by the power of the steam tug into collision with the steamboat. And although the decree in the case of the Napoleon is no estoppel to the Enterprise, who was no party to it on the record, yet as between her and the libellants, under the circumstances I have detailed, it should have the force of an acknowledgment or confession in deciding doubtful questions of fact. If, as between the tug and the steamboat, the latter has been partially or entirely in the fault, the owners of the Enterprise may have their remedy for the half or the whole of the damages recovered by the libellants, and the judgment in this case cannot affect, by way of estoppel, either party in such a contest, as to any matter of fact herein decided, except

that the tug has been compelled to pay the damages caused by the collision.

Let a decree be entered for libellants for the value of the iron lost, to be calculated by the clerk. As other evidence was given in this court, materially affecting the cause, the appellants will not be allowed costs in this court.

ENTERPRISE, The. See Case No. 247.

ENTERPRISE, The (DAVIS v.). See Case No. 3,632.

ENTERPRISE, The (HART v.). See Case No. 6,151.

ENTERPRISE, The (HASLETT v.). See Case No. 6,197.

Case No. 4,501.

The ENTERPRISE v. UNITED STATES.

[The case reported under above title in 4 Hall, Law J. 115, is the same as Case No. 4,499.]

ENTERPRISE CO. (GEIB v.). See Case No. 5,297.

ENTERPRIZE, The (TURNBULL v.). See Case No. 14,242.

Case No. 4,502.

The ENTIRE.

[5 Adm. Rec. 477.]

District Court, S. D. Florida. Feb. 14, 1856.

SALVAGE—TOWING VESSEL IN DISTRESS—COMPENSATION.

[Towing into port a vessel in distress, but in no great danger of loss, is not strictly salvage service, and is worthy of but small compensation. Eight hundred dollars allowed on a valuation of twelve thousand dollars.]

[In admiralty. Libel by William Rollins and others against the schooner Entire and cargo for salvage services rendered by the steamer Isabel.]

W. R. Mackley, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This schooner had lost all her sails and rigging and both masts, except a gaff topsail and the stump of the foremast; in this condition she had crossed the Gulf from near Matauzas, had made the Florida coast about twelve miles to the eastward of the Key West light, and was running along, outside of the reef, with the intent of coming into this port, when the steamer Isabel hove in sight. The captain hoisted his colors, and the steamer turned a little out of its nearest course, and took the schooner in tow, and brought her into port. The steamer, by this service, was delayed about an hour, and broke two warps or hawsers. At the time the steamer hitched on to the schooner, she was about three-quarters of a mile distant from the east end of the Western Samboes, in the Gulf. The master knew his position from his coast pilot, and from having often sailed along the coast. He had already passed the Eastern and Middle Samboes. The schooner with a fair wind, and the wind was fair to come into the ship channel, was under good command, and made about three knots an hour through the water. There was a strong wind blowing.

The whole case shows, I think, that the schooner was not in much danger, but was in distress, and the assistance rendered by the Isabel was very useful, and very timely, and should be fairly and reasonably compensated. The compensation however, ought to be much less in amount than an ordinary salvage, for the reason already given, that the services rendered were not, strictly speaking, salvage services, inasmuch as the schooner was not in much if any, danger of loss. The vessel and cargo may be estimated at $12,000, and in my opinion $800 is a reasonable compensation to be allowed for the service. It is therefore, ordered, adjudged, and decreed, that the libellants recover, in full compensation for their services rendered said schooner entire and cargo, the sum of eight hundred dollars and the costs and expenses of this suit, and that upon payment thereof the marshal restore said schooner and cargo to the master thereof, for and on account of whom it may concern.

Case No. 4,503.

ENTWISLE v. BUSSARD.

[2 Cranch, C. C. 331.][1]

Circuit Court, District of Columbia. May Term, 1822.

EXECUTION—PRACTICE—FORTHCOMING BOND TO DECEASED CREDITOR.

If the plaintiff delivers his fieri facias to the marshal, and dies, and the marshal levies it upon the goods of the defendant, he has a right, under the laws of Virginia, to give a forthcoming bond payable to the deceased creditor; and such bond will support a judgment on motion by the administrator of the creditor.

Mr. Swann, for plaintiff, moved for execution upon a forthcoming bond given by the defendant [Daniel Bussard] to Isaac Entwisle, who had died after delivering the fieri facias to the marshal and before the levying of it upon the goods of the defendant, for the forthcoming of which, on the day of sale, the bond was given.

The act of Virginia, concerning executions, of the 10th of December, 1793, § 13 (Rev. Code 298), after enacting that the property of the defendant's goods shall not be bound by a fieri facias until it shall be delivered to the officer, provides "that if the owner of such goods and chattels shall give sufficient security to such sheriff or officer, to have

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

the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or officer to take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount due thereon with condition to have the goods or chattels forthcoming at the day of sale," &c.; and the act further provides that if the bond shall be forfeited, and returned to the clerk's office, it shall have the force of a judgment, and the court may award execution thereon, upon motion and ten days' notice.

Mr. Swann, contended that if the marshal could, after the creditor's death, proceed to levy the execution upon the defendant's goods, the defendant was entitled to the correlative right of giving a forthcoming bond; which bond, by the express provision of the law, must be made payable to the creditor; and the only creditor whom the marshal could know, was the plaintiff named in the execution. Besides, the defendant is estopped from denying the existence of the obligee; and it is unjust that, having had the full benefit of the bond himself, he should now seek to avoid it.

Taylor, contra. The bond, as a contract, must have two parties; a bond given to a dead man is void, for want of parties. If considered as a judgment confessed, it is erroneous because there was no plaintiff. The defendant is not estopped to plead that there was no such person in rerum natura.

Swann, in reply. The bond is a part of the process of execution. When an execution is begun, the death of the parties makes no difference; it must be finished; and for that purpose the parties are still, in law, considered as alive. The bond was as lawful as the execution, and the right to give it and relieve the property was appendant to the execution.

THE COURT (MORSELL, Circuit Judge, contra, and CRANCH, Chief Judge, doubting) refused to quash the bond, and awarded the execution upon it.

ENVOY, The (WILSON v.). See Case No. 17,802.

ENWRIGHT (UNITED STATES v.). See Case No. 15,054.

Case No. 4,504.

The EOLIAN.

[1 Biss. 321.][1]

Circuit Court, S. D. Ohio. June, 1860.[2]

SEAMEN—WAGES—LIEN OF MASTER FOR SERVICES AS PILOT — UNION OF DUTIES OF MASTER AND PILOT IN ONE PERSON.

1. The master of a vessel has no lien upon a vessel for services as pilot, he acting in both capacities.

[Cited in The Atlantic, 53 Fed. 608.]

2. The trust committed to the master and pilot, should never be united in the same person, except temporarily, and under an emergency.

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

In admiralty.

A. H. McGuffey and Mills & Hoadley, for libellant.

T. D. Lincoln, for respondent.

McLEAN, Circuit Justice. On the 7th of January, 1859, the above steamer was libelled by her captain and clerk at Cincinnati, and soon afterwards, on the application of the said master and clerk, the vessel was sold upon an interlocutory order. While in the hands of the marshal, the seamen and material-men, having admiralty liens upon the vessel, intervened and set up their claims.

On the sale of the boat it did not bring enough to discharge the admiralty liens established against her, even excluding the claim of the captain and clerk. The captain claimed two hundred dollars per month wages as pilot, professing to have received his wages as captain, and the sum of $496.24 was allowed him as pilot by the district court. [Case No. 8,465.] The material-men, not being paid in full, appealed to this court from that part of the decree.

The question made is, whether the master is entitled to the allowance made to him as pilot, while he received the pay and discharged the duties of master.

As the master contracts with the owners of the ship and upon their personal credit, he has no lien on the ship or freight for his wages. The master is the agent of the owners and he has a right to pay himself for his expenses and charges out of the sale of the cargo; but he has no preferable lien as the seamen have, on the ship and cargo. It is said that this lien adheres to the last plank of the ship.

Mr. Justice Ware in Drinkwater v. The Spartan [Case No. 4,085], says: "It is a well settled principle of law in this country, that the master has no remedy for his wages against the vessel." But he argues against the equity of this rule, and thinks that the master should be entitled to his lien. But the argument, as well as the rule, is against the master. He is the agent of the owners and receives the earnings of the ship and pays them over to whom of right they belong; and he has a lien on the freight, not only for his wages but for his own disbursements. He has various duties as connected with his services as master, which bind him to the fulfillment of his whole duties. These responsibilities should not be changed nor lightly regarded. The Grand Turk [Id. 5,683]; Fisher v. Willing, 8 Serg. & R. 122; Brown v. Lull [Case No. 2,018]; Poland v. The Spartan [Id. 11,246]; Sheppard v. Taylor, 5 Pet. [30 U. S.] 711.

In Gardner v. The New Jersey [Case No.

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

[2] [Modifying Case No. 8,465.]

5,233], the judge says: "I do not find any precedent or authority to warrant my granting the prayer of the master's petition in the case before me for his wages. His contract is clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship."

The pilots are often, if not generally, designated by the master of the vessel; and there would seem to be a great propriety in such a rule, as the commandant of the vessel should have confidence in those so intimately connected with the management of the ship.

Captain Logan had the command of the boat after Benedict left her, and from that time there seems to have been no regular pilot on board. From several witnesses it appears that when the boat was about to land, Logan would take the command of her as pilot, and bring her to a proper mooring.

Aldrich acted as captain some eight or twelve days, but he was no pilot, and never saw the river before, to the knowledge of the witness. Logan says that he received for his services seventy five dollars per month, in addition to what he was to receive as pilot.

The pilot, by his employment, ordinarily is entitled to a lien on the boat, as the other hands employed. The laws regulating pilotage have generally been adopted from the respective laws of the states. The master has no lien on the ship for his wages, but he claims a lien on the ship for his compensation as pilot. These claims are incompatible. As pilot he may claim more than he is entitled to, and do wrong to the seamen. The master, being without a lien on the ship, can have no interest in making an unjust apportionment among the seamen, but this is not the case with the master, who serves also in the capacity of pilot, and who has a lien on the ship. On an occasion where, by the death of the pilot, a necessity may be thrown upon the master, temporarily obliging him to discharge the duty of pilot, it is admissible, but this can only occur under an exigency. The master and the pilot are the most efficient agents on the boat, and when he is employed in two capacities, there is also danger to the boat and her cargo.

The witnesses show, that while the pilot was necessarily at the helm, a certain person was performing the duties of master who was not fit for that duty. The master seems to have been the only person on the boat competent for its management, as master, or at the helm. This hazarded the safety of the boat and the lives of its passengers. If the boat was not lost it may have been more fortunate for the crew than they had any right to expect.

With all the care and prudence which can be exercised, a boat improperly officered always incurs danger. A vigilant policy should be required, especially by the master and pilot.

There was a strong motive in the master to unite the two capacities of master and pilot, by which means his pay was greatly increased. This is an irregularity and an abuse that should be corrected. Such a course may be adopted with the view of enabling the master, and other officers of the boat at a distant port, to seize the boat and have her sold, fraudulently.

The trusts committed to the master and pilot should never be united in the same person, as the interests represented are often conflicting, and can only be united temporarily and under an emergency.

The distinctions which exist among the officers of the boat, tend to secure the rights of the owners and others, and prevent fraudulent combinations. The double capacity in which the master acted was wrong in principle and prejudicial to all the interests concerned.

The exception to the allowance of the master as pilot, while he received the pay as master, is the only one insisted on, and the court thinks it ought to be sustained. The court will, therefore, reverse the decision of the district court on this ground, and direct the fund distributed to the pilot to be distributed to the claimants, who have a prior lien. In all other respects the decree of the district court is affirmed.

NOTE. In Willard v. Dorr [Case No. 17,680], Story, J., ruled that the master could have no claim in admiralty for services performed by him, in any character other than that of master.

EPPING (PERRIN v.). See Case No. 10,996.

EPPING (TOWNSEND SAVINGS BANK v.). See Case No. 14,120.

EPPINGER v. MISSOURI VALLEY LIFE INS. CO. See Case No. 2,901.

Case No. 4,505.

EPPINGER v. RICHEY et al.

[14 Blatchf. 307; 3 Ban. & A. 69; 12 O. G. 714; Merw. Pat. Inv. 221; 23 Int. Rev. Rec. 319.] [1]

District Court, S. D. New York. Sept. 11, 1877.

PATENTS—VALIDITY—PATENTABLE INVENTION—NOVELTY.

1. The letters patent granted to Isaac Eppinger, June 17th, 1873, for an "improvement in plug and bunch tobacco," are valid.

[Cited in Hat-Sweat Manuf'g Co. v. Davis Sewing Mach. Co., 32 Fed. 403.]

2. The claim of said patent, namely, "Plug or bunch tobacco made as herein described, the same consisting of a rope or strand, composed of a sweetened or prepared filler, inclosed in a binder, in turn enveloped in a wrapper, the said rope being coiled around a central core, forming a continuous part of the rope, and the bunch thus made being subjected to a pressure,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 69; and here republished by permission. Merw. Pat. Inv. 221, contains only a condensed report.]

as and for the purposes set forth," claims a patentable invention.

3. The peculiarity of the invention is in the form and shape of the coil, and the change required invention, and the article produced is a new and useful article of manufacture.

[Cited in Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 908; Hill v. Biddle, 27 Fed. 561; Asmus v. Alden, Id. 657.]

[This was a suit by Isaac Eppinger against Henry A. Richey and John J. Boniface for the alleged infringement of letters patent No. 140,020, granted to claimant June 17, 1873.]

Fig. 1.

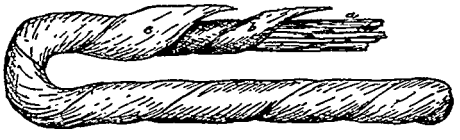


Fig 2.

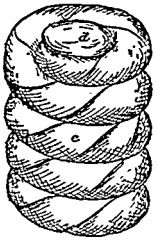
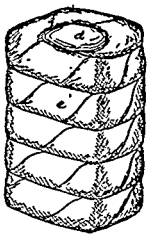


Fig. 3.



Benjamin F. Lee, for plaintiff.
Samuel J. Glassey, for defendants.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendants from the infringement of letters patent, dated June 17th, 1873, for an "improvement in plug and bunch tobacco." The infringement is admitted. The novelty of the alleged invention and its patentability are denied.

Licorice, or some other moist and sweet substance, is used in the manufacture of plug or bunch chewing tobacco, in order to impart moisture and sweetness to the manufactured article. The preservation of these two qualities is greatly desired by the consumer. When tobacco is thus prepared, there is danger that the moist tobacco, if exposed to the air, will ferment, or will mould and "dry rot." It is, therefore, important to make the plug or bunch as compact as possible, in order to preserve moisture and to prevent mould. Before the date of the invention, this kind of chewing tobacco was made by enclosing strands of sweetened "filler" tobacco in a binder. The wrapped tobacco was then spun upon a wheel, or twirled or rolled by hand into a roll, and, after being encased in a wrapper, was coiled and packed for market, or was subjected to extreme heat, and afterwards to pressure, before being put up in packages. Moisture was removed by this "hot house" process, and thus danger of fermentation was obviated, but the quality of the tobacco was made inferior. Another method of manufacture was by encasing the sweetened filler strands in an unsweetened binder, and, also, in a wrapper. The rope was then bent and braided, and the two ends of the braid were fastened by a cap of wrapper tobacco. The braids were subjected to sidewise pressure, but could not be subjected to pressure endwise, in consequence of their shape, and, therefore, were not compressed sufficiently to exclude the air, and the tobacco was liable to become mouldy. Each braid soon became quite dry in the pocket of the consumer, and lost its flavor.

The patentee gives, in his specification, the following description of the patented improvement: "My improved mode of manufacturing plug or bunch tobacco, of the kind above stated, consists in forming the strand of 'filler' tobacco, which is treated with licorice or other sweetening substance, in the usual manner. I envelope this filler in a 'binder,' which is a brighter and larger leaf, and around the binder I wrap what is called a 'bright wrapper leaf,' which is used in its natural condition, without treatment. The rope thus formed is, in fact, a long flexible cigar, with a sweetened filler. It is dry and clean on the exterior, the binder effectually isolating and separating the filler from the exterior wrapper. It does not require to be sweated, and it can be shipped and transported for long distances by water or land conveyance, without danger of moulding or spoiling. The wrapper is of little use for chewing purposes. Therefore, in order to make good chewing tobacco, the filler and binder should be of such proportions to the wrapper, that, while the wrapper will suffice as a protector and preserver of the filler, there will be no appreciable loss in the plug or bunch, for chewing purposes. In Figure 1 is shown a rope or strand such as I have described, a being the filler, b the binder, and c the wrapper. The rope or strand thus made is coiled into a bunch around a central core, one end of the rope, either single or doubled, serving for the core, and the remainder of the length being coiled around this core, as represented in Fig. 2, the central core d and external coil e being thus in one piece, and constituting part of the same continuous strand or rope. The coil or bunch thus made by hand is not, however, completed, nor is it fit for sale or use, being loose and unfinished in appearance and condition. The next step is to finish it, which is effected in the polishing-pot or finisher—a strong receptacle of suitable shape and size to contain a number of plugs, provided with a follower forced down upon the plug or plugs in the pot by hydrostatic pressure or other sufficiently powerful agency. The bunches are first placed in the pots on end, and the follower is then forced down with great pressure upon them. After being allowed to set for about twenty minutes, the follower is remov-

ed and the bunches are taken out and replaced in the pot on their sides, and side by side, and pressed again in like manner. They can then be pressed on their edges, but this, however, is optional, and not absolutely necessary, as the two pressings have compacted and solidified the plug sufficiently for all ordinary purposes. The plug thus compacted is represented in Fig. 3, and is ready for packing. In conclusion, I wish to state that I do not here broadly claim plug or bunch tobacco put up in coils with a central core and then subjected to pressure; nor do I claim, separately, the combination of a filler, binder and wrapper." The claim of the patent is for "plug or bunch tobacco made as herein described, the same consisting of a rope or strand, composed of a sweetened or prepared filler, inclosed in a binder, in turn enveloped in a wrapper, the said rope being coiled around a central core, forming a continuous part of the rope, and the bunch thus made being subjected to a pressure, as and for the purposes set forth."

The advantages of this improved or new article of manufacture are very marked. The moisture of the tobacco is preserved. Air and dampness are excluded by the compactness into which the tobacco is pressed. It can be shipped to warm or damp climates without liability to deterioration by mould, and a single coil can be carried in the pocket of the consumer without becoming dry or friable. The article has had a very large sale, and has commanded a much higher price than the same quality of tobacco when put up in any other form. The price of the patented article has been 51 or 52 cents per pound, exclusive of government tax, while the same qualities of twist or braid tobacco are sold at 27 cents per pound, exclusive of tax. The utility of the article is indicated by its remarkable success as an article of merchandise—a success which is not attributable to the quality of the tobacco of which it is composed, or to the novelty of the style of manufacture, but to the inherent advantages which it possesses in the particulars which have been mentioned.

The novelty of the invention was clearly proved. It manifestly differs from the ordinary spun or rolled plug tobacco in this, that in such tobacco, the filler and binder are rolled together, while in the patented article the binder simply encircles the filler. "Twist," or "braid" tobacco was made in the same manner as the patented article is made, by encircling the sweetened filler with two separate wrappings of unsweetened tobacco, but twist tobacco is simply braided and subjected to lateral pressure. Each plug is a flat braid, into the interstices of which air freely enters, and, having a comparatively thin and flat surface, the plug cannot be made compact by endwise pressure. The shape and the method of the formation of the coil, which render endwise pressure practicable, and which enable the coil to be compactly compressed without injury to the strands of the filler, constitute the particulars in which the patented article differs from braid tobacco.

The important question which arises in the case is as to the patentability of the invention. A rope of strands of sweetened filler, enclosed in a binder, which in turn is enveloped in a wrapper, ante-dated the patent, and is disclaimed. Plug tobacco had always been coiled and braided in various forms and had been subjected to pressure. The peculiarity of the invention is in the form and shape of the coil. Can any particular method of coiling, although both endwise and sidewise pressure are thereby made available for the purpose of excluding air, and although the method enables the consumer to use the whole coil in its desired state of moisture, be the subject of a valid patent? The argument of the defendants' counsel is, that the combination of filler, binder and wrapper is old and is disclaimed, which is true; that subjecting a coiled rope of such tobacco to pressure is old and is disclaimed, which is true; that coiling or twisting a moist rope of tobacco has always been practised, which is, also, true; that the particular form of the coil is a matter of fancy; and that the form of the coil cannot involve the exercise of the inventive faculty. This is the precise question which is at issue.

The article of plug tobacco has been long in use, and has been in constant demand. As it has been prepared for market, it has been liable to spoil in warm and damp weather, and to grow mouldy in any temperature. It is fair to presume that the ingenuity of tobacco manufacturers, and of tobacconists, has been exercised in an attempt to find a remedy for this liability to pecuniary loss. The evils were notorious, but no remedy was found until this invention was made. If the remedy consists in the shape of the coil, and if the particular twist of the coil requires no greater exercise of the inventive faculty than is involved in the shape of a bow into which a ribbon may be twisted, it is strange that an evil which had long existed had not previously been avoided. Two facts exist in this case. One is, that an important improvement has been attained. The second is, that the improvement is in a staple article, which has been manufactured in this country for a long series of years. Without the testimony of the patentee and the first manufacturer in regard to the number of experiments which were required before the invention was hit upon, and in regard to the difficulty which was experienced in perfecting the manufacture, it is manifest, from the length of time during which tobacco has been manufactured, from the constant demand for it, and from the well-known evils to be overcome, that the inventive faculty must have been brought into exercise, or else that mechanical skill would long since have avoided any

danger of fermentation or mould. The utility of the patented article has been evinced by its large sales, and by the unanimity with which rival tobacconists have commenced its manufacture. The inventor evidently gave to the public an article which it wanted, and which it had not previously known. Without giving to the general use of the invention, as a test of its patentability, any greater importance than the supreme court, in the case of Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, indicate should be given to this circumstance, I am of opinion, that the facts in the case fully establish the conclusions, (1) that, however simple the change in the method of manufacture apparently may have been, yet it was a change which required invention for its accomplishment; and (2) that the improvement resulting from the changed method of manufacture has been so great, that the article which is produced is, within the meaning of the patent acts, a new and useful article of manufacture. Let there be a decree for an injunction and an account.

Case No. 4,506.

The EPSILON.

[6 Ben. 378;[1] 17 Int. Rev. Rec. 68.]

District Court, E. D. New York. Feb. 7, 1873.

LIMITATION OF LIABILITY—INJURIES TO PERSON—JURISDICTION OF THE ADMIRALTY — MODES OF PROCEDURE.

1. The act of March 3, 1851 (9 Stat. 635), limits the liability of the owner of a ship for injuries to persons, as it limits such liability for injuries to property.

[Cited in Re Long Island, N. S. P. & F. Transp. Co., 5 Fed. 608; The Manhasset, 18 Fed. 926; The Amsterdam, 23 Fed. 112; The Harrisburg, 119 U. S. 210, 7 Sup. Ct. 145.]

2. Notwithstanding the language of the 4th section of the act, it can be carried into effect by a court of admiralty.

3. In case the fund provided for by the act is insufficient to satisfy the demands against it, the claimants on the fund must share pro rata.

[Cited in Butler v. Boston & S. S. S. Co., 130 U. S. 552, 9 Sup. Ct. 612.]

4. The admiralty creates its own forms of proceeding.

[Cited in The Alert, 40 Fed. 838.]

5. Where the supreme court has not by its rules provided for modes of proceeding, the district courts have the power and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer.

[Cited in Thomassen v. Whitwell, Case No. 13,930.]

Goodrich & Wheeler, for Sarah Parsons.

Wilcox & Hobbs, for petitioners.

BENEDICT, District Judge. This is a cause of limitation of liability promoted by the owner of the steamer Epsilon. The material facts stated in the libel are as follows:

On the 27th day of May, 1872, while the steamer Epsilon was engaged in her ordinary and maritime occupation in that arm of the sea known as the East river, within the admiralty and maritime jurisdiction of the United States, her boiler exploded, and she was thereby caused to sink immediately.

This accident, the owner insists, was not caused by any negligence or fault on his part, and was without his privity or knowledge, notwithstanding which certain persons who were then on board said vessel have made claims against him for payment of damages sustained by them by reason of said explosion. Some of these claims arise out of personal injuries sustained by persons on board the vessel. Other claims arise out of the destruction of property belonging to the master and crew; others still arise out of the deaths of persons on board, caused by the said explosion; and there is one claim arising out of the death of a person who, while on pier 20, and in no way connected with said vessel, is said to have been so injured by a part of the said steamer thrown by the explosion, that he died, whereupon one Sarah Parsons, the legal representative of said deceased person, has sued the said owner in the supreme court of the state of New York, and within this district, to recover $5,000 damages, by reason of said death. No freight was at the time pending, and the said steamer was so injured, that, although thereafter raised by her owner, her value as she now lies within this district, is alleged to be less than the sum of money expended by her owner in raising her.

Under these circumstances, the owner of the steamer has presented his cause of limitation of liability to this court, and prays that this court would direct an appraisement of the value of his interest in said vessel and her freight, to the end that he may pay the same into the registry of this court, or secure the same to be so paid when directed, and that a monition may issue against all persons claiming any damages of any kind, by reason of the said explosion, citing them to appear before this court, and make due proof of their respective demands, and that this court would declare the limit of the owner's liability, by reason of said accident, and would, upon the payment of said amount into the registry of the court, declare the said owner exempt from further liability, and that this court would distribute among the parties proved entitled thereto any amount so paid into this court, and restrain all persons, including the said Sarah Parsons, from further prosecuting any suit against the said owner to recover damages arising out of said accident. Upon the filing of this libel, notice of the time of application for the appraisement prayed for was directed to be given by publication; it appearing necessary, to avoid injustice, that the value of

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

the owner's interest should not be appraised without notice to the creditors. Upon the return day of the notice, Sarah Parsons appeared by her attorney for the purpose of objecting to the jurisdiction of the court, and several questions have been presented which I am asked to pass upon in this stage of the case, to avoid expense, delay and confusion.

And first, my attention has been directed to the fact that the libellants ask relief against an adjudication of demands not maritime in character, and therefore not cognizable by this court. Second, that the libel does not show the pendency of any suit in rem or in personam in the admiralty, to recover any of the demands against which protection is sought in this court. Third, that it does not appear by the libel that this court has, or will ever have, any fund in its custody on which to base its jurisdiction in the premises. And, lastly, that none of the demands against which protection is sought by virtue of the act of March 3d, 1851, are within the scope of that act.

In considering these features of this case, I remark first, as I have had occasion before to say in considering the petition of the owners of the City of Norwich for a limitation of their liability—In re Providence & N. Y. Steamship Co. [Case No. 11,451]—that the jurisdiction of the admiralty over such a cause was maintained by the supreme court in the case of Norwich Co. v. Wright, 13 Wall. [80 U. S.] 104, not because of the maritime character of the demands of the creditors, but by reason of the nature of the relief to the owners of a ship which the act of 1851 affords. If I have correctly estimated the effect of the action of the supreme court in regard to this subject, the character of the demands of the creditors is immaterial. But if the rule were otherwise, it would not prove fatal to this cause, inasmuch as many of the demands set forth in the libel are cognizable in the admiralty, the injuries having been done upon the navigable waters of the United States, and some of the persons injured having been at the time engaged in the service of the vessel. The Plymouth, 3 Wall. [70 U. S.] 20. See, also, in this connection, the cases of The Beta, 20 Law T. (N. S.) 988; The Sylph, 17 Law T. 519; The Guldfaxe—an action in the admiralty, by representatives, to recover damages for the death—19 Law T. (N. S.) 748; Crapo v. Allen [Case No. 3,360]; Cutting v. Seabury [Id. 3,521]; The Admiralty Law of Collision, 158; The Sea Gull [Case No. 12,578]. Others of the demands described in the libel, certainly that one of them arising out of the death of the person who was standing upon the pier, are not cognizable in the admiralty (The Plymouth, 3 Wall. [70 U. S.] 20), but the presence of such demands cannot oust the jurisdiction of the admiralty to entertain this proceeding.

In a cause of this character the adjudication of any one demand involves an adjudication of all other demands made and arising out of the same disaster; and from the necessity of the case, therefore, the whole mass of demands may be brought within the cognizance of the admiralty by the institution there of a cause of limitation of liability promoted by the ship's owner. Neither is it fatal to this cause that no suit in rem or in personam has been brought in this court to enforce any of the demands in question. Nor is it requisite that it should appear on the face of the libel that some amount of money is to be distributed in this cause. Objections similar to these have been considered by me in the case of the owners of the City of Norwich, above referred to, and my views in respect to them will be found there stated.

There is, however, in this case, another question of much importance, and that is, whether the act of 1851 has any effect to limit the liability of the ship owner for personal injuries which have been caused, without privity or knowledge of the owner, in the course of and by reason of the use of his vessel in her natural and lawful employment. This question is by no means free from difficulty, but the opinion I have arrived at is, that the act of 1851 limits the liability of the ship owner as well for injury done to the person as for those done to property. This conclusion appears to be compelled by the language of the third section of the act. In that section the words used are, first, "for property, goods or merchandise;" next, "for any loss, damage or injury," and then "for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred." These words include all kinds of injuries, for which the ship owner may become liable in the use of his vessel, and cover injuries to the person as fully as they do injury to property. Furthermore, section 6 of the act indicates that the intention was to cover injuries other than those to property. The implication of that section is, that the preceding sections cover not only damages arising from injury to property, but in addition thereto "demands on account of any negligence of the master or crew." The supreme court have been unable to consider the effect of the third section to be limited to the goods on board the owner's ship, and it is to my mind still more difficult to find anything in the section which can be said to restrict its effect to demands arising out of injury to property alone. If, as has been suggested by the supreme court, the intention of the act of 1851 was by statute to establish in this country the rule of the general maritime law in respect to the liability of the owners of ships, it must follow that the act be held to cover demands for injuries to persons as well as to property.

I am not unmindful that it may be urged that the rule of liability imposed upon the owners of ships by the maritime law is founded upon public policy, and that, when it is to be applied to modern navigation, the limitation of that liability must be restricted

to injury to property, because otherwise the tendency of the rule would be to deprive the public of such protection against accidents as a fear of an unlimited liability for injuries to persons on board vessels will naturally compel ship owners to afford. But this consideration has force only in regard to a certain class of persons, and fails to furnish ground for a construction which, if it places any, must place all personal injuries beyond the scope of the act. Considerations of a very similar character have furnished the ground for all the opposition which has been made to the rule of limited liability, and they have, in most countries, been overpowered by the strong public interest to encourage the investment of capital in ships. It is, of course, highly important to protect the persons of those who are carried in ships, but, in order that there may be any persons carried, there must be ships to carry them. The act of 1851 does not apply to river or inland navigation, but is confined to a commerce where the amount of property and number of persons transported on each voyage is upon the increase, while the hazard of the navigation does not diminish. In a late collision off Dungeness, some hundreds of persons were destroyed or injured. The investment of capital in such a commerce might well be deterred by a refusal to give the benefit of the act of 1851 in respect to demands for injury to the person. The necessary protection of life against neglect may perhaps be better secured by criminal punishments inflicted on those guilty of the neglect than by increasing the risks of capital invested in navigation.

There is also a reason for the rule of limited liability, founded in justice to the ship owner, which is applicable alike to demands arising out of injuries to persons and to property. It is, that the master and crew of a ship are agents forced upon the ship owner by the necessities of navigation, to whom he is compelled to intrust his ship—an instrument of great power for good and for ill, but whose actions he cannot, in the nature of things, superintend or control; and for whose acts either of omission or commission, therefore, he should not be responsible beyond the value of the property which he has been willing to commit to their control. Boulay-Paty, tome 1, p. 269; Bedarride, Com. du Code de Commerce, liv. 2, traité 1, § 298. We may also look at the law of the two great maritime nations, England and France, as well calculated to throw light upon this question, for "uniformity is almost the essence of the maritime law." Pardessus. Nothing appears in the law of these countries which leads to the conclusion that any such restricted operation should be given to our act of 1851. In England, where—and the fact is characteristic of the nation—it was not until 1734 that any recognition whatever was made in courts of common law of what had been a marked feature of the law of other nations for centuries, the limited liability acts have been constantly extended, and, although still partial in their operation, they cover demands arising out of injuries to persons as well as to property; which limitation, it may be noted in passing, is there effected in the admiralty, although the demand be that of a representative of a person deceased, under Lord Campbell's act. The English act has restricted operation, because the vessel is assumed by statute to be of a value of £8 per ton, where there is no loss of life, and of a value of £15 per ton where both kinds of injury happen, a feature open to the criticism that while the liability of a wealthy ship owner of a large ship cannot exceed the value of the property he puts at risk, the poor owner of a less valuable vessel may be held liable for an amount far exceeding the value of the property which he has put at risk. See Papers on Maritime Law, by Wendt, p. 130. But our act of 1851 was manifestly intended to have a more enlarged effect than any English statute, and finds its true interpretation in the maritime law of the continent. If we turn then to France, where the rule of maritime law now under consideration has been administered for so long a period, no tendency to restrict the rule can be detected, but the contrary appears. There the Ordinance of 1681 made an election between the more extended liability which existed under the laws of the Romans, a nation which had little commerce, and that more liberal rule adopted by the commercial nations of the Mediterranean, and embodied in the Consulato. The latter was chosen and incorporated in the Ordinance. After the passage of the Ordinance, in opposition to the opinion of Valin, with whom the Roman law had great influence, and in accordance with the opinion of Emerigon (Contr. á la Grosse, c. 14, § 11), the rule was understood to enable the ship owner, by a surrender of his ship and freight, to free himself from all liability of every kind, as well that arising from the contracts as from the faults and torts of the master. The Code de Commerce was long understood as having simply restated, in section 216, the rule as practiced under the Ordinance. And when, in later years the court of cassation evinced a determination to give to that section a restricted effect, and to exclude from it all demands arising on contract, immediate resort was had to the legislative power, and by general request, in 1841, the phraseology of section 216 was so changed as to make the restriction attempted by the court impossible to be maintained.

The text writers on maritime law whose works I have been able to consult, do not appear to allude in terms to the effect of the Ordinance or the Code de Commerce upon demands arising out of personal injuries, but the language everywhere used is broad enough to cover such demands. "The abandonment of the ship and freight puts an end to every kind of responsibility on the

part of the owner." Caumont, Dict. Mar. Law, p. 24, traité "Abandon," § 13. That the rule of the maritime law is there so understood, appears from a case before the court of cassation in January, 1860, involving claims by passengers, where it was declared that "even where the ship is totally lost, and although the passenger has not made a special commercial contract, (acte de commerce), upon taking passage on a steamboat, no provision of law prevents the application of the rule of limited liability declared in section 216 of the Code, otherwise the special responsibility resulting in favor of passengers would be more onerous even than that resulting from a shipment of merchandise. Such an exception would be in fact contrary to the spirit as to the words of the law." Caumont, Dict. Mar. Law, traité "Abandon," § 83. The law upon this subject in Italy, Portugal, Holland, Denmark, Sweden and Russia is said to agree with that of France.

Looking therefore at the words of section third of the act, in the light thus thrown, it appears to me that the full effect can be given to the section which its language imports, and that it should not be considered as confined to demands arising out of injuries to property alone.

But, it is said, this construction cannot be given to the third section of the act, because no terms used in the fourth section can be construed to include demands other than those arising from injuries to property, and the fourth section must therefore be held to engraft a restriction upon the third section. But no such result necessarily arises from the absence in the fourth section of any provision respecting claims for injuries to the person. The manifest object of section 4 was to indicate methods to which resort might be had to carry the third section into effect. It specifies some cases, not necessarily all, where relief may be sought under the act, and it specifies some, but by no means all, the machinery to be used to give the relief. It contains, however, no language which appears to be intended to convey the idea that no other cases than those specified in the section could arise under the act. Even the meagre provisions which the section does contain, seem unnecessary, and in my opinion, the whole section could be stricken from the act, without in the slightest degree impairing its efficiency. Possibly the clause providing for a transfer of the ship to a trustee may be important to the working, as it certainly is to the understanding, of section 3; but even that clause cannot be given effect except under the order of a court, and the language there used is sufficiently broad to enable all classes of demands to receive the benefit of it. The same result could probably be reached by a court of admiralty, without the clause. Results very similar are effected in the course of ordinary admiralty proceedings without any statutory provisions.

The other provisions of section 4 seem clearly superfluous. One of these is a declaration that where there are various demands for damages to property which exceed the amount of the owner's liability, as limited by the third section, they must share the amount proportionately. But section 3 contains by necessary inference the same declaration. When that section made all the demands payable out of a certain amount, it declared in effect, that in case of deficiency the demands must share pro rata. Another provision of section 4 is the declaration, that owners of ships may take appropriate proceedings in court for the purpose of apportioning the sum for which they may be liable among the parties entitled thereto. But it is not said where such proceedings are to be taken, nor when, nor what they shall be; and I take it no special statute was necessary to give to ship owners the general right to take appropriate proceedings in court to obtain relief given them by law. Furthermore, the only proceedings spoken of are those to be taken for the purpose of apportioning the sum for which the owners may be liable; but other proceedings may be taken, for instance, to free the vessel by a stipulation. The remaining provision of the fourth section which confers on freighters and owners of property the right to institute a proceeding apparently intended for the benefit of the ship owner alone, may be the sole foundation for so peculiar a right, and it may well be that the limitation of this provision to demands for injuries to property, excludes holders of demands for injuries to the person from exercising such a right.

In most countries, proceedings to limit the liability of the owner are never taken by a creditor of any kind, because they are proceedings for the benefit of the owner alone; and I imagine that here freighters will seldom avail themselves of the right to take such proceedings, which the fourth section of our act confers. But surely the granting of such a right to owners of property does not warrant the conclusion that there are no other descriptions of demand, against which the ship owner may be protected, when all kinds of demands are covered by the plain words used in that portion of the act framed expressly to declare the limit of his liability.

It seems, therefore, that the provisions of the fourth section should not be held to engraft any restriction upon the language of the third section, unless it be found that the third section is incapable of being carried into effect except by means of methods and proceedings provided in the fourth section. It cannot be so found, if it be held that the admiralty has jurisdiction to enforce the section, by reason of the subject-matter.

When this act was first presented to my consideration, upon the application made in regard to Place v. The City of Norwich [Case No. 11,202], although I denied the application up-

on a ground which appears to be sustained by the decision of the supreme court in Wright's Case [supra], namely, that a proceeding to obtain the benefit of the act must be a proceeding independent of an action in rem, I expressed the opinion that a court of admiralty could not entertain jurisdiction of a cause of limitation of liability, no matter how brought. But now, better instructed by the supreme court, and bound to hold that such a cause is within the jurisdiction of the admiralty by reason of the subject, I can add, without hesitation, that the owners of a ship can, without difficulty, obtain at the hands of that court all the relief intended by the act, and without any resort to or violation of any provision in the fourth section contained. For the admiralty creates its own forms of proceeding, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the admiralty. "The principles, rules and usages which belong to courts of admiralty" (Process Act 1792 [1 Stat. 275]) enable these courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other courts, and for many of which it were vain to look in any statute. Stripped of the power to pursue these methods, there would be little left to distinguish a court of admiralty from a court of equity or of law. So the admiralty and maritime jurisdiction of the United States has been described as "embracing a system of procedure known and established for ages." The Magnolia, 20 How. [61 U. S.] 303. Therefore is it said that "a maritime lien arises from the jurisdiction, not the jurisdiction from the lien." Smith v. Brown, 1 Asp. 59.

For the sake of maintaining uniformity, the supreme court of the United States, which is the highest court of admiralty, has been given power to prescribe and regulate the forms and modes of proceeding to be followed by all the district courts in the exercise of their admiralty jurisdiction; but when cases arise which have not been provided for in the rules prescribed by the supreme court, the district courts, as the only courts of original jurisdiction in admiralty, have the power and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer. "The reason of the thing and usage" afford a sure ground for procedure in courts of admiralty. The Orpheus, 3 Marit. Law Cas. 532. Thus guided, it has been possible for the maritime courts of the continent to administer a rule of limited liability similar to that stated in the third section of the act of 1851, without the aid of any special statutory modes of proceeding. No modes of proceeding appear to have been attached to the rule when placed in the Ordinance, and none appear in the Code de Commerce. In England, where the execution of the law was at first intrusted to the courts of equity, statutory modes of proceeding were provided for these courts, some of which appear in the fourth section of our act. But here, where the jurisdiction is given to the admiralty by reason of the subject-matter, the courts of admiralty are certainly as well able as any courts of admiralty to exercise it effectually; and other maritime courts, say the supreme court, "have found no difficulty in carrying the law into execution." In fact, one of the reasons given by the supreme court for holding the subject-matter in question to be within the jurisdiction of the admiralty courts, is because the modes of procedure belonging to those courts are so well adapted to carrying the law into execution. And the supreme court have, by the new rules, prescribed methods to be pursued by the district courts in carrying the law into effect, which are not to be found in section 4 of the act of 1851, thus not only showing the ability of these courts to contrive methods whereby to carry the law into execution, but also showing that, in the opinion of that court, no restriction of the act arises from the provisions of the fourth section, at least in respect to methods of procedure. For these reasons, therefore, I conclude that the legal effect of the act of 1851 is to limit the liability of the owner of a ship for injuries to persons as it does for injuries to property, and that notwithstanding the phraseology of the fourth section of the act, the statute so understood can be carried into execution by a court of admiralty, and that upon the facts set forth in this libel, it is the duty of the court to entertain the present proceeding and grant such relief therein as the proofs may show the libellant to be entitled to. In announcing this determination, I feel at liberty to say that I realize the importance of the main question here involved, and appreciate that the solution I have endeavored to give may have the appearance of extending the act of 1851 beyond any limit in the mind of the supreme court, when the decision of that court in the Case of Wright was made. But I give to the action of the supreme court in respect to this subject full scope and effect in this case with less solicitude, because, by entertaining the present libel, I furnish the parties in interest an opportunity, by means of an application for a writ of prohibition, to bring the subject before the supreme court with little delay or expense; and if I have made a mistake, I can thus at once be set right, and much litigation saved, not only to these parties, but to other parties similarly situated.

An order will, therefore, be made, directing that an appraisement be had of the value of the libellant's interest in the said steamer Epsilon and her freight, to the end that a monition be issued against all persons claiming damages by reason of the accident in the

said libel mentioned, citing them to appear and make due proof of their respective claims, and meanwhile that, until the further order of this court, the said Sarah Parsons be restrained from prosecuting her above mentioned suit against the libellant.

EPSILON, The. See Case No. 569.

EQUATOR MINING & SMELTING CO. (HALL v.). See Case No. 5,931.

EQUITABLE FIRE INS. CO. (DEAN v.). See Cases Nos. 3,705 and 3,706.

EQUITABLE FIRE & MARINE INS. CO. (BATES v.). See Case No. 1,101.

EQUITABLE SAFETY INS. CO. (ALDRICH v.). See Case No. 155.

Case No. 4,507.

EQUITABLE SAFETY INS. CO. v. DUNHAM.

[See Case No. 10,155, note.]

EQUITABLE SAFETY INS. CO. (HEARN v.). See Cases Nos. 6,299 and 6,300.

EQUITABLE TRUST CO. (GUM v.). See Case No. 5,867.

Case No. 4,508.

EQUITABLE TRUST CO. v. SELDON.[1]

Circuit Court, D. Connecticut.[2]

TAXATION—BANKS—WHAT CONSTITUTES—CONSTRUCTION OF STATUTE.

[1. A corporation, the sole business of which consists in loaning and investing its capital on mortgages of real estate, in selling the mortgage securities, and guarantying the payment thereof, is not taxable as a "bank or banker," under Rev. St. § 3407.]

[See note at end of case.]

[2. In the construction of such a statute, the words are to be taken in the sense in which they are understood by that public in which they take effect, and where there is doubt as to the liability of an instrument for taxation the construction is in favor of the exemption, since a tax cannot be imposed without clear and express words for that purpose. U. S. v. Isham, 17 Wall. (84 U. S.) 504, followed.]

Action by the Equitable Trust Company against Joseph Seldon to recover taxes paid.

SHIPMAN, District Judge. This cause was tried by the court, a jury having been waived by written stipulation of the parties. The counsel of the respective parties, having been thereunto duly authorized, agreed that the statement of facts, which is signed by them, and which is made a part of the record, is true. The court, upon the hearing and trial of said cause, also finds that said agreed statement contains the facts and all the facts which are proved in the cause, and is true, and said statement is hereby incorporated into and made a part of this finding. The conclusion of law upon the foregoing and agreed facts is that the plaintiff corporation was not a bank or a banker under the provisions of the 79th section of the act of June 30, 1864 (13 Stat. 251), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 115), at the time when said tax was paid to the defendant, and said suit was brought, and that said tax was improperly exacted.

Section 3407 of the Revised Statutes of the United States is a transcript of that portion of the 79th section of the act of June 30, 1864, as amended, which contains the definition of a bank or a banker, and is as follows: "Every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker." Although said corporation is empowered by its charter to receive money upon deposit, it is expressly found that it does not collect, nor has it ever collected or received, any deposit of money subject to be paid or remitted upon draft, check, or order. It does not receive or open credits by the deposit or collection of money or currency. The plaintiff's sole business consists in the loaning or investment of its capital upon mortgages of real estate, and in the sale of the mortgage securities which are the evidence of such loans, the corporation also guarantying to the purchaser the payment of such securities. The defendant, conceding that the plaintiff corporation is not included within the first clause of the section just cited, strenuously contends that it is a bank or a banker within the second and third branches of the definition contained in the act. In my opinion, by the clause, "where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes," is meant, the loan of money upon the pledge, hypothecation or mortgage of the personal property therein mentioned, as a collateral security for the repayment of the amount loaned, and that the loaning of money, where the loans are evidenced merely by the note of the borrower, without security, is not intended to be embraced in this part of the definition. The business of the plaintiff is the loan of money upon mortgages of real estate, and no money is loaned upon bonds or any personal security. A bond is given to the lender as an evidence of the sum loaned and of the borrower's promise to repay it; the money is loaned not upon the bond, but exclusively on or upon the mortgage of real estate. The

[1] [Not previously reported. Date of decision not given.]

[2] [Affirmed in 94 U. S. 419.]

buisness which is referred to in this clause is that portion of the ordinary and well known business of a banker, which consists in the advancing or loaning of money upon the pledge or mortgage of stocks and of that large class of securities commonly styled bonds, usually of the government, or of different states, or of municipal or other corporations, and upon the pledge of other personal property. Bankers do not usually or ordinarily engage in the business of loaning upon real estate, and when a person, who does not receive money upon deposit, confines himself to loaning his capital upon real estate mortgages of a character more or less permanent, he is not a banker, within the common acceptation of the term, nor does he, in respect to that department of his business, come within the definition of a banker which has been given by congress. Neither does the plaintiff receive stocks, bonds or promissory notes for discount or sale, within the meaning of the third clause of the section. A banker or a broker who receives for discount or sale, bonds, notes or stocks, receives not his own property, but the property of his customers. This part of his business consists either in discounting the notes or bills of exchange offered to him by others, or in receiving their stocks, bonds, bullion or commercial paper and selling the same upon commission or otherwise. The loaning of money secured by bond and mortgage is not the discount of notes referred to in the statute, and when a capitalist sells his own stocks or bonds exclusively, he cannot be said to receive stocks or bonds for discount or sale. A commission merchant receives the property of others for sale, but a merchant who sells only his own merchandise cannot justly be said to receive property for sale. Such language is naturally and ordinarily understood to apply solely to those dealers, who act as agents in the sale of property belonging to their principals, and not to that class of merchants who buy and sell simply upon their own account.

The second and fourth rules for the interpretation of statutes which are laid down in U. S. v. Isham, 17 Wall. [84 U. S.] 504, seem to me to be of importance in determining the construction which should be given to the section now under consideration. The court say, "The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect," and, "if there is a doubt as to the liability of an instrument for taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in Gurr v. Scudds [11 Exch. 191], 'a tax cannot be imposed without clear and express words for that purpose.'" Guided by these rules, I am of opinion that the construction which the defendant has given to the statute ought not to prevail. Let judgment be entered for the plaintiff for $1,354.38 and interest from Aug. 30, 1873.

[NOTE. This case was taken to the supreme court on writ of error by the defendant, Seldon. The judgment of the circuit court was duly affirmed, Mr. Justice Strong delivering the opinion. It was held that the plaintiff company could not be classed as a bank, whose business consists of lending its own funds on real-estate mortgages, and the subsequent selling of those mortgages with a guaranty as to their payment. It was contended that, as bonds are usually taken in connection with the mortgages, the plaintiff would come within a definition of a "banker," which is one who advances or lends money on stocks, bonds, bullion, etc.; but the court decided that the money is loaned on security of the real estate mortgaged, and not on the security of the bond. It was also contended that the plaintiff company is included within the term "banker," as one at whose place of business stocks, bonds, bullion, or bills of exchange, etc., are received for discount or sale; but the court held expressly that one who receives his own bonds, etc., is not a banker, within the definition, although he may afterwards sell them. The judgment of the circuit court was affirmed. Selden v. Equitable Trust Co., 94 U. S. 419.]

ERBEN, In re. See Case No. 1,315.

Case No. 4,509.

ERDHOUSE v. HICKENLOOPER.

[2 Bond, 392.][1]

Circuit Court, S. D. Ohio. Oct. Term, 1870.

FRAUDULENT SALE OF PERSONAL PROPERTY—INNOCENT PURCHASER—POSSESSION BY AGENT WITH AGREEMENT TO SELL.

1. Where it is shown that the purchaser of property had no knowledge of the existence of a judgment against the seller, or that he was otherwise embarrassed, the inference of fraud upon the part of the buyer is negatived.

2. The possession of property by an agent to sell, under a special agreement for that purpose, is the possession of the owner.

[This was an action of replevin by John P. Erdhouse against Andrew Hickenlooper.]

W. B. Caldwell, for plaintiff.

W. M. Bateman, for defendant.

OPINION OF THE COURT. This case was originally brought in the superior court of Cincinnati, and removed to this court under an act of congress authorizing such removal. The plaintiff has filed a declaration in replevin, claiming title to certain specified chattel property. The case is submitted to the court, the parties waiving the intervention of a jury.

The defendant has filed pleas: 1. Denying the ownership of the plaintiff in the property. 2. Setting forth specially that the United States had recovered judgment for between six and seven hundred dollars against one John Sackstader, for a violation of the internal revenue laws of the United States, upon which an execution issued directed to the defendant Hickenlooper, as the marshal of the United States for the southern district of Ohio, in virtue of which, on August

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

4, 1870, he levied on the chattels described in the declaration as the property of said Sackstader, and holds the same to satisfy the execution. Issue is taken on these pleas, presenting the question, who is the legal owner of the property?

As the court is called on to pass upon the case, it will be proper briefly to notice the material facts in evidence. It is proved that prior to April 14, 1870, the said Sackstader and one Heidrick were copartners, at Cincinnati, in the business of dealing in and the exchange of sewing machines, and some other things connected with these operations. On May 4, 1870, one Otis Hiddon purchased the interest of Heidrick, and became the partner of Sackstader on terms not necessary to be stated. On the 14th of May, Sackstader, by a written article of agreement, for the consideration of $2,000, sold and transferred to Hiddon all the property in question, agreeing to employ Sackstader to aid him in the prosecution of the business. It is in evidence that pursuant to this contract, actual possession of the property was delivered to Hiddon, and that he thereby became the sole owner. It is also in evidence that on June 2, 1870, Hiddon, on account of some dissatisfaction with the management by Sackstader, for the sum of $2,000, named in the bill of sale, sold his entire interest in the concern to the plaintiff, Erdhouse, who paid $1,500 of the purchase money and took full possession, and held it as owner until the 4th of August following, when it was seized by the marshal as the property of Sackstader. By an agreement between Sackstader and the plaintiff, the former was permitted to retain possession of the concern, the plaintiff Erdhouse agreeing he should have all the profits made while the arrangement continued. It appears, also, that some time after the sale by Hiddon to the plaintiff, a verbal agreement was entered into between him and Sackstader to sell the concern to the latter, provided the plaintiff should be satisfied with a mortgage on certain real estate in the west, which Sackstader proposed to give him as security for the payment of the purchase money. It is in evidence that this mortgage was not satisfactory to the plaintiff, and that the sale to Sackstader was not perfected.

These are the material facts in the case, and they lead satisfactorily to the establishment of the conclusions: 1. That Hiddon was a bona fide purchaser of the property from Sackstader. 2. That Hiddon sold to the plaintiff for a fair and full consideration, and delivered possession to him. 3. That the plaintiff did not part with his title, which was vested in him at the time of the levy by the marshal. These propositions are not only sustained by the explicit and credible evidence of the plaintiff and Hiddon, but by proof of declarations by Sackstader that the plaintiff was the owner of the property, made at different times to different persons, who have testified as witnesses in the case. It is claimed, however, by the counsel for the defendant, that the sale to Erdhouse was fraudulent, and that Sackstader had an interest in the property, which subjected it to levy to satisfy the execution against him. The only ground which could sustain the allegation of fraud, as against the plaintiff Erdhouse, would be evidence of the fact that in becoming the apparent owner of the property, he was acting in collusion with Sackstader to shield the property from execution at the suit of the United States. But the proof is, by Hiddon, as well as Erdhouse, that neither had any knowledge of the existence of the judgment against Sackstader, or that he was otherwise embarrassed, until the time when the property was levied on by the marshal. This seems to negative any inference of fraud on the part of the plaintiff. The possession of the establishment after the sale to Erdhouse by Sackstader, is explained without the necessity of supposing fraud. It was legally the possession of Erdhouse, and Sackstader was in possession by permission of and under the authority of the plaintiff, by a special agreement for that purpose. Judgment will be entered for the plaintiff.

ERDMAN (BARING v.). See Case No. 981.
ERICH (MULLER v.). See Case No. 9,915.

Case No. 4,510.

The ERICSON.

[3 Sawy. 559.][1]

District Court, D. California. Jan. 10, 1876.

DESERTION BY SEAMAN.

1. When a seaman, against the orders of the master and knowing that the ship was about to sail, went ashore and failed to return to the ship, and subsequently, when apprehended by the master, broke away from his custody, and it appeared that further delay would have imperilled the ship: *Held*, that this conduct amounted to a desertion, and that the wages due the seaman were forfeited.

2. Where he has gone ashore by permission and without knowing that the ship was about to sail, and his failure to rejoin her is caused by drunkenness, but without any intention on his part to desert, but a qualified forfeiture will in such case be imposed.

Daniel T. Sullivan, for libellants.
Charles Page, for claimants.

HOFFMAN, District Judge. The evidence shows that the libellant McKenzie, against the orders of the master and with the knowledge that the ship was about to sail, persisted in going on shore "to take a drink," as he said. Circumstances which will be detailed hereafter rendered the immediate departure of the vessel indispensably necessary.

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

The captain deemed it so important to get over the bar that he abandoned about twelve tons of freight which he would otherwise have taken on board. As many of the men were missing, the remaining crew objected to going to sea short-handed. The captain, however, persuaded them to work the ship over the bar by the promise that he would either recover the deserters or procure substitutes. He accordingly left the ship in charge of the pilot and mate, and went into the town (Newcastle, N. S. W.), to endeavor to find the missing men. He found the libellant, with some others, at a dram-shop and directed them to remain where they were while he went to look after the other men. On his return with the men he had shipped, he found the libellant and proceeded with him and the rest towards his boat. They had approached within a short distance of the boat when the libellant broke away and ran. The captain and two men pursued him. They were unable to overtake him. When he found they had abandoned the pursuit he, as the captain states, "turned round and abused him fearfully." The captain had no alternative but to go to sea without the libellant, notwithstanding that he was the carpenter, whose services might be of great importance. It was nightfall; the ship was on a lee shore; the barometer was low; storm signals were set, and the harbor-master had warned him of the approach of an easterly gale. Had he continued the pursuit of the carpenter he might have lost the men whom he had just recovered or shipped. The ship, therefore, set sail without the libellant. He now sues to recover wages, not only for the time of his service actually performed, but for the whole voyage up to the arrival of the ship at this port. This last claim is wholly inadmissible; and it was not insisted on at the hearing.

The only question is, whether the abandonment of the service by the libellant constituted a desertion to which the statute attaches the penalty "of forfeiture of all or any part of the wages he had then earned." In the case of Scully v. The Great Republic [Case No. 12,571], a somewhat similar case was considered by this court. The libellant, in that case, had gone ashore by permission. By some accident not clearly explained, but probably owing to indulgence in liquor, he did not return to the landing until after the ship sailed from Yokohama for Hongkong. On her return to Yokohama, he claimed to be reinstated, which the captain refused. He sued for wages for the whole voyage, and his expenses at Yokohama from the time he offered his services to the master. He was allowed wages up to the time of his leaving the vessel.

The court held that there was no reason to believe that he intended to finally abandon the service. But the circumstances of this case are clearly distinguishable from those of the case at bar. In Scully's Case, the absence, though culpable, was the result of accident; or, if that term be inapplicable to a neglect caused by drunkenness, the facts negatived the idea of any intention to desert. But in the case at bar, the libellant went on shore without permission and against the express command of the master, who informed him that the ship was to sail at eleven o'clock. He did not, like Scully, merely arrive at the landing too late to rejoin the ship; but when the master, who was at pains to recover him, was taking him to the boat, he broke away and ran. He himself admits having done so. The natural and inevitable consequence of this was to compel the master to proceed to sea without him. He must be held to have intended what was the necessary result of his conduct. He cannot, by alleging drunkenness, or rather forgetfulness of all that occurred except his starting back, escape the consequences of his own acts. He does not, in his testimony, explicitly say that he was drunk; and the fact that he was able to outrun his pursuers would seem to indicate that he was only partially intoxicated. His running away was, under the circumstances, an act of desertion, and must have been so intended by him. Whether that intention was formed while under the influence of liquor, I consider immaterial.

In the case of the libellant Weston, the evidence is very meagre, but I think it hardly sufficient to show a desertion. He left the ship about seven o'clock by permission of the master, as he says. He got drunk and remembers nothing until the next morning. The captain denies that he gave permission to the man to go ashore; but it does not appear that he knew that the ship was to sail, or that he commenced his debauch with the knowledge that, if he did not rejoin the ship during the morning, he would certainly be left. His case seems nearly identical with that of Scully. If the decision in that case was correct, Weston is entitled to his wages, subject to such qualified forfeiture as this court may, by section 4596, Rev. St., impose. In cases of absences without leave, not amounting to desertion, the offender may be punished by imprisonment for not more than one month, "and also, at the discretion of the court, by forfeiture of his wages of not more than two days' pay, and for every twenty-four hours of absence either a sum not exceeding six days' pay, or any expenses which have properly incurred in hiring a substitute." The amount of the forfeiture, if any, which is to be imposed thus seems, within the limits prescribed, to be left to the discretion of the court. If Weston had known that the ship was about to sail, I should be inclined to inflict the extreme statutory penalty. But this is not shown. I shall impose a forfeiture of such a sum for each twenty-four hours of absence as will amount to twenty days' pay. Decree accordingly. The libel of McKenzie is dismissed.

These suits, though separately brought, were tried together. I have, therefore, considered them both in one opinion.

Case No. 4,511.

ERICSSON v. MANCHESTER.

[3 Hughes, 191.][1]

Circuit Court, E. D. Virginia. April 10, 1879.[2]

MUNICIPAL CORPORATIONS — LIABILITY FOR DAMAGES CAUSED BY DEFECTIVE STREETS — STREETS OWNED BY PRIVATE CORPORATIONS.

1. A municipal corporation is liable in damages for the defective condition of its streets to an individual suffering injury from that condition, under certain circumstances.

[See note at end of case.]

2. This liability is not affected by the fact that the street, from defects in which the injury happens, is in the proprietorship of a private corporation.

[See note at end of case.]

[This suit was brought by O. A. Ericsson against the city of Manchester for damages resulting from the defective condition of one of defendant's streets. Heard on motion for a new trial.]

C. P. Meredith and S. Macon, for plaintiff.

J. S. McRae and T. M. Logan, for defendant.

The cities of Manchester and Richmond are the corporators of the James River Bridge Company in about equal interests. The work consists of a bridge over the James river, and of an elevated earthen causeway, extending from the southern edge of the river on the Manchester side across the flats and over the Danville Railroad (which it crosses upon a stone arch) to the level of Seventh street in Manchester, of which it and the bridge are an extension. The accident by which the plaintiff was disabled for life was a fall which he had at night from a low parapet of a corner of the arch over the railroad, down, some fifteen feet, to a ditch on the side of the railroad. The bridge lies within the corporate limits of Richmond. The causeway, which is a part of it, a hundred yards or more long, lies within the corporate limits of Manchester. This work was a joint public undertaking of the two cities, under the act of assembly passed November 5th, 1870, incorporating the James River Bridge Company. The commissioners incorporated by this act are mentioned as having been appointed by the trustees of Manchester. The city of Richmond, the county of Chesterfield, and certain townships of the county of Chesterfield, were authorized to appoint like commissioners, and in that manner to become corporators of the company; and it was expressly provided that the authorities of Richmond, Chesterfield and these townships should have control and authority over their respective commissioners similar to that given to Manchester over its commissioners by the act. Thus a public highway was provided to be built by two public municipalities, one county, and certain of its townships. In fact, however, it was built by Manchester and Richmond alone. The cities of Manchester and Richmond are connected by two foot and carriage bridges open to the public, of which this bridge of the James River Bridge Company is one. It is a free bridge, open to the public without charge of tolls; the other is a toll bridge. The city of Manchester is a chartered corporation, endowed by statute with liberal powers of taxation. It has full power to close or extend, widen or narrow, lay out, improve, and light its streets, and keep them in order. It has ample powers of police. It has all the rights, immunities, powers, and privileges usually granted to, and is charged by statute with the duties and obligations ordinarily imposed on, municipal corporations. It may not only tax the property of its citizens, but may contract loans. Its taxes are a lien upon the real estate of the citizens taxed. It may condemn lands for streets, subject to the payment of just compensation. The remaining facts of the case appear in the opinion of

HUGHES, District Judge. This is an action on the case for damages, the declaration charging with the usual amplitude of allegation, among other things, that the street on which the accident occurred was a public highway of the city, that it was at the time, and had been for some time before, in unsafe condition, for the want of a proper railing or wall to protect persons passing over the arch from accident, and that the defendant had notice of its bad and defective condition, and wilfully neglected to make it safe. (The case was tried at the February term of the court, when a verdict was rendered for the plaintiff in which his damages were assessed at $5,500.) At the trial the defendant insisted generally that a city is not liable to individuals injured for the bad condition of its streets. It insisted, moreover, that this causeway was not a public street of the city, and for that reason that the city was not liable for the accident. It insisted further that the causeway was the property of the James River Bridge Company; that it was under the bridge company's control, and not under the control of the city, and that for that reason the city was not liable.

Elaborate argument, based upon very numerous authorities, was made at the trial by counsel on either side, on prayers for instructions to the jury. The court was obliged to rule upon them off-hand, and in doing so invited in advance a motion for a new trial, in order to a more deliberate argument of the

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

[2] [Reversed in 105 U. S. 347.]

law of the case, in the event of a verdict for the plaintiff, giving to the jury the following instructions:

"There are three questions for the jury, viz.: (1) Whether a proper guard or protection had been provided at the point where the accident to the plaintiff occurred. If there was not, (2) whether the accident was in consequence of the absence of such proper guard or protection; and (3) if so, whether damage ensued to the plaintiff, and what amount of money shall be allowed as the measure of the damage to him. If the jury believe from the evidence that a proper guard or protection to the highway was not provided, that the accident occurred in consequence, and that damage ensued to the plaintiff from the accident, then the court instructs the jury that the city of Manchester is liable for the damages, unless it proves that the plaintiff sustained his injury through his own neglect or want of care. The jury are also instructed that in considering damages in this case they may take into account any permanent future suffering and disability resulting to the plaintiff from the accident."

A motion for a new trial was duly made by the defendant and the questions of law very fully reargued. The motion was, of course, based upon the ground that the court misruled at the trial on the law of the case.

I am now to revise the ruling of the court at the trial of this case, made in the instructions given to the jury. There are three questions in the case, viz.: 1. Whether the causeway was a highway or public street of Manchester. If so, (2) whether Manchester as a municipal corporation is liable to an individual for damages resulting to him from the defective or bad condition of its streets; and, if so, (3) whether the relations of the James River Bridge Company to this particular causeway relieved Manchester from responsibility for its defective or bad condition.

1. As to the first point, I think the causeway was in every sense a public highway; and, lying wholly within the corporate limits of Manchester as it did, I think it was a public street of the city, subject to its control and authority in every way in which any other street of the city is so subject. For the purpose of building the bridge and causeway, which was a joint enterprise of the two contiguous cities, it was found convenient to make use of the instrumentality of a joint stock company; but the adoption of this method of action was not intended to, and did not, convert what was in its nature a public highway, connecting two cities, into the private property of a private company. If the two cities had designed by such an expedient to avoid the liability of keeping a public highway in safe condition, I cannot suppose that an act of incorporation for the joint stock company would ever have been given them by the legislature. This causeway is the only free highway connecting the two cities. It is essentially and necessarily a public highway, and being in the corporate limits of Manchester, is in its essential character a public street of that city.

Stress was laid by counsel for defendant upon that section of the charter of the city of Manchester which provides that any street which shall have been open and used by the public as a street for five years shall become a public street and be subject to the control of the council. This section has no other effect than to render the mere fact of a street being open to the use of the public for five years, ipso facto, a subjection of it to the control and power of the city. The object of the provision was to get rid of the refined learning of the law-books on the question what constitutes the dedication of a street to the public in cases where doubt exists. The numerous decisions on that subject cited at bar have no application to cases where there is no doubt about a street being used, and intended to be used, by the public, as in the case before us. Here was a street necessarily public in its very nature. No formal adoption of the bridge by Richmond, or of the causeway by Manchester, was necessary to constitute them a public highway. They were constructed by public bodies, with public funds, for public use, as a public highway, and were thrown open to the public for free use at the start. A formal adoption of them as a public street would, therefore, have been an idle ceremony. The use of them for five years by the public was not necessary to clear up any doubt as to their public character, and thereby to establish upon them the control and authority of the respective municipalities. I could not so falsify an evident and indisputable fact as to refuse to hold that the causeway in question is a public street of Manchester, as such subject to its control, and as to which Manchester is liable to such duties and responsibilities as the law imposes upon municipal corporations.

2. The next question is, whether Manchester as a municipal corporation is liable for the defective or bad condition of its streets, to individuals sustaining actual injury therefrom. Only a few weeks ago the supreme court of appeals of Virginia, in the case of Noble v. City of Richmond, 31 Grat. 271, passed upon this question, and decided that: "A municipal corporation which, by its charter, has the power to lay out, improve, light, and keep its streets in order, is liable in damages at the suit of an individual who sustained injuries by reason of the neglect of said corporation to keep its streets in a proper and safe condition; and that such person may recover damages for such injuries in an action in which he alleges and proves that the corporation had notice of defects or want of repairs in its streets (which notice may be implied), and that he was injured in consequence of such defects in a street." The decision was rendered in a case in which the

plaintiff's wife had fallen into a hole in the sidewalk of a street of Richmond at night, the hole having been left uncovered and no light placed near by. This was the first case in which that court had had occasion to deal directly and particularly with this important question of law, and it made this decision after a full review of all the authorities bearing on the subject, citing, among others: City of Richmond v. Long's Adm'rs, 17 Grat. 375; Sawyer v. Corse, Id. 230; the English cases of Henly v. Mayor, etc., 5 Bing. 91, and Russell v. Men of Devon, 2 Term R. 667; Weet v. Trustees of Brockport, 16 N. Y. 163; Judge Cooley's opinion in City of Detroit v. Blackeby, 21 Mich. 84; Weightman v. Washington, 1 Black [66 U. S.] 39; and Barnes v. District of Columbia, 91 U. S. 540. The case of a municipal corporation existing by authority of a charter obtained by its solicitation, clothed by charter with powers of taxation and administration, and charged with correlative duties and responsibilities, was distinguished by the court from that of a quasi corporation, like a county or township, exercising no statutory authority, and having no power except the limited, ordinary powers incident to counties and towns under the common law. The supreme court of the United States had previously announced this principle in the case of Weightman v. Washington, 1 Black [66 U. S.] 39, upon a wider review and a much fuller citation of authorities, citing the leading English cases; also Erie City v. Schwingle, 22 Pa. St. 384; Storrs v. Utica, 17 N. Y. 104; Conrad v. Trustees of Ithaca, 16 N. Y. 159; Browning v. Springfield, 17 Ill. 143; Hutson v. New York, 5 Sandf. Ch. 289; Lloyd v. Mayor and City of New York, 1 Seld. [5 N. Y.] 369; Wilson v. New York, 1 Denio, 595, 2 Denio, 450; Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 763; Smoot v. Mayor, etc., of Wetumpka, 24 Ala. 112; Hickok v. Plattsburgh, 15 Barb. 427; Mayor, etc., of New York v. Furze, 3 Hill, 612, and other cases. This decision was rendered in a case where the plaintiff had been injured by the falling in of a defectively constructed bridge constructed by agents of the city. The court held, that where the charter of a municipal corporation gives it the control and management of a bridge, makes it chargeable with the expense of keeping it in repair, and gives it power to provide the means of doing so, then such corporation is liable to the public for the safe condition of the bridge, and to individuals for injuries resulting from its neglect to keep it in repair; and this even though only one end of the bridge is within its limits. Thus the courts of last resort both of Virginia and of the United States, to say nothing of other courts, have settled the principle of the liability of a municipal corporation in damages for injuries received by an individual, resulting from defects in or the bad condition of its streets, and therefore it is useless for me to refer to the multitude of decisions in England and America in which this subject has been discussed. I cannot say that the precedents in England have been consistent. They settle, beyond question, the principle, that a parish, which is but a mere ecclesiastical precinct, is responsible for damages resulting from the bad condition of its roads; and they settle the opposite principle with equal decisiveness, that such quasi corporations as hundreds and counties are not so responsible. These diverse rulings result no doubt from antiquarian reasons that have no application in this country. But the English precedents also establish the principle that municipal corporations, having by charter the extraordinary powers of taxation and control over streets usually given to chartered cities, are responsible to individuals injured for defects in their streets; and this latter proposition may be considered to be settled law, both in England and America. True, there is the case of City of Detroit v. Blackeby, 21 Mich. 84, in which the contrary of this latter doctrine is held; but this case is anomalous, and is overborne by the great mass of contrary authorities on this continent. At all events this court is bound by the ruling of the supreme court of the United States in Weightman v. Washington, already cited, and of the Virginia court of appeals in Noble v. City of Richmond, supra. These decisions leave me no alternative but to hold that the city of Manchester is liable to individuals for damages resulting from injuries caused by the defective condition of its streets.

3. The only question remaining for consideration, therefore, is, whether the fact of the particular causeway in question having been constructed by and being the property of the James River Bridge Company, relieves Manchester from the liability imposed upon her by law for the safe condition of her streets. This is the difficult question of the case; difficult because I know of no precedent which has presented the precise facts which constitute the distinguishing features of this case. The point was much relied upon by counsel for the defence, that the mere fact of the James River Bridge Company being liable to the plaintiff (as it certainly is) established the non-liability of the city of Manchester. But it is a non-sequitur to insist that such a liability does exonerate the city. If, for illustration, we suppose the case of a turnpike company's road running along and constituting a street of a city, I would see no difficulty in holding the company responsible for its defects as a road, while holding the city at the same time responsible for its defects as a street. There are many cases of dual liability known to the law. In such a case as that of the turnpike supposed, I should think it clear that there was a dual liability, and that an individual receiving injury from defects in the road or street might elect whether to proceed for damages against the city

or against the private company. I conceive that the existence of a right in an injured person to proceed against the company could not of itself negative his right otherwise belonging to him to proceed against the city. Nor could the responsibility of the city to an individual sustaining injury from the defective street in any way affect the responsibility of the company to the city for negligence in respect to its road. The principle of a city's liability for defective streets, notwithstanding the fact that they were under the control and authority of an intervening agency, itself independent of the city, has been established by very authoritative decisions. One of these is the case of Bailey v. Mayor, etc., of New York, 3 Hill, 531, 2 Denio, 433. The Croton aqueduct and waterworks were constructed for the city of New York under the control and direction of five commissioners appointed by the governor of the state, who were not responsible to the city. One part of their work, a dam forty miles from the city, had been defectively constructed, and had given way, causing great damage to the property of the plaintiff. He sued the city, and under the ruling of the court recovered a verdict and judgment for a large amount. The case was carried to the supreme court of the state, and that court, Judge Nelson (afterwards justice of the supreme court of the United States) delivering the opinion, affirmed the ruling of the court below. It was then carried to the court of errors and appeals (the senate) of the state, where the decision was affirmed, Chancellor Walworth, among others, delivering an affirming opinion. This was a very strong case for the city. The fault was committed by a board which it did not appoint and could in no manner control. The defective work was forty miles beyond its border and its control. Yet on the principle that she and her citizens were to be the chief beneficiaries of the work she was held liable. This New York decision is the more important to us, because it has been made the basis of a decision upon the same point by the supreme court of the United States in the case of Barnes v. District of Columbia, 91 U. S. 540. That was an action brought by an individual against the District of Columbia, to recover damages for an injury resulting from a fall into a pit made by workmen in grading a street. The liability of the District was denied on the ground that a body of five men, called the "Board of Public Works," appointed by the president of the United States, were invested by act of congress with the entire control of the streets and alleys of the District, and their regulation and repair; that this board (and not the District) was responsible to the public and to individuals for the condition of the streets; that over this board the District had no control; and that the District was consequently relieved from the duties and responsibilities in respect to its streets, which might otherwise have attached to it as a chartered municipal corporation. But the court discarded this reasoning and held the District liable. In its opinion, after citing very many cases, in speaking of the case of Bailey v. Mayor, etc., of New York, the court said: "The learned judge (Nelson) repudiates the argument arising from the fact that the commissioners were appointed by the state; that the defendants had no control over their actions; that they were bound to employ them, and to submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct. * * * This case is nearer the one we are considering than any other reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it." The only difference between the two cases which have been described and the one at bar is, that in them the board or the commission represented a single city, whereas here the bridge company represents two corporations, that is to say, Richmond and Manchester jointly. This, however, does not affect the principle established by the two cases, that the liability of a municipal corporation for the condition of its streets is not relieved or removed by the interposition of a subordinate corporation ancillary to the principal one, and charged with the direct possession and control of its streets, or of a particular street.

I think the cases of Bailey v. Mayor of New York, and of Barnes v. District of Columbia, furnish the law to the case at bar, and establish the liability of Manchester in this suit for the defective condition of the Seventh street causeway, where the fearful accident which is the subject of this suit befell the plaintiff. As I cannot change the ruling which I made in the instructions given to the jury at the trial, I must overrule this motion for a new trial.

[NOTE. This case was taken to the supreme court by the city of Manchester on writ of error, and judgment of the circuit court was reversed, and the case remanded, with instructions to set aside the verdict and grant a new trial. The opinion of the court was delivered by Mr. Justice Miller, and it rested upon the ground that the question whether or not the city had so far assumed the care of the approaches to the bridge on which the accident occurred as to incur an obligation to be diligent and watchful in that duty was a question for the jury. Mr. Justice Miller remarked in conclusion: "In our opinion, though strongly persuasive of the proposition that the city had assumed charge of the place, the evidence was not necessarily conclusive. The inference was one of fact, and not of law, and was to be be made, if at all, by the jury, under such proper instructions on the matter as the court should give, and not by the court alone. It was

a mixed question of law and fact, proper for the jury, aided by the court." City of Manchester v. Ericsson, 105 U. S. 347.]

Case No. 4,512.

The ERIE.

[3 Ware, 225;[1] 22 Law Rep. 152; 16 Leg. Int. 245.]

District Court, D. Massachusetts. 1859.

CHARTER-PARTY—CONSTRUCTION—LOSS OF VESSEL—PAYMENT OF FREIGHT EARNED—ROUND VOYAGE—DIVISIBILITY—FREIGHT DUE TO EACH PORT WHERE CARGO IS DELIVERED.

1. A charter-party will not be construed to be a demise of the ship, although her whole capacity is let; unless the possession is transferred to the charterer.

2. By the maritime law, when a ship is chartered to one or more parties out and home, freight will be due to each port where cargo is delivered, though the ship is lost on her return home. By the maritime law, freight is due as far as the charterer has had the beneficial use of the vessel.

3. The owner and charterer as between themselves may make the whole freight, in such a voyage, to depend on the safe arrival of the ship at her home port, or on any other contingency.

4. But when they make the freight to depend on any farther condition than the safe delivery of the cargo, this will not affect the right of others who have an interest in the freight, as seamen for their wages, or lenders on bottomry. They trust to the ship, and have their rights against the freight as appurtenant to the ship; and as far as she has earned freight, by the maritime law, their rights cannot be impaired by any private agreement between the owner and charterer, to which they are strangers.

5. When a vessel is chartered at a monthly freight on a round voyage to one or more ports, and the language of the contract leaves it doubtful whether the voyage is single or divisible, for the purpose of freight, the presumption is that it is divisible, and against the waiver by the owner of his legal rights. And this presumption holds, although the freight is made payable after the ship returns to her home port.

[Cited in The L. L. Lamb, 31 Fed. 34.]

6. But if she is chartered for a gross sum for the round voyage, and that by the terms of the contract is made payable after her return to her home port, it seems that the presumption is, that the whole voyage is one and indivisible, and that no freight is due to the owner until the whole is completed.

7. But if not made payable on that or any other contingency than the delivery of her cargo, the presumption of the law is, that it is a divisible voyage.

This was a libel in personam, by the owners of the brig Erie against the charterer for the charter or hire of the vessel. The brig was chartered for a voyage from the port of Boston to Port-au-Prince and back to Boston. The charterers were to have the use of the whole vessel except what was required for the use of the crew, and for the stowage of the sails, etc., and to pay $1800, and all port charges, pilotage, and lighterage, and to advance to the captain what money he may require to disburse the vessel at Port-au-Prince, not to exceed one-half of the freight. 'There is a further provision that 'the charterers or their agent are at liberty to re-charter this vessel, or to take freight therein, and that the master shall sign bills of lading for all lawful merchandise laden on board said vessel during the voyage aforesaid, at the rates of freight by terms contracted for, as they or their agent may require, without regard to the terms of this charter.' Under this contract, the brig sailed from Boston, Oct. 25, 1856, and arrived at Port-au-Prince Nov. 10, and safely delivered her outward cargo. The master there took up four dollars only, to disburse the vessel. She took in a full cargo and sailed December 3d, and was totally lost on the return voyage.

Mr. Parker, for libellant.

Mr. Brigham, for respondent.

The counsel for the libellant cited and relied on Marquand v. Banner, 36 Eng. Law & Eq. 139; Mackrell v. Simond [2 Chit. 666] Abb. Shipp. 466; Havelock v. Geddes, 10 East, 555; Brown v. Hunt, 11 Mass. 45; Locke v. Swan, 13 Mass. 76.

The counsel for the respondent relied on Byrne v. Pattinson, Abb. Shipp. 566; Barker v. Cheviot, 2 Johns. 352; Pennoyer v. Hallett, 15 Johns. 332; Coffin v. Storer, 5 Mass. 352; Towle v. Kettell, 5 Cush. 18; Blanchard v. Buckman, 3 Greenl. 1; Post v. Robertson, 1 Johns. 26.

WARE, District Judge. It is contended for the libellant that this is a contract for letting the vessel, and not a contract of affreightment; and that though the loss by an accident of major force may excuse the hirer from the return of the vessel, it will not exempt him from the payment of the stipulated hire; and the case of Marquand v. Banner, 36 Eng. Law & Eq. 139, is referred to as directly in point. That was a charter of very complicated conditions. Like this it was for a gross sum. The vessel was to be used by the charterers as a general ship, as this might be; and the master was to sign bills of lading without reference to the charter, on such terms as the charterers might direct, as is also provided in this charter; for an action on a bill of lading, the question arose to whom the freight was due and payable,—to the ship owner or the charterer. The court held, that as the charterers were to pay a lump sum for the use of the vessel not dependent on her earnings, that the freight accrued to the charterers, and that the master in signing the bills of lading acted as their agent, and not as the agent of the owners. It is true that the judge, who pronounced the judgment of the court, at the close of his opinion, says that the charterers must be considered as the owners of the ship. But taking the whole of his reasoning together, it is evident that his meaning was only that they were owners in relation to the accruing freight,

[1] [Reported by George F. Emery, Esq.]

and not owners for all purposes. A charter-party, in order to amount to a demise of the ship, and clothe the charterers with all the right and liabilities of owners, must transfer the possession of the ship as well as a right to the profits of her employment. Drinkwater v. The Spartan [Case No. 4,085]. In this case the owner retained the possession by his own master and crew, and the general rule, to which there, perhaps, may be rare exceptions (Trinity House v. Clark, 4 Maule & S. 288), is, that although the owner lets the whole capacity of the ship, yet if he appoints the master and crew, it is not a demise of the ship, but a contract of affreightment Taking this to be a charter of affreightment, and not a letting of the ship, the only question raised by the libel and answer, is whether on these admitted facts anything, and if so, how much, is due under this charter. This depends upon the construction of the contract, whether the voyage out and home was a single indivisible or a divisible voyage.

It is apparent on the face of the contract, that the parties anticipated only a prosperous termination of the whole enterprise; and as such a disaster as occurred did not enter into their calculation as a probable event, it was not provided for. The court is therefore left to infer, in the best way it can, what provision would have been made, if such a disaster had been contemplated as a possibility.

There are two sources to which recourse may be had to guide our judgment in coming to a conclusion. The first is the contract itself, in all its terms and conditions. If those show to a tolerable certainty, or a reasonable probability, what their intentions may have been, if, in fact, they had any, which is, perhaps, hardly probable, then this intention ought to prevail. The second is the law which regulates and governs the subject-matter of the contract, when not affected by the special agreement of the parties. For all persons, when entering into engagements, of whatever kind, are presumed to know the law, and must be considered as making them with reference to it. The law, therefore, according to the presumed intentions of the parties, comes in as a supplement to their contracts, and measures and regulates their rights and obligations where the contract is silent.

In the first place let us look at the law. By the maritime law, when a ship is chartered for a foreign port and back, if she delivers her cargo at the outward port, the freight is earned and due. It is the price of that service which has been performed, and it is then due and payable, unless by special agreement it is made dependent on the safe arrival of the vessel at her home port, or on some other contingency. This is shown by the common form of a bill of lading. The goods are to be delivered to the consignee, he paying freight. If she is hired or chartered for several ports in succession, and proceeds on her voyage and delivers cargo at two, three, or more, and, after prosperously prosecuting her enterprise to the last outward port of delivery, is lost on her return for her home port; freight will be due, as well as wages, to the last port where she has delivered cargo, unless the law is controlled by the special terms of the contract, so that it is made to depend on some further condition beyond the safe delivery of the goods. There may be a partial exception in charters for a purely trading voyage along the coast, called in the French law a voyage en caravan, in which, according to Emerigon, the whole is but a single voyage; and though in this, a sort of retail trade, the freight is collected from time to time, wages are not earned, and, perhaps, charter not due until the voyage is completed. Des Assurances, liv. 13, §§ 3, 2. This, however, is but an exception, and the general rule is, that the hirer shall pay freight or charter as far as he has had the beneficial use of the vessel, notwithstanding that by an accident of major force she has been prevented from performing the whole service for which she was engaged. But parties for the purposes of freight, as between themselves, may consolidate all these voyages into one. The common law, which favors the unity and entirety of contracts, when there is but one agreement, though more than one thing is to be done under it, in a doubtful case may incline that way. But this is a maritime contract, and the maritime law easily renders contracts divisible when the justice and equity of a case require it. The charter of a vessel for a single foreign port and back, or to a number of successive ports and home, is not made one indivisible voyage because engaged for by one agreement, nor because it is called one in that agreement; but is divided for the purposes of freight, which in its largest and most general sense means the hire of the ship (1 Valin, p. 639, tit. "Du Fret."), and is also for wages divided into as many voyages as there are ports of delivery. The ship owner and charterer may, by special agreement, make them all one voyage as between themselves, and suspend the right to freight for the whole on the safe arrival of the ship at her home port. But the presumption is otherwise; and however clear this may be on the terms of the contract between the owner and charterer, it will not affect the right of third persons, who have an interest in the freight. Notwithstanding any such agreement, freight will be earned at each port of delivery for the benefit of the seamen and the holders of bottomry bonds, who have an interest in the freight. They are strangers to the contract, and their rights cannot be bargained away by the owner and charterer. I have seen, says Emerigon, in a great many (une foule) charter-parties, a provision for the forfeiture of half the freight, in case of an infraction of the contract. But, he adds, this conventional penalty cannot affect the privilege of the seamen,

nor the lenders on bottomry. The reason is, that they have given credit to the ship. She with her appurtenances, is their debtor, and the ship, by the maritime law, has earned full freight by the delivery of her cargo. The seamen and the bottomry creditors have a privilege against this freight, and have a right to proceed against it as appurtenant to the ship, on their maritime hypothecation, before it is absorbed or diminished by any private agreement between the ship owner, and the freightor. Contrats a la Grosse, c. 4, §§ 13–2, Pitman v. Hooper [Case No. 11,186]. The case stated by Emerigon does not, indeed, directly apply to this case, for this is a controversy between the owner and the charterer; and the owner, where the rights of third persons are not involved, may make the payment of freight depend on what conditions he pleases. I refer to the opinion of this eminent jurist to show how clear it is, that by the maritime law, freight is earned for the ship at every port where cargo is delivered.

It has before been observed, that no one is ever presumed to waive his own rights. Express words are required for that purpose. Still less is he to be presumed to waive the rights and interests of other parties. If his own he may relinquish for such consideration as he pleases, he can make no bargains for others without an authority for that purpose. To attempt to waive the rights of others would be an attempted fraud, and fraud is never to be imputed but on proof. Freight is the joint earning of the vessel and the crew. The holder of a bottomry bond represents the vessel, and stands in the place of the owner; for the bottomry bond includes the freight as well as the vessel. The seamen have also a right in the freight, a jus in re, which may be enforced against that in specie. These rights the owner had no authority to bargain away, especially for a consideration accruing peculiarly to himself. A construction which should hold a charter-party as to freight entire for the voyage, which should separate the freight of the outward from the homeward voyage, and make these dependent on the prosperous issue of the whole voyage, would be at once a fraud on the bottomry holder and the seamen, unless they were parties to the contract. When the question arises, therefore, in the construction of a charter-party, whether freight is due at a port of delivery, if on the whole instrument it is left doubtful, the conclusion of the maritime law would be in favor of the owner. For if it be granted that the stipulation for freight is the language of the owner, the rule that words are to be construed most strongly against the party using them, is the last rule of interpretation to be resorted to when all others fail. 6 Toull, Droit Francais, Nos. 323, 324; Dig. 44, 1–99.

We will now look at the terms of the contract. The charter describes the voyage out and home as one voyage. But this is not decisive. In fact, it is of but little significance. The same descriptive words are often, if not commonly, used where the vessel is intended for several successive ports, and it is the universal formula in seamen's contracts; but it is never construed to deprive them of wages up to the last port of delivery, whatever may be the ultimate fate of the vessel. In order to give to this language the effect of consolidating the outward and homeward voyages into one, for the purposes of freight, it must be made to appear from other conditions contained in the instrument, or from its whole tenor, that such was the intention of the parties. If the freights stipulated for in this charter-party had been a monthly freight, I should think that there would be little difficulty in allowing charter under this contract to Port-au-Prince, and for half the time the brig lay there. And the case of Brown v. Hunt, 11 Mass. 45, and Locke v. Swan, 13 Mass. 76, would amply justify the decision, if any authority would be needed. There are decisions, it is true, that have a different aspect. Byrne v. Pattinson, Abb. Shipp. 560; Coffin v. Storer, 5 Mass. 252; Blanchard v. Buckman, 3 Greenl. 1. But these, I think, stand on the better reason, and are more in harmony with the spirit and equity of the maritime law.

But the charter here stipulated for, is a single gross sum. This looks as though the parties intended a single and not a divisible contract. When the hire is fixed by a monthly sum, though the voyage is described as one, I think the presumption of the maritime law is, that for the purpose of freight, it is divisible into as many voyages as there are ports of delivery. Freight, the hire for the use of the vessel, is due as far as the charterer has had the beneficial use of it, which is to the last port where cargo is delivered. But when the owner stipulates for a single gross sum to be paid on the return of the ship to her home port, he makes the voyage apparently one. But in either case, this presumption is liable to be controlled by other conditions in the charter showing a different intention. Still this appears to be the natural inference, and I think it belongs to the party who denies it, to show that the natural conclusion is not the just one. In looking into this charter-party, we find that so much of the freight as should be required to cover the disbursements of the vessel at Port-au-Prince was payable there. So much must be considered as earned before the completion of the round voyage, and this might amount to one-half, but was not to exceed that sum. Upon this stipulation it may be fairly asked, as it was by the libellant's counsel, does it not open the contract and let in the equity of the maritime law? The whole of the outward freight is there demandable on the happening of a certain contingency. One might feel inclined to pause on this question; but it is said that this precise point has been decided by the supreme court of this state, in the late case of Towle v. Kettell, 5 Cush. 18. That was a charter-party for a voyage

from Boston to Wilmington, N. C., thence to Cape Haytien, and thence back to Boston, for a gross sum of $1500. So much was payable at Hayti as the master might require for the disbursement of his vessel, and the balance on the discharge of the cargo at Boston. The vessel made the voyage to Hayti and there delivered her cargo, and was lost on her return to Boston. The court held that it was a single indivisible voyage, and that no freight was due. The only difference between the two cases is this; in that case the balance of the freight not required to disburse the vessel was, by the terms of the charter-party, made payable on the vessel's arrival at Boston. In the present case, the time and place for the payment of the residue of the freight is not fixed by the contract, but is left to be determined by the law. The distinction, it may be said, is a narrow one. But if the cases in which the courts have been called upon to interpret charter-parties, where the performance of the entire contract has been prevented by a fortuitous event, are critically examined, it will be found that they have turned on distinctions so minute and subtle that, as is remarked in the case of Towle v. Kettell, one decision can hardly be relied on as authority for another, unless there is between them a perfect identity. The just rule of interpretation is, I think, that suggested by Lord Mansfield in the case cited from Abbott on Shipping. If there be anything in the contract from which it can be inferred that the parties contemplated a divisible and not an indivisible voyage, for the purposes of freight, it ought to be held to be divisible. This is in conformity with the general rule of law, and meets the justice of the case. This contract made the voyage divisible in a certain contingency, and to a certain extent. Beyond that, no intention is expressed. The balance of the freight is not made payable after the vessel returns to her home port, as was the fact in all the cases cited by the respondent; and it cannot, therefore, be pretended, as was urged by Lord Kenyon in the leading case of Byrne v. Pattinson, that the contingency has not happened on which the freight is payable.

The only reason upon which the defendant refuses to pay the freight on the outward voyage, is, that the whole stipulated freight out and home is in one sum. The plaintiff has performed one-half the service, and has been prevented by a fortuitous accident from performing the whole. It may be safely affirmed that it is a universal maxim of law, as it is of reason and common sense, that no one is responsible for fortuitous events without an express agreement for that purpose. Dig. 50, 17, 23; Domat, liv. 1, tit. 1, § 3, No. 9. And the general policy of the maritime law is to allow a contractor his reward as far as he has performed his service, and more especially when the other party has received the benefit of it. In this the maritime law conforms to the genius of the Roman law. If an architect agreed to build a house, and when it was partly finished it was destroyed by a fortuitous accident, "si vi naturali, veluti terrae motu acciderit," (Dig. 19, 2, 59); or if an undertaker engaged to make an artificial stream or canal, and before approval it was destroyed, "si soli vitio id accidit, locatoris erit periculum" (Dig. 19, 2, 62). In either of these cases, if the fault was in the workman "si vitio operis id accidit," the loss fell upon him, if the loss arose from unavoidable accident it fell on the owner. In such cases the workman guarantees his own work only, and the acts of Providence are left to be borne by those on whom they fall. On the authority of these cases, Domat so states the law (livre 1, tit. 4, § 3, Nos. 8, 2, 10), though the price is fixed at one sum, "un certain prix de l'ouvrage entier." And Voet (livre 19, 2, 37), without any misgiving thus explains the law.

It is true that the common law, in its original features, as they are disclosed in the early reports, inclines strongly against the apportionment of contracts. It is equally true that the elements of the common law were formed and grew to maturity under the Norman aristocracy, when the people had no voice in making it. The rules of law were generally favorable to capital and wealth, and bore hard on poverty and labor, as is always the case when the law is made by an aristocracy. But it is abundantly proved by the late reports, that the humanity of modern judges has struggled hard against the severity of the ancient rule, and has often made exceptions on slight grounds. The leading case in favor of the old law is Cutter v. Powell, 6 Term R. 320, decided under the presidency of Lord Kenyon, who, although not much distinguished as a classical scholar was delighted to stand, in his own language "super antiquas vias" of the law. The old doctrine has been met by the solid reasoning of Chief Justice Parker, in Britton v. Turner, 6 N. H. 481. The cases are faithfully collected in 1 Pars. Cont. bk. 3, c. 9, § 1, particularly note p and 2 Pars. Cont. pt. 2, § 5. The author himself gives a strong intimation of his opinion in favor of the later doctrine. The broad basis on which the decisions turn is that of apportionment. The distinction on which the decisions often rest, is whether the price agreed is one gross sum, or whether it is made up by a computation of days, weeks, or months. But this can make no difference in principle, but is only important in ascertaining the common intention of the parties. On the whole, as well on the general principles of the maritime law, as on the peculiar phraseology of this contract, my opinion in this case is that the contractor did not become an insurer against inevitable accident, which alone prevented him from the completion of his contract, and is entitled to his outward freight.

The decree will be for $896, with interest, deducting $4 paid and costs.

ERIE, The (DAVIS v.). See Case No. 3,632a.

ERIE, The (KILLAM v.). See Case No. 7,765.

ERIE RY. CO. v. The D. S. GREGORY. See Case No. 4,101.

Case No. 4,513.

ERIE RY. CO. et al. v. HEATH et al.

[8 Blatchf. 413;[1] 4 N. B. R. 177 (Quarto).]

Circuit Court, S. D. New York. May 3, 1871.

PRACTICE — PRODUCTION OF BOOKS AND PAPERS — CONTEMPT — NON-BAILABLE ATTACHMENT — SUBPOENA DUCES TECUM — OFFICER OF CORPORATION.

1. A corporation, a party to the suit, was directed, by an order of the court, in the suit, to do a specific thing to effectuate the relief to which the defendants were declared to be entitled, and it was referred to a master to superintend the doing of such thing. The master ordered the production before him, by the corporation and by its president, of certain specified books and documents of the corporation. The president refused to produce them, and an attachment for contempt was issued against him by the court, non-bailable until the books and documents should be produced.

2. Under such circumstances, an officer of the corporation can be compelled, by subpoena duces tecum, to bring its books from its office, and produce them before the master.

3. The authority to require their production is conferred by rule 77 of the rules in equity prescribed by the supreme court.

[This was a bill in equity by the Erie Railway Company and others against Robert A. Heath and Henry L. Raphael.]

William A. Beach, for plaintiffs and Gould.

William M. Evarts and Charles F. Southmayd, for defendants.

BLATCHFORD, District Judge. The motion for an attachment against Jay Gould, the president of the Erie Railway Company, is granted. The contempt of court committed by him, in refusing to produce before the master the books and documents specified in the order of the master, made on the 14th of April, 1871, appears, by the evidence, to have been wilful, and is wholly unexcused and inexcusable. Mr. Hilton, the transfer clerk, in whose possession, and in whose safe, some, if not all, of such books and documents are shown to be, testified that he would produce them, if so directed by Mr. Gould, but Mr. Gould refused before the master to give such direction. The pretence on the part of Mr. Gould, that he doubted his power to give such an order, is shown, by his own testimony, to be without foundation, and only aggravates the deliberate character of his action. For, in regard to the stock transfer books of September, 1870, and December, 1870, and January, 1871, he at first stated that he thought they were in the possession of the master; that he supposed they had been sent to the master; that they sent down two or three loads of books, which he supposed were the books relative to this matter; that he himself gave directions to the transfer clerk to bring such books as related to the transfer of the 60,000 shares of stock to Mr. Coleman, as receiver; that he supposed that the transfer books relating to the 30,000 shares, which were issued and sold upon the street, in lieu of the 30,000 shares of the Heath and Raphael stock, had been sent before the master; that he thought the stock certificate books, from which were cut the stock certificates issued from December 28th, 1870, to January 16th, 1871, both inclusive, had been sent before the master; that the stock transfer books and stock certificate books are in the department of the transfer clerk, and in his control; and that all the books of the corporation are under the control of him, Mr. Gould, through the different departments. The doctrine that an officer of a corporation which is not a party to a suit, or even of one which is, will not be compelled to bring from its office its books, on a subpoena duces tecum, has no application to an investigation like the one in which this question arises, where the corporation is not only a party to the suit, but is, by the order under which the master is proceeding, directed to do a specific thing to effectuate the relief to which the defendants are declared to be entitled, and in aid of which the master is acting. Besides, the authority to require the production before a master of all books, papers, writings, vouchers, and other documents, applicable to the matters embraced in the reference before the master, is directly conferred by rule 77 of the rules in equity prescribed by the supreme court. In executing, under the order made by the court, and the rules which govern the court, the power of calling for books and documents, the master will, of course, see to it that as little inconvenience as possible is caused to the company in the way of interrupting its business, or the use by it of the books needed for the investigation. But such books must be produced, not necessarily all at once, but from time to time, as needed, and the master must conduct the examination at such place as shall seem to him most advisable.

An attachment must issue against Mr. Gould, as moved for, to be non-bailable until the books and documents specified in the order of the master, of April 14th, 1871, are produced, and, when the master certifies to the marshal that such order is complied with, then to be bailable in the sum of $10,000. [The motion for the addition to amendment of the order of March 11, 1871, is granted.][2]

[NOTE. For other proceedings, see Cases Nos. 4,514–4,516, 6,306, and 6,307.]

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

[2] [From 4 N. B. R. 177 (Quarto).]

Case No. 4,514.

ERIE RY. CO. et al. v. HEATH et al.

[8 Blatchf. 536.] [1]

Circuit Court, S. D. New York. July 12, 1871.

COURT—POWER TO ORDER RESTORATION OF PROPERTY ABSTRACTED FROM ITS CUSTODY—SUMMARY PROCESS.

1. This court has power to compel, by summary process, the restoration of any property abstracted from its custody, whether the party abstracting it be or be not a party to the suit concerning such property.

2. Shares of the stock of a corporation were in the hands of a receiver of this court. Certificates therefor were issued by the corporation to the receiver, and had, appurtenant to them, the privilege of being certified by the registering agent of the corporation, as representing shares duly registered. Such privilege was a part of the property in the shares, and a valuable privilege. G., by his acts in respect to such shares, deprived such shares, while they were in the custody of this court, of such privilege, and procured such privilege to be conferred on a like number of other shares of the stock of the corporation, while they were his property: *Held*, that G. must restore the property abstracted, by making provision for the restoration of such privilege to the receiver's shares, or, in default thereof, make good the pecuniary value of the spoliation.

3. The mode of making such provision, discussed.

Edwin W. Stoughton and William A. Beach, for plaintiffs and Jay Gould.

William M. Evarts and Charles F. Southmayd, for Heath and Raphael.

BLATCHFORD, District Judge. Without discussing at length the various questions debated on the hearing on the petition of Heath and Raphael for relief against Jay Gould, I deem it sufficient to state briefly the conclusions at which I have arrived:

1. The shares of stock which are the subject of controversy in this suit are in the possession of this court by the hands of its receiver, Mr. Coleman, and they have been in such possession, and Mr. Coleman, as receiver, has been the officer of this court, ever since the removal of the suit, as regards Heath and Raphael, into this court.

2. This court has the power to compel, by summary process, the restoration by Mr. Gould of any property which he has abstracted from the custody of this court, whether he be or be not a party to the suit concerning such property.

3. As respects such shares of stock, the certificates representing them, which were issued to the receiver, had, when such receiver became the officer of this court, the privilege appurtenant to them, of being certified by the registering agent of the Erie Railway Company, as representing shares duly registered with such agent. Such privilege was a part of the property in the shares, and was a valuable privilege. Mr. Gould has, by his acts, in respect to 30,000 of such shares, not only destroyed such privilege, and deprived such 30,000 shares, while they were in the custody of this court, of such privilege, but has converted such privilege to his own use, by procuring it to be conferred on 30,000 other shares of the stock of the company, while such latter shares were his property.

4. Having thus abstracted property from the custody of this court, Mr. Gould must restore it, by making, or causing to be made, provision, that the 30,000 shares represented by the certificates issued to the receiver, which have been thus deprived of the privilege referred to, shall have such privilege restored to them; and, in default thereof, he must make good the pecuniary value of such spoliation.

5. Such provision is proposed to be made by placing on the registry list of the registering agent of the company, 30,000 shares, which have been created by the company and certificates for which have been issued by the company, but which have never hitherto been upon such registry list, and thereby providing an adequate privilege of registry for all the shares represented by the certificates issued to the receiver I see no objection to this course. If the company recognizes this 30,000 shares as valid stock, as is shown to be the fact, and the registering agent of the company will, on the proper steps being taken to that end, certify all the shares held by the receiver, as being duly registered shares, this court cannot, in this suit, adjudicate on the question of the alleged invalidity of such shares, as having been issued ultra vires or in an irregular manner not capable of ratification and not ratified by the company. Such question is wholly collateral to this suit. The issues in this suit raise no such question, and it can be determined only in a plenary suit, with proper parties and with pleadings framed to present it. I do not intend to suggest that the stock is valid or that it is invalid, but only that, for the purposes of this suit and of this question of registration, it must be regarded by this court as prima facie valid stock.

6. This court is equally without power, in this suit, to enjoin the company from placing on the registry list the 30,000 shares which it is proposed to place there. The pleadings in this suit allow no such relief, and the company is a plaintiff in it.

7. The motion of the plaintiffs to open the default taken on the 11th of March last is denied. Such a course is not necessary in order to allow the real owner of any stock represented by Heath and Raphael to claim it at the hands of this court, while it is in the custody of this court. When such stock shall have been placed in proper condition for its restoration to Heath and Raphael, if, then, any person claiming any of the stock through evidence of title issued by Heath and Raphael, shall apply to this court to have his rights in the premises awarded to him out

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of the res in court, the application will be considered and disposed of.

[NOTE. For other proceedings between the same parties, see Cases Nos. 4,513, 4,515, 4,516, 6,306, and 6,307.]

Case No. 4,515.

ERIE RY. CO. et al. v. HEATH et al.

[9 Blatchf. 226.] [1]

Circuit Court, S. D. New York. Dec. 19, 1871.

EQUITY—RECEIPTS FOR SHARES OF STOCK—IDENTIFICATION OF CERTIFICATES IN HANDS OF THIRD PERSONS.

This court having in its hands certificates for 60,056 shares of the capital stock of a corporation, one of the plaintiffs, and having made an order for the delivery of those certificates to the defendants, one G. petitioned to have so many of such certificates as would represent 12,735 of such shares delivered to him, as the owner thereof. Certificates of shares, far exceeding in number 60,056 shares, had been put into the hands of the defendants, by various persons, with power to the defendants to transfer them, on the books of the corporation, from the names of such persons to their own names. The defendants gave to such persons receipts, stating the number of certificates and the number of shares, and that the certificates were to be registered in the names of the defendants. G. became the owner of 124 of such receipts, representing 12,735 shares. The 60,056 shares, and no more, had been transferred to the names of the defendants, and the certificates therefor, in the hands of the court, were in their names. G. could not identify any of the receipts he held as having been given for any particular certificates represented by any of the certificates in the hands of the court: *Held*, that any person who could identify any certificate he deposited with the defendants, could call upon them to respond in respect thereof; and that, as G. did not show that any person under whom he claimed title to the receipts, deposited any of the certificates representing the 60,056 shares in the hands of the court, or that such certificates were not all of them deposited by persons to whom the receipts which he claimed to own were not issued, the prayer of this petition must be denied.

In equity.

David Dudley Field and William A. Beach, for petitioner.

William M. Evarts and Charles F. Southmayd, for Heath and Raphael.

BLATCHFORD, District Judge. The substance of the allegations of the petition of Jay Gould, now presented to the court, is, that there were put into the hands of the defendants Heath and Raphael, by the owners thereof, certificates for and representing shares of stock in the Erie Railway Company amounting to over 300,000 shares; that such certificates, when so put into their hands, were each of them accompanied by a power of attorney to transfer the same, signed in blank by the holder on the back of the certificate, with permission to such defendants to stamp their names in such blank power of attorney, thereby conferring upon them power to cause the shares represented by each certificate to be transferred on the books of the corporation to the name of them, thus giving them full power and authority over the stock to the same extent as though they were bona fide owners and holders thereof; that thereupon the defendants caused their names to be stamped in the blank powers of attorney, so executed, authorizing them to cause the stock to be transferred on the transfer books of the company, to the names of them or their nominees; that, for the stock so received, the defendants caused to be delivered to the shareholders, in exchange for each certificate of stock received, a receipt in substance as follows: "No. ——. Received of ——, —— certificates for —— shares in the Erie Railway Company, to be forwarded to America for registration in the names of Messrs. Robert Amadeus Heath and Henry Lewis Raphael;" that all of the stock so received was stamped with the names of the said Heath and Raphael, in the power of attorney so signed in blank, thereby empowering them to cause said stock to be transferred upon the books of the corporation to their own names; that such receipts do not represent, and were not intended to represent, any particular certificates of stock, or class of such certificates, and do not designate any of such certificates to which the holders of such certificates are entitled, but, on the contrary, entitle the holders thereof to demand any portion of the certificates held by the defendants, without any discrimination; that the petitioner is the holder and owner of 12,735 shares of the stock of the company, the certificates or evidence whereof, issued by the company, have been so delivered to the defendants, with a blank power of attorney, for a transfer thereof, signed on the back thereof, with the names of the said Heath and Raphael stamped thereon; that the only evidence the petitioner has of his ownership of such certificates is a quantity of such receipts in said form, the number of each receipt and the quantity of shares represented by it being set forth, the receipts being 124 in number; that 60,000 shares or over of the stock of the company, with said blank powers of attorney endorsed thereon, and with the names of Heath and Raphael stamped thereon, have been presented at the office of the company, with the request that the same be transferred to the names of the said Heath and Raphael, and the company, under the orders of this court herein, has, to a great extent, caused such shares to be put in condition to be transferred to the names of said Heath and Raphael, and is diligently engaged in completing such transfer; that the certificates representing the shares of the stock of the company owned by the petitioner, and represented by such receipts now held by him, are a part of and among such certificates so delivered to Heath and Raphael, with such blank powers of attorney endorsed thereon, and which have been

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stamped with the stamp of Heath and Raphael in the blank power of attorney, and are either a part of such 60,000 shares or of the residue not embraced therein; that the petitioner has no means of identifying such certificates, his only evidence of ownership thereof being the receipts he holds for the same, in the form before mentioned; that the petitioner is unwilling that the stock owned by him, or the certificates representing the same, should be held by or in the names of said Heath and Raphael, or any of their nominees; that said Heath and Raphael acquired no title to or interest in said stock, by virtue of said receipts, or any right to hold the same; and that no trust was created for any purpose by which said stock can be held by said Heath and Raphael as against the owners thereof, nor were such receipts intended by such owners to create in said Heath and Raphael any right, title, or interest therein, either in trust or otherwise.

The prayer of the petition is, that this court will cause proof to be taken of the title of the petitioner to the said shares of stock and certificates, and that the same, to the extent of the receipts held by him, may be delivered to him, and that, in the meantime, the delivery of such shares and certificates to said Heath and Raphael, or any other person, to the extent above claimed by the petitioner, may be suspended, until the title of the petitioner thereto shall be adjudged by this court.

In answer to this petition, it is shown, by affidavit, that the receipts referred to in the petition are not specially for parts of the 60,056 shares of stock involved in this suit, but are for portions of a much larger quantity of stock delivered over to said Heath and Raphael for registration in their names, the 60,056 shares forming part of the entire larger quantity; that the transfer to said Heath and Raphael, or registration in their names, of the said stock other than said 60,056 shares, has been hitherto prevented by the refusal of the company to permit such transfers; that, at present, any attempt of said Heath and Raphael to effect such transfer is practically enjoined by an order of receivership granted by the supreme court of New York, by the terms of which any such stock, upon being presented for transfer or registration, is to be forthwith taken into the possession of a receiver; that, by the terms of the arrangement by which the stock was delivered by its owners to Heath and Raphael, for registration, and such receipts were issued therefor, the delivery of the new stock certificates to the owners, after the making of such transfer and registration in the names of Heath and Raphael, was to be made not in this country, but in London; that information has been received from the person who signed the receipts, that there is reason to believe that spurious and forged documents, purporting to be such receipts for shares delivered for registration, have been put in circulation, and are outstanding; that, if this court should undertake to entertain jurisdiction in respect of the obligations of Heath and Raphael under such receipts, and to compel delivery of the stock called for by the receipts to be made in this country to the holders of the receipts, instead of requiring it to be done in London, according to the arrangement under which the stock was received for registration, there is not believed to be any safe basis here upon which the agents or attorneys of Heath and Raphael can know or decide as to whether receipts which may be presented here are genuine or not, nor as to the genuineness or validity of the title, by endorsement or otherwise, under which the parties now holding such receipts may claim to have become assignees of the rights of the persons to whom the receipts were originally given; that the said stock, other than the 60,056 shares, the transfer of which to the names of Heath and Raphael has been and is thus prevented, is very large in amount, embracing many thousands of shares, a large amount of such stock having been sent back to England after the seizure of the 60,056 shares; and that the practical negotiability of the stock certificates therefor has been destroyed, because of the fact, that, when such stock was sent to the United States for transfer and registration, the names of Heath and Raphael were inserted as transferees, in the powers of attorney endorsed on the certificates, so that delivery of such stock can no longer be made to a purchaser by giving to him the certificate with a blank power of attorney for transfer.

In July last, when this suit was before me in one of its phases, the question was discussed as to the propriety of allowing the real owner of the stock represented by Heath and Raphael to claim it at the hands of this court while it is in the custody of this court. I then remarked [Case No. 4,514]: "When such stock shall have been placed in proper condition for its restoration to Heath and Raphael, if, then, any person claiming any of the stock through evidence of title issued by Heath and Raphael, shall apply to this court to have his rights in the premises awarded to him out of the res in court, the application will be considered and disposed of."

It is quite apparent, that the claim of the petitioner to have delivered to him certificates of stock to the extent of 12,735 shares out of the entire 60,056 shares, but no particular 12,735 shares, cannot be allowed. By the transaction of putting the certificates for the shares into the hands of Heath and Raphael, the owners thereof merely appointed Heath and Raphael their agents to have such stock transferred to and registered in the names of such agents. Such agency was not a power coupled with an interest, but was a power revocable at the will of

its grantor. The petitioner, claiming to stand in the place of original grantors of such powers, (for he does not allege that he was an original depositor of certificates,) claims to revoke such powers. But he can revoke them only in respect to the identical certificates which such original grantors put into the hands of Heath and Raphael, or in respect to certificates representing, in direct replacement and succession, such original certificates, and not in respect to certificates which were not put into the hands of Heath and Raphael by grantors of powers to whom receipts were issued which the petitioner claims to own. He explicitly states, in his petition, that the certificates represented by the receipts which he owns are either a part of the 60,056 shares, or are a part of the remainder not included in the 60,056 shares, and that he has no means of identifying such certificates. It is true, that the petition states, that such receipts do not represent, and were not intended to represent, any particular certificates of stock, and do not designate any of such certificates to which the holders thereof are entitled, but entitle the holders to demand and receive any portion of the certificates of stock held by Heath and Raphael, without discrimination. The receipts do not specify or identify, by numbers or otherwise, the particular certificates received, and do not, on their faces, represent any particular certificates, or designate the certificates received as being the certificates to which the holders of the receipts are entitled. But it by no means follows that the receipts do not in fact represent any particular certificates, or that they entitle the holders thereof to demand and receive any portion of the certificates held by Heath and Raphael, without discrimination. Each receipt bears a number. It is to be supposed that, by such numbers, or otherwise, the particular certificates which each grantor of a power placed in the hands of Heath and Raphael can be identified. Whether this be so or not, any person who can identify the certificates he deposited, is entitled to call upon Heath and Raphael to respond in respect of such particular certificates, and to claim that no one else shall call upon them to respond in respect of the same certificates. This view becomes important in connection with the fact that Heath and Raphael hold, under like powers, certificates for a very large number of shares besides the 60,056 shares. Such other shares have not yet been transferred to, or registered in, the names of Heath and Raphael. This has happened, as appears, through no fault of Heath and Raphael. There is no justice in allowing the petitioner to claim and receive the 12,735 shares in preference to other depositors who are not parties in court. For aught that appears, it may very well be, that such other depositors deposited all the certificates representing the particular 60,056 shares now in the hands of this court. The petitioner does not assert that any person under whom he claims title to the receipts, deposited any of such certificates, nor does he assert that such certificates were not, all of them, deposited by persons to whom the receipts which he claims to own were not issued.

This court can, out of the 60,056 shares which are in its custody, deliver certificates for shares to no other person than Heath and Raphael, on a petition of this character, in this suit, unless such person shows himself affirmatively to be the depositor, or the assignee of the depositor, of particular certificates which have been replaced by, and are directly represented by, particular certificates forming part of such 60,056 shares.

I do not dwell upon any of the other views taken in the affidavit presented in opposition to the petition, or urged on the hearing, or express any opinion in regard to them, as the grounds on which I have above put my decision are sufficient to dispose of the present application.

In connection with the suggestion as to spurious receipts, I observe, in the list of the receipts furnished by the petitioner, as owned by him, there are, of receipts numbered 15, 18, 59, 191, 329, 438, 460, 812 and 906, two each; of receipts numbered 381, 428 and 475, three each; and of receipt numbered 349, four. These thirty-one receipts cover 3,700 shares. In the cases of numbers 15, 329, 460 and 812, the same number of shares is represented by each of the two receipts of the same number. In the cases of numbers 18, 59, 191, 438 and 906, a different number of shares is represented by each of the two receipts of the same number. In the cases of numbers 428 and 475, the same number of shares is represented by each of two of the three receipts of the same number, and a different number of shares is represented by the remaining one of the three. In the case of number 381, a different number of shares is represented by each of the three receipts of the same number. In the case of number 349, the same number of shares is represented by each of two of the four receipts of the same number, and a different number of shares is represented by each of the other two of such four receipts, each of such latter two representing, also, a different number of shares from the other one of such latter two. I allude to these circumstances only for the purpose of saying, that the field of inquiry which they indicate as a necessary one, is one which ought not to be entered upon by a tribunal which has before it only a portion of the entire number of shares covered by the transactions with Heath and Raphael, and only a controversy respecting a portion of such entire number, and which has no jurisdiction in this suit to affect the rights of those who are not before it.

The prayer of the petition is denied, and

the order for the suspension of the delivery to Heath and Raphael of the 12,735 shares is vacated.

[NOTE. For other proceedings between the same parties, see Cases Nos. 4,513, 4,514, 4,516, (79 U. S.) 366.]

Case No. 4,516.

ERIE RY. CO. et al. v. HEATH et al.

[10 Blatchf. 214.] [1]

Circuit Court, S. D. New York. Oct. 14, 1872.

PRACTICE IN EQUITY—ALLOWANCE TO MASTER.

A special allowance made to a master, for his services in executing a decree.

Barlow, Larocque & McFarland, for the company.

Kenneth G. White (the master), in pro. per.

BLATCHFORD, District Judge. The 82d of the rules in equity prescribed by the supreme court provides, that "the compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct."

The $6,005,600 of stock which passed through the hands of the master, in executing the decree of the court, represented, at the market value thereof at the time, about $2,000,000 of money. Under the act of February 26, 1853 (10 Stat. 163), the clerk of the court, if that amount of money had passed through his hands, would have been entitled, for receiving it, keeping it, and paying it out, under the order of the court, to one per cent. on the amount, or $20,000. Receivers are allowed usually, as commissions, a per centage on the moneys passing through their hands.

By the laws of New York, the commissions of an executor or administrator, for receiving and paying out $2,000,000, are over $20.000.

It is also made known to the court, that, according to the established usage in the city of New York, the compensation of a broker, for receiving shares of stock, is one-eighth of one per cent. on the nominal or par value of the shares, and the same for delivering them. Such compensation, at those rates, on the $6,005,600 of stock, would be $15,014.

The fees of the master, not objected to, for services in the suit, under the decree of reference, running through a period of ten months, and exclusive of the receipt, custody, registration and delivery of the certificates for the shares of stock, amount to $2,690.71. His disbursements, for stenographers' fees, use of safe, carriage hire and watchmen, were $554.80.

The course which the master pursued, of receiving the certificates of stock, then causing them to be registered, and then delivering them to the defendants, was one acquiesced in by both parties. The defendants insisted upon such course, in order that the certificates should be registered while in the custody of the master, and should not be delivered to them until the registration had taken place. The Erie Railway Company insisted upon delivering the certificates to the master. The certificates were 6,027 in number. They were registered while in the custody of the master, and then delivered to the defendants, and the provisions of the decree were carried out by the master with fidelity and punctuality, without interruption, and to the attainment of the result expressed in the decree.

It seems to me proper that this special service in regard to the certificates should be compensated by a special allowance. It was a highly responsible service, and, independently of its nature as a trust, the circumstances which had attended the litigation in its previous stages, were such as to make great caution on the part of the master necessary, in order that the certificates might not be interfered with or intercepted before their delivery to the defendants in the completed form directed by the decree. Since the discharge of this service by the master, the management of the affairs of the Erie Railway Company has passed into the hands of new directors, who are represented by counsel who took no part in the litigation referred to. They submit the matter of the compensation of the master entirely to the discretion of the court, without suggestion as to amount, and with the expression of a desire that he shall be properly compensated, and of a willingness to pay such proper compensation.

On a review of all the facts in the case, I fix the compensation of the master at the sum of $7,500, in addition to the $2,690.71, allowing to him, also, the $554.80 of disbursements, thus making the entire amount allowed to him, $10,745.51. This amount is to be paid to him by the Erie Railway Company.

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

ERIE RY. CO. (HEATH v.). See Cases Nos. 6,306 and 6,307.

ERIE RY. CO. (LOCOMOTIVE ENGINE SAFETY TRUCK CO. v.). See Case No. 8,452.

ERIE RY. CO. (ST. JOHN v.). See Case No. 12,226.

ERIE RY. CO. (SAYLES v.). See Case No. 12,418.

ERIE RY. CO. (SEAMAN v.). See Case No. 12,582.

ERIE RY. CO. (SPERRY v.). See Case No. 13,237.

ERIE RY. CO. (UNITED STATES v.). See Cases Nos. 15,055 and 15,056.

ERIE RY. CO. (WHELPLEY v.). See Case No. 17,504.

ERIE & W. TRANSP. CO. (PHOENIX INS. CO. v.). See Case No. 11,112.

Case No. 4,517.

ERIKO et al. v. BOMFORD et al.

[1 Hayw. & H. 261.][1]

Circuit Court, District of Columbia. May 17, 1847.

ATTORNEY AND CLIENT—APPEARANCE—MOTION TO STRIKE OFF — CONTROL OF CAUSES IN WHICH COUNSEL APPEAR.

1. It is not the practice of the court to order the name of a counselor or attorney to be stricken off in any particular case, who has entered his appearance. It is a matter that must be decided by the attorney and his client.

2. The court will not decide which of the contending counsel has the better right to control the causes in which they appear. This, also, must be left to their clients.

[This was an action at law by Hyppolitus Eriko and others against George Bomford and others.] Heard on motion to strike out the appearance of Fendall and Bradley.

On the 12th of April, 1847, Gaspard Tochman, Esq., claiming to be an attorney, solicitor and counsel of the plaintiffs in the above entitled cause depending in the circuit court of the District of Columbia, and whose name in December, 1845, had been entered upon the docket of the court, together with the names of Joseph H. Bradley and P. R. Fendall, Esqrs., also claiming to be attorneys, solicitors and counselors of the plaintiffs in the said cause, moved the court: That the names of Messrs. Fendall and Bradley be stricken off the docket in all the cases of the Eriko branch of the heirs and next of kin of General Thaddeus Kosciusko; in other words, "that they be not permitted to appear for the heirs in any of said cases, for want of authority." And he asks leave to file certain papers in said cause to show his own authority, and the want of authority in Messrs. Fendall and Bradley, to appear for the Eriko branch of the heirs. The court refused to permit him to file the said papers, but permitted his motion to be entered upon the docket.

It appears by the records of the court that in December, 1845, there had been a rule laid on those parties to give security for costs. This security was given by Messrs. Fendall, Bradley and Tochman, and their appearance was entered in their own hands respectively upon the dockets and the papers in all the cases of the Eriko family.

When an attorney or counselor or proctor of this court offers to appear in any cause depending, or any suit to be brought in this court, the court does not generally require evidence of his authority. They have such confidence in the gentlemen of the bar as to believe that they would not attempt to impose on the court, and after the appearance has been entered it is not the practice of the court to order it to be striken off in any particular case without the consent of the attorney or counselor who has entered the appearance. We have no recollection of any such order in this court or in any other. It is a matter between the client and his attorney. The court will not undertake to decide which of the contending counsel has the better right to control and manage the respective causes in which they appear. It is a question which must be left to their constituents, who have the right and the authority to grant and revoke from time to time such powers as they deem proper and expedient.

The COURT must therefore overrule the motion to order the names of Messrs. Fendall and Bradley to be stricken off the docket in the cases of the Eriko branch of the heirs of Gen. Kosciusko, and it is ordered that Mr. Tochman have leave to take from the clerk's office all the papers which he has produced and offered to file in support of his motion.

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

Case No. 4,518.

ERLANDSEN et al. v. The OCEAN SPRAY.

District Court, D. California. Sept. 29, 1868.[2]

COLLISION—BETWEEN SAILING VESSELS—RECKLESS SPEED.

[The master of a ship sailing directly for a harbor observed a schooner making for the same place. With the intention of getting in ahead of her, he put on additional sail, and running before the wind at high speed, and without reference to the movements of the schooner, came in contact with and stranded her. *Held*, that the ship was liable for the resulting damages.]

[Libel by N. C. Erlandsen and others, owners of the vessel Lane, against the ship Ocean Spray, for damages sustained by being forced ashore.]

H. & C. McAllister, for libellant.

J. B. Manchester, for claimant.

HOFFMAN, District Judge. On the morning of the 4th of March last, the schooners Lane and Ocean Spray were proceeding along the coast,—the Lane bound for Mendocino Harbor, and the Ocean Spray for Little River, a harbor, or, as it is not inappropriately called, a "hole" in the coast, about three miles further to the southward. The Lane was at this time considerably in advance of the Spray, probably not less than seven or eight miles. On approaching within about one-half a mile of Mendocino Harbor, the master of the Lane observed the flag on shore at half-mast, indicating that it would be dangerous to enter the harbor. He therefore squared away, and ran down the coast, intending to go into Little River. He had ac-

[2] [Affirmed by Circuit Court and in 12 Wall. (79 U. S.) 366.]

complished about two-thirds of the distance between the harbors, when he found that he was too far in shore to permit him to weather the end of the ledge of rocks which forms the northerly side of the entrance of Little harbor. He, therefore, jibed his mainsail, and stood off shore. In doing so his main sheet parted. He thereupon lowered his mainsail, hoisted his foresail, and stood off under his foresail until he could repair the damage. As soon as this was effected, he lowered his foresail, wore his vessel around, and stood directly in for the harbor, under mainsail and jib. All the witnesses agree that at this time he was distant from the shore about one mile and a half, or two miles, and directly off the entrance to the harbor. It is also stated by all the witnesses that the Spray was going three or four times as fast as the Lane when the latter was standing in for the harbor. As the vessels at these different rates of speed reached a common point of collision, which was distant a mile and a half from the Lane when she wore round and headed for the harbor, it is evident that at the time the Spray must have been three or four times further off from it than the Lane, or distant from it five or six miles. When the master of the Spray observed that the Lane had lowered her mainsail and was standing off shore, he, as he says, "jumped to the conclusion" that she was not going into the harbor. He thereupon put additional sail on his vessel, and, being to the northward and westward, came down before the wind at a high rate of speed. He continued his course without any reference to the Lane's movements, and, while in the act of passing close to, or as some of the witnesses assert pass outermost of the rocks which formed the ledge, came in contact with the Lane, striking her about amidships with his stern. The two vessels swung together and were carried into the harbor, where the Lane soon after was stranded on its southerly shore.

On the part of the respondents it is urged that the action of the Lane in standing off shore and lowering her mainsail indicated to the master of the Spray that she was not going in, and gave him the right to treat her as having abandoned the right to do so, which being in advance she would otherwise have had. It is true that the conclusion at which the master of the Spray arrived was natural and justified by the appearances. But his mistake must have been apparent to him the moment the Lane wore round and stood in for the harbor. During the whole time that the Lane was accomplishing the mile and a half which she performed before reaching the point of collision, her intention to go in must have been manifest, and the master of the Spray had no right to attempt to cut her off and get into the harbor ahead of her, if by so doing he exposed himself to the danger of a collision. The account of the occurrence given by Captain Tommeledge, a witness for the claimant, is conclusive as to the merits of the case. He states that when he saw the Lane standing off shore, he thought she was not going in; but when he saw her set her mainsail, "he knew she was going in." This, he says, occurred about half an hour before the collision. The Lane was then about two miles from the point of rocks,—the Spray four or five miles off. He adds: "If I had been coming in as the Spray was, I should have done my best to get in first and get my load first. If I had missed it and cut him down, I should have had to stand the consequences. The Lane was ahead, and had the first right to go in." I entirely assent to the correctness of the views of this witness, and think there is no room for doubt that the collision was caused by an attempt on the part of the Spray to cross the track and get ahead of the Lane when the latter was too far in advance to allow her to do so. There is so little conflict of testimony as to the principal facts in the case that I do not deem it necessary to consider the evidence relative to the subsequent admission of the master of the Spray, or the testimony of persons on shore, whose attention was attracted to the "race" between the vessels.

It is suggested in the brief submitted by the advocate for the claimants that the immediate cause of the collision was the force of a breaker, which threw the Spray against the Lane, and the testimony of some of the witnesses is referred to, to the effect that a vessel in the breakers near the point of rocks is to a great extent unmanageable. But this, if it be true, is no excuse to the Spray. She had no right, in attempting to cut off the Lane, to run into breakers which rendered her unmanageable. During the whole time that the Lane was standing in (half an hour, according to the claimant's own witness), the intention to go in was unmistakable, and the Spray should have given way and yielded the precedence to her before she had placed herself in a position to render the effort to avoid her impracticable, or even of doubtful result. I think it very plain that the accident must be attributed solely to the fault of the Spray.

An order of reference to the commissioners, to ascertain and report the damages, must be entered.

[Affirmed by Circuit Court and in 12 Wall. (79 U. S.) 366.]

Case No. 4,519.

ERLEN v. The BREWER.

[35 Hunt, Mer. Mag. 716.]

Circuit Court, S. D. New York. Oct. 3. 1855.[1]

CHARTER PARTY—AGREEMENT TO GUARANTY—EVIDENCE.

[Libelant, who was insolvent, contracted to charter a ship, agreeing that the charter party should be guaranteed to the entire satisfaction of the owner. He offered one J. as guarantor, but, at the time fixed for the execution of the charter party, the owner expressed doubts as to J.'s responsibility, whereupon libelant assured

[1] [Reversing Case No. 4,519a.]

him that the guaranty would be made satisfactory, and that J. was all right. The charter party was then executed in the presence of the brokers of the respective parties, and guaranteed by J.; and the owner, expressing himself as satisfied, endorsed it as taking effect on that day. On the next day, however, he notified the charterer that J.'s guaranty was insufficient. There was in fact no evidence of J.'s responsibility. *Held*, that what took place at the execution of the paper did not amount to an agreement to accept J. as sufficient, and the charter was still subject to the condition that a satisfactory guaranty should be furnished.]

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

NELSON, Circuit Justice. The libel in this case sets out a charter party between the libelant [John C. Erlen] and the owner, bearing date the 16th June, 1853, by which the ship Brewer was chartered for a voyage from the port of New York to Melbourne, Australia, upon certain terms and conditions therein specified. That the libelant took possession of the vessel with the knowledge and assent of the owner, and has never since relinquished the same. That by the terms of the contract, he, the libelant, was bound to man, victual, and navigate the said ship at his own expense, and by his own procurements, whereby he became owner of the vessel during the time covered by the charter party, and had expended large sums, and much time, and had incurred heavy responsibilities in and about the procurement of passengers, and outfits for the ship, her crew and passengers, and had entered into contracts of affreightment for the outward and homeward voyage. That the libelant is disturbed, hindered, and molested in his possession of said ship, and in putting her cargo on board, and in the enjoyment of his rights, secured to him under the charter party, by a person placed on board by the owner, as master, and who, as such, is bound to obey the instructions of the libelant, according to the terms of the contract, but refuses to obey the same, and is upheld and encouraged in the disturbance and molestation of the possession by the owner. The libel then prays a decree for the possession, or damages for withholding it. The answer admits the charter parties as set out; and the complaint alleges that the delivery was conditional, and to become absolute only in case the owner (the respondent in the suit) should, after inquiry for that purpose, be satisfied as to the sufficiency of one Samuel D. Jones, who undertook, by an indorsement on the charter party, to guaranty performance on the part of the libelant, the charterer; and that it was understood and agreed at the time of the execution and delivery, and the guaranty was not to be considered sufficient till the respondent should declare his satisfaction with the responsibility of Jones, and that being unable to obtain any reliable information as to his responsibility or sufficiency, notice was given to the libelant the next day (the 17th June) of the insufficiency of the guaranty; and that he then and there agreed to procure other person or persons to secure the performance on his part to the satisfaction of the respondent, but wholly neglected and failed to do so. The answer, also, denies that the possession of the ship was delivered to the libelant, or to any person on his behalf; but alleges that the charter became null and void on account of the nonfulfillment of the covenants on the part of the libelant. Among the covenants in the charter party, the charterer agreed to pay the owner of the ship for the charter during the voyage, $1,200 per month, and to pay all the wages of the master, officers and crew; also, all foreign port charges, including consul's fees, wharfages, and pilotage, and to furnish sufficient provisions and water for the use of passengers and crew, and all incidental expenses (except repairs) during the voyage, one thousand dollars to be paid on the 20th of June, two thousand at the expiration of sixty days, four thousand on the arrival of the ship at Melbourne, or in New York within thirty days after advices of her arrival, and the balance on the arrival and discharge of cargo in the United States. There is also this further covenant:—"And it is also understood and agreed that this charter party shall be guarantied to the entire satisfaction of the party of the first part." The charter party was signed and delivered on the day it bears date, June 26, 1853, and underwritten the signatures, is the following:—"I hereby guaranty the fulfillment of the within contract. New York, June 16, 1853. Samuel D. Jones. Witness, B. E. Arrowsmith." And also the following indorsement:—"This charter party commences on the sixteenth instant. New York, June 16, 1853. J. N. M. Brewer."

This statement of the pleadings and parts of the charter party will be sufficient to present the material questions involved in the case. The first case, and which concerns the merits of it, whether or not the owner agreed, either expressly or by necessary implication, from his silence at the execution and delivery of the charter party, to accept Jones as guarantor within the covenant. This is a question of fact, and must be decided upon the weight of the evidence. Edwin R. Jones, the broker who negotiated the charter for the libelant, with B. E. Arrowsmith, a broker, on behalf of Brewer, the owner, states that he was present when the guaranty was signed by Jones; that Brewer was present, and that the witness proposed at the time that the parties should go to the Atlantic dock, where the ship lay, and put her in possession of the libelant; that Brewer said that he would not go at that time, but assigned no other reason; that the witness then proposed that he should put on the charter party some stipulations

that would answer the same purpose, which he agreed to, and wrote the indorsement signed by him, which we have already referred to. He further states that when the writings were completed, he inquired of all the parties if they were satisfactory, and all agreed that they were, and that no dissatisfaction was expressed by Brewer. Sylvanus Pickering, a commission merchant, was present and concurs, substantially, with Ives; also, McLorid, clerk of the libelant, and R. H. Lockwood, who was present. The latter was to be supercargo of the ship in her voyage to Australia. At the time of the execution and delivery, a draft by the libelant, accepted by Jones, the guarantor, for $2,000, payable in sixty days, was given to Brewer, to cover the second payment, and a receipt given for the same. B. E. Arrowsmith, the broker on the side of the owners in the negotiations, states that when they went to the office of the libelant, where the charter party was executed, he met the latter at the entrance of the inner office; that he and Brewer conversed together on the subject; and that Brewer stated that he did not know about Jones. The libelant said it should be made satisfactory. It was all right in regard to Jones. The conversation had been that other security should be given, if required. He admits that when the draft was handed to Brewer, and he had signed the receipt, the libelant asked if it was all satisfactory, and the former answered in the affirmative; but the witness states that Brewer sent him the same day to the libelant to say to him that the matter was not satisfactory; he said that he should endeavor to get other names as security, and advise him as soon as possible. Other names were offered, but on inquiry were rejected. The witness also states that he made inquiries about Jones, and could not get anything satisfactory concerning him. Brewer authorized this witness, as late as the 21st and 22nd of June, to accept sufficient security, and carry into effect the charter party, but refused to give up possession of the ship till the security was given.

This is the substance of the testimony bearing upon the main question involved, except it has been shown by evidence in this court that the libelant was insolvent at the time he entered into the charter; and I can find nothing in the proofs, either in the court below or in this, to show that Jones was a man of any responsibility. It is quite clear, therefore, that whatever may have been the form and solemnities with which this contract was entered into, and even, if in a way to bind, in judgment of law, the parties, so far as Brewer, the owner, is concerned, there has been, in reality and substance, no fulfillment of the most material covenant in his favor, on the part of the charterer. The guarantor, for aught that appears, was a man of straw, and the charterer himself insolvent. This inference against Jones is not a harsh one; for after the evidence that inquiries had been made, and nothing satisfactory could be obtained concerning him, the burden lay upon the libelant to show that he was a man of responsibility. I admit he may rest his case, as he has, upon the agreement of Brewer to accept him as satisfactory, whether possessed of any responsibility or not; but if there is any doubt about this agreement upon the testimony, the fact of his want of responsibility is an element that cannot be overlooked. The equity and justice of the case must have its weight in deciding the question. The importance of this evidence was, no doubt, fully appreciated by the learned counsel for the libelant, and the omission to produce it leaves the unavoidable inference that it was in his power.

The case then, on the part of the libelant, must be upheld, if upheld at all, upon the naked fact that Brewer agreed to accept Jones as security, whether of any responsibility or not,—either supposing at the time, that he was, or so indifferent to his interest that he would not take the trouble to make inquiry. The witnesses examined for the libelant go far to establish this view of the case. But they do not directly nor even by necessary inference. No one of them ventures to say that Brewer expressed himself satisfied with Jones as guarantor or surety, or anything to that effect. They speak in very general terms on the subject,—that it was all satisfactory, appeared to be perfectly satisfied, expressed no dissatisfaction, and the like. But I agree, taking into consideration the execution of the charter party, the indorsement of Jones as surety, and of Brewer, as the time when the articles were to commence, in connection with the evidence of satisfaction expressed by him at the time, would be sufficient to foreclose the case, if there was nothing else in it. The conclusion would be irresistible that he had agreed to accept Jones as satisfactory. Arrowsmith, however, who knew as much about this transaction as any one, being the broker of Brewer, states that in an interview between the parties, just previous to the meeting to execute the articles, Brewer expressed his doubts as to the responsibility of Jones; and that thereupon the libelant promised that it should be made satisfactory, and added that it was all right in regard to Jones. Now, it was after this assurance and representation by the libelant, that the articles were executed and delivered, and the expressions of satisfaction made. What strengthens the evidence of this witness, and shows that he could not well be mistaken, he states that, afterward, on the same day, Brewer sent him to the libelant to say that Jones was not satisfactory, and that he thereupon promised to get other names, and others were subsequently furnished, but rejected as insufficient.

This evidence explains the expression of satisfaction of Brewer at the time of the execution of the charter party, as the question of the sufficiency of the surety was left open between the parties, and the instrument not to be binding, which is the fair inference, till the matter was determined. This explains, also, the taking of the draft accepted by this same man Jones, and receipt given, as the whole was to be dependent upon the event of the satisfactory security. It has been said that there is a great preponderance of witnesses in favor of the libelant on the question of the acceptance of Jones. But this is a mistake. There is no discrepancy between these witnesses and Arrowsmith. The interview between the parties when he was present, was at a different period of the transaction, and of which they had no knowledge. There is no contradiction of this witness.

Take the case, therefore, in any aspect in which it can be properly presented, and the libelant must fail. There was either a false representation of the pecuniary ability of Jones to induce Brewer to accept him, or there was an understanding between them that other names should be procured, and that the articles should be considered open till this matter was determined.

This case is somewhat interesting. A party utterly insolvent, with a friend as surety for him, equally irresponsible, undertakes to charter a ship for passengers and freight to Australia for large hire, agreeing with the owner in the charter party that its fulfillment shall be guarantied to his entire satisfaction. The articles are entered into, and formally guarantied by his friend in the presence of his clerk, broker, and person appointed supercargo of the ship, all of whom, with another witness, are called to prove that it was agreed this friend should be considered satisfactory. No proof is offered of his pecuniary ability, but from the course of the trial, on the contrary, it was conceded that he was a man of straw; and the case put upon the naked fact of the acceptance of this sort of security. In addition to this, a payment of two thousand dollars of the hire of the vessel is sought to be made by a draft at sixty days, drawn by the charterer, and accepted by the same friend. The thousand dollars that were to be paid in a few days was more embarrassing; when called on for that sum, it was not paid, for the reason, as assigned, that he had not finished his contracts for freight and, therefore, had not the money. This is not an isolated case. Other vessels have been chartered for these gold regions, that have come under our notice, evincing similar ingenuity, and financial skill; but unfortunately, the enterprise was not checked as early as the present one. Plausible and specious as has been the attempt here to get the possession and money upon her freight and passengers, it is impossible not to see, if it had been successful, the transaction must in all human probability have resulted in a fraud, either upon the ship owners or passengers, or both. The whole capital out of which to hire and bear the expenses of the ship during the voyage was dependent upon the fare and freight. If the libelant could have got possession of the ship, he probably might have procured passengers, and received passage and freight money, but whether the owner would have received the hire for his ship, or the passengers reached the gold regions of Australia, is not so certain. The ship itself was all the security of either for the undertaking, or any undertaking, entered into by the libelant in connection with the enterprise.

I am also of opinion that the libelant had not at any time, or for any time, acquired the actual possession of this vessel under the charter party; and if the question had become material, I should have deemed further inquiry necessary to satisfy me that the court of admiralty had jurisdiction of this case. But I do not go into this question, and prefer placing the decision upon the grounds above stated.

As the decree below [Case No. 4,519a] was for the libelant, I must reverse it, and direct a decree for the respondent, with costs.

Case No. 4,519a.

ERLEN v. The BREWER.

[Betts, Scr. Bk. 272.]

District Court, S. D. New York. 1853.[1]

CHARTER PARTY—AGREEMENT TO GUARANTY—POSSESSION OF VESSEL.

[Where a charter party provided that a ship was to be put in the charterer's possession, the charter to be guarantied to the satisfaction of the owner, upon proof of a guaranty to the owner's satisfaction, the court will decree possession of the vessel to the charterer.]

[In admiralty. Libel by John C. Erlen against the ship Brewer, her tackle, etc.]

This case came up to determine the validity of a charter party, entered into for the ship in question, to go from New York to Melbourne, in Australia. By the terms of the charter party, it was agreed that the ship was to be put in the possession of the charterer on the 17th June. The charter to be guaranteed to the satisfaction of the owner—the respondent in the suit. The libellant claimed that the respondent, who was the general owner, had by the terms of the charter party, divested himself of the possession of the ship, and had vested it in the libellant, who claimed a decree by which he could be put in possession of the vessel, and prosecute the intended voyage. The respondent contended that the charter party was not perfected, and that if the charter had been delivered to the libellant, it was only conditional. The charter party was executed on the 16th June, 1853, in dupli-

[1] [Reversed in Case No. 4,519.]

cate, one copy given to each party. In the instrument it was provided that it was to be guaranteed to the satisfaction of the respondent, before possession should be given. Samuel D. Jones became the guarantor. The proof was that the consideration to be paid was guaranteed to the entire satisfaction of the respondent.

Before INGERSOLL, District Judge.

THE COURT, in giving judgment in the case, remarked, that in many charter parties there is no letting or hiring of the ship, but only a contract to carry freight for the charterers, the owner continuing to hold possession and retaining the control of the vessel and her movements; the captain and crew being subject to the control of the owner. This case differs from that. Here is a transfer of the right of possession to the charterer, the libellant; and by the terms of the charter, he had the sole right of possession under the charter party, and the decision of the court must be to restore him to the actual possession. A court of admiralty will restore a party having such right when he had been wrongfully deprived of it where the respondent had been the wrong doer. The decree of the court must be to that effect, and the respondents must pay the costs.

Counsel for the respondent said they intended to appeal to the United States circuit court, and asked for a specific order in damages and costs, and they would give the usual security. Counsel for the libellant said his client wanted the ship to depart on her voyage, and that her value was estimated at $20,000, in which sum the libellant was willing to give security. The judge declined to make any further order, except the regular papers were served.

ERNEST (COOK v.). See Case No. 3,155.

ERNEST (McCOMB v.). See Case No. 3,155.

Case No. 4,520.

ERNEST v. STOLLER et al.

[5 Dill. 438;[1] 2 McCrary, 380.]

Circuit Court, D. Colorado. March, 1879.

FACTOR'S DUTY TO OBEY INSTRUCTIONS IN RESPECT OF TRANSMITTING FUNDS TO PRINCIPAL—USAGE.

Factors at Kansas City were instructed by their principal to place the proceeds of a sale of property to the credit of the principal in the Exchange Bank, in Denver. The factors deposited the money in a bank at Kansas City, to the credit of the Exchange Bank. The Kansas City bank failed in two days thereafter. In an action by the principal against the factors, *held*, on the facts appearing in the case, that it was the defendants' duty to have put the money in the Exchange Bank, or to have adopted the usual and ordinary means to effect that end; and having failed to do either, and to show affirmatively that such failure was not the cause of the loss, the defendants were liable.

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

[This was an action at law by F. P. Ernest against J. R. Stoller and S. R. Hill, partners, etc.]

Mr. Butler, for plaintiff.

Mr. Hughes, for defendants.

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

HALLETT, District Judge. Defendants are engaged in the business of selling live stock at Kansas City, in the state of Missouri. In July last, plaintiff consigned to them, from Deer Trail, in this state, ten car-loads of cattle, to be sold for his account. The cattle arrived at Kansas City on the 26th day of July, and were immediately forwarded to Brown, Price & Co., of Chicago, who sold them and remitted the proceeds to defendants, at Kansas City, by draft on New York. This draft, amounting to $3,771.65, was received by defendants at Kansas City in the morning of the 1st day of August, and was by them deposited to their own credit in the Mastin Bank, at that place. Deducting a small sum due them for charges on the cattle, defendants at the same time drew a check on the bank for the sum due to plaintiff, as the net return from the sale of the cattle, and took in exchange for the check a deposit slip in the following form:

"The Mastin Bank, Kansas City, Mo., 7-31, 1878. Exchange Bank, Denver, Col.: Your account has credit thirty-seven hundred and fifty-seven 56-100 dollars, deposited by Stoller & Hill, for use of F. P. Ernest. Very respectfully,

"John J. Mastin, Cashier,

"Per J. A. Boarman, Teller.

"$3,757 56-100."

This certificate was issued in duplicate and one copy delivered to defendants, and by them sent by mail to plaintiff, at Deer Trail, where it was received on the 3d day of August. According to the course of business, as claimed by defendants, the Mastin Bank should have sent the other copy by the next mail to the Exchange Bank, of Denver; but this apparently was omitted, as the officers of the latter bank testified that they did not receive it until some time after the Mastin Bank suspended, and then notice of the credit was sent by the receiver of the bank.

The date as given in the certificate—July 31st—is shown to be incorrect. It was issued on the 1st day of August, and the credit was not entered on the books of the bank until the next day. On the 3d day of August, 1878, the Mastin Bank was not opened for business, and from thence hitherto it has been wholly insolvent, so that the sum so deposited by defendants has not been received by the Exchange Bank or by the plaintiff. It is claimed by defendants that the money was deposited in the Mastin Bank in compliance with instructions from plaintiff to place the amount to his credit in the Exchange Bank, of Denver. As to the in-

structions given relating to the proceeds of the sale, and all the facts hereinbefore mentioned, there is no controversy.

At an interview between the plaintiff and defendant Stoller, which took place at Kansas City about the time the cattle arrived at that place, defendants were directed to place the money received from the cattle to plaintiff's credit in the Exchange Bank, of Denver. Both parties agree in this statement, and also in saying that no directions were asked or given as to the manner of transmitting the money to the Exchange Bank. Considered in itself, the instruction given by plaintiff to defendants imports nothing more than the substitution of the Exchange Bank, of Denver, for himself, as the party to whom the money was to be sent. But defendants contend that it has a peculiar significance when taken in connection with a custom or usage universally recognized by cattle dealers at Kansas City, and well known to all persons dealing with them, by which money is remitted to banks in other places in the way and manner adopted by defendants in this instance. By this usage, the factor is required to deposit in some bank in Kansas City the proceeds of any consignment that may be made to him to the credit of the bank to which the remittance is to be made, and to forward to his customer one of the slips issued by the bank at Kansas City, attesting such deposit. With that, it is said his duty ends, and, if any loss occurs, it must fall on the principal rather than the agent. From the evidence given at the trial, it seems that the usage is not recognized by all the dealers at the Kansas City stock-yards, but perhaps it is sufficiently shown that the course pursued by defendants was recognized among such dealers at that place as a method of transmitting money to distant places. Four out of thirteen or fifteen firms engaged in that business at the stock-yards near Kansas City were in the habit of remitting money in that way, and the officers of the First National Bank, formerly in business there, and of the Mastin Bank, testify that the practice was general.

The direction to defendants to place the money to plaintiff's credit in the Exchange Bank, of Denver, required them to transmit the money to the bank in some usual and customary method, recognized among business men as proper for that purpose; and if there are several methods of transmitting money from Kansas City to Denver equally in use among business men, and safe, serviceable, and economical, no reason is perceived for saying that defendants were bound to adopt one such method more than another. From what we know of business in the country at large, although no evidence was given on that point, we may assume that if the money had been sent by express, or by bill of exchange on New York, the risk of loss in transitu would have been with the plaintiff. Choosing fairly between known and recognized methods of sending the money as directed by plaintiff, defendants would not be held responsible for an error in judgment, or for any misfortune to which they had not contributed. Whart. Ag. § 248; Chandler v. Hogle, 58 Ill. 46. And so we may say that if the method adopted by defendants for transmitting the money to the Exchange Bank was in use among business men in Kansas City and Denver, they cannot be chargeable with negligence or omission of duty to their principal in resorting to it.

But when we consider attentively the nature of the alleged usage, we find that it is not shown to be of sufficient extent to embrace the subject of this controversy. It is said to be a method of transmitting money from one city to another, but it cannot be such unless it extends to the place to which the money is to be sent, as well as that from which it started. It must be a usage between the bankers in Kansas City and the bankers in Denver, or between the Mastin Bank and the Exchange Bank, of Denver, to be effectual in any way. According to the alleged usage, the effective act in transferring the funds from Kansas City to Denver was to be performed by the Denver bank; money was deposited in Kansas City to the credit of the Denver bank, and, of course, it would remain there until the bank should draw for it, or get it in some other way. In other words, defendants were instructed to send the money to the Exchange Bank, of Denver, and, instead of complying with that instruction, they placed it in the Mastin Bank, at Kansas City, and invited the former to come to Kansas City and get it, or send for it, as would best suit its convenience. If, by force of some general usage between the banks named, or between the banks in Kansas City and the banks in Denver, or by some special agreement, authority had been conferred on the Mastin Bank to receive deposits for the Exchange Bank, the position assumed by defendants would be more tenable. But nothing of that kind was shown. The Exchange Bank did not keep an account with the Mastin Bank at the time of this transaction, and the alleged usage was not shown to exist, except in Kansas City. Whatever the custom of banks and dealers in that city may be in matters of this kind; it could not confer the authority here claimed for it. The Exchange Bank was not in any way bound to recognize the deposit made by defendants in the Mastin Bank for its use, or to take any action in respect to it. For the purpose of transmitting the money, the defendants could have notified the Exchange Bank that they held it subject to order, and the act would have been just as effective. That the money was not sent, or anything that could symbolize it, is too plain for argument.

The language of the deposit slip is, "Your account has credit," which means no more than we hold for your use, or, we have a

sum of money, and you can get it whenever you may apply for it. Until the Denver bank should agree to such holding in some form, or should send for the money by draft, or otherwise, no transfer of the fund would take place. And whether this would have been done by the Denver bank at any time if the Mastin Bank had continued in business, is matter for conjecture only. They were not bound to act, and we cannot assume that they would have taken any steps to get the money. That is not, however, of any importance in this connection; it is only necessary to say that defendants were instructed to send the money to the Exchange Bank, and they have not done it.

That they acted in good faith, upon the assumption that the Exchange Bank would accept the credit in the Mastin Bank, and that the course pursued by them was sanctioned by commercial usage at Kansas City, will not help them. They should have put the money into the Exchange Bank, or adopted the usual and ordinary means to effect that end; and having failed to do either, and to show affirmatively that such failure was not the cause of the loss, they must be held for the amount. The judgment will be for the plaintiff. Judgment accordingly.

ERNEST AND ALICE, The (DEELY v.). See Case No. 3,735.

Case No. 4,521.

The EROE.

[9 Ben. 191.][1]

District Court, E. D. New York. July, 1877.[2]

DAMAGE TO CARGO—REBATE OF DUTY — MARKET VALUE EVIDENCE—MEASURE OF DAMAGES.

1. A rebate of duty for damage to goods obtained by the consignee, is not to be considered in computing the damage recoverable by the consignee against the ship; as an element of market value it has no place.

[Cited in Morrison v. I. & V. Florio S. S. Co., 36 Fed. 573.]

2. A bill for the amount of damage, made out after an appraisal, and presented, may be taken to show the difference in the market value of sound and damaged goods at that time.

3. The case of The Carlotta [Case No. 2,413] dissented from.

In admiralty. A vessel that had carried petroleum to Italy brought back to New York a cargo of almonds, wine, etc., and the almonds being found tainted with petroleum the consignees brought suit against the vessel for damages, and recovered. Upon reference to ascertain the amount of damage, the commissioner allowed evidence of a rebate of duty, obtained by the consignees upon the almonds for damage on the voyage of importation, exceeding the amount of difference in market value between sound and damaged almonds at the time of sale, fifteen months after; and, following the case of The Carlotta [Case No. 2,413], reported no damages for the libellant. Upon exceptions to his report and argument, the following decision was made.

Beebe, Wilcox & Hobbs, for libellant.
Butler, Stillman & Hubbard, for claimant.

BENEDICT, District Judge. This action is brought upon a bill of lading to recover for damages to almonds caused by petroleum. The interlocutory decree determined that the libellant was entitled to recover the damages caused by petroleum to the almonds in question.

The evidence taken before the commissioner shows 192 bags of almonds damaged by petroleum. It also appears that these same bags were stained by salt water and by wine. The evidence fails to show the proportion of injury arising from these different causes. In this state of the proofs it must be assumed that no diminution in value was caused to almonds injured by petroleum by the contact with sea water or wine. The damage, from the character of the injury, was caused by petroleum. The difference then between the market value of the almonds in the 192 bags as they arrived, and the sound value of the almonds, is the true measure of damages.

It has been claimed on the part of the respondents that the libellant must give credit for any rebate of duties that he may have received upon these damaged bags, and I am referred to a decision where such rebate was taken into consideration in determining the amount of damages to cargo. The Carlotta [Case No. 2,413].

With all my respect for the learned judge who made the decision referred to, I am unable to agree with him. The market price of a merchantable commodity must furnish the test of value. To take into consideration the amount of duty paid upon an article in determining its value, is, according to my view, to resort to cost as a test of value. The rate of duty doubtless is an element which goes to fix market value, but the amount paid for duties upon any particular article is not taken into consideration in determining the value of that article. The article sells for the same, whether the owner paid or escaped paying the duty. So in this instance the damaged almonds were worth the same in the market, whether the libellant paid the whole or a part or none of the duty. And the difference between that value and the market value of sound almonds shows the amount of injury caused by the failure of the ship-owner to perform his contract.

Any advantage which the freighter has gained in adjusting the duties was an advantage to him in his contract with the gov-

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

[2] [Affirmed in Case No. 4,522.]

ernment, not a benefit to the goods arising from the act of the ship-owner. The ship-owner is no party to the dealing of the freighter with the government, and the result of that dealing cannot inure to his benefit, otherwise the ship-owner might claim to take upon himself the adjustment of the duty, and if not permitted, he might ask to show in diminution of his liability, that if permitted, he would have obtained a larger rebate.

Upon these grounds I must reject the claim of the respondents that the rebate of duties obtained by the libellant from the government be credited to them, in calculating the damage arising from their negligence.

The bags damaged by petroleum were sold at a loss of $140.39, and this sum the libellant claims should be allowed him as his damages. The damaged almonds were kept in store some fifteen months before they were sold, and when sold, it was without notice to the ship. There is evidence that the almonds were sold in the usual way, and some evidence that no material change in the market occurred while they were in store. On the other hand, it is shown that soon after the arrival of the cargo, the consignees caused an estimate of the damage to be made by their own broker, and upon such estimate sent in a bill to the ship for $100 as the damage. I am of the opinion that the respondents can resort to this bill rendered as showing that a difference in value did occur between the time of arrival and time of sale, in which case there being no other proof, it must be taken as evidence of the amount of such difference. Of this the consignees cannot complain, as it is their own bill.

The libellant is therefore entitled to recover $100 with interest from the date of the arrival of the ship.

Case No. 4,522.

The EROE.

[17 Blatchf. 16.][1]

Circuit Court, S. D. New York. Aug. 11, 1879.[2]

CARRIERS—DAMAGE TO CARGO—REBATE OF DUTY—MEASURE OF DAMAGES.

Where a rebate of duties is made in regard to goods respecting which damage is awarded for a breach of a contract of affreightment by a vessel, the vessel cannot have credit, against the amount of damage, for the amount of the rebate.

[Followed in The Lizzie W. Virden, 8 Fed. 627. Cited in Morrison v. I. & V. Florio S. S. Co., 36 Fed. 573; The Umbria, 8 C. C. A. 194, 59 Fed. 490.]

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

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Butler, Stillman & Hubbard, for claimant.

BLATCHFORD, Circuit Judge. The libel claims $300 for damage to 1,503 bags of almonds in the shell, the damage being alleged to have been caused by the improper stowage of the almonds, so that they were injured by oil and wine. The district court found, from the proofs, that the contents of 192 of the bags were, on arrival, injured by contact with petroleum oil, and that the vessel was responsible for such damage. On a reference to ascertain the amount of such damage, the referee reported that no damages to the libellant were proved. On exceptions to the report by the libellant, the district court sustained the exceptions, and made a decree awarding to the libellant, as damages, $100, with $15 75 interest and $112 57 costs, being $228 32, in all. [Case No. 4,521.] The libellant is satisfied with this decree, and has not appealed. The claimant has appealed. The district court held, that the diminution of the almonds in value was wholly caused by petroleum, and that the proper measure of damage was the difference between the market value of the almonds in the 192 bags, as they arrived, and their sound value. This the court fixed at $100, and it allowed interest thereon from the date of the arrival of the vessel.

The claimant insisted, before the district court, that the libellant ought to give credit for a rebate of duties which he had received from the United States government, on the damaged almonds in the 192 bags, on account of petroleum damage; and that the amount of such rebate exceeded $100. The district judge rejected this view, and said, in his decision: "The market price of a merchantable commodity must furnish the test of value. To take into consideration the amount of duty paid upon an article, in determining its value, is, according to my view, to resort to cost as a test of value. The rate of duty, doubtless, is an element which goes to fix market value, but the amount paid for duties upon any particular article is not taken into consideration, in determining the value of that article. The article sells for the same, whether the owner paid or escaped paying the duty. So, in this instance, the damaged almonds were worth the same in the market, whether the libellant paid the whole, or a part, or none, of the duty; and the difference between that value and the market value of sound almonds shows the amount of injury caused by the failure of the ship-owner to perform his contract. Any advantage which the freighter has gained in adjusting the duties, was an advantage to him in his contract with the government, not a benefit to the goods arising from the act of the ship-owner. The ship-owner is no party to the dealings of the freighter with the government, and the result of that dealing cannot inure to his benefit: otherwise, the ship-

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[2] [Affirming Case No. 4,521.]

owner might claim to take upon himself the adjustment of the duty, and, if not permitted, he might ask to show, in diminution of his liability, that, if permitted, he would have obtained a larger rebate. Upon these grounds, I must reject the claim of the respondent, that the rebate of duties obtained by the libellant from the government be credited to him, in calculating the damage arising from his negligence." This decision was made in July, 1877. In January, 1877, in the district court for the southern district of New York, the case of The Carlotta [Case No. 2,413] came before me, in which, in directing an interlocutory decree for the libellant, and a reference, in a suit for the breach of a contract of affreightment by a vessel, I said, that, if any sum of money had been received by the libellant, or by any purchaser of the damaged goods from him, from the government, as a rebate of duties, for loss or damage in respect of any goods as to which an allowance should be found due for loss or damage, he must be charged with such sum. The view thus expressed was brought to the notice of the district judge who decided the present case. He announced his dissent from it, and proceeded to give his own views, as above set forth. In the case of The Carlotta [supra] no allowance was, in fact, made for a rebate of duties, because, no allowance was made for damage in regard to any goods respecting which a rebate of duties was made. The case of The Carlotta came, on appeal, before Chief Justice Waite, sitting in the circuit court for the southern district of New York, July 31st, 1879 [unreported], but the question raised was not decided, because he concurred with me in not allowing any damage in regard to any goods respecting which a rebate of duties was made. It remains, therefore, to decide, in this case, whether, where a rebate of duties is made in regard to goods respecting which damage is awarded for breach of a contract of affreightment by a vessel, the vessel can have credit, against the amount of damage, for the amount of the rebate. I think the considerations set forth by the district judge, in this case, present the proper view of the law, and that the libellant is entitled to a decree for $100, with interest from the date of the arrival of the vessel, with $112 57, his costs in the court below, and with his costs in this court.

Case No. 4,523.

ERRETT v. CRANE.

[21 Int. Rev. Rec. 268.]

Circuit Court, E. D. Michigan. July 2, 1875.

JURISDICTION OF FEDERAL COURTS—ACTION PENDING IN STATE COURT—RIGHTS OF COTENANTS.

[The pendency in a state court of an action of ejectment against one cotenant is no bar to the maintenance in a federal court of a suit by another cotenant, who is a citizen of a different state, to quiet title, against the plaintiff in the ejectment suit.]

[In equity. Bill by Harriet Errett against Walter Crane.]

The following is the substance of the oral judgment delivered by

EMMONS, Circuit Judge. This was a bill to quiet the complainant's title to lands situate in Wayne county, known as the Reeder farm. The complainant claims title as an heir of John Harvey, to whom the lands were patented in 1811. The defendant in 1869 commenced seven separate suits in ejectment for the recovery of different parcels together, including the entire tract. These suits at law have been strenuously contested by the defendants therein, and the main suit of Crane v. Reeder [Case No. 3,356] has been three times tried by a jury of Wayne county, resulting in each case in a verdict in favor of the defendants. These verdicts and the judgments thereon rendered have been reversed in the supreme court of Michigan, are reported in 21 Mich. 24; 22 Mich. 322; 25 Mich. 303; and the case stands at issue. Petitions to remove these suits to the federal court have been filed and granted by the circuit court for Wayne county. Such orders, however, have since been reversed by the supreme court of the state, and upon motions made to remand two of the cases they have been certified from the circuit court of the United States upon a certificate of division of opinion, and are there awaiting argument. The defendant in this suit filed a plea and disclaimer, setting up the pendency of these suits at law and alleging the proceedings with particularity. The complainant set the plea down for argument, and it was argued and submitted, D. B. and H. M. Duffield, Ashley Pond and Theodore Romeyn appearing for complainant, and Douglass and Bowen and William P. Wells appearing for the defendant Crane. The facts in this case, so far as they were necessary to determine the sufficiency of the plea, were very few. The many years of complicated litigations carried on in the state tribunal, and above referred to, although much discussed at the bar, had no significance here. The questions raised by the pleas could all be disposed of without other statement than to say, that 10 tenants in common owned the tract of land to quiet title to which the present bill is filed. Against two of these tenants the defendant Crane brought ejectment in the state court. The others were not made parties, nor were any steps taken to implead them under the Michigan law. The complainant Errett, one of the owners, filed her bill in this court to remove the cloud upon her title, which Crane's claim creates. The defendant, Crane, pleads in bar the pendency of the ejectment in the state court against her co-tenants. It is claimed that the jurisdiction of this court, to entertain a bill like this, depends upon the absence of all opportunity on the part of a complainant to litigate the question in a suit

at law; and that, as the complainant may make himself a party defendant to the ejectment suit of Crane, this court ought not to entertain a suit here to determine in equity a right ready determinable at law.

Judge EMMONS said: He had not, from the first moment the case was opened, felt any doubt in the case; and he ventured the opinion that, but for the extraordinary history which the litigation between other parties had had in the state court, a question like that now before him would not have elicited such prolonged discussion at the bar. Between Crane and the two tenants against whom he has brought ejectment there have been, during the last 10 years, as already stated, three trials at law, in all of which verdicts have gone against him, and in each case they have been reversed by the supreme court. That after so many years' contest in the state court, other tenants in common file their bills, to have tried and determined here the whole matter in controversy, takes counsel by surprise, and the first impression is that such a jurisdiction is impolitic, and that every intendment should be against it. Had the circumstances been different, and the case one where a single resident tenant in common had been sued in ejectment, and numerous other owners, citizens of other states, or aliens, had immediately put their bills on file in the federal court, the consistency of such a practice, with the privileges accorded by the constitution and laws of the United States, would have been such as to have commended the course to the judgment of all. If the doctrine of the defendant's counsel be true, then it would follow, that if a citizen of another state should die, leaving large estates in this, with many heirs, and a single one of them residing here, the owner of a tax title, in an interior county, bringing ejectment against the single resident tenant in common, might compel all the other complainants to litigate in the state court, thus depriving them of their right to seek a remedy in a federal tribunal. If an ejectment against one tenant in common is such an impleading of all the others as prohibits their seeking an independent remedy, then the absurd consequence referred to necessarily follows. In a case thus stated, it would hardly be contended that the co-tenants were bound to come in and make themselves defendants in the state tribunal. It was the thoroughness with which this matter had been heretofore litigated in the actions of ejectment, and the practical connection with them of the other tenants in common, one of whom is now complainant in this case, which suggests to the mind of counsel, what has been urged at the bar, as a gross abuse of jurisdiction. With these accidents, it was said this court had nothing to do. The abstract question for judgment was, could a tenant in common, file his bill in this court to quiet title, after his co-tenant had been sued by the claimant in an action of ejectment in the state tribunal? That he might do so, the court said, seemed to him now, as in the outset it did, entirely clear. The general jurisdiction of the court to entertain such a proceeding had not been disputed. It had not been for the purpose, his honor said, of removing any doubt upon that subject, that he had requested counsel to collect and analyze some of the cases upon this subject, but only that he might the better judge, from the reasons upon which the jurisdiction depended, whether, in the circumstances of this case, it would be exerted. Wherever the statutory requisites exist, and a complainant avers himself to be in possession of premises to which a claim is asserted by the defendant, and that no action at law can be brought to have the claim determined, it has always been deemed sufficient to launch the jurisdiction. They authorize a rule broader than that contended for by the defence. If it be true in any case that the ability of a complainant to become a party to a legal proceeding, in which the title might be litigated is an answer to a suit of this nature, the occasion must afford a remedy, adequate, and without embarrassment. He should require the plea to set forth facts showing the cause in the state tribunal was in such condition that the appearance of the complainant there would enable her to remove the cause to this court if she elected so to do. Had Crane made her a defendant originally she might have availed herself of that right. It is enough, however, to authorize the retention of her bill, that she is in possession of her land, and that she can commence no suit to test the title of the defendant Crane. See Alexander v. Pendleton, 8 Cranch [12 U. S.] 462; 3 Pet. Cond. R. 216; Crase v. Burcham, 1 Black [66 U. S.] 352; Clark v. Smith, 13 Pet. [38 U. S.] 195. That the complainant brought herself within the plain terms of the statute was conceded. She was in possession of the property. The complainant claimed title to her land, and no suit at law was pending to which she was a party. It is argued that, although the literalisms of the law include the complainant, that when we look to the reason of the enactment and the history of its administration, it is apparent that it is not intended to apply to a case where an opportunity is afforded a complainant to litigate at law if he pleases. It is added that the pendency of the ejectment suit in the state court, against the co-tenants, affords an opportunity for this complainant to go there, to become a party defendant, and have her right determined. Whether she can go there under the state statute is extremely doubtful. We are inclined to think she is not a proper defendant, unless the plaintiff originally elected to make her so. She cannot force herself into a litigation, the judgment in which can in no way offset her rights. I shall not go over the statutes, the judge said, to discuss this question, for he did not deem it necessary to decide it. He contented himself with say-

ing generally that no clause of the statute included a tenant in common. The word "landlord," as construed at common law, did not authorize the appearance of a tenant in common to defend. That she could not so appear, irrespective of the statute, the following cases show: Austin v. Hall, 13 Johns. 286; Low v. Mumford, 14 Johns. 426; Decker v. Livingston, 15 Johns. 479; Hill v. Gibbs, 5 Hill, 56; Doolittle v. Blakeley, 4 Day, 273; White v. Pickering, 12 Serg. & R. 435; Innis v. Crawford, 4 Bibb, 241; Adams, Ej. 186; Tyler, Ej. 202. The above cases show that tenants in common cannot join as plaintiffs. The following show that they cannot join as defendants: Jackson v. Bradt, 2 Caines, 169; Malcom v. Rogers, 5 Cow. 192; Jackson v. Flint, 2 Cow. 594.

The proper question here, however, was said to be, not whether the complainant might not make herself a party defendant to a pending litigation, assuming the burden of its vast expenses and the disadvantages of its anomalous condition, but whether, under the constitution and laws of the United States, she had not the right to litigate her claims in this tribunal, notwithstanding a citizen of Michigan had brought an ejectment suit against somebody else in the state tribunal. Her rights were in no legal sense connected with those of the defendants in the ejectment suit. They did not claim in privity with each other. A judgment against the one had no tendency to conclude the other. The admissions which bound one tenant in common could not be given in evidence against his co-tenant. Estoppels work only against the individual tenant which created them. And so far as the question before this tribunal is concerned, their relations are the same as though their several ownerships were of distinct tracts. Upon the oral argument, it was assumed by counsel for the defence that qualities attached to joint ownership of tenants in common were quite distinct from those of independent owners of property in severalty; and, although in replies given to interrogatories from the bench, the line was not distinctly drawn, still, counsel were understood to maintain doctrines quite different from those here declared. Our request has been answered by counsel for the complainant, and a few judgments and authors have been cited which fully maintain the common truisms in reference to the title of tenants in common which we have stated. See Freem. Judgm. § 189, and cases there cited. Adams, Ej. p. 186, cites many cases and says that "joint tenants or possessors have a sufficient interest in the lands held in joint tenancy or parcenary to entitle them to make a joint demise; but tenants in common have not, and the reason for this difference seems to be that tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also. The court said, it had no doubt that, whether the state law did or did not authorize Mrs. Errett to appear as a co-defendant and have her rights determined, she was not compelled so to do. It was enough that she was in possession of land; that the defendant Crane had elected to bring his action of ejectment in the state court, and not make her a defendant. She came within the language of the statute, and it was not at war with public policy, and it was in harmony with the general purposes for which jurisdiction was given to this court originally, that she should be permitted to sue here. Should Crane, in the state court, commence originally an action of ejectment against her, now, she might remove it here. To compel her, at the present stage of the proceedings, to become a party defendant in the state court would, in all probability, force her to remain there, and thus resign the constitutional privilege of choosing her forum. See Turner's Case [Case No. 14,245], which holds that a landlord who voluntarily appears in a suit brought against his tenant cannot sever and remove. The act of 1866 (14 Stat. 306) was the first that gave one defendant a right to remove in a suit brought against several. Looking at this act, which was in force when this bill was filed, and at its re-enactment (section 639, Rev. St.), it would seem that this right of removal should be recorded only in a case where the party seeking it is made defendant by the plaintiff's forcing him into a state tribunal, and thus impleading him. It would require much liberality of interpretation for a state tribunal to hold that Mrs. Errett could not file a similar bill there, notwithstanding the pendency of this ejectment against her co-tenant. They would have to determine that an ejectment against one tenant in common was substantially a suit against all. To so hold would be at war with the whole current of judgments, both in common law and those under the several statutes of the different states. Whether such would be the judgment there would not determine the question here. He was quite confident no answer could be given to the present bill unless it was the pendency of a suit to which the present complainant was an actual party. Much importance in argument was given to what was assumed to be the gross impolicy of this jurisdiction, erroneously assuming it to create a double litigation of the same matter. It is not so. Mrs. Errett's title is in no way called in question in the state tribunal. But if it were, a double litigation has not been deemed so impolitic as to call for a strained and illiberal construction of a statute in order to avoid it. That a suit in the state court, even between the same parties, is not an abatement of an action pending in this court, has been frequently decided. See White v. Whitman [Case No. 17,561]; Bowne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 99; Wadleigh v. Veazie [Case No. 17,031]; New England Screw Co. v. Bliven

[Id. 10,156]; Mitchell v. Bunch, 2 Paige, 620. Judge EMMONS took occasion to express much disapprobation of the general doctrine of these latter cases, which held that the federal and state courts were foreign to each other, in such sense that a suit pending in one was not an abatement of a like litigation in the other. With the justness or policy of such a rule he had nothing to do, however, here; he referred to these judgments only to show that the mere fact of such litigation did not, so far as precedent was concerned, call for any extraordinary canons of construction in order to avoid it.

Counsel for the defence had argued that, if a final decree were rendered in Crane's favor, in the state court, and if the sheriff should put him in possession of the property, that he would have a right to oust the complainant, even although her possession were protected by a final decree of this court. This, his honor thought an entire misapprehension. The state sheriff would have no right whatever to oust any one of the complainant's co-tenants under a judgment in Crane's ejectment suit. Final process in that case would authorize such officer to put the plaintiff in possession, and to oust the two defendants named in the writ. He would have no power whatever to interfere with the equal rights of the complainant in this case, and the other seven tenants in common who might occupy with her. There was neither conflict nor inconsistency in the two litigations. The suit between Crane and Eliza Reeder and her co-defendant in ejectment, might be determined one way; that between the complainant and Crane differently; still other suits might be commenced by the seven co-tenants against Crane in this tribunal. Indeed he saw no difficulty in their becoming parties to the present proceeding. A final decree in favor of all, or part, would in no way come in conflict with the judgment in ejectment in the state court. Writs of assistance in each might be consistently and harmoniously executed. Quite a number of other supposed conflicts and inconsistencies had been stated at the bar, not one of which could spring from the exercise of jurisdiction which was now invoked. They were all misapprehensions of the law.

[NOTE. See Case No. 3,356.]

ERSKINE (UNITED STATES v.). See Case No. 15,057.

Case No. 4,524.

In re ERWIN et al.

[3 N. B. R. 580 (Quarto, 142).][1]

District Court, S. D. Georgia. Feb. 1, 1870.

BANKRUPTCY—DISTRIBUTION OF ASSETS—PRIORITY OF JUDGMENT CREDITOR'S CLAIM.

In the distribution of the assets of the bankrupt derived from the collection of a promissory note, a creditor whose claim is in judgment has no priority, and will share pro rata with the other creditors.

I, Frank S. Hesseltine, register of the said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause, the following question pertinent to the same arose; and was stated and agreed to by Harden & Levy, counsel for John U. Meyer, creditor, and Hartridge & Chisholm, who appeared for Calvin L. Cole, a creditor of said bankrupts. Erwin & Hardee filed their petition to be adjudicated bankrupts, December 31, 1868. They returned among their assets one promissory note for twelve thousand dollars, which the assignee collected. Calvin L. Cole proved his claim on a judgment obtained against Erwin & Hardee, in November, 1868, and, at the second meeting of creditors, claimed that the said judgment had priority, and should first be paid in full, which claim counsel for John U. Meyer opposed, and asked that the assets be distributed pro rata. And the said parties requested that the issue thus raised should be certified to your honor for your opinion thereon.

Opinion of the Register:

In the Case of Winn [Case No. 17,876], your honor decided that a lien of the judgment upon the property of a bankrupt "follows the property into the hands of the assignee, and that a judgment in this state retains its lien in the court of bankruptcy." In accordance with this decision, where property of the bankrupt, which was subject by the laws of this state to the lien of judgments, has been sold free, and discharged from the incumbrances thereon, it has been my practice, as register, in ordering a distribution of the assets derived from the sale of the property, to pay the creditors holding judgments according to the priority of their liens. It is only in such cases where the lien upon the property was transferred to the fund in court, derived from the sale of the property, that I have considered the judgment-creditor as entitled to any priority in the distribution of the assets. In this case the fund in court is derived from the collection of a promissory note. The judgment had no lien upon the said notes in the hands of the bankrupts, for the Code, § 3524, expressly declares, "a judgment has no lien upon promissory notes in the hands of the defendant." Hence, by virtue of a lien, it cannot claim to be first satisfied out of the fund derived from this note.

The judgment-creditor, Cole, I understand, bases his claim to be first paid in full, upon the laws of this state, governing the distribution of the estate of a decedent, and of money brought into a state court. Would he, under like circumstances, possess any priority as distributee of the estate of a decedent? It is true that paragraph 2494 of the Code, places in prior rank over written obligations and book accounts, "judgments, mortgages, and other liens created during

[1] [Reprinted by permission.]

the lifetime of deceased, and to be paid according to their priority of lien;" but it also says, "mortgages and other liens on specific property to preferred only so far as such property extends." But the Code of Georgia does not govern in the distribution of the estate of a bankrupt. The bankrupt's assets must be divided in accordance with the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. Section 27 enacts—"That all creditors whose debts are duly proved and allowed, shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house-servant, to an amount not exceeding fifty dollars, etc." By the bankrupt act the judgment-creditor enjoys no advantage, except where the bankrupt returned property upon which the judgment is a lien by the laws of the state in which the property lies. Unquestionably in this case, Cole, the judgment-creditor, must share pro rata with the other creditors.

ERSKINE, District Judge. After a careful consideration of the question submitted and the ruling of the register, I am clearly of the opinion that there should be a pro rata distribution, and therefore affirm the decision of Mr. Register Hesseltine. The clerk will please certify this to Mr. Hesseltine.

Case No. 4,525.

ERWIN v. CUMMINS.

[Hempst. 703.] [1]

Circuit Court, D. Arkansas. April, 1855.

MARSHAL'S COMMISSIONS—COSTS.

1. Where property is not sold, nor money made nor received by the marshal on execution, he is not entitled to half commissions.

2. Taxation of costs reformed on motion.

[This was a suit by James Erwin, to the use of James Shelby, against Ebenezer Cummins, as administrator of William Cummins, deceased.] Heard on motion to retax costs.

P. Trapnall, for motion.

RINGO, District Judge. There was no legal authority for any charge of half commissions by the marshal when no property was sold or money made or received by him on execution, at any time from the 26th of February to the second Monday of April, 1849. Therefore the item of one hundred and two dollars and eighty cents charged by and taxed in favor of the marshal, on the execution, as half commissions on ten thousand and eighty dollars, the amount of the judgment and interest specified in the execution, is improperly and illegally charged and taxed as costs, and must be disallowed and stricken from the bill of costs, and the taxation thereof reformed in that respect. Ordered accordingly.

[1] [Reported by Samuel H. Hempstead, Esq.]

ERWIN (PHILIPS v.). See Case No. 11,093.

Case No. 4,526.

ESLAVA v. BANK OF MOBILE.

[The case reported under above title in 3 Chi. Leg. News, 297, is the same as Case No. 4,527.]

Case No. 4,527.

ESLAVA v. MAZANGE'S ADM'R et al.

[1 Woods, 623; [1] 3 Chi. Leg. News, 297.]

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

WITNESS—TRANSACTIONS WITH DECEASED PERSONS—POWER OF COURT TO REQUIRE SUCH TESTIMONY—"OPPOSITE PARTY"—EQUITY—DISCHARGE OF ORDERS ON MOTION—MOTION TO SUPPRESS DEPOSITIONS.

1. Under the statutes of the United States in actions against executors, administrators or guardians, "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." An ex parte order, obtained by complainant before process issued for his own examination as a witness, does not qualify him as such on the ground that he is required by the court to testify.

2. The reservation of power in the court to require the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it.

3. Where a bill was filed to set up a parol trust in real estate against the heirs and administrators of a deceased person, and an execution creditor of the complainant who had levied on the property was made a defendant, and had filed a cross bill, such execution creditor could be considered as "the opposite party," referred to in the act of congress, who is authorized to call the complainant as a witness. The "opposite party" is that party against whom the evidence is sought to be used.

4. In such a case the evidence of the party cannot be taken and admitted under the 70th equity rule, on the ground that the witnesses are old and infirm. This rule was not originally intended for the examination of a party, and it is doubtful whether it ought ever to be extended to the case of a party propounding himself as a witness.

5. In equity, orders obtained upon motion may be discharged upon motion, and orders obtained ex parte may be thus discharged when they have never been assented to by the other party.

6. A motion to suppress depositions fairly brings up the regularity of an order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never waived the objection.

This was a cause in equity which came on for hearing upon the motion of defendant to suppress the depositions of complainant and his wife.

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

Alex. McKinstry, for complainant.
Geo. N. Stewart, J. Little Smith, A. R. Manning, and Percy Walker, for defendants.

BRADLEY, Circuit Justice. The bill is filed in this case to subject certain property, conveyed by the complainant to Ovid Mazange many years since, to a parol trust, in favor of the complainant, on which, as he alleges, the conveyance was made. The Bank of Mobile is made a defendant because it has an execution against Eslava which has been levied on the property in question. On filing the bill and before issuing the subpoena, the complainant obtained an order to examine himself and his wife as to any transactions with or statements by Ovid Mazange, deceased, upon interrogatories to be served on the parties to the suit, or upon notice to them, before some commissioner of the United States. The rule suggests that Eslava and his wife are aged and infirm, and reside in New Orleans. As soon as issue was joined in the cause, the defendants gave notice to the complainant that they desired the testimony in the case should be taken orally, under the 67th rule of the court, and soon after filed written objections to taking the testimony of the plaintiff and his wife on the grounds, amongst others, that the complainant was not a competent witness in the case (Mazange being dead), and that the wife could not be a witness for her husband. The complainant's counsel, nevertheless, after this, proceeded to file and serve interrogatories with a view to examine the complainant and his wife on commission. The defendants filed cross interrogatories under protest. The examination having been taken and the depositions returned, the defendants at the last term moved to suppress the same. The motion, not being disposed of, is now repeated. One ground of the motion is, that the complainant and his wife are not competent witnesses in the case.

In general the competency of witnesses in the United States courts in civil cases is governed by the law of the state in which the court is held. Such was the rule enacted by the statute of July 6, 1862 (12 Stat. 588). But congress has specially regulated the subject now before the court. By the act of July 2, 1864 (13 Stat. 351), it was declared, amongst other things, that there should be no exclusion of any witness in the federal courts because he was a party to, or interested in, the issue tried. This act was modified by that of March 3, 1865 (13 Stat. 533), by which it was enacted that in actions by or against executors, administrators, or guardians, neither party should be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward unless called to testify thereto by the opposite party, or required to testify thereto by the court. This act is a recognition of the glaring injustice it would involve, to permit one party to propound himself as a witness in his own behalf as to a transaction between him and a deceased person, who can no longer give his version of the affair. If the law were to allow a man to wait until his antagonist were dead, and then to sue his heirs, and put himself upon the witness stand and give his version of the affair, with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law, as to allow a man to be judge in his own cause. Every honest mind revolts against it. There may be special cases, it is true, in which the court can see that no injustice would be done by calling on a party to testify, even though his adversary be deceased. But it is useless to attempt to anticipate such cases. When they arise it will be for the court, and not the party himself, to suggest that he be called. Or, if he make the suggestion, the other party ought at least to be heard upon it.

It is claimed in this case that the court has made an order to take the testimony. But how was it made? It was an ex parte order taken before the defendants were subpoenaed to appear in the cause. When the statute authorizes such testimony to be taken if "required by the court," it does not refer to such a requirement or order as that which was made in this case. If an ex parte order can be got in this way, the statute would be practically abrogated. The reservation of power in the court to require the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it. The court will exercise this power with great care and caution. This case is one in which it would be eminently improper to allow the evidence. The complainant seeks to set up a parol trust in property conveyed away by him over twenty years ago, and possessed by the grantee and his assigns ever since. It would be most dangerous to allow a party to prove his own case under such circumstances, after his grantee was dead. Whether it is provable at all is another question, not now before the court. But no man's property would be safe under such a rule of evidence. Of course, the wife is incompetent to testify for or against her husband. The fact that the Bank of Mobile has filed a cross bill in the case can make no difference. The order to examine the parties is taken on behalf of the complainant, not on behalf of the bank, and, if it were taken on behalf of the bank, it would not help the case. The bank is not the "opposite party" referred to in the act who is authorized to call the plaintiff as a witness. The "opposite" party meant is that party against whom the evidence is sought to be used. The interests of the complainant and of the bank in the matter are the same. The testimony is clearly incompe-

tent and must be disallowed, and the depositions suppressed.

It is urged that the witnesses were old and infirm, and, therefore, that the order to take their testimony was strictly regular under the 70th rule in equity. That rule was not originally intended for the examination of a party; and it may be questioned whether, under any circumstances, it ought to be extended to the case of a party propounding himself as a witness. But it certainly cannot legalize testimony taken as the plaintiff's has been taken in this case. It may also be urged that the order for taking the testimony must stand until it is regularly discharged. It is undoubtedly the general rule that, after the close of the term in which an order is made, it must stand until it is regularly discharged. But orders obtained upon motion may be discharged upon motion; and a fortiori, orders obtained ex parte may be thus discharged which have never been assented to, but always resisted by the other party; and a motion to suppress depositions fairly brings up the regularity of an ex parte order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never done anything to waive the objection.

From an examination of the minutes and files in this case, I am satisfied that the defendants have taken every opportunity fairly in their power to express their opposition to the testimony of these parties, as well as to the taking of it by deposition. The motion to suppress the depositions will be granted; but, as they were taken under an order of the court, though an irregular order, the cause will be continued until the next term, and the time for taking testimony enlarged until the rule day in September, to enable the complainant to take other testimony in the cause, with like liberty to the defendants.

Case No. 4,528.

ESLINE v. UNITED STATES.

[1 Hayw. & H. 62.][1]

Circuit Court, District of Columbia. Jan. 11, 1842.

LARCENY—WHAT CONSTITUTES.

Where property is taken from the owner openly and in his presence and in the presence of others with a felonious intent to steal the same, it is larceny.

Error to the criminal court.

Indictment for larceny.

Brent & Brent, for petitioner.

P. R. Fendall, for the United States.

Sarah Esline was indicted for feloniously stealing, taking and carrying away one green veil of the value of $2 of the goods and chattels of one Eveline Alison. On said indictment the jury rendered a verdict of guilty. The criminal court, Judge James Dunlop presiding, rendered the following judgment: That the said Sarah Esline suffer imprisonment in the jail for three months and pay a fine of $2.

Before the jury withdrew from the bar of the court here, the said defendant, by her attorney, filed in the court, the following bill of exceptions: On the trial of this cause, the United States offered evidence tending to prove that the owner of the veil named in the indictment, was walking in company with others on Pennsylvania avenue in Washington city. That the prisoner with another person came up, and after they had walked a short distance the prisoner snatched the veil from the witness' head and ran off with the veil. That the witness saw the prisoner when she snatched the veil, but that the eyes of the witness and the eyes of the prisoner did not meet. That the witness pursued the prisoner, but did not overtake her till half an hour afterwards, when the witness overtook her at the house of one Harriet Jones, to which house the witness had followed the prisoner. That the witness asked the prisoner why she had taken the witness' veil, to which question the prisoner answered that she had not taken the veil, and that she had not been out. That Richard R. Burr, a constable, who had accompanied witness to said house of Harriet Jones, then took hold of the prisoner and drew her from the chair on which she was sitting; and that the veil named in the indictment was then found in the chair on which the prisoner had just been sitting as aforesaid. Whereupon the counsel for the prisoner prayed the court to instruct the jury, that should they be satisfied that the defendant took the veil of the prosecutrix before her and other persons, and that it was done openly in the presence of the owner as well as of other persons known to the owner, it amounts only to a trespass and that the defendant is entitled to a verdict of acquittal, which instruction the court gave, but with a qualification, that the jury should be satisfied from the evidence that the veil was not taken with a felonious intent to steal the same. To the giving of which qualification, the prisoner, by her counsel, excepted.

After argument by counsel the court dismissed the appeal.

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

Case No. 4,529.

ESPINOSA v. UNITED STATES.[1]

District Court, D. California. March 31, 1873.

COURTS—POWER TO CORRECT MISTAKES OF PREDECESSOR.

[A federal court has no power to correct, after the lapse of 16 years, an alleged error in a decree of its predecessor, not due to a clerical

[1] [Not previously reported.]

mistake disclosed on the face of the record, but to a mistake, if any there were, which is only disclosed by additional proofs.]

This was a motion to amend a final decree of the late district court of the United States for the southern district of California, entered on the 24th day of September, 1855.

HOFFMAN, District Judge. It is not, of course, pretended that this court has any jurisdiction to review or reverse any decree entered by its predecessor, or by itself, after the term has expired, or to correct any errors of law or fact which may have been committed. It is not suggested that there has been any fraud upon the court. The ground upon which the application is based, is that the record discloses a case of manifest mistake, and that the decree does not express what the record shows to have been the real judgment and sentence of the court. To the proper appreciation of the question thus presented, a brief statement of the facts of the case is necessary.

In October, 1837, Salvador Espinosa presented a petition to Governor Alvarado, setting forth, in substance, that he had for fourteen years occupied the place known as La Bolsa de Escorpines, which had been ceded to him by the ancient (Spanish) government; but that the record of the grant had been lost, and was not to be found in the archives. He therefore prayed that the possession of the land might be given him in due form, and, according to the diseño, annexed to his petition. On the same day the governor, by a marginal decree, acceded to his petition, and directed him to present himself before the alcalde by whom the land was to be measured, according to the ordinances and the diseño, "expressing the number of varas which result, to the party interested." This being done, the expediente was to be returned to the government, "that the party interested may receive the title he asks for, and that the documents may be concluded." In pursuance of this decree the measurements were effected. The proceedings of the alcalde are contained in a record of judicial possession of unquestioned authenticity. These proceedings, however, do not appear to have been returned to the government, nor was any formal title applied for or obtained from the governor.

It was held, both by the board of land commissioners and the district court that, notwithstanding this defect, the claimant was entitled to confirmation in consideration of the manifest intention of the governor to make the grant—his recognition of the title, derived from the ancient Spanish authorities, and the equities growing out of a long and uninterrupted possession. It is apparent that under these circumstances the juridical measurement afforded the chief means of ascertaining the extent and location of the grant. On this point the board observes: "The juridical measurement does not define with great accuracy the boundaries; but, with the aid of the map on file, taken in connection with the long and notorious possession of the claimant, the premises can, we think, be located without much difficulty." In the record of juridical measurement, the alcalde, after stating that a cord was measured of 50 varas in length, describes the measurement as follows: "And thereupon, in the corner (rincon) of the bolsa de los Escorpines, which is situated to the west, they commence their measurement, extending the cord towards the east as far as the boundaries of Nicolas Alvera, and there were measured 233 cords; and after that, standing on the borders of Trinidad Espinosa at the south, the cord was carried towards the north as far as the first saucelito at the entrance of the cañada de San Miguel, and there were measured 70 cords of 50 varas," etc., etc. In the decree of the board, the land confirmed is described as follows: "The lands, of which confirmation is hereby made, are known by the name of Bolsa de los Escorpines, and are the same now occupied by Salvador Espinosa, and are bounded and described as follows, to wit: "Commencing at the first saucelito at the entrance of the cañada de San Miguel, and running thence south 3,500 varas to the borders of the land owned by Trinidad Espinosa; thence running west 11,600 varas; thence running north 3,500 varas; thence running east to the place of beginning 11,650 varas." It will be seen that with the slight discrepancy of 50 varas between the lengths of the northern and southern boundaries (due, no doubt, to a clerical mistake), the location of the tract is fixed with absolute certainty, provided the saucelito or point of beginning can be found; and of this no question is made. It will also be seen that there is confirmed to the claimant the full quantity measured for him by the alcalde, viz., a tract 233 cords (11,650 varas) in length, by 70 cords (3,500 varas) in width.

It is urged, however, that, by the record of juridical measurement, it appears that only two lines were measured by the alcalde, one running through the rancho from west to east, from the rincon of the bolsa to the lands of Alvera, in length 233 cords. The other, from south to north, from the borders of Trinidad Espinosa to the saucelito, in length 70 cords,—and that this latter line was run through the middle of the rancho, and did not form its eastern boundary. It is therefore argued that the board and the district court, by adopting the saucelito as the point of beginning, and directing the line to be run thence 70 cords to the lands of Trinidad Espinosa, and thence (i. e., from its termination) west 233 cords; thence north 70 cords; thence east 233 cords, to the place of beginning,—have shifted the location of the tract to the westward of the tract measured by the alcalde, and have prevented it from extending toward the east to the lands of Alvera, as described in the record of juridical measure-

ment, and in conformity to its ancient and notorious boundaries. In support of this view, several depositions have been taken, and references made to other expedientes in the archives. These proofs, it is claimed, establish beyond doubt that the rancho of Bolsa de los Escorpines and that of La Natividad (the lands of Nicolas Alvera) were universally recognized as coterminous. It is apparent that the introduction of these proofs is a recognition of the fact, otherwise sufficiently obvious, that this application is in effect an attempt to procure, after the lapse of sixteen years, the revision and correction by this court of a supposed error of its predecessor, and that this correction is to be made, not because the record discloses that a clerical misprision has occurred, but because, aided by additional proofs, this court is of opinion that an error has been committed. Such a proceeding is wholly inadmissible, and the application might be dismissed on the sole ground that this court is without power or jurisdiction to make the desired correction. But even if the question were an open one, and I were now at liberty to make such a location as might appear to be just; on the proofs recently submitted, I have failed to find any certain evidence that an error has been committed. The counsel for the claimant has assumed in his brief that the second line run by the alcalde was drawn through the middle of the rancho, and not at its eastern boundary. Of this, I find in the record no proof.

The record states that "after that, standing in the borders of Trinidad Espinosa, at the south, the cord was carried to the north, so far as the first saucelito," etc. From this we learn that the point of commencement on the borders of Trinidad Espinosa, was a point to the south of the saucelito; but whether the line so drawn was run through the middle or at the end of the rancho, does not appear. On recurring to the diseño, we find the saucelito clearly delineated. It and the cañada de San Miguel are at the extreme northeastern corner of the tract marked "Bolsa de los Escorpines," and their positions show that a line drawn south from the saucelito would form the eastern boundary of the tract as delineated on the diseño. It may be presumed that the board and the district court were guided by this indication in fixing the eastern boundary of the tract.

Again, I do not understand it to be denied that the claimant must be restricted to the precise quantity measured off to him by the alcalde, viz., a tract 233 cords in length, by 70 in width. The measurement gave precision and definiteness to the tract called "Bolsa de los Escorpines." It was accepted by the claimant, and the tract so measured is the only one which we can presume the governor promised or intended to grant. The boundaries of this tract can be ascertained without difficulty. If a line be drawn from the rincon of the bolsa, east 233 cords, and another at right angles to it from the saucelito, south 70 cords, we have the length and width of the tract. By drawing at each end of the longitudinal line, two lines parallel to and of equal length with the line drawn from the saucelito, and connecting the extremes of these two lines, a tract is enclosed of precisely the required dimensions. If it be contended that the line from the rincon and that from the saucelito must be run until the lands of Alvera are reached by the one, and the borders of Trinidad Espinosa by the other, it is sufficient to say that in the record of measurement these calls are evidently subordinate to the calls for distance or length, and that even if this were not so, the adoption by this court of those boundaries would be the substitution of a new and radically different mode of survey in place of that finally fixed and determined upon by the decrees of the board and the district court. Neither the record nor the proofs recently taken show that a line drawn from the bolsa, 233 cords, would extend beyond the eastern boundary, as fixed by the board, or that a line drawn westerly from the saucelito line to the distance of 233 cords, would extend beyond the bolsa. If, then, this grant were now to be located by this court, the location fixed by its predecessor would not certainly appear to be incorrect. To determine that question, evidence as to the situation of the rincon and its distance from a line drawn south from the saucelito, would be necessary; as would also some proof identifying the objects marked "laguna," "isla," and "arrolo," on the diseño—the first of which seems to form the southerly boundary of the rancho for more than half its length, and the others are represented as situated towards, or at its western extremity. The establishment of the position of these objects might or might not show error in the location fixed by the board; but the necessity for an inquiry into their positions demonstrates that what the court is now invited to do, is not to correct an obvious clerical mistake manifest by the record, but to re-locate the tract; and that to do this advisedly and correctly additional testimony is indispensable—the result and effect of which is doubtful. It will not be pretended that the court has at this time any such power. It may be observed, in addition, with reference to the supposed clerical mistake, that the decree of the board remained on appeal to the district court from December, 1852, until September, 1855, when the decree of the district court was rendered. That, during all this time, there was opportunity to procure the correction of the supposed mistake by the district court, and that the decree of the latter tribunal is in the precise language of the decision of the board, and wholly in the handwriting of the late Judge McAllister, who was then holding the district court for the southern district of California. The motion must be denied.

(April 5, 1873.)

HOFFMAN, District Judge. Since the foregoing opinion was written, an additional brief has been filed, to which, as well as to the depositions recently taken, my attention has been earnestly solicited. I see no reason to doubt the correctness of the conclusions heretofore reached. Though not explicitly stated, it is, nevertheless, clear that the efforts of the claimant are directed to the obtaining from this court a decree adopting the survey of Turrell. In other words, substituting for the final decree in the case a new decree, fixing the limits of the tract by reference exclusively to the boundaries of the adjoining ranchos. It is sufficient to say, that if the case were open for adjudication, this could not be done. The only land to which the claimant can set up any title, is the tract measured to him by the alcalde. This was evidently a parallelogram, in length 233 cords, and in width 50 cords. To a tract of those dimensions his claim was confirmed by the board and the district court, and to it he must now be restricted. The mode of measuring ought unquestionably to have been that adopted by the alcalde, viz., by drawing from the rincon in an eastwardly direction a line 233 cords in length, and by drawing from a point 50 cords south of the saucelito a line north to that object. The tract would then be inclosed by lines passing through the extremities of the first mentioned lines in a direction perpendicular to their course. It appears from the map of Bielawski, to which my attention had not been directed when the former opinion was written, that the line drawn south from the saucelito and established by the decree as the eastern boundary will not pass through the end of a longitudinal line drawn from the rincon eastward 233 cords, but will cut that line at a considerable distance from its extremity.

I think, therefore, that the decree is erroneous in this particular. But that the board and district court misled, it may be, by the diseño, as already suggested, intended to adopt and establish the line running south from the saucelito as the eastern boundary, cannot, I think, be for a moment doubted. The language of the decree is explicit and unequivocal. Nothing in the record tends to show such a location to be incorrect. It even derives much apparent support from the indications of the diseño. The error is disclosed only on the production of the evidence contained in Mr. Bielawski's deposition and map. I can see no reason whatever for attributing this error to a clerical mistake. It is plainly a case of error arising from want of evidence as to the real facts of the case. It is exposed, and could now be corrected only by the production of additional proofs. This court has no jurisdiction to take or consider those proofs, or to correct the error.

Case No. 4,530.

In re ESS et al.

[3 Biss. 301; 7 N. B. R. 133; 4 Chi. Leg. News, 357; 20 Pittsb. Leg. J. 34; 2 Md. Law Rep. 353; 1 Am. Law Rec. 356; 6 Alb. Law J. 277; 6 West. Jur. 447.] [1]

Circuit Court, N. D. Illinois. July, 1872.

RESUMPTION OF PAYMENT — SECRET PARTNER — WHEN LIABLE TO ADJUDICATION.

1. Any creditor may avail himself of an act of bankruptcy committed by his debtor in the non-payment of any of his commercial paper, and a resumption of payment after the expiration of fourteen days does not cure the act unless the debtor's whole indebtedness is paid.

[Cited in Re Laner, Case No. 8,055.]

2. Although the suspended paper, the non-payment of which constituted the act of bankruptcy, be taken up and paid before the filing of the petition, any creditor may still insist upon having the debtor adjudged a bankrupt, and his estate administered upon under the act.

3. A secret partner, known to the petitioning creditors to be such at the time the indebtedness was incurred, and a guarantor on the commercial paper, the non-payment of which constituted the alleged acts of bankruptcy, may, although entirely solvent, and having personally committed no acts of bankruptcy, be adjudged a bankrupt, on petition filed against both partners.

In bankruptcy. On the 7th of March, 1872, the firm of T. B. Weber & Co., of the city of Chicago, filed their petition in bankruptcy, alleging that Jacob Ess and William Clarendon, doing business as co-partners in the city of Peoria in this state and district, under the firm name of Jacob Ess, were indebted to the petitioners in the sum of $2,724.28, for goods sold said firm in due course of their business as merchants and traders at Peoria; that said Jacob Ess and William Clarendon, as such partners, within the six calendar months next preceding the filing of said petition, being merchants, had stopped and suspended payment of their commercial paper, and did not resume payment thereof for fourteen days, to-wit: that they suspended payment upon a promissory note for the sum of $500, dated April 12, 1871, payable to the order of Mabie, Murray & Morgan, two months after its date, and also of another note of the same date, payable to the same parties five months after date, and another note of the same date and amount, payable to the order of the same parties in three months after the date thereof.

Ess appeared and confessed the acts of bankruptcy alleged, and consented to an adjudication of bankruptcy. Clarendon appeared and answered, denying that he was or had been at any time within the six months preceding the date of the filing of the petition, a partner of the said Jacob Ess, under the style of Jacob Ess, or under any other name. He also denied that he had been engaged in business within the period afore-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Alb. Law J. 277, contains only a partial report.]

said in said district in any manner whatever, or that he was indebted to the said petitioners in any sum whatsoever, either individually or as a member of the firm of Jacob Ess, or that he had committed any act of bankruptcy, as alleged in said petition. It appeared that Clarendon individually was entirely solvent, and no acts of bankruptcy were charged against him other than as above stated in reference to the three notes to Mabie, Murray & Morgan. The facts further appear in the opinion.

Rich & Noble, for creditors.
L. S. Hodges, for bankrupts.

BLODGETT, District Judge. The trial was had upon the issue made by the denial of Clarendon, on which it appeared in evidence that some time in the year 1866 Clarendon, who was then a resident of New York City, and engaged in the wholesale boot and shoe business in said city, wrote to Jacob Ess, who was at that time living in Memphis, proposing to unite with Ess in business; Clarendon to furnish the goods, and Ess to manage the business of a retail store in some place which they might select in the West. After some correspondence it was agreed that Ess should start the store at Peoria, and that Clarendon should furnish him with the goods for stocking the store. In a letter of December 27, 1866, from Clarendon to Ess, Clarendon uses this language: "Now I have to say to you, that if you act to me like a brother, I will do as well for you as I have done for my brothers. The way I have always done with them was, that I bought the goods and they sold them, and they took half the profits and I took the other half. If this meets your ideas we will put the thing through." In a letter of January 23d, 1867, Clarendon writes: "Don't be afraid of any of them in the shoe business, for I know I can skin them on buying. I will make the profits right. You need not let on that your partner is in the shoe business until you see how it will work. I think you had better make the name of the concern Jacob Ess & Co., and if you will only sell the goods I am certain I can buy them, and if you are going all right I may come out to see you next summer." Again, in the same letter, he says: "If you could send the money when you order the goods, it will give my folks here a better opinion of the business. I am not going to let them know that I am in with you; but I guarantee that you will pay for them, and I will see that the goods are charged to you at small profits." Under date of February 9th, 1867, Clarendon writes to Ess: "In writing let me know every day's sales. I will do the very best I can to put the goods at low figures. I have put most of these at cost." This was after Ess had opened the store at Peoria. On March 2d, Clarendon writes to Ess: "Write to me twice a week, and at the end of the month send me a statement of what you have sold during the month, and what you have done with the money. Keep your books straight." In a subsequent letter Clarendon writes to Ess: "If you have not got your sign yet, have it Jacob Ess. I will send the goods in your name from here."

A large number of other letters were introduced and read upon the trial, but the quotations I have made already show clearly enough to my mind that a partnership was entered into between Ess and Clarendon, and that, by Clarendon's especial request and direction, the business was to be done in the individual name of Jacob Ess. Ess testifies that, sometime in 1869, Clarendon told him that he thought they had now got on far enough so that he (Ess) could pay him (Clarendon) fifty dollars per month for the profits of the concern. Ess demurred to this, stating that they had not yet reached the point where Clarendon's share of the profits would amount to that, but agreed to send Clarendon all the money he could spare from the business; and, accordingly, during the year 1869 and part of the years 1870 and 1871 Ess remitted to Clarendon various sums of money, amounting in all to between $700 and $800, to apply upon the profits of the business. During this time, Clarendon changed his business relations in New York, the firm of which he had been a member having dissolved, and, sometime in 1870, Clarendon commenced purchasing goods on account of Jacob Ess from the firm of Mabie, Murray & Morgan, in New York, Clarendon guaranteeing the payment of the bills. It also appears, however, that Ess purchased of other dealers in the same line of goods, and it does not appear that Clarendon in all cases guaranteed the payments, although Ess testifies that he notified his creditors and those with whom he dealt, as a rule, that Mr. Clarendon was his secret partner. Ess also testifies that the notes described in the petition were given in due course of business to the firm of Mabie, Murray & Morgan, and that at the time mentioned in the petition, to-wit, as those notes respectively fell due, the said firm suspended payment thereof, and that on or about the first of March last, all of said notes remained unpaid. There was no evidence of a dissolution of the firm or of any change in the relations of the partners. It was proved by the petitioners that Ess, at the time of purchasing the goods of them, told them that Clarendon was a partner in the business.

The only evidence interposed on the part of the defense is that of the respondent William Clarendon, who testifies that, about the first of March last, he paid the notes to Mabie, Murray & Morgan, described in the petition, and took them up, he being liable thereon as guarantor.

The evidence on file in the case, and on

which the rule to show cause was granted, shows that Jacob Ess was indebted to the petitioning creditors for goods sold them in the due course of their business to the amount named in the petition, to-wit: $2,724.28.

It is contended on the part of the respondent, Clarendon, that inasmuch as he had paid the commercial paper described in the petition prior to the filing of said petition, that this proceeding cannot now be maintained.

Assuming, as I do, that the proof shows that Clarendon was a partner with Ess in business at Peoria, the question is, have the petitioners, Weber & Co., the right to avail themselves of the act of bankruptcy, which was committed by said firm by suspending payment of its commercial paper, to-wit: the Mabie, Murray & Morgan notes, and to have the firm and its members declared bankrupts, notwithstanding said paper had been paid and taken up prior to the filing of the petition in this case?

There can be no doubt that the suspension upon this paper for fourteen days was an act of bankruptcy, and as much against Clarendon as against Ess, if Clarendon was a member of the firm. And if it were an act of bankruptcy, is that condoned or so far defeated as to prevent any other creditor from availing himself thereof by the mere payment of the suspended paper? If a merchant or trader suspends payment of his commercial paper for fourteen days, that is an act of bankruptcy of which any creditor may avail himself. The act of suspension raises a presumption of insolvency and makes the party guilty thereof a proper subject for proceedings in bankruptcy. It is not enough that the debtor shall pay his suspended paper alone. He must pay or settle all his debts and satisfy all his creditors, if he would wipe out the offense against his commercial standing, committed by the suspension. Otherwise a trader might, although hopelessly insolvent, avoid adjudication as a bankrupt by the payment of a tithe of his indebtedness, because, as a rule, but a small proportion of a trader's indebtedness is evidenced by commercial paper. I conclude, then, that William Clarendon and Jacob Ess were, at the time of the filing of this petition, partners in business under the firm name of Jacob Ess, at Peoria, in this district; that they were guilty of the acts of bankruptcy charged in the petition; and that the petitioning creditors had the right to avail themselves of that act of bankruptcy, although the suspended paper had been taken up by one of the partners at the time of the filing of the petition.

The finding of the court, therefore, is that William Clarendon was guilty with the said Jacob Ess of the act of bankruptcy charged in the petition, and that he and the said Jacob Ess must be adjudicated bankrupts.

NOTE. The general question of the liability of secret partners was not raised in this case, the respondent Clarendon not denying on the trial that he had guaranteed the payment of the indebtedness to Mabie, Murray & Morgan, the non-payment of which was the act of bankruptcy charged, nor that the petitioning creditors had been informed by Ess, at the time of contracting the indebtedness to them, of his (Clarendon's) relations to the business.

For a discussion of the liabilities of secret partners, consult Waugh v. Carver, 1 Smith, Lead. Cas. 491, and numerous authorities there cited; Story, Partn. §§ 63, 373; T. Pars. Partn. 61–67, and notes; Winship v. Bank of U. S., 5 Pet. [30 U. S.] 529; Bank of Alexandria v. Mandeville [Case No. 851]; Ex parte Warren [Id. 17,191]; Bigelow v. Elliot [Id. 1,399].

Case No. 4,531.

ESSELTYNE et al. v. ELMORE et al.

[7 Biss. 69; 3 N. Y. Wkly. Dig. 357; 9 Chi. Leg. News, 48.][1]

Circuit Court, E. D. Wisconsin. Oct., 1875.

DEMURRAGE—REASONABLE TIME.

1. In this case five days were considered a reasonable time in which to unload a vessel laden with 567 tons of coal, demurrage being allowed for the detention of the vessel after that time.

2. The charterer of a vessel takes all risks as to delay from any unforeseen circumstances.

[Cited in Williams v. Theobald, 15 Fed. 470; The William Marshall, 29 Fed. 330.]

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

In admiralty.

H. H. & G. C. Markham, for libellants.

Finches, Lynde & Miller, for respondents.

DRUMMOND, Circuit Judge. The libellants, in the fall of 1872, were the owners of the schooner Montana, and the defendants were coal merchants in Milwaukee. The libel is filed by the owners of the Montana, for the detention of the schooner by the defendants, in November, 1872. The schooner, laden with five hundred and sixty-seven tons of coal consigned to the defendants, arrived in Milwaukee from Erie, Penn., on Sunday, the 17th of November. The captain reported his arrival the next morning at the office of the defendants. The defendants were not then in their office, but an intimation was given by a clerk in their employ that the Montana was to go to the upper dock of the defendants—they having at that time three docks for the landing of coal and other merchandise. It was also then stated by the clerk to the captain that there was a vessel already unloading at the upper dock, and that another vessel was expected to proceed there in a short time, it already being in port, having arrived before the Montana.

The captain called again at the office of the defendants in the afternoon of the 18th of November, and was told by one of the defendants to take his vessel to the upper dock. He accordingly went there, and found

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 3 N. Y. Wkly. Dig. 357, contains only a condensed report.]

two vessels which were to be unloaded before the Montana. In consequence of this, and of the prevalence at the time of a horse disease called the epizootic (horses being much used in unloading coal from vessels), they did not begin to unload the Montana until Friday, the 22d, and the unloading was not completed until late Tuesday night of the 26th of November.

The vessel being consigned to the defendants, and they being the owners of the coal, under the conceded facts of the case, it became their duty to furnish, within a reasonable time after the arrival of the Montana was reported to them, a suitable place for the unloading of the vessel, and to complete it, also, within a reasonable time. The evidence shows—it being near the close of navigation—that a considerable number of vessels had arrived with cargoes consigned to the defendants about the same time. But it is manifest that the Montana could not be responsible for that circumstance. It was a separate and independent contract made between the schooner and the defendants for the transportation of coal from Erie to Milwaukee, and the duties of the defendants in unloading the Montana did not depend upon the fact that other vessels arrived at about the same time. That was a risk which the defendants themselves took when they agreed to freight the schooner from Erie to Milwaukee.

The weight of evidence is that the captain of the Montana was induced to believe by the conduct and declarations of the defendants, that the schooner Hattie Johnson, one of the vessels found at the upper dock, was to be discharged there before the Montana, and he must, therefore, for this reason, as well as for others appearing in the testimony, be excused for not reaching the dock before the Hattie Johnson. Now it must be apparent on this statement of the evidence, that it was not the fault of the Montana that she did not go to the upper dock on the morning of the 18th, because the captain did not then receive any direct instructions to go there, and there were no instructions left by the defendants in the office, he having called there several times, and when he first saw the defendants in the afternoon he was directed to go to the upper dock, and he says (there is no controversy about that) that he immediately proceeded there, and when he arrived he found two vessels, the Dore in the act of being unloaded, and the Hattie Johnson lying outside ready to take her place.

According to the rules of the port, and as of right, perhaps, they were entitled to be discharged before the Montana, there being no means to unload two vessels at the same time. It was immaterial to the defendants which of the schooners was discharged first, the Hattie Johnson or the Montana. There had to be a delay of the one or of the other.

It does not clearly appear that the principal delay in unloading arose from the prevalence of the horse disease at the time, but rather from the fact that adequate dockage was not seasonably furnished by the defendants. As I have said, the Montana was not responsible for the arrival of vessels consigned to the defendants about the same time; that was a risk which the defendants themselves took. It was, I think, the duty of the defendants to furnish dockage to the Montana by Tuesday, the 19th of November, and even under the adverse circumstances of the time, the unloading should have been finished by Friday. In taking this view of the case I am not unmindful of the difficulty of unloading vessels at that time, in consequence of the prevalence of the horse disease, a circumstance which strictly speaking ought not, perhaps, to be considered at all, because it might well be questioned whether that was not one of the risks that the defendants took. In allowing until Friday to unload the vessel, I give all the time that was really taken by the defendants. They commenced the unloading of the Montana on Friday and they finished it Tuesday, that would be four working days. So that I have taken, I think, a favorable view of the rights of the defendants in stating that they were entitled until Friday to complete the unloading of the vessel. Then, all the time after that was taken unnecessarily. It was a detention for which the defendants are responsible to the owners of the vessel. That would constitute a delay of four days.

The unloading ought to have been completed Friday night at the very latest. It is a matter of some difficulty to determine the extent of the defendants' responsibility. It is to be borne in mind, however, that it was at a season of the year when the Montana was peculiarly entitled to dispatch; towards the latter part of November, when navigation was about to close, and when it was desirable that the schooner should have an opportunity to take freight for another port. But my experience is that all vessel-owners, in stating the value of the use of their vessels, are very apt to exaggerate. I have always felt inclined to make considerable deduction from the accounts which they give of that value.

So that, in view of this, the only allowance I shall make to the libellants for the delay, is four hundred dollars, one hundred dollars a day. I therefore shall allow a decree to pass against the defendants for that amount, together with interest from the first day of December, 1872.

The result of this is that the decree of the district court dismissing the libel [case unreported], must be reversed, and a decree for the above amount rendered, together with the costs in the court below, and in this court.

See Fulton v. Blake [Case No. 5,153].

ESSEX CO. (ABBOTT v.). See Case No. 11.

Case No. 4,532.

ESSEX COUNTY NAT. BANK v. BANK OF MONTREAL.

[7 Biss. 193;[1] 15 Am. Law Reg. (N. S.) 418; 5 Am. Law Rec. 49; 3 Month. Jur. 93; 11 Bankers' Mag. (3d S.) 142; 1 Law & Eq. Rep. 617.]

Circuit Court, N. D. Illinois. May, 1876.

ACCEPTING CERTIFICATION OF CHECK RENDERS COLLECTING BANK LIABLE — DAMAGES PRESUMED.

1. A bank holding a check for collection and accepting the certification of the bank upon which it is drawn in lieu of payment, thereby assumes the risk of payment, and becomes liable to the owner for the amount of the check, with interest from the date of certification.

[Cited in Harrison v. Wright, 100 Ind. 524.]

2. It is not necessary that the owner prove his damages; the law presumes them.

3. Nor is it essential that the bank on which the check was drawn, should have had the funds to pay it when presented.

Action to charge the defendant with the amount of a check transmitted to it for collection under the following circumstances: P. Becker & Co., of Chicago, on the 3d day of August, 1875, sent their check for $856.37, on the State Street Savings Bank to T. B. Peddie & Co., of New York. It was indorsed by the payees to the plaintiffs, and by the plaintiffs was indorsed to the German-American Bank, New York, for collection, and by that bank in the usual course of business was indorsed to the Bank of Montreal, of Chicago, the defendant, for collection. It belonged to the plaintiff in this case, but the plaintiff having no correspondent or agent in Chicago, employed the German-American Bank to collect it, and that bank employed the defendant, according to usage among banks located at different points. The Bank of Montreal received the check about 11 o'clock on the morning of the 9th of August, and soon thereafter sent it by its messenger to the State Street Savings Bank for payment. The messenger presented it at the counter to the teller, who informed him that the cashier was not then in, and that he could not pay it in his absence. The messenger took the check away, and later in the day called again with it and presented it to the same party, and he made the same reply that the cashier was out, and he could not pay it until he came in. The messenger then asked the teller to certify it, which he did in the usual mode of certifying checks by that institution, and thereupon the messenger took the check away with him. The teller, when he certified the check, charged the amount of it up to the drawer's account, which then exceeded the amount of the check, and credited certificate account with amount of the same. The defendant sent the check for payment on the next day at about 11 o'clock, and it was not paid because the bank had not the funds to pay it. The bank kept its doors open during all of the 10th of August, but had not the funds to pay the check, and failed to open after that day.

Hitchcock & Dupee, for plaintiff.
Dexter & Smith, for defendant.

HOPKINS, District Judge. The testimony is not very clear as to whether the bank had currency enough on the 9th to pay the check, if payment had been insisted upon, but as this point is not material in the view I have taken of the law of this case, I shall not stop to settle it; when it was presented after certification it was not paid because the bank was insolvent.

The defendants had the check to collect. It was transmitted to them for that purpose, and their duty as collecting agents was to present and demand payment within the time prescribed by law, and, if not paid, notify the proper parties of its dishonor. If that had been done, the rights and remedies of all parties liable upon it, when it came into their hands, would have remained intact. If loss occurs by the acts or omissions of the party thus assuming the duty of collection, it should fall upon the delinquent agent, not upon the absent owner.

The State Street Savings Bank was not liable to the holder of the check without acceptance. It was liable before acceptance only to the drawers. Chapman v. White, 6 N. Y. 412. It could not be made liable to the holder of the check except by its own consent. It had the funds of the drawers, and according to the usual course of dealing with its customers was under obligation to pay on demand all checks drawn upon it by them, but a refusal to do so would not give the holder of the check the right to sue the bank. The drawer in such case would be liable, and he could sue the bank immediately, without redeeming the check, and the bank would be liable for damages for its refusal to perform its undertaking with him as depositor. Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 604; Bank of Republic v. Millard, Id. 152.

This being the law, the duty of the defendant upon receipt of the check for collection was plain. It was to present it for payment, and only for payment. This it did at first, and if it had stopped then there would have been no liability upon it. But it did not; it went farther; it asked for and received the certification of the bank upon the check. By this act a new relation was created between the parties. The amount the check called for was withdrawn from the drawers' account and control, and thereafter they had no right of action for it against the bank. The technical operation of the transaction was a transfer to the holder of the check of the drawers' funds and right of action against the bank. It superseded the previous rights

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

and obligations of the parties, particularly of the drawers.

Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification they had no control over the fund or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check. If the drawers had taken it up before its certification it would have been useless, but after that they could only get the money by surrendering it. It resembled after certification, more a certificate of deposit than a check. Now, what was the effect upon the legal rights and liability of the drawers? Did it not discharge them from all further liability upon the check? And if such should be found to be the consequence, does it not follow that the defendants are liable to the owners for the amount? If they have by their acts released the responsible drawers whereby the instrument is made worthless, why should they not make good the loss?

In Smith v. Millar, 43 N. Y. 176, it is said that presenting a check for payment and accepting a certificate as good "is equivalent to payment." In Morse on Banking (page 282), it is laid down that, if the holder chooses to accept the bank's certification, no matter to suit whose convenience, there can be but one result. The promise of the bank on the drawers' account, accepted as satisfactory by the creditor, discharges the debtor, and by the same action deprives him of all further concern in the premises. The bank no longer owes him any duty which he can enforce, or for the breach of which he can sue. If this is the result of the act of the defendant in accepting the certification of the check it would seem too clear for discussion that the defendant had incurred a liability to pay the amount of it to its principal. The drawers being released by the certification, and the bank being unable to pay, it follows irresistibly that the plaintiff is entitled to recover of the party releasing the drawers, whereby the amount of the check is lost to them.

It was claimed on the part of the defendant on the trial that the plaintiff must show some damages by the act. If the act released a responsible party that would be damage enough. But the law presumes damages from the negligence or unauthorized act of a collecting agent of commercial paper whereby any party to it is released or not charged. Commercial Bank of Albany v. Hughes, 17 Wend. 94. And if this presumption is not conclusive, but liable to be overthrown by proof to the contrary, it is the duty of the party at fault to show clearly that no damages did result to the holder of the paper from their negligence, which in this case the defendant did not do. It did not clearly show that the check would not have been paid on the 9th of August if payment had been insisted upon. I think the only safe and maintainable doctrine in this case is that the defendant assumed the risk of payment by the bank when it accepted the certification, and if the bank did not pay, then it must. In laying down this rule I assume that the certificate operated as a release or payment as to the drawers, and that they were no longer liable upon the paper. This release I regard as the pivotal point in this case, and upon that point I am not forced to rely upon my own judgment. I find the precise question has been decided by the court of appeals of New York in the case of First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350. That was an action on a check drawn by defendant on the 21st of November, 1871, on the Ocean National Bank, payable December 12, 1871. The bank, the plaintiff in that case, discounted it for the payee, and at 11 o'clock a. m. on the 12th day of December, they presented it to the Ocean Bank and got it certified as good. The drawer then had an account there sufficient to pay it, which was on the certification charged up to him on the Ocean Bank books. Within an hour after that, the Ocean Bank suspended. The check was again presented on that day for payment, and was duly protested for non-payment. The bank then sued the drawer to recover the amount of it. The court upon that state of facts held that the plaintiff could not recover; that the certification operated as a payment as between the holder and drawer.

In the opinion it is said "the law will not permit a check, when due, to be then presented and the money left with the bank for the accommodation of the holder without discharging the drawer," that if the holder chooses to have it certified instead of paid, he will do so at the peril of discharging the drawer.

But they say that "this would not discharge the drawer of a check who himself procured it to be certified and then put it in circulation; that the reason of the rule would not apply to him," and conclude the opinion by saying "that upon principle it must be held that the bank holds the money after certification by request of the holder, not at the risk of the drawer, but of the holder of the check."

This is the only direct authority I have found upon this question, from which I judge that the practice of holders of checks getting them certified is not very usual, for if it were, other cases would have found their way into the books and come under judicial consideration.

The defendant on the trial cited Bickford v. First Nat. Bank of Chicago, 42 Ill., 239, and Rounds v. Smith, Id. 245. From an examination of those cases, I do not see that they conflict with the case of First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350. In those cases the checks were certified at

the request of the drawer before delivery. This expressly appears in the last case, and the judge in his opinion in that says "the case in all its important features is the same as Bickford v. First Nat. Bank of Chicago," so that I may assume that the checks in both these cases were certified by request of the drawer, which presents an entirely different question from this, and leaves the point involved here unconsidered in those cases.

In Brown v. Leckie, 43 Ill. 497, cited by the defendant's counsel, the check was also certified by the request of the drawer before it was passed by him, so that the reasoning of the court in that case was not predicated upon the same facts as appear here. But, as I understand those cases, that court holds that a check operates to transfer the amount named in it to the payee, and authorizes him to sue for and receive it from the bank. If such is the doctrine of that court, I am not at liberty to follow it, for the supreme court of the United States, in Bank of Republic v. Millard, 10 Wall. [77 U. S.] 152, has decided differently. And as the question involved is one relating to commercial securities, and belongs to the domain of general jurisprudence, this court is not bound by the decision of the state courts where the matters arise. Township of Pine Grove v. Talcott, 19 Wall. [86 U. S.] 666. But, waiving this view and difference between the courts on this point, I do not think that the decision of the learned court of Illinois above referred to, when carefully examined, will be found to touch the point involved here. It was not before that court in either of those cases, and, although the general language used might seem to be in conflict with the conclusions I have reached in this case, still when read and considered as used in reference to the facts and question before that court, no conflict or discrepancy of opinion will be found to exist. Those cases are clearly distinguishable on the facts from this case, and are, therefore, not authority upon the point involved here. I am therefore of the opinion that the defendant is liable for the amount of the check, with interest from the certification, as by its certification the drawers were discharged.

A question was suggested as to the right of this plaintiff to sue the defendant, as it was not its agent, alluding to the recent decision of the supreme court of the United States in Hoover v. Wise, 91 U. S. 308, but it was stated, and not disputed, that the plaintiff's attorneys had authority to sue in the name of the German-American Bank as well as in the name of the present plaintiff, the real owner, and that an amendment under the laws of the state was allowable, in the discretion of the court, by inserting the name of the German-American Bank as plaintiff in lieu of the present plaintiffs, and as the decision making the change necessary has been announced since the commencement of the suit, and as no injury can result, as it appears to the court, to the defendant thereby, I direct and allow an amendment in that respect by striking out of the process and pleadings the name of the present plaintiff, and inserting in lieu thereof the name of the German-American Bank, and as so amended that judgment be entered for plaintiff and against defendant for $882.76, the amount of the check and interest, with costs of this suit to be taxed.

See Farwell v. Curtis [Case No. 4,690].

ESSEX FIRE & MARINE INS. CO. (ANDREWS v.). See Case No. 374.

ESSEX FIRE & MARINE INS. CO. (HAMMOND v.). See Case No. 6,001.

Case No. 4,533.

ESSEX HOSIERY MANUF'G CO. v. DORR MANUF'G CO.

[14 Hunt, Mer. Mag. 355.]

Circuit Court, D. Massachusetts. 1846.

PATENTS—PRELIMINARY INJUNCTION.

[A preliminary injunction should be refused when, on the evidence submitted, complainant's right appears to be in doubt, and defendants are amply able to answer in damages, and would suffer great injury by the suspension of their manufacturing plant.]

This was a proceeding for an injunction, which came on for a hearing on the bill and affidavits. The plaintiffs set up a patent for an improvement in the rotary power stocking loom, issued to Richard Walker, December 5, 1839, and which had come to them by sundry intermediate assignments. The defendants had built and used machines, according to the subsequent patent issued to the said Richard Walker and Jefferson McIntire, February 12, 1844, and which had been assigned to the defendants. It was alleged that the machines built under the second patent were an infringement on the plaintiffs' rights.

SPRAGUE, District Judge, in delivering his opinion, said that a preliminary injunction should only be issued for the purpose of preventing mischief, and in aid of the legal right. A judgment at law, although the best evidence, was not the only evidence of the legal right; but, in its absence, the court would look more carefully into the circumstances of the case, and especially to the mischief that might be produced by granting an injunction. The vigilance or acquiescence of the complainant, were also circumstances requiring attention.

1. As to the point of mischief: The defendants had a manufacturing establishment, of more than $100,000 capital, and employing more than a hundred workmen. An injunction, by arresting their business, would

produce great mischief, for which, if the suit should terminate in their favor, there would be no remedy. On the other hand, there was no doubt of their pecuniary ability to pay the damages which should be awarded, in case the suit should be determined in favor of the plaintiffs. And the danger that others would follow the defendants' example did not appear to be imminent.

2. As to the point of vigilance: The plaintiffs had notice of the application for the patent which the defendants hold, and resisted it. In the summer of 1844, the agent of the holders of the first (the plaintiffs') patent saw a machine made under the second patent publicly exhibited, and in February, 1845, saw one of them in actual operation. The present suit was not brought until October. There had, consequently, been some want of vigilance on the part of the plaintiffs, not affecting their legal rights, but to be taken into view upon the application for an injunction.

3. As to the evidence of the legal right: The strength of the plaintiffs' exclusive possession, as evidence of their exclusive right, depended upon the knowledge which the public had of it, their interest to resist it, and the extent and duration of their submission to it. This machine had been used by no one but the plaintiffs and their predecessors; and an agent had been unsuccessful in attempting to introduce it in England and Scotland.

His honor then reviewed the evidence as to the question whether the plaintiffs' patent had been infringed by the defendants, and said that, without expressing an opinion further than it was necessary to dispose of the question before him, he considered that the plaintiffs' right, so far as the acts of the defendants might affect it, was left in too much doubt to authorize a preliminary injunction, under the circumstances of the present case. He therefore refused to grant the injunction, but ordered that the defendants keep an account, to be forthcoming on the trial of the action at law now pending between the parties.

Case No. 4,533a.

ESSLER et al. v. WORTH et al.

[22 Betts, D. C. MS. 47.]

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

PRACTICE IN ADMIRALTY—WARRANT OF ARREST—ATTACHMENT OF PROPERTY OF ABSENT DEFENDANT—APPEARANCE—PLEADING — LACK OF PRECISION AND CERTAINTY IN LIBEL.

[1. Where a libel lacks precision and certainty in alleging facts, but is not excepted to in that respect, the court may dispose of a motion to vacate an attachment issued thereunder upon an assumption of facts as broad as the libel will warrant, or as are claimed on behalf of libelant.]

[2. The object of a warrant of arrest in admiralty, requiring the attachment of the property of defendant if they cannot be found within the district, is to compel the appearance of the defendants, and on such appearance the attachment must be discharged. Manro v. Almeida, 10 Wheat. (23 U. S.) 476, followed.]

[3. If the defendant fail to appear, the attached property will be held until final decision of the case, when it may be proceeded against by suit of execution.]

[In admiralty. This was a libel in personam by Henry Essler and others against Henry C. Worth and others, owners of the steamboat Naushon. Motion by defendants other than Worth to vacate an attachment against the steamboat.]

BETTS, District Judge. The libellants instituted an action in personam against Henry C. Worth, Gideon Fountain, William Andrew and Hiram Watson to recover $3314.16, the amount of charges for materials, labor and supplies furnished the steamboat Naushon in this port. The libel lacks precision and certainty in alleging the facts upon which the action is founded, but, no exception being taken to the pleading in that respect, the court will dispose of the case presented for consideration upon an assumption of facts fully as broad as the libel will warrant, or as are claimed on the argument on behalf of the libellants.

The libel prayed a warrant of arrest in due form of law according to the course of the court in causes of admiralty and maritime jurisdiction against all the defendants, and that if they cannot be found that their goods and chattels within this district may be attached to a sufficient amount to answer the libellants, and that payment may be decreed the libellants for the amount of their debt with interest and costs. Upon filing the libel the libellants obtained from the clerk, without mandate of the judge, the ordinary mesne process for the arrest of the persons of the respondents, commanding the marshal to arrest them and have their bodies before the court on a day named, to answer the libel; with a clause thereto annexed that "if the said respondents, or any of them, cannot be found in your district, you are hereby commanded that you attach the boat Naushon her tackle, etc., as the property of the said respondents, to compel their appearance." The marshal returned the process, with the return endorsed thereon: "Defendants not found. I have attached the steamboat Naushon as the goods and chattels of the within named debts." On filing this return an order was obtained of the proctors for all the respondents except Worth that their appearance for said respondents be entered, and for a further day to answer. A motion is now made to vacate the attachment and deliver up possession of the steamboat to the respondents. The leading reasons assigned

[1] [No date is given in the original manuscript. 22 Betts, D. C. MS., includes cases from September, 1853, to January, 1857.]

for the discharge of the attachment are: 1. That the process is irregular, as being unauthorized by the practice of the court. 2. That Worth, one of the defendants, has no title to or interest in the vessel attached, and that she cannot be held in custody to compel his appearance. 3. That the defendants having appeared regularly and filed the stipulation required and put in their answer to the libel, the purpose of the attachment has been accomplished and its force expended.

The stress of the case is placed by counsel on both sides upon the last objection, and the judgment of the court is sought upon that to settle what is supposed to be an undetermined point of practice, whether an arrest of property under a warrant of foreign attachment effects a sequestration of the property seized to answer the final decree of the court; or whether its effect is limited to coercing the appearance of the debtor owner, and placing him within the control of the court the same as if brought before it by arrest of his body. Without then discussing the question of irregularity of process, or that of the ownership of the defendant Worth, I will dispose of the case upon the point of the right of the libellants to hold the steamboat under seizure to answer the debt they may on hearing establish against her owners. It seems to be not important now to attempt to ascertain precisely the form or operation of a similar process employed in the civil law against the effects of absent debtors, because from the time it was adopted in admiralty courts, to its recognition by the American tribunals, it seems to have been understood to perform but the single office of constraining the party proceeded against to appear and submit himself to the jurisdiction of the court in the cause for which it was issued. The like functions were attributed by the courts of common law to the writ of distringas or distress infinite, under which, progressing gradually from a nominal amount to embracing all the goods of an absent debtor, the courts compelled the party sued to appear, but the property seized was still not appropriated to the benefit of the creditor. Com. Dig. "Process," D 7. The writ of foreign attachment allowed against the goods of a foreign merchant found owing money in England charged with having robbed English merchants abroad, who failed obtaining redress there, was not improbably the foundation of the writ of foreign attachment established by the customs of London, and by which the property seized was detained under arrest to satisfy the judgment rendered against the debtor. Such is also the effect of an attachment of property authorized by the laws of several of the states of the Union, as a process by which the action is imitated. But the supreme court has settled the point in our practice that the admiralty writ of attachment is not borrowed from or in imitation of the foreign attachment under the custom of London. [Manro v. Almeida] 10 Wheat. [23 U. S.] 490. The supreme court rules of admiralty practice have legislated into authoritative use this long known process (rule 2), and the rule has also pointed out the terms of the writ, but has not defined its operation. Rule 2 declares: "In suits in personam the mesne process may be by a single process or arrest of the person of the defendant in the nature of a capias, or by a warrant for the arrest of the person of the defendant with a clause therein, that if he cannot be found to attach his goods or chattels to the amount sued for." In the English practice the attachment process followed that for the arrest of the defendant, and was issued upon the return of the first, that the defendant has absconded or was concealed so that he could not be arrested (Clarke, Praxis Adm. tit. 28), and this is so in the Massachusetts district (Dunl. Adm. Pr. 137, 139).

This court decided in 1840 that a foreign attachment is not to be regarded a proceeding in rem, arresting the property as initiatory to the commencement of a debt, but as a collateral proceeding, and for an object different from that of subjecting the property to the demand. Cole v. The Brandt [Case No. 2,978]; Betts' Adm. Pr. 28, 30, 33. This it appears to me is the light in which the process has been viewed in the admiralty courts of this country and in the English practice. Bouysson v. Miller [Case No. 1,709]; Dunl. Adm. Pr., Conk. Pr. 478; 2 Browne, Civ. & Adm. Law, 435. It is, however, not necessary to trace back the origin or ancient application of the writ, or consider the manner in which other courts of admiralty have employed it. The decision of the supreme court of the United States in Manro v. Almeida, 10 Wheat. [23 U. S.] 476, settles with entire precision that its object and effect is to compel the appearance of the defendant. Id. 489, 493, 494. And rule 26 of this court provided that the attachment may be dissolved on the party giving a stipulation with sureties to the same effect as in cases of arrest. If the defendant fails to appear, then undoubtedly the arrest of the property will remain under the attachment to the final decision of the case, when it may be made to satisfy the decree. Clarke v. New Jersey Steam Nav. Co. [Case No. 2,859]. But then I apprehend it will not be condemned to that end by the court, but it must be proceeded against by suit of execution,—when the right of ownership of the defendant may be inquired into and determined. Three of the defendants having entered their appearance in the cause, the attachment is practus officio as to them, and their motion to discharge the property, so far as their interest is concerned, must prevail. Rule 26. The plaintiff has, however, a right to retain it as to Worth until his right of property in the steamboat is determined, unless he duly enter his appearance also to the action. The real owner is entitled to intervene and contest the possession or interest of Worth in the vessel. Order accordingly.

Case No. 4,534.

Ex parte ESTABROOK.

In re WOOD & LIGHT MACH. CO.

[2 Lowell, 547; 15 Alb. Law J. 271; 24 Pittsb. Leg. J. 152.][1]

District Court, D. Massachusetts. Feb. 1877.

CORPORATIONS — POWER OF TREASURER TO GIVE NEGOTIABLE NOTES—ACCOMMODATION OF THIRD PERSONS—BONA FIDE PURCHASER.

1. The treasurer or manager of a manufacturing corporation, established by the laws of Massachusetts, has authority, by virtue of his office, to give negotiable notes in the prosecution of the business of the company, but not for the accommodation of third persons. If such an officer gives a note without authority, it is valid in the hands of an innocent purchaser for value before maturity.

[Disapproved in National Park Bank v. German-American Mut. Warehousing, etc., Co., 116 N. Y. 293, 22 N. E. 567.]

2. A bona fide puchaser is not bound to inquire into the character of a note which on its face is valid.

3. Circumstances that would put a prudent man on inquiry will not affect the title of the purchaser of a note before maturity, if he did not in fact know of any defect in the title.

Estabrook & Smith, bankers or brokers, of Worcester, offered for proof against the estate of the Wood & Light Machine Company five notes, signed by Richardson, Meriam, & Co., and indorsed by the bankrupt company, by their treasurer, and duly protested for non-payment. The corporation was a manufacturing company, organized under the general law of Massachusetts, and consisted of four persons, who had formerly composed a firm. There was evidence tending to show that the notes were indorsed by the corporation for the accommodation of Richardson, Meriam, & Co.; that all the members of the company were aware of the course of dealing with that firm, and one of them objected or advised against it, because he thought it unsafe; that there was a by-law of the company forbidding any officer or member from using the name of the corporation for any other than the legitimate business of the corporation. There was evidence that the petitioners bought the notes of the promisors for value, before they were due, but at a considerable discount; that statements were made at some time by the promisors, though not, perhaps, with reference to these particular notes; that the parties had close business relations with each other.

G. F. Verry, for proving creditors, cited Monument Nat. Bank v. Globe Works, 101 Mass. 57.

T. L. Nelson, for assignee, cited Torrey v. Dustin Monument Ass'n, 5 Allen, 327; Eastman v. Cooper, 15 Pick. 276; Shaw v. Spencer, 100 Mass. 382; Williams v. Cheney, 8 Gray, 206; Smith v. Livingston, 111 Mass. 342.

LOWELL, District Judge. It is admitted by both parties that the treasurer or manager of a trading corporation may, by the law of Massachusetts, bind the company to the payment of promissory notes made in pursuance of the business of the company; and that he has no such authority in respect to notes given for the accommodation of third persons. If, however, a note of the latter kind is held by an indorsee, who took it for value before it was due, and without notice, his title is good. Monument Nat. Bank v. Globe Works, 101 Mass. 57.

So much being granted, the decisions of the supreme court of the United States have established two rules which must govern this case.

1. The first is thus stated by Mr. Justice Clifford, for the court: "The repeated decisions of this court have established the rule, that, when a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other negotiable paper." Lexington v. Butler, 14 Wall. [81 U. S.] 282, 296, citing Gelpecke v. Dubuque, 1 Wall. [68 U. S.] 203; Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Supervisors v. Schenck, 5 Wall. [72 U. S.] 784; Bissell v. Jeffersonville, 24 How. [65 U. S.] 287.

2. It is argued, and there is some evidence tending to prove, that the fact that a note is offered for sale or discount by the promisor has a tendency to excite the suspicion that it is indorsed for his accommodation, and to put the buyer on inquiry. Granting that this is true, and, for the purposes of this case, that the conversations testified to do not prove a sufficient inquiry to satisfy an inquisitive mind, yet here, again, the decisions of the highest court are, that a failure to inquire, or negligence of any degree, will not invalidate the title of the holder, unless they convict him of actual knowledge, or of a wilful negligence amounting to fraud. Goodman v. Simonds, 20 How. [61 U. S.] 343; Murray v. Lardner, 2 Wall. [69 U. S.] 110; Michigan Bank v. Eldred, 9 Wall. [76 U. S.] 544; Hotchkiss v. National Banks, 21 Wall. [88 U. S.] 354.

These authorities are decisive, unless I should be satisfied of knowledge or fraud in fact, which I am not, and which was not seriously imputed to these creditors in argument.

Debt admitted to proof.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 15 Alb. Law J. 271, and 24 Pittsb. Leg. J. 152, contain only partial reports.]

Case No. 4,535.

ESTABROOK et al. v. DUNBAR et al.

[2 Ban. & A. 427;[1] 10 O. G. 909.]

Circuit Court, D. Massachusetts. Sept. 23, 1876.

PATENTS—VALIDITY—INFRINGEMENT — CONSTRUCTION OF CLAIMS.

1. The patent granted to Joseph M. Estabrook, December 29th, 1868, No. 85,374, *held* valid, and upon the construction given to the patent by the court, the defendants *held* not to have infringed.

2. The claim of the patent for "the self-clinching metallic screw-peg A, having a flattened wedge-shaped end, whereby, as it strikes the metal plate upon the last, in the act of driving, it is adapted to be bent down into the inner sole of the boot or shoe, as herein shown and described" construed in view of the state of the art, a claim for a self-clinching metallic screw-peg A, (i. e., one having a body retaining substantially the same size and strength from the head to the clinching point) such body being serrated or corrugated, and having a flattened wedge-shaped end whereby, as it strikes the metal plate upon the last in the act of driving, it is adapted to be bent down into the inner sole of a boot or shoe, so that the flattened wedge-shaped end or point alone will bend over the inner sole to form a clinch, and so that the comparatively very rigid body of the screw-peg will not cripple or tend to force the sole off the last again. And *held*, that thus construed, it is not infringed by the defendants' nail which is cut tapering from the driving to the entering end of the nail without any such wedge-shaped flattened end or point separate from the body of the nail or peg.

[Cited in Dunbar v. Albert Field Tack Co., 4 Fed. 543. Explained in Dunbar v. Estabrook, Id. 546.]

3. Where the patentee, in the specification, claims to have invented the art of driving into the leather such screw-pegs with wedge-shaped ends, and again refers to his "improved process," his technical claim being not for an art, but for the thing manufactured—his newly invented screw-peg, the technical claims are to be construed with reference to the state of the art, and in connection with the specification, so as to limit the patentee to, and to give him the full benefit of, the invention he has made and described.

[Cited in Schillinger v. Gunther, Case No. 12,456; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 30.]

4. General and sometimes special words in the claims must receive such a construction as may enlarge or contract the scope of the claim so as to uphold that invention, and only that invention which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim.

[Cited in Clark v. Kennedy Manuf'g Co., Case No. 2,826; Union Paper-Bag Mach. Co. v. Pultz & Walkley Co., Id. 14,393; Fitch v. Bragg, 8 Fed. 590; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 30.]

[In equity. This was a suit by Joseph M. Estabrook and others against William H. Dunbar and others for the alleged infringement of a patent.]

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

J. E. Maynadier, for complainants.

B. F. Thurston and W. W. Swan, for defendants.

SHEPLEY, Circuit Judge. The invention of Estabrook is thus described in his patent, No. 85,374: "Its object is to facilitate the attachment of soles to the uppers of boots and shoes, and consists in the construction of a screw-peg having a flattened wedge-shaped point, which, when the peg is driven into the sole of a boot or shoe, will strike against the metal plate upon the last, and bend over the inner sole to form a clinch."

He then describes his screw-peg as made of round or other wire, which is provided with a screw-thread and a flattened, wedge-shaped point. When this wedge-pointed peg is forced by a hammer or other equivalent instrument through the holes made by awls or otherwise in the soles of boots or shoes properly lasted, it will, when it strikes the metal-covered last, have its weak point bent down, and will therefore be properly clinched over the insole. He does not claim that wire provided with a screw thread was new as a fastening to confine the soles of boots and shoes to the uppers, and admits that screws had been used for that purpose, but claims that these screws were screwed into their seats, that they were of conical shape, and could never be satisfactorily fastened. He states that when one of these screws was turned a little too far, so that its flat point struck the last, it would invariably tend to force the sole off the last again, and that thus a water-tight boot or shoe could not be produced. He continues—"Furthermore these screws had to be made tapering, and thus became weak on their inner ends, while my pegs can be made entirely cylindrical or prismatic." He claims to have invented—"The driving of screw-pegs having flattened or wedge-shaped ends into the leather by means of a hammer, and to have found that the peg when thus applied will hold as fast as when screwed in. The leather being wet when the peg is applied will close tight around the peg, and will hold the same very securely. The clinching wedge-shaped pegs are self-adjustable—that is, they will be clinched more or less as they are more or less too long."

Although in the specification he claims to have invented the art of driving into the leather such screw-pegs with wedge-shaped ends, and again refers to his "improved process," his technical claim is not for an art, but for the thing manufactured—his newly invented screw-peg. Most of the questions presented at the hearing of the cause depend for their solution upon the construction to be given to his claim. The claim is in these words: "The self-clinching metallic screw-peg A, having a flattened wedge-shaped end, whereby, as it strikes the metal plate upon the last, in the act of driving, it is adapted to be bent down into the inner sole of the

boot or shoe, as herein shown and described."

The technical claims in a patent are to be construed with reference to the state of the art so as to limit the patentee to, and to give him the full benefit of, the invention he has made. They are also to be construed in connection with the specification, so as to limit the patentee to, and give him the full benefit of, the invention he has described.

The general terms, and sometimes special words, in the claims, must receive such a construction as may enlarge or contract the scope of the claim, so as to uphold that invention and only that invention which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim.

Before Estabrook made his invention, shoe-nails and metallic shoe-pegs having a clinching-point had been in common use. They were like the defendants' nails, except that they were without corrugations. Prior to the date of complainants' invention nails and tacks with clinching-points had been used in various kinds of wood and leather work. Shoe fastenings of metal, having serrations upon the bodies of the nails, had been used. Screws of a conical shape had been used for fastening the soles of boots to the uppers, which screws were screwed into their seats. Cylindrical metallic shoe-pegs had been made with an exterior screw-thread. There was also in use a corrugated nail, which was well known under the name of the imported sprig. This nail had a uniform diameter from the head to the point. The head was of the usual and common form; the point was conical or four-sided; the body was corrugated or serrated, but not in the form of a true screw. The imported sprig differed from the complainants' patent screw-peg in three particulars, which (without at this time distinguishing what were material and what immaterial differences) were: first, the imported sprig had a head, the patented screw-peg is represented and described as headless; second, the imported sprig had a conical or four-sided point, apparently designed only for facilitating the insertion and driving of the nail, the patented screw-peg had a flattened wedge-shaped end, with a chisel-point, intended to bend and clinch; third, the body of the imported sprig was serrated or corrugated, while the body of the patented screw-peg is represented with a true screw-thread.

There was also in use the cable-screw fastening, which differs in form from Estabrook's only in the fact that Estabrook's has a clinching-point, while the cable screw-peg is so blunt at the entering end (which is a wedge whose sides are at an obtuse angle) that it cannot possibly clinch without crippling the peg, and will not take up the settle of the stock. It is obvious, from this reference to the state of the art, that the claim of Estabrook must be limited to that form wherein his screw-peg differed from those shoe-fastening screws, nails, and pegs previously in use, to which reference has been made.

The description of the Estabrook invention given by Wires, the complainants' expert, is substantially accurate when he says that—"The invention consists in a peg made of tough malleable metal, with threads or projections upon the body, with a flattened wedge-shaped clinching-point, and the body enough stronger than the point so that, when it is driven into or through the sole of a boot or shoe, and comes in contact with the iron face of the last, the point will bend over and clinch back on to the inner sole, and thereby force the stock back upon the threads or projections on the body of the nail, and thereby take up the settle and adapt itself to the varying thickness of the leather without crippling the body of the nail."

To this definition of the invention should be added that this result was effected by Estabrook by an improvement in the form of the previously existing screw-peg and cable-screw, which improvement in form consisted, first, in substituting for a tapering form of the body of the screw a body having substantially the same size in cross-section, and substantially the same strength from the head end to the commencement of the "point" (using point in its technical sense) at the other end of the screw-peg; and, secondly, in providing a flattened wedge-shaped "point" so very much weaker than the body of the screw that the whole clinch, when the peg is driven against the armour of the last, shall be made by the bending of the wedge-shaped point, without crippling the body of the peg.

It is now obvious that the claim of Estabrook is to be construed as a claim for a self-clinching metallic screw-peg A (i. e., one having a body retaining substantially the same size and strength from the head to the clinching-point), such body being serrated or corrugated, and having a flattened wedge-shaped end whereby, as it strikes the metal plate upon the last in the act of driving, it is adapted to be bent down into the inner sole of a boot or shoe, as in the patent is shown and described, i. e., so that "the flattened, wedge-shaped end or point" alone will "bend over the inner sole to form a clinch," and so that the comparatively very rigid body of the screw-peg will not cripple or "tend to force the sole off the last again." This secures to Estabrook his invention, and limits him to the invention which he actually made—an improvement upon the shoe-peg made of wire, with a corrugated, serrated, or screw-threaded body, of substantially uniform size from head to point, by adding to it a flattened wedge-shaped end, forming a clinching-point, which bends down into the inner sole without crippling the body of the screw-peg.

The defendants make and sell a shoe-nail scarcely distinguishable, except in the form

of the head, from the Field nail, so called, and other tapering and corrugated nails which were in common use. So far as the defendants' nail differs in form from nails which were old, it is merely an attempt to improve upon the form of the old corrugated, tapering-cut shoe-nail. It is not like the complainants', an improvement in the screw made by cutting off lengths of cable wire, or corrugated wire, and forming a point on one end of each piece by cutting away the metal upon opposite sides so as to form a thin wedge-shaped end with concaved sides. The two improvements relate respectively to different points of departure from entirely distinct manufactures. One vital distinguishing difference between the complainants' screw-peg and the Whidden nail is, that the complainants' screw-peg has a body continuing of the same size without tapering from the driving end to the commencement of the entering and clinching point, and this is a vital and important element in this invention, while the defendants' nail is cut tapering from the driving to the entering end of the nail without any such wedge-shaped flattened end or point, separate from the body of the nail or peg, as distinguishes the complainants' invention. Other differences are clearly pointed out in the testimony of Mr. Waters and Mr. Hibbard, the experts on the part of the defendants, who have given a very clear and accurate history of the state of the art. The differences, however, which I have pointed out are sufficient to prove that the defendants' nail is not an infringement upon the complainants' screw-peg. I find myself unable to give any construction of the complainants' patent for a manufactured article which would cover the defendants' manufacture without at the same time embracing what was older than complainants' invention, and thus invalidating their patent. The conclusion to which I have arrived is that the complainants have a good and valid patent, but that the defendants have not infringed.

Decree in favor of defendants to be drawn up and submitted to the court.

ESTATE OF.

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

ESTERBROOK STEEL-PEN MANUF'G CO. (MORSE FOUNTAIN-PEN CO. v.). See Case No. 9,862.

Case No. 4,536.

In re ESTES et al.

[See 3 Fed. 134.]

ESTEY (BURDETT v.). See Cases Nos. 2,145 and 2,146.

Case No. 4,537.

ESTHER et al. v. BUCKNER.

[4 Cranch, C. C. 253.] [1]

Circuit Court, District of Columbia. Nov. Term, 1832.

SLAVERY — REMOVAL TO THE DISTRICT OF COLUMBIA—FREEDOM.

1. A citizen and resident of Virginia commenced, bona fide, removing his furniture and family to Washington, D. C., in November, 1826, and continued such act of removal bona fide, at intervals during the month of December and up to January 7, 1827, and then, within one year thereafter, introduced the petitioners into the county of Washington, D. C. The court *held* that the petitioners were not thereby entitled to freedom.

2. But, if he did perfectly, entirely, and completely remove to the city of Washington, and had rented a house and put some part of his family and furniture into it, and claimed the privileges of a resident of that city on or before November, 1826, although he had not removed all his family and property, it was competent for him to bring the rest of his family and furniture to Washington after his removal, and his so bringing them after his said removal, did not prevent his being a resident on or before November, 1826.

Petition for freedom [by Esther, a negro, and her two children]. Evidence was offered to the following effect: The petitioners were brought in from Virginia on the 6th of January, 1828. The defendant [Bernard H. Buckner], then owner of the petitioners, came to Washington on the 3d of November, 1826, with intent to remove and settle there, and had some of his household furniture in one of the houses called the seven buildings, in that city; and some of his family, namely, two daughters, and some of his servants resided there. His wife and some of his children and some of his furniture did not arrive until about the 7th of January, 1827. The defendant had, (on the 3d of November, 1826, in order to be able to hire his slaves in this District without incurring the fine of $20 each, imposed upon slaves of non-residents hired out in the city, by a by-law of the corporation of Washington,) given a list of his slaves, agreeably to that by-law; in which he calls himself Ariss Buckner, residing in the first ward; and, on the 7th of January, 1828, he gave a like list of other slaves brought in within twenty days preceding that date. This last list included the petitioner, Esther, and her two children.

Upon trial of the cause, on the general issue, R. S. Coxe, for the defendant, prayed the court to instruct the jury, that if they should believe, from the evidence, that Mr. Buckner, being a citizen and resident of Virginia, in the month of November, 1826, commenced, bona fide, moving his furniture and family, and continued such act of removal, bona fide, at intervals during the month of December, and up to January 7, 1827, then the petitioners, having been intro-

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

duced into the county of Washington, within one year thereafter, are not entitled to recover; which instruction THE COURT (CRANCH, Chief Judge, contra,) gave.

Whereupon, Mr. Key, for the petitioners, prayed the court to instruct the jury, and they did so instruct them, that if they believe from the said evidence, that the defendant did perfectly, entirely, and completely remove to the city of Washington, in or before November, 1826, (although he had not removed all his family and property,) and claimed the privileges of a resident of that city at that time; and had rented a house and put some part of his furniture and family into it; then it was competent for him to bring the rest of his family and furniture to Washington, after his removal; and his so bringing them here, after his said removal, does not prevent his being a resident before.

Verdict for the petitioners. The defendant moved for a new trial, which was refused.

ESTHER (LEWIS v.). See Case No. 8,322.

Case No. 4,538.

ESTILL et al. v. BLAKEMORE.

[Brunner, Col. Cas. 100;[1] 1 Overt. 273.]

Circuit Court, D. Tennessee. June, 1808.

BREACH OF COVENANT IN CONVEYANCE—MEASURE OF DAMAGES.

In an action for breach of a covenant that lands conveyed are of a certain quality, the measure of damages is the value of the land at the time of the covenant broken or date of the deed.

Covenant that a tract of land should be of a certain quality, and to execute a deed, which had been done some time since, but the bond or covenant retained. The declaration for breach stated that the land was not of the value convenanted. The question with the court and jury was, whether the value of the land should be estimated at the time of the conveyance in this case, or covenant broken, or at the time of rendering the verdict.

M'NAIRY, District Judge, said he had understood the practice in the state was to assess the damages in such cases, according to the value at the time of the verdict; but he much doubted whether such practice was legal or not.

TODD, Circuit Justice. Cases have been decided in New York, Pennsylvania, Connecticut, and Virginia, contrary to the practice here, as stated. The practice here, therefore, is very doubtful, and I am strongly inclined to think it is not law.

M'NAIRY, District Judge. It would seem that we could not with propriety depart from the practice in the state without further argument.

THE COURT left the decision to the jury without any particular directions. The jury found a verdict for the plaintiff, and Grundy, for the defendant, moved for a new trial upon the ground of excessive damages.

SED PER CURIAM. The damages are not excessive, nor more, it is believed, than the value of the land, estimated at the time of the covenant broken, or date of the deed, and interest. (Ex relatione, Mr. Grundy.)

NOTE [from 1 Overt. 273]. The practice of the state, as referred to in this case, is certainly repugnant to the authorities. Vide Act 1786, c. 4, § 5, Ird. 577; Humphries v. Knight, Cro. Car. 455; 4 Moore & P. 370; Speake v. Speake, 1 Vern. 217; Berty v. Dormer (per Holt, C. J.) 12 Mod. 526; Staats v. Ten Eyck's Ex'rs, 3 Caines, 111; Bender v. Fromberger (Sup. Ct. Pa., Jan., 1807) 4 Dall. [4 U. S.] 436; Lowther v. Com., 1 Hen. & M. 202; 1 Reeve, Eng. Law, 444, 447, 448; Flureau v. Thornhill, 2 W. Bl. 1078; Kames, Eq. 206–225; 21 Vin. tit. "Value;" Cox v. Strode (Ct. App. Ky., Fall term, 1810) [2 Bibb. 273].

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Case No. 4,539.

ESTILL v. DOLL.

[Nowhere reported; opinion not now accessible.]

ESTUDILLO (UNITED STATES v.). See Case No. 15,058.

ETCHESON (WORTHINGTON v.). See Case No. 18,053.

ETHAN ALLEN, The (UNITED STATES v.). See Case No. 15,059.

Case No. 4,540.

The ETHEL.

FIVE HUNDRED AND ELEVEN TONS OF NITRATE OF SODA.

[5 Ben. 154.][1]

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

CHARTER PARTY AND BILL OF LADING—DEVIATION—DAMAGE TO CARGO—DESERTION OF CREW.

1. A bark, which was on her way to the port of Caldera, a short distance from Valparaiso, was chartered at Valparaiso to go, after delivering her cargo at Caldera, to Iquique or Junin, and take a cargo of nitrate of soda to be delivered at New York. The charter contained a clause that the vessel was "well and sufficiently manned, stored and victualled, and in every respect fit to perform the voyage," and also a clause "dangers of the seas and navigation, from the signing of the charter party till the conclusion of the voyage, excepted." The bark at the time had a full crew of twelve, all told, but two of the men were shipped only for the run to Caldera. By sickness and desertion the crew became insufficient for the voyage round the Horn, and after taking in the cargo at Junin, the master went to Valparaiso, where he got a crew and sailed for New York, but was driven back by stress of weather, having been compelled to jettison part of the cargo. The vessel

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

sailed again from Valparaiso, but the crew mutinied, and compelled her master to put back again, when a new crew and a new master were put on board, and the vessel made the voyage to New York, and there delivered all of her cargo not jettisoned. The owners of the vessel libelled the cargo for freight, and the consignees of the cargo libelled the vessel for loss of and damage to the cargo. *Held*, that, as the consignees had notice of the charter party, by the reference to it in the bill of lading, the charter party alone was to be looked to as the contract of the parties.

2. The going to Valparaiso from Junin was a deviation.

3. The covenant for a ship well manned for the voyage attached at Caldera, and the duty of performing that covenant was not affected by the fact of the execution of the charter at Valparaiso, the bark then being at sea, bound to Caldera. Seamen might have been procured at Valparaiso and sent to Caldera by steamer.

4. The failure to have a sufficient crew was the cause of the deviation, and was no justification for it.

5. Desertion of seamen is no peril of the sea.

6. The vessel was liable for all the loss and damage to the cargo after the vessel sailed.

7. The owners of the cargo could not split up their demand, and apply part of it as an offset to the freight, but they must recover their damages, and the vessel her freight.

In admiralty.

C. Donohue, for consignees.
R. H. Huntley, for the bark.

BENEDICT, District Judge. These are two actions heard together, the second of which is brought by the owners of the British bark Ethel against the cargo of that vessel, to recover upwards of $6,000 of freight, claimed to be due upon a charter party. The other is brought by the consignees of the same cargo against the bark to recover upwards of $20,000, for damages arising from short delivery and deterioration in that cargo.

The charter party in question was executed at Valparaiso on the 22d of February, 1870, by the agents of the ship on the one side, and Hainesworth & Co., of Valparaiso, as charterers, on the other. The bark was not then at Valparaiso, but was on her way to the port of Caldera, laden with a cargo deliverable there. Among other things, the charter party provided that the said vessel, "being tight, staunch, and strong, well and sufficiently manned, stored and victualled, and in every respect fit to perform the voyage shall, with all convenient speed, after discharging her present inward cargo, at the port of Caldera, proceed to the ports of Iquique or Junin, and in all or either of said ports, take in a full and complete cargo of nitrate of soda in bags, bills of lading for which to be signed by the master, weight and quality unknown, all on board to be delivered." When loaded as aforesaid, the bark was to proceed with all convenient speed to the port of New York, and there deliver the cargo, and so end the voyage—dangers of the sea and navigation, from the signing of the charter party till the conclusion of the said voyage always excepted. In consideration of all which, the charterers agreed to pay for the freight of said vessel, on the true and right delivery of the cargo in New York, "according to the bill of lading and charter party," for each ton forty-five shillings sterling. At the time of the execution of this charter party the ship was provided with a full crew of twelve, all told—two of the seamen, however, being engaged only for the run to Caldera. These two left the ship there, one man deserted, and one man became too sick to be able to work. The vessel procured a single man, and thus provided with a crew of only nine men, all told, left Caldera. Upon arrival at Iquique she was directed to proceed to Junin, there to load according to the charter party. On the 20th of March she arrived at Junin, and commenced taking in cargo, and completed it on the 6th of April. On the 3d of April two more of her seamen deserted, reducing her crew to seven men, all told. After the loading was completed, the master made efforts to supply the deficiency in his crew, but succeeded in obtaining only one man, and was without a crew sufficient to navigate the vessel safely around Cape Horn. He accordingly proceeded from Junin to Valparaiso, in order to fill up his crew there. This was done, and sailing thence for New York, the vessel met with disastrous storms, compelling the jettison of a portion of the cargo, and a return to Valparaiso for repairs. These completed, she again set sail for New York; but the crew soon after mutinied, and forced the master to return to Valparaiso, where another crew was shipped, and another master put on board, under whose command the vessel proceeded to New York, and there safely arrived and delivered the portions of her cargo not jettisoned.

Upon this state of facts, the owners of the vessel claim to be entitled to recover the amount of freight due for the cargo delivered, and a general average contribution towards the expenses caused by the disasters which ensued after leaving Valparaiso; while, on the other hand, the consignees of the cargo deny any liability for freight or general average, and claim to recover of the vessel all the damages and loss sustained by the cargo after its leaving the port of Junin, upon the ground that the vessel unlawfully deviated from the voyage as provided in the contract, by going to Valparaiso.

In determining the legal liabilities which arise out of the facts which these cases disclose, I remark, first, that the bill of lading, given at Junin under the circumstances proved, amounts to no more than a receipt to indicate the quantity of cargo shipped in pursuance of the charter party, of which the consignees had notice by the provision in the bill of lading, that the freight was to be paid as per charter party. Accordingly the

charter party alone is to be looked to for the contract of the parties. By the charter party the ship owner covenanted that the bark, being well and sufficiently manned, with all convenient speed, after discharging her inward cargo at Caldera, should proceed to Junin, and having there taken in a full cargo, proceed thence with all convenient speed to the port of New York, and there deliver the cargo, and so end the voyage.

This was a contract to proceed from Caldera to Junin, and from Junin direct to New York. Instead of which the vessel went from Junin to Valparaiso, and thence to New York. This was a clear failure to perform the voyage contracted for, as there is no evidence of any usage for vessels bound round the Horn to stop at Valparaiso; and the question is whether it can be held to be excused by the facts in proof. It is not necessary in this case to question the proposition that a deviation may be excused by showing that it was compelled by accident or misfortune, not arising from any fault of the ship owner or his servants. Here the evidence shows that the only circumstance which led to the deviation was the failure to provide, at the outset of the voyage, a sufficient crew to navigate the vessel round the Horn. The facts in respect to the crew are not in dispute. A full crew consisted of twelve, all told, that is, of eight men before the mast, besides the cook; but when the vessel sailed from Caldera she had but five men before the mast. According to the charter party, although the cargo was to be taken in at Junin (or Iquique), the voyage was to commence at Caldera, and at that place and time the covenant for a ship, well manned for the intended voyage, attached. It was, therefore, a manifest violation of the contract to sail from Caldera with such an insufficient crew.

It is true that the charter party was signed in Valparaiso when the vessel was on her way to Caldera, and then the vessel had a full crew. But two of the crew were shipped by the run. It was, therefore, then known that she would have at least two men short at Caldera. The ship owner is chargeable with the knowledge of the facilities for obtaining men at Caldera, which is but a few days' sail by steam from Valparaiso; and the risk of obtaining there a sufficient number of men to constitute a full crew for the voyage was assumed by the ship. If it had been intended to cast that risk upon the charterer, a clause to that effect should have been inserted in the charter party.

Furthermore, the evidence shows that although more seamen were not to be obtained at Caldera when the vessel was ready to sail, they could always be obtained at Valparaiso and sent to Caldera by steamer. It is evident from the testimony that this mode of procuring seamen was well known and entirely feasible at Caldera. Instead of pursuing this course, and thus complying with the provisions of the charter party, as might easily have been done, the master commenced his voyage with a short crew, trusting to the chance of procuring the necessary men at the other ports to be visited before leaving the coast for New York. In so doing a risk was incurred which could not be transferred to the charterer without his consent.

This failure to have on board a full crew at the commencement of the voyage was the sole cause of the deviation, which subsequently became necessary when it was ascertained that seamen could not be procured along the beach to fill up the crew, and being without excuse affords no justification for the deviation. Accordingly, the ship became thenceforth an insurer of the cargo, liable for all damages sustained by it during the subsequent and new voyage.

But it has been contended that the evidence shows that the crew with which the ship sailed from Caldera, although not of the number usually carried by this vessel, was sufficient to navigate the vessel safely around the Horn, and rendered her seaworthy for such a voyage; and that the vessel would have proceeded from Junin to New York direct with that crew, had it not been for the desertion of two men at Junin when the cargo was nearly loaded, and where the master, after due exertion, could only procure a single man. It is claimed, therefore, that in view of this misfortune, the master exercised his best judgment, and rightly concluded that it was for the interest of all concerned, that the ship proceed to Valparaiso for the purpose of making up the deficiency occasioned by the desertion, and that the deviation is thus excused.

To this argument there are two answers, and that without calling in question the correctness of the master's conclusion as to his best course to procure a crew, after the desertion of the men at Junin. First, only two men deserted at Junin, and if the vessel had been well and sufficiently manned when she commenced the voyage at Caldera, the desertion of two men at Junin would not have prevented the completion of the voyage contracted for. Second, desertion of seamen is not a peril of the sea, nor does it afford an excuse to the carrier for a failure to perform his contract. Seamen are servants of the ship owner, necessary to insure the performance of the voyage. It is the duty of the ship owner, at the outset of his voyage, to provide a proper number of them, properly bound to the ship. He must see to it, that his contract with them is kept during the voyage so as to afford no justification for desertion, and he is by law armed with power to prevent unjustifiable desertion as well as to reclaim deserters. When he charters his ship, and covenants to keep her well and sufficiently manned, he assumes the risk of being able, by those means, to retain on board the seamen necessary to sail the ship.

This risk it is entirely competent for him to guard against by a special provision in his contract, when the voyage is such as to make the risk too onerous. But in the absence of such provision, it would hardly do to hold the ship excused from making the voyage, because the sailors ran away. If such were the law, the freighter would be left without protection, for he has no power to select or control the crew. A wide door for fraud would at once be opened, as the ship master could easily so conduct himself as to insure a desertion of the crew at any port where it might be desirable, or could easily afford opportunity for its occurrence with no possible chance of detection by the charterer.

No case has been cited where such an excuse has been held valid, and I know of none. The decision in the case of The Gentleman [Case No. 5,324], to which reference was made, furnishes no authority in support of this defence, and the same remark is applicable to the case of The Eliza [Id. 4,348], which might be referred to as a case somewhat similar to the present in some of its features.

The liability of the ship owner for losses like the present seems clearly established by the French authorities on maritime law. There losses arising from desertion, revolt or insubordination of the crew, are declared not to be losses arising from any peril of the seas, but to be chargeable to the owner. They are classed as arising from barratry of the master—a phrase which, in the French law, has an extended signification, and includes not only crimes and offences, but violations of duty by the master and also by the crew. Code de Com art. 350, 353; Boulay-Paty, p. 370; Bedarride, Code de Com. lib. 2, tome 4, arts. 1269–1271. The rule thus declared seems to me in harmony with the well settled principles of the maritime law. My conclusion, therefore, is that the circumstances proved in this case do not, according to the maritime law, afford a justification for the failure to make the voyage contracted for, and that the consignees of the cargo are entitled to recover of the bark all the loss and damage to the cargo after the vessel sailed from Junin. They cannot, however, split up their demand for damages, and apply a part of it to offset the ship's demand for the freight, but must suffer a recovery of the freight in the action brought by the owners of the bark. The Water Witch, 1 Black [66 U. S.] 494.

A decree will accordingly be entered in the first named action for the amount of such damages, with an order of reference to ascertain the amount. And in the action of the ship owner a decree will be entered for the amount of the freight, according to the charter party, with a like order of reference.

ETHRIDGE v. EIGHMEY. See Case No. 1,928.

Case No. 4,541.

ETHRIDGE v. JACKSON et al.

[2 Sawy. 598;[1] 19 Int. Rev. Rec. 134; 1 Am. Law T. Rep. (N. S.) 271.]

Circuit Court, D. Oregon. March 31, 1874.

COSTS—FOLLOWING STATE PRACTICE.

1. Section 34 of the judiciary act—1 Stat. 92 [Rev. St. § 721]—adopts as "rules of decision" the law of the state regulating costs in the trial of common law actions in the United States courts, unless otherwise provided.

[Cited in Neff v. Pennoyer, Case No. 10,084.]

2. Section 3 of the fee act—10 Stat. 168 [Rev. St. § 983]—specifies what items of cost may be taxed in favor of the prevailing party in cases where, by the law of the state, such party is entitled to recover costs, and not otherwise, and impliedly denies costs to the losing party in any case, and, therefore, section five hundred and forty-one of the Oregon Code, which gives costs, of course, to the defendant, when the plaintiff is not entitled to them, does not apply to actions in the United States courts.

[Cited in Jerman v. Stewart, 12 Fed. 275; U. S. v. Treadwell, 15 Fed. 532. Followed in Richter v. Magone, 47 Fed. 195.]

This action was brought to recover $475 for the wrongful conversion, by the defendants, of seven hundred and fifty bushels of oats and the sacks containing them. It was tried by a jury, and a verdict given for the defendants. On a motion for a new trial, the court made an order setting aside the verdict and ordering a new trial, unless the defendants consented to the entry of a verdict for the plaintiff, for the wrongful conversion of sixty bushels of said oats, and thirty of said sacks, of the aggregate value of $27. The defendants consented, and the verdict was so entered. Thereupon the plaintiff moved for judgment on the verdict, with costs, to which the defendants objected, and moved that judgment be given for them for costs, because the verdict was for less than $50.

John A. Woodward, for plaintiff.
Walter W. Thayer, for defendants.

DEADY, District Judge. At common law costs were not given to either party. By 6 Edw. I. c. 1, commonly called the "Statute of Gloucester," costs were given in all cases to the party recovering damages, de incremento, as an increase, or increment of the judgment.

The act of February 26, 1853 (10 Stat. 168), provides what attorney's fees and items of expense are taxable as costs in the national courts. Dedekam v. Voge [Case No. 3,731]; Parker v. Bigler [Id. 10,726]; Lyell v. Miller [Id. 8,620]; The Baltimore, 8 Wall. [75 U. S.] 388.

The statute of Gloucester is considered a part of the law which our ancestors brought to this country from England, and is in force here, and governs the question who is entitled to costs in this case, unless a different

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

rule has been prescribed by statute. Hathaway v. Roach [Case No. 6,213]. There is no act of congress which directly declares which party is entitled to recover costs, except in a few special cases, of which this is not one.

In Hathaway v. Roach, supra (decided in 1846), it was held that by force of section 34 of the judiciary act, the law of the state applied and governed the question of costs generally.

In May, 1852, Mr. Justice Nelson delivered an "opinion," reported in appendix to 1 Blatchf. 652, in which he held that the right of the prevailing party to recover costs is recognized by the judiciary act, but the rule as to what items were taxable was the one prescribed by the state statute. But in the course of the opinion, it is assumed in opposition to the opinion in Hathaway v. Roach, that the question is one to be governed by the laws regulating the practice and proceedings of the court rather than section 34 of the judiciary act which furnishes the rule of decision in common law actions.

By section 5 of the act of June 1, 1872 (17 Stat. 197), it is provided that "the practice, pleadings and forms and modes of proceedings" in common law actions, in the United States courts, "shall conform" to that of the states where they are held. If the question of who is entitled to costs in a particular case is a question of practice, certainly it is not one of pleading or form or mode of proceeding. Then according to the opinion of Mr. Justice Nelson, supra, the subject is regulated by the law of the state.

But I think that giving or withholding costs in a particular case is not a mere matter of practice. Costs are of the substance of the controversy, and not the form. They are a part of the judgment, and affect the right of the party as well as the recovery of the principal sum or thing. Therefore I agree with Mr. Justice Woodbury, in Hathaway v. Roach, supra, that the subject of who shall recover costs in a common law action is within the purview of section 34 of the judiciary act, which provides: "The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply."

The cases upon this subject are meagre and not satisfactory or in accord. In my judgment, it is clear that the right to costs in this action—not the mere mode of taxing them or enforcing such right—depends upon the law of this state, because section 34 of the judiciary act makes such law the rule of decision herein—the rule by which the rights of the parties are ascertained and measured in respect to all matters which enter into and form a part of the judgment or are determined by it.

Substantially section 539 of the Oregon Code provides that in an action of this kind the plaintiff shall not be allowed costs unless he recovers fifty dollars or more; or unless "a claim of title or interest in real property, or right to the possession thereof, arises from the pleadings or is certified by the court to have come in question upon the trial." Section 541 enacts that "costs are allowed of course to the defendant in the actions mentioned in section five hundred and thirty-nine, unless the plaintiff be entitled to costs therein."

Unless, then, "a claim of title or interest in real property, or right to the possession thereof, arises upon the pleadings" in this case, it is plain that the plaintiff cannot recover costs.

The only allegations upon which it is claimed that any such question could arise, are the following:

1. The adjudication in bankruptcy against A. J. Fleming. 2. The appointment of plaintiff as his assignee. 3. The execution of the deed of assignment to plaintiff. 4. The recording of the same. 5. The ownership of the real property upon which the oats in question were grown by Fleming. 6. The entry and taking possession of the property by the plaintiff.

The fifth of said allegations is admitted, and thereby the defendants admit that the title to the real property was in the bankrupt at the time of the adjudication, and thereafter in the plaintiff, if, as he alleges, he is the duly qualified assignee.

The other five of said allegations are denied by the answer. Counsel for plaintiff maintains that such denials, taken together, amount to a denial of the plaintiff's title or right to the possession of the real property upon which the oats were grown, and upon which title or right he based his property in the oats.

The denial of the sixth of said allegations only raises the question of fact—Did the plaintiff enter and take possession of the premises? No question of title or right to the possession of the property is involved in that allegation. Pollock v. Cummings, 38 Cal. 684; Ehle v. Quackenboss, 6 Hill, 538; Muller v. Bayard, 15 Abb. Pr. 450; Burnet v. Kelly, 10 How. Pr. 406; Rathbone v. McConnell, 20 Barb. 314.

The other four allegations, taken together, simply allege in effect that the plaintiff was the duly qualified assignee of Fleming, in bankruptcy, and therefore entitled to maintain this action for the wrongful conversion of his property by the defendants.

Indeed, there was no necessity of alleging in detail the adjudication, the appointment of assignee, the assignment and the record thereof. As in the case of an executor or administrator, it was only necessary to state, "Ethridge, assignee of the estate of Fleming, a bankrupt (or duly adjudged a bankrupt), according to the statute in such case made and provided, complains of Jackson and Imbrie, for that," etc.

A "claim of title or interest in real property or right to the possession thereof" cannot be said to arise "upon the pleadings," unless such claim or right is averred therein upon the one side, and denied upon the other. Jackson v. Randall, 11 Johns. 405.

Section 3 of the act of 1853, supra, provides that "the bill of fees of clerk, marshal and attorneys, and the amount paid printers and witnesses, and lawful fees for exemplification and copies of papers necessarily obtained for use on trial, in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of the judgment or decree against the losing party."

The rule which prescribes in what cases "costs are recoverable in favor of the prevailing party" is the law of the state above cited. But who is to be considered the "prevailing party" within the meaning of this section?

In a general sense, the prevailing party in an action is the one for whom judgment is given concerning the matter or thing in controversy. In that sense the prevailing party in this case is the plaintiff, for he is entitled to judgment upon the merits for twenty-seven dollars. Still, by the state law, costs are not recoverable by him because his damages are less than fifty dollars. Nor do I think the defendants are entitled to costs. In this case section 541 of the Oregon Code, which gives costs, of course, to the defendant in an action, unless the plaintiff is entitled to them, does not "apply" because "a statute of the United States" otherwise provides. Section 3, supra, only gives costs to the prevailing party. They are to be "included in and form a portion of the judgment or decree against the losing party." The right of the losing party to costs is not recognized, but impliedly denied. These provisions are inconsistent with the idea that there may be a judgment for the plaintiff upon the merits and for the defendants for costs, as implied in section 541 of the Oregon Code.

In conclusion: 1. In the absence of any act of congress to the contrary, the party recovering damages in this court is entitled, by virtue of the statute of Gloucester, to recover costs without reference to the amount of such damages. 2. By virtue of section 34 of the judiciary act, section 539 of the Oregon Code, which in effect denies costs to the plaintiff in an action of trover, when he recovers less than fifty dollars, is applicable to this action. 3. Section 3 of the act of 1853, supra, specifies what items of costs may be taxed in favor of the prevailing party in cases where, by the Oregon Code, such party is entitled to recover costs, but impliedly denies costs to the losing party in any case; and, therefore, section 541 of the Oregon Code which gives costs, of course, to the defendant when the plaintiff is not entitled to them, does not apply to actions in the United States courts.

Let judgment be entered on the verdict for the plaintiff, without costs to either party.

Case No. 4,542.

The ETNA.

[1 Ware (462) 474.][1]

District Court, D. Maine. Nov. 20, 1838.

PARENT AND CHILD—RIGHT OF PARENT TO CHILD'S EARNINGS—ADMIRALTY PRACTICE—PROTECTION ACCORDED MINOR SUING BY HIS PROCHEIN AMI.

1. The right of a father to the fruits of his child's labor has its foundation in his obligation to protect, nurture, and educate his child. If he neglects these obligations, and abandons his child, he forfeits his right to his earnings.

2. A court of admiralty will interpose to protect the rights of a minor suing in that court by his prochein ami against the misconduct of such next friend, and will hold his acts in the conduct of the suit not conclusive on the rights of the minor, if he acts in bad faith, and especially if he colludes with the adverse party.

[Cited in The Melissa, Case No. 9,400.]

3. Where the father's name was used as prochein ami, and he settled the suit privately, without the knowledge of the minor's counsel, and gave a receipt in full, the receipt was set aside, and full wages decreed to the minor.

This was a suit brought by Edward Walker, a minor, who prosecuted by Joseph Walker, his father and next friend, for subtraction of wages. The libellant shipped April 15, 1838, for a voyage from this port to Norfolk, and thence to various ports in the southern states and back to Portland, where the vessel arrived August 31, when he was discharged. No shipping paper was signed, and there was no special agreement as to the amount of wages; and the parties disagreeing after the termination of the voyage, a libel was filed claiming under the act of July 20, 1790, § 1 [1 Stat. 131], the highest rate of wages paid at the time. The libellant had been previously engaged in the Grampus, another vessel belonging to the same owners, for a different voyage; but the mate of the Etna having absconded, he was with his own consent transferred from the Grampus to the Etna, and forthwith sailed, leaving his clothing on board the other vessel.

The owner in his answer admitted the service, and stated that not having the shipping paper in his possession, he was unable to state whether it was signed by the libellant or not, but alleged that he offered and tendered the wages at the rate of twelve dollars a month, which was as much as the libellant's service was worth, and brought the money into court. After the examination of several witnesses the cause was postponed, on the motion of the respondent, to give him time to procure the testimony of the master, and to ascertain whether the shipping paper was signed by the libellant.

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

At the adjournment, the master was not produced, nor any evidence offered with regard to the shipping paper, but the owners produced a receipt in full for the wages, by Joseph Walker, the father, and the respondent moved for liberty to withdraw his plea of tender, and to take back the money which had been paid into the court.

S. Fessenden, for libellant. Mr. Haines, for respondent.

WARE, District Judge. The first question, which is presented by the case, arises on the admissibility and effect of Joseph Walker's receipt in full for the wages claimed in the libel. It is said that the father being entitled to the earnings of his child by virtue of his paternal power, and the wages being a debt due to him, in his own right, he had full authority to compromise and settle the suit on such terms as he pleased, although the action was not brought in his name. As a general proposition, it is undoubtedly true that the father is entitled to the earnings of his children during their minority, nor is there any doubt that he may maintain a suit in the admiralty for their wages earned in a maritime service. Plummer v. Webb [Case No. 11,233]. But this is not, like the duties of a parent, a right which is indissolubly attached to the paternal relation. It is a right which may be either renounced by the father, or forfeited. He may renounce it by voluntarily allowing his child to have the exclusive use of the fruits of his own industry; and he may forfeit his right by neglecting to perform those parental duties which are the foundation of the right. It is the duty of the father to provide for his child a home, to protect, to maintain, and to educate him according to the measure of his ability. It is to enable him to do this that the law gives to him the custody and right of control over the person of his child; and, as some compensation for it, allows him to take the fruits of his child's labor. But this paternal power is not of the nature of a sovereign and independent power. It is subject to the restraints and regulation of law. Upon the principles of the law of nature, as well as of the municipal law of this country, it is inseparably connected with the parental obligations, and arises out of them. It is not a power granted to the parent for his benefit, but allowed to him for the benefit of the child, and it ceases when the faculties of the child have acquired that degree of maturity, that it may safely be trusted to its own resources. When, therefore, the parent abuses this power, or neglects to fulfil the obligations from which it results, he forfeits his rights. If instead of treating his child with tenderness and affection, and bringing him up in habits of industry, sobriety, and virtue, he treats him with such cruelty that he cannot be safely left in his custody; or corrupts the purity and integrity of his nature and trains him up to immorality and profligacy, the protecting justice of the country will interpose and deprive him of the exercise of a power, which having been allowed for the benefit of the child is perverted to his injury and perhaps his ruin. There are many cases in which the court of chancery in England has interposed its authority and taken children from the custody of their fathers who have abused their parental power, and placed them under the care of persons proper to have the control of them, and to superintend their education. 2 Story, Eq. Jur. c. 35; De Manneville v. De Manneville, 10 Ves. 52; Whitfield v. Hales, 12 Ves. 492; Wellesley v. Wellesley, 2 Bligh [N. S.] 128. I am not aware that any doubt exists that the courts in this coutry have similar authority. It would certainly be a great defect in the laws of any civilized people, if they furnished no mode by which the innocence and helplessness of infancy, and the purity and ingenuousness of youth could be protected from the brutality of an unnatural parent. The community has a deep interest in preserving the rectitude of the young, and in imparting to them such an education and training them to such habits as will render them in manhood useful and not pernicious members of society. As a father may forfeit his right to the custody and control of his child's person by abusing his power, so by neglecting to fulfil the obligations of a father, he may forfeit his right to the fruits of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all his child's earnings. It would be recognizing in fathers something like that preëminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be the property of the father, and placed them in relation to him in the category of things instead of that of persons.[2]

[2] Gaii, Comm. Lib. 1, 55; Just. Inst. 1, 9, 2; Poth. Pand. 1, 6, 16. The law gave to a Roman father the same form of action for the recovery of his goods, his cattle, or his children. In so strict a sense were they held by the primitive law of the state to be in the dominion of the father as property, that he might bring an action in rem (rei vindicationem) for their recovery, alleging, as this right was peculiar to a Roman citizen, that it was brought ex jure Quiritium (Dig. 6, 1, 1, § 2), or he might have the action of theft; and although the general language of the law was "liberi hominis nulla aestimatio est," he recovered double damages. As a domestic judge, he had over them the power of life and death, and might sit in judgment and inflict upon them the last punishment, without referring the cause to the public magistrate. He might sell his children as he could his slaves, and what is more extraordinary, if the child by any means became free, he was authorized to retake him and sell him a second and third time. It was not until the child ac-

Keeping these principles in view, let us look to the facts in this case, as they have been proved by unexceptionable witnesses. A number of persons have been examined who have been acquainted with Joseph Walker and his family from one to four years, or more, and who have testified to the kind of care which he took of his family, to his habits, his temper, and manner of life. During that time, although constantly residing in the same town, and his place of employment, where he worked at his trade, not being more than half a mile from the residence of his wife and children, he has never lived with them except in some portion of the winter season when he was unoccupied in his trade. The witnesses testified that he never visited his family oftener than once a week, and seldom oftener than once a fortnight, when he came home on Saturday nights and spent Sunday. That on these occasions he often returned in a state of intoxication, when he abused his children with such excess that they have been seen, when their mother happened to be from home, flying from the windows to escape from his violence, and the younger ones have been taken by a family residing in another part of the house, to save them from the brutality of their father. That during this period he has done nothing towards the support of his children, except that he sometimes brought some small articles of provision into the family, but less, as the witnesses testify, than he himself consumed in these fugitive and unwelcome visits. The whole burden of providing for the family has been thrown upon the mother, who has labored to the full measure of her strength to provide a support for her children and herself, aided by a part of the earnings of such of the older children as could get employment. For this father, while he neglected all the duties of a father, was sufficiently tenacious of his supposed paternal power. When his son was at sea he took to himself a part of his wages, but he allowed a part to go towards the support of the child and the rest of the family. A few days after the son sailed on this voyage, having obtained the surplus money which was distributed among the inhabitants by the city government, he immediately without allowing any part of it to his family, left this city and has not yet returned. The force of this testimony is but very slightly, if at all weakened by that produced by the respondent, while so far as respects his habits of intoxication it is fully confirmed by the unsuspicious testimony of a physician who has known him for eight years, and who testifies fully to his habits in this particular, and has been called to visit him while suffering under delirium tremens from habitual intemperance.

Is the father, under these circumstances, entitled as a matter of right to appropriate to himself the earnings of his son? At the time when he undertook to do it, he had, as we have seen, abandoned his family. He left the place without giving them any notice of his intentions or his purposes, and they ascertained where he had gone, not from him, but by inquiries of others. The father is bound, as has been already observed, by the dictates of natural law, to support, protect, and provide for the well-being of his children, according to the measure of his ability. And if the law invests him with a right of control over their persons, it is only for the purpose of enabling him to perform more effectually and completely those duties which

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quired his freedom after a third sale that he became independent or sui juris. The legal and solemn form of emancipation was by a fictitious sale three times repeated. Dig. 47, 2, 14, § 13; 1 Huber, Prael. lib. 4, 1, 18; Gib. Hist. Rom. Emp. c. 44; Heinn. Recitationes, No. 135, 8; Antiq. Rom. L. 1, 12, 6-9.

Among savage and barbarous tribes the father is usually invested with an unlimited power over his children. He may either put them to death or sell them into slavery, without being called to an account by any public authority. We find traces of this paternal power in the pictures which the Bible gives of the simple manners of the primitive and patriarchal ages of the world. When the sons of Jacob proposed to take with them into Egypt their brother Benjamin, the aged patriarch objected, and to overcome his scruples, "Reuben spake unto his father, saying, Slay my two sons if I bring him not to thee." Gen. xlii., 37. Nor are we to suppose that the paternal power, in the early and rude ages of the common law, was restrained within its present limits. It is not improbable that among our Saxon ancestors, as among other barbarians, the father was allowed an unlimited power over his children. It is certain that long after their settlement in England, they continued in the practice of selling their children into bondage, and even into foreign bondage. They were publicly exposed for sale in the slave market in Rome. Gib. Hist. Rom. Emp. c. 38. But this power among barbarians is limited to the period while the children reside in the father's family, and depend on him for their support. When they have attained the age of manhood and are separated from the father's family, they become independent. In the progress of civilization, and upon the institution of a regular government, this domestic jurisdiction is restrained. The individual becomes a member of the state, and the authority over him in all cases of graver importance, especially those involving life and liberty, is transferred from the father to the civil magistrate. Millar, Origin of Ranks, c. 2.

The Romans, from some causes not well understood, formed an exception to this common law of civilization. The absolute and perpetual dominion which was attributed by the law to a Roman father over all his descendants, for it extended to his grand and great grandchildren in the line of male descent, as well as to his children, is one of the most remarkable characteristics of that extraordinary people. It appears to have been coeval with the origin of the state, and continued in nearly its whole vigor down to the end of the commonwealth. Fulvius, one of the conspirators who fled with Catiline, upon being brought back to the city was without any form of public trial put to death by order of his father. Sallust, Bellum Catilinae, 39. And it was not until the reign of Maximian and Diocletian that the right of the father to sell his children into slavery was prohibited by law. Code, 4, 43, 1. A custom so remarkable could hardly fail to have left deep traces of its influence on the domestic manners and habits of the people.

are enjoined, as well by the instincts of nature and the dictates of reason, as by the law of the land. The soundest and most approved expounders of the law of nature place the paternal power exclusively on this foundation. The Creator of man, in giving to him a social nature and endowing him with those qualities which fit him for the enjoyment of social life, has imposed upon the parent, as one of the conditions of his being, the obligation of providing for his offspring while they are incapable of taking care of themselves. But his children are not on that account born slaves. They do not become the property of the parent. As soon as a child is born, he becomes a member of the human family, and is invested with all the rights of humanity. Nature has placed him under the tutelage of the parent, because this tutelage is necessary for his preservation and well-being, and has implanted in the bosom of the parent the instinct of parental love as a pledge and security for the faithful and pious execution of the trust; and, as wherever a duty is required, a grant of the powers which are indispensable for its performance is implied, the law of nature allows him just so much authority as is necessary for its execution. "The power of a father," says Puffendorff, "is that which is absolutely necessary to enable him to discharge the duties to his children which nature has imposed upon him, and consequently does not extend further than is requisite for this object." Jus Naturae et Gentium, lib. 6, c. 2, § 6; Grotius, lib. 2, c. 5, §§ 1, 7; Locke, Second Treatise on Government, c. 6; Heineccius, Jus Naturae, lib. 2, c. 3. The celebrated Hobbes, who seemed to think that children were born to no rights, as he resolves all right into that of the strongest, and who held that the relation of parent and child is that of master and slave, defends his doctrines not on the simple fact of generation, or the relation of paternity and filiation, but on the fact that the child is indebted to the parent for protection, support, and education, as it depended on his will, whether he would nurture and maintain the child or leave it to perish. If he abandons his child, he abandons at the same time his paternal power, and the right of dominion over the child passes to the first person who takes it under his protection and gives it a support.[2]

The municipal law of the country is founded upon and enforces the precepts of natural law; and the soundest and most esteemed commentators upon the common law explain the rights and duties of the parent in terms that correspond entirely with the dictates of the law of nature. "The power of parents over their children," says Blackstone, "is derived from their duty, this authority being given them partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it;" and he adds, that the parent "may have the benefit of his children's labor, while they live with him, and are maintained by him." 1 Comm. 452, 453; 1 Woodeson, Lect. 451. The language of Chancellor Kent, in his Commentaries, is, that "in consequence of the obligation of the father to provide for the maintenance and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and the value of their labor and services." 2 Kent, Comm. 290; Reeve, Dom. Rel. c. 9, p. 283; Id., c. 10, p. 290; Plummer v. Webb [supra]; Benson v. Remington, 2 Mass. 113; Day v. Everett, 7 Mass. 145. It may be true that the paternal power is sometimes described in terms more general, for men who are most accurate in the use of language, do not always, whether in speaking or writing, annex to a general truth all the limitations and qualifications with which it is to be understood. It is perfectly true, as a general proposition, that the father has the right to the custody and control of the person of his child; and it is equally true that if he abuses this power the law will interpose and take his child from him. What degree of abuse will justify or require this interpo-

[2] " 'Socrates est homo, ergo et animal,' " says Hobbes, "is a self-evident proposition because 'homo' is, by definition, 'animal.' But 'Sophroniscus Socratis pater est, ergo et dominus,' is a just inference, but not self-evident, because 'dominus' is not included in the definition of 'pater.' " He then proceeds to prove that the father has the same right of dominion over his children that he has over his slaves. He observes that this right of dominion over property is usually founded on the paternal relation or generation. But if that is assumed as the right, it will be divided between the father and mother, as both contribute to the being of the child. Now the right of dominion is in its nature and essence indivisible. No one can be the servant of, and bound to obey two wills, for if they should happen to disagree it would be impossible, and no one can be bound to an impossibility. This right cannot, therefore, have its origin in generation. According to Hobbes, all men are naturally equal, and they are also naturally enemies, and from these facts results the law of nature, that in a conflict of wills the victor has the right of dominion over the vanquished, or over one whom he has in his power. It follows that a child is the property of the first one who has the child's life in his power. This is the mother, and it is thus that it is to the mother that nature has originally assigned this right of dominion over her children. If she supports and educates the child, she does this upon the tacit condition that the child shall not be her enemy, nor have the right of dominion over her. But every man is an enemy to every other man, to whom he does not stand in the relation of master or slave. "Hostis autem est quisque cuique, cui neque paret neque imperat." The condition, therefore, upon which the mother nurtures and educates her child, is, that he shall be obedient to her will, in other words her slave. This according to Hobbes is the condition of man in a state of nature. He then proceeds to relate how the mother may part with this right of dominion by her own voluntary act, or by compact, transfer it to another, or how it may be modified by the laws of society. De Cive, c. 9.

sition is necessarily a question of discretion; but no one will contend that a father, under the common law, stands in the relation of a sovereign to his child, invested like a Roman father, with the jus vitae et necis. So also it is not questioned as a general truth, that the father is entitled to the fruits of his child's labor; but it is equally true, that this is a right which results directly from the fulfilment of his paternal obligations of providing for the well-being of his child. If these duties are not performed, if he abandons the care of his children, he renounces at the same time his paternal power. There is, as is justly observed by Chief Justice Parker, no law, human or divine, short of that of absolute slavery, which can authorize the father to take to himself the fruits of his child's industry, when he has discharged himself from the obligation to support the child, or has obliged him to support himself. Nightingale v. Withington, 15 Mass. 274; per Sedgwick, Justice, Benson v. Remington, 2 Mass. 115.

But there is proof in this case that the father was, from infirmity, unable to perform the ordinary labor of a man, having had the misfortune to lose one of his legs. Now it is not intended to be said, when a parent from sickness or any other cause becomes unable to support his children, that they are discharged from the obligation of filial piety and reverence. These are obligations which follow them through life; and these sentiments are so deeply implanted by nature in the human bosom, that ordinarily no degree of neglect or unkindness on the part of a parent can entirely extinguish them. Nor is it pretended that this obligation is fully discharged by cherishing passive feelings of gratitude and affection for a parent. When a child has arrived at that degree of maturity and strength that he is able by his industry to do more than is necessary for his own support, nature imposes on him the obligation of contributing to the support of a sick or infirm parent. Provision is made by the laws of this state for enforcing the performance of this natural obligation. Laws Me. c. 122, § 5. But neither the law of nature, nor the law of the state applies in favor of a parent, who being able to support himself, as this one was, and to contribute something at least to the well-being of his family by the exhibition of feelings of paternal kindness and solicitude for their welfare, if in no other way, in the first place disturbs and disquiets them by the abuse of his paternal power, and then abandons them to the care of themselves and to the charity of their neighbors. In whatever light this case is viewed, it appears to me that Joseph Walker had neither a moral nor legal right to appropriate to himself the libellant's wages. If the payment then to him is a discharge of the suit, it must be on some other ground than that of his paternal prerogative of receiving them to his own use.

Is his discharge valid and conclusive on the rights of the minor if he be considered as acting in the character of prochein ami? What power or control the prochein ami or guardian ad litem has over the management of a suit at common law, and how far his acts may be binding and conclusive on the rights of a minor, does not seem to be very precisely settled in the books.[4] Before, however, he is permitted to assume the direction of the suit he must be specially admitted by the court for that purpose, and if he is guilty of any misconduct he may at the discretion of the court be removed and another appointed in his place. Com. Dig. "Pleader," 2 C. 1; Hargrave's notes to Co. Litt. 135, C. note 220; 2 Saund. 117f, note; 1 Coke, Second Institute, 261, 390; Tidd, Pr. 50. The authority of a prochein ami to sue for an infant, was given originally by the statutes of 1 & 2 West. Edw. I., and was designed to protect the infant against the frauds of the guardian who had the legal custody of his person. Co. Litt. 135, 136, Hargrave's note, 220; 2 Inst. 261, 290. The legal reason now, for requiring the suit to be instituted by a next friend, is to guard the rights of the minor, who is not supposed to have the knowledge and experience requisite for the management of the suit himself. But though appointed as guardian ad litem, there is reserved an ultimate guardianship to the tribunal before which the suit is pending, which will at least so far be promptly exercised, as to remove a guardian who is unfaithful to his trust. And although it is said that the minor cannot disavow the acts of his next friend, it would, I presume, hardly be contended that the acts of such next friend would be so far conclusive on the rights of the minor as to preclude the court from allowing him a remedy, if they were done in bad faith, and especially if there was evidence of collusion with the adverse party. It would seem to be, not only the right, but duty of the court to protect an in-

[4] Parsons v. Jones, 9 Mass. 106; Smith v. Floyd, 1 Pick. 275; Blood v. Harrington, 8 Pick. 552; Crossen v. Dryer, 17 Mass. 222; Reeve, Dom. Rel. c. 7. By a rule of the supreme court of Massachusetts, passed in 1784, no prochein ami was allowed to prosecute any personal action in behalf of an infant, until he should have filed a bond to the commonwealth, in the probate office, for the county, with a condition to account to the infant or his heirs, for all sums which might be recovered. But the rule, either from doubts of the authority of the court to establish such a rule, as involving an act of legislation, or from some other cause, was never observed in practice. 9 Mass. 106. By the 53d rule of the circuit court of the United States for the first circuit, it is provided, that no prochein ami shall be allowed to prosecute any action, unless at the return term he give such security as the court may direct, that the property recovered in the suit shall be faithfully accounted for to the infant or his legal guardian.

fant against the fraudulent acts of a guardian appointed under its immediate authority.

But whatever may be the power of a court of law, this is undoubtedly within the power of a court of equity. The mere filing a bill constitutes a minor, as to his interest embraced in the bill, a ward of the court, and places him under its special protection; and it will actively interpose to protect the interest of a minor against the negligence or bad faith of a guardian ad litem. Story, Eq. Pl. 60; 1 Madd. Ch. Pr. 332; 2 Madd. 280; Stephens v. Van Buren, 1 Paige, 479; 2 Story, Eq. Jur. 531. A court of admiralty is not a court of general equity jurisdiction, but its course of proceedings bears more analogy to that of equity, than to that of the common law. In matters falling within its jurisdiction it professes to decide ex aequo et bono, and to place its decrees on the broad principles of general equity. It would, I apprehend, be chargeable with a neglect of its duty, if it allowed the rights of a minor to be compromitted by the negligence or bad faith of his guardian ad litem. By the civil law from which the admiralty has in a great measure borrowed its course of procedure, minors might upon general principles be restored to their rights, in integrum, when they had been compromitted by their tutors, even when the father acted as tutor, whether this had been done in the course of judicial proceedings or otherwise. Dig. 4, 4, 29; Domat, Lois Civiles, liv. 2, tit. 1, §§ 2, 16, and liv. 4, tit. 6, §§ 2, 23, 24. "Tutor in re pupilli tunc domini loco habetur, quum tutelam administrat, non quum pupillum spoliat." Dig. 41, 4, 7, § 3. Although the minor had a remedy by a personal action against his tutor or curator, he might waive that and proceed to have the act of his tutor annulled, and the benefit of restitution to his entire rights. Code, 2, 25, 3. A court of admiralty would more readily relieve a minor when the suit is for his wages as a mariner, a class of men placed peculiarly under its protection. This court will look critically into the contracts and dealings of ship-owners, with the mariners themselves when of full age; and if it finds that a seaman has been surprised into any engagements that are inequitable and unreasonable, by the superior knowledge and experience in business of the merchant, and that an undue advantage has been taken of him, the court wil interpose its authority to protect him against his own ignorance and improvidence. The Juliana, 2 Dod. 504; Harden v. Gordon [Case No. 6,047]; The Minerva, 1 Hagg. Adm. 347; Brown v. Lull [Case No. 2,018]. It would then be surprising if it could not protect him when a minor, and therefore still more dependent on others, from the negligence or bad faith of a next friend, if through inadvertence an incompetent or unfaithful one should happen to be appointed. My opinion is that the court has the power, and is bound in proper cases to exercise it; and of course that it is not bound to receive this receipt and discharge without looking into the circumstances and consideration under which it was taken.

Let us then examine the facts of the case. It appears that the respondent was acquainted with Joseph Walker and his family, and, therefore, may be presumed to have had some knowledge of the manner in which he fulfilled the duties of the father of a family. It was well known to him, that heretofore the father had claimed for his own use the wages of his son, and it was equally well known that his right to them in this case would be resisted. The fact that the suit was brought in the son's name, was a sufficient notice of that, if he had no other. The father's name was, indeed, rather unfortunately, as the result has shown, used as prochein ami, because the forms of law required that the suit should be brought under the nominal protection of some next friend. But it was without any intention or thought of allowing him any control in the management of the suit, as it was well known to all the parties that he had for months been absent, and residing at a distance of fifty or sixty miles from this place. The respondent, then, having obtained a postponement of the cause for the avowed purpose of introducing further evidence to the merits, instead of employing the time in procuring the evidence, seeks an interview with the prochein ami and privately settles the suit by paying to him such sum for wages as was agreed upon between them, without the knowledge of the minor's counsel or friends, or even of his own counsel, and after stripping his child of his four months' earnings, discharges the action and leaves him to settle his own costs in the best manner that he can. I imagine if he had consulted his own counsel he would have admonished him that there was some hazard in taking a step of this kind. If the terms of the settlement had been reasonable, and the costs had been provided for, the least that the court could have done, would have been to hold the action until it saw that the money was appropriated to the use of the libellant. But under the circumstances of this case, the money having been so manifestly paid by the respondent in his own wrong, I think it my duty to proceed as though nothing had been done.

If the views which I have taken of these preliminary matters are correct, the case upon its merits may be disposed of in a few words. The libellant having signed no shipping articles, claims under the act of congress of July 20, 1790, § 1 [supra], for the government of seamen in the merchant service, the highest rate of wages that was paid at this place, at any time within three months before the engagement. No evidence has been introduced showing what was the highest rate of wages for boys of his age. Prime seamen obtained eighteen dollars a month. The libellant was, at the time of the service,

about eighteen years of age, small of his age, but active, intelligent, and trustworthy; capable of doing in some parts of the ship's service, perhaps as much as a man, but probably in the laborious part of the service, not so much. It is a circumstance which speaks strongly in favor of his character and capacity, that he was taken to supply the place of the mate, who had absconded. Though he was not shipped as mate, nor expected to do a mate's duty, it cannot be supposed that he would have been taken in such a case, unless he was capable of performing the duty at least of an ordinary seaman. I am satisfied that I shall not exceed the measure of a just compensation by pronouncing for wages at the rate of fifteen dollars a month.

ETNA INS. CO. (FLANDERS v.). See Case No. 4,852.

ETNA INS. CO. (WARREN MANUF'G CO. v.). See Case No. 17,206.

ETTA, The (UNITED STATES v.). See Case No. 15,060

Case No. 4,543.

In re ETTINGER.

[18 N. B. R. 222.][1]

District Court, S. D. New York. Aug. 10, 1878.

BANKRUPTCY — COLLECTION OF MONEY BY BANKRUPT—ACCOUNTING TO ASSIGNEE—PROCEEDINGS BY SUMMARY PETITION.

1. Where the bankrupt collects moneys belonging to his estate, either before or after the filing of the petition in bankruptcy, and fails to account for the same, he will be compelled to pay such moneys to the assignee.

2. Proceedings of this character may be instituted by summary petition.

[Cited in Re McKenna, 9 Fed. 29.]

3. Payment of such moneys after the filing of the petition, for interest on mortgages, will not be allowed unless shown to be for the benefit of the estate.

[In bankruptcy. In the matter of William Ettinger.]

A. Blumenstiel, for assignee.

Gardiner & Goodheart, for bankrupt.

CHOATE, District Judge. This is a petition to compel the bankrupt to pay over to his assignee certain moneys alleged to have been collected by him and not accounted for. The bankrupt has been examined at great length, and his examination is chiefly relied on by the assignee as furnishing the evidence of the receipt of the money. The petition was filed against him by his creditors, October 22, 1875, and it is claimed that he received after that day five thousand one hundred and ninety-nine dollars and fifty-seven cents from various persons indebted to him, and two thousand four hundred and seventeen dollars and nineteen cents before that day, besides the sum of nine hundred and fifty dollars drawn from the bank. The bankrupt admits the receipt of only five hundred and forty-six dollars and sixty-four cents after October 22d, and claims to have paid out a part of it, three hundred and twenty-four dollars and twenty-five cents for the benefit of his estate, and the rest in necessary household expenses; and as to all sums received before October 22d, he claims to have paid the same out to his creditors, and in paying the expenses of his business, except five hundred dollars which he says he gave to his wife.

The evidence is satisfactory that the bankrupt received and is chargeable with the following sums, received after the filing of the creditor's petition:

T. G. Widener	$ 25 00
Marks	8 00
Bernhard	11 00
Copperly & Collins	35 50
Clark Brothers & Co.	59 00
Gerber	52 52
Vogel	9 00
Spanganthal	13 00
Davis	54 50
Rent of Forty-Eighth street house	28 50
J. Gangston, January 25, 1876	46 88
Mrs. Gangston, per Laly, October 27, 1875	50 00
A. Rosenbaum & Co., January 4, 1876	96 25
J. G. Mautner, December 15, 1875	40 50
Scheidenbach & Bettman, January 4, 1876	45 24
Adriance, Robbins & Co.	11 00
Wm. Thomas	95 33
Bartlett, Reed & Co.	15 75
	$696 97

As to the other sums claimed to have been received after October 22d, the evidence is not sufficient to prove that they were received after that day. The bankrupt's testimony as to many of them is contradictory and apparently evasive, but as to several of these sums he swears that they were received before the filing of the petition, and while his testimony is entitled to little or no credit, there is no evidence from which the receipts of the moneys after October 22d can be fairly inferred. He testifies that the sheriff was in possession of his books from the 13th of October, and no entries could be made in them after that, and also that before the 13th of October his bookkeeper was sick, and his books were not regularly kept. He is not contradicted in these statements, although, if untrue, they would be susceptible of contradiction. Therefore as to receipts between the 14th and the 22d of October, and perhaps before the 14th, the fact that he admits payments at some time, in connection with the facts that the parties owing the money are charged with the amount on the books as due, and that no credit is given to them on the books, leaves the time of payment still uncertain, in respect to whether the money was received before or after October 22d.

As to the case of Samuels, it is proved that the bankrupt received in May or June, 1875, two notes at eight months for the amount, one thousand and ninety-seven dollars and seventy-two cents. He testifies that he sold

[1] [Reprinted by permission.]

them when or about the time he received them. No entry of this transaction appears in his cash-book, but Samuels is credited with the amount as cash in the ledger. The testimony of the bankrupt is very contradictory as to the party to whom he sold the notes, but they were produced by Samuels, and show an endorsement of the bankrupt, and of one Nathan Lithauer, who is not called as a witness. This testimony does not justify the conclusion that the bankrupt held the notes or received the proceeds after October 22d; nor does it determine at all the time when he received the money on the notes. As to this and several of the other sums claimed by the assignee to have been received after October 22d, he has not apparently exhausted the sources of evidence as to the time when the money was received, and the matter being left in doubt on the testimony of the bankrupt, he has not produced sufficient weight of evidence to sustain the burden of proof which rests on him. There is no presumption as to the time when the moneys were received, nor is the contradictory and evasive character of the bankrupt's testimony a circumstance sufficient to supply the want of proof. The bankrupt has not duly accounted for this money received after the filing of the petition. He had no right to pay it out without the order of the court, even for the benefit of the estate. The alleged payment of interest on mortgage of real estate is not proven to have been for the benefit of his estate, nor is any voucher produced for it.

If the fact of payment were clearly proven, and the benefit to the estate, these alleged payments might now be ratified and allowed, but in the absence of any such evidence, his uncorroborated statement is not a sufficient accounting. He must therefore be charged with, and ordered to pay over to the assignee said sum of six hundred and ninety-six dollars and ninety-seven cents, with interest from the first day of January, 1876. As to the moneys alleged to have been received before he bankruptcy, he admits receiving, before the filing of the petition, including nine hundred and fifty dollars—drawn from the bank—

		$7,545 37
From this should be deducted, as upon the evidence they may have been received long before, G. Samuels	$1,097 72	
Werkless	59 91	
Charged above as received after October 22d, Bartlett, Reed & Co	15 75	1,173 38
Leaving to be accounted for, as received within three weeks before October 22d		$6,371 99
Of this it is proved by the witness Zippert, and by the bankrupt that he paid Zippert, a few days before the filing of the petition:		
In cash	$2,800 00	
In note received for H. Robinson	126 32	2,926 32
Leaving		$3,445 67

The bankrupt claims to have paid out all the rest in household and business expenses before the filing of the petition, but he offers no evidence whatever in corroboration of his statement, and he does not commend himself to the court as so credible a witness that his money should be considered properly accounted for upon his bare statement that he had paid it out, especially as for the greater part of it, if so paid out, there would in the due course of business be vouchers, which he does not produce, and corroborative testimony, which also is not produced.

The result, therefore, of the case as it stands is that he is chargeable with the further sum of three thousand four hundred and forty-five dollars and sixty-seven cents, with interest from October 22, 1875. While I think this is the proper conclusion from the testimony as it stands, I am embarrassed by the circumstance that the case of the bankrupt was submitted without the aid of counsel, and that he may be able, on taking further proof, to discharge himself as to some part of the moneys received in October, and therefore an order will be made that upon his giving satisfactory security for his appearance from time to time to abide the order of the court, further testimony may be taken as to the disposition of the moneys received before October 22d. The following order was made upon this decision on the 13th day of August, 1878: The petition of John Currie Wilmerding (the assignee in bankruptcy of the above-named bankrupt) to compel the said bankrupt to pay to said assignee certain moneys alleged to have been collected by said bankrupt, and belonging to his estate, coming on to be heard upon the answer filed, and the proofs taken therein, and upon consideration of said testimony and proofs, and hearing A. Blumenstiel, of counsel for petitioner in favor of the prayer of said petition, and William Ettinger in opposition, it is adjudged, that the said bankrupt had in his hands, at the time the petition in bankruptcy was filed against him, to wit, October 22, 1875, the sum of thirty-four hundred and forty-five dollars and sixty-seven cents. And it is also further adjudged that the said bankrupt collected of his assets subsequent to the filing of said bankruptcy petition the further sum of six hundred and ninety-six dollars and ninety-seven cents, all of which moneys, amounting in the aggregate to the sum of forty-one hundred and forty-two dollars and sixty-four cents, has been entirely unaccounted for, and on motion of A. Blumenstiel, attorney for said assignee, it is ordered, that said William Ettinger, within fifteen (15) days from the service of this order on him, pay to the said assignee, or his attorney, the said sum of forty-one hundred and forty-two dollars and sixty-four cents, with interest thereon from January 1, 1876, and in case of default in the payment of said sum, or of any part thereof, it is ordered, that an attachment

issue against said William Ettinger as for a contempt of court to the marshal of this district, commanding him to confine the said William Ettinger in close custody until said sum be paid. Provided, however, if the said William Ettinger shall, within said fifteen days from the entry of this order and service of a copy thereof on him give a bond, with surety or sureties to be approved by the court, in the penal sum of five thousand dollars, for his appearance from time to time to abide and perform any further order of the court to be made in this matter, then leave is given to said William Ettinger to give and produce further testimony before the register in charge of this case in reference to the disposition of said moneys or any part thereof, and in such case like permission is given to the assignee to produce such other testimony as he shall be advised to further sustain the allegations of said petition, or any part thereof, as well as to meet any evidence to be produced by said William Ettinger.

Case No. 4,544.

EUBANKS v. LEVERIDGE.

[4 Sawy. 274; 9 Chi. Leg. News, 394; 4 Law & Eq. Rep. 349; 23 Int. Rev. Rec. 281.][1]

Circuit Court, D. Oregon. Aug. 6, 1877.

MORTGAGE- LIMITATIONS OF ACTIONS.

1. A suit upon a mortgage is not a suit for the determination of any right to or interest in real property, but simply a suit upon a sealed instrument to enforce a lien for the payment of the debt which it is given to secure, and is therefore barred within ten years from the time the cause of action accrues.

[Cited in Allen v. O'Donald, 28 Fed. 348].

2. Absence of the mortgagor from the state, when or after the cause of suit accrues upon a mortgage, does not suspend or prevent the statute of limitations from running against a suit to foreclose the same.

[Cited in Allen v. O'Donald, 28 Fed. 348].
[Cited in Zoll v. Carnahan, 83 Mo. 43].

Suit in equity [by Hannah Eubanks against W. K. Leveridge], to foreclose a mortgage.

Walter W. Thayer, for plaintiff.

James G. Chapman and James K. Kelly, for defendant.

DEADY, District Judge. This suit was commenced in the circuit court of the state for Lane county against the defendant Leveridge and Arthur I. Chapman. So far as Leveridge is concerned, it is brought to foreclose a mortgage upon his interest as grantee of said Chapman in the south half of section 35, in township 17 south, and range 4 west of the Wallamet meridian, and situate in Lane county.

On April 18, 1877, said court, on the application of Leveridge, made an order removing the cause as to him to this court. Here the cause was brought to a hearing upon the complaint filed in the circuit court, and the demurrer of Leveridge thereto.

Several causes of demurrer are assigned in the demurrer, but on the argument only one was insisted upon, namely: that the suit was barred by lapse of time.

From the complaint it appears that on July 18, 1860, Thomas and Arthur I. Chapman, being the owners in common of the premises in question, duly mortgaged the same to Joseph Bromley, to secure the payment of their joint promissory note, of even date therewith, for the sum of $2776, payable in twelve months from date, with interest at twenty-five per cent. per annum; that on September 20, 1860, said Bromley duly assigned said note and mortgage to Campbell E. Chrisman; that about the same date, said Arthur I. Chapman removed from Oregon to what is now known as Idaho territory, where he has ever since remained; that about August 9, 1861, said Chrisman commenced a suit in the circuit court aforesaid, against said Thomas and Arthur I. Chapman and Joseph Bromley, to foreclose said mortgage and recover the amount of said note, in which, on November 1, 1861, a decree was given against said defendants for the sum of $3663.50, to bear interest at the rate of twenty-five per cent. per annum, and for the sale of said premises to satisfy the same; that afterwards said Chrisman purchased said premises at the sale upon said decree for $500, which sum, less $44.25, costs and expenses, was applied on said decree; that at the term of April, 1862, of said circuit court, said sale was confirmed, and a deed made by the proper officer to said Chrisman, which purported to convey to the grantee therein, all the interest of both said Chapmans in said premises; that on January 14, 1865, said Chapmans paid on said decree the further sum of $1800, and the remainder thereof is still unpaid; that said Arthur I. Chapman was never served with process in said suit or appeared therein, and that said decree, sale and conveyance as to him was void and of no effect; that said Arthur I., in 1875, sold his interest in said premises to the defendant Leveridge, who took the same with notice of these facts; that on November 18, 1876, said Chrisman duly assigned said note and mortgage to the plaintiff, and that there is now due and owing on the former the sum of $4000 or more.

The complaint prays that a decree may be given against Chapman for the sum due upon the note, and for the satisfaction of the same by the sale of the undivided half of the premises conveyed by him to Leveridge, and that said Chapman and his assigns be barred of all rights of redemption in the same.

The suit commenced by the plaintiff in the circuit court of Lane county had a double object: the one to obtain a personal decree against Chapman for the amount due on the note, the other to obtain a decree foreclosing the mortgage and for the sale of the mort-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 349, contains only a condensed report.]

gaged premises. The removal into this court as to Leveridge had the effect to discontinue that suit as to the second object, and institute one in this court for a like purpose. The suit against Chapman is not in this court.

The interest of the mortgagor, Chapman, in the premises has been conveyed to Leveridge, subject to the lien of the mortgage, and therefore this suit is to be considered as one brought by the plaintiff in this court to obtain a foreclosure of said mortgage, and the sale of said interest therein. To this suit, Chapman is not a party, and so far as appears, it is one in which he has no direct interest.

Is this suit then barred by lapse of time? By the law of Oregon an action to recover the possession of real property is barred, unless brought within twenty years from the time the cause of action accrued (Civ. Code, §§ 3, 4); and a suit in equity for the "determination of any right or claim to, or interest in real property," is barred in the same time (Id. § 378). An action or a suit upon a sealed instrument must be brought within ten years. Id. § 5. But if a person is out of the state when a cause of action or suit accrues against him, or he is absent therefrom after it accrues, the time of such absence shall not be taken as a part of the limitation. Id. §§ 16, 378.

In Anderson v. Baxter, 4 Or. 107, it was held by the supreme court of this state that a mortgagee had no interest in the mortgaged premises, but only a lien thereon to secure the payment of his debt, and that, therefore, a suit to foreclose a mortgage was not a suit for "the determination of any right, or claim to, or interest in real property" which might be brought within twenty years; that such proceeding was only a suit upon a sealed instrument, the mortgage, for the "collection of a debt charged upon specific property" by subjecting the same to sale for that purpose. This ruling is binding on this court, and was followed by it in the late case of Witherell v. Wiberg [Case No. 17,917]. In Anderson v. Baxter, it was also held that a suit to foreclose a mortgage was simply in effect a proceeding, not against the person of the mortgagor or his assigns, but in rem, against the property mortgaged; and therefore the qualification contained in section 16, supra, concerning the absence from the state of a person against whom a cause of action accrues, does not apply to such a suit.

The reason given is that where the cause of action or suit accrues "against a person," and the remedy thereon is therefore in personam, as an action or suit to recover a debt from a debtor, then the absence of the person, the debtor, from the state suspends the remedy, and therefore the time of such absence ought not to be taken as a part of the limitation. But where the remedy is in rem, as a suit for the mere enforcement and satisfaction of the lien of a mortgage, then the absence of the mortgagor or debtor in no way suspends or interferes with the prosecution of such suit, and therefore the time of it ought not to be deducted from the limitation in such case.

It is admitted that this ruling is also binding upon this court, but it is sought on behalf of the plaintiff to distinguish this case from that of Anderson v. Baxter, because it appears that there is also a personal obligation for the payment of the debt in the one, while it does not appear that there was such obligation in the other.

But the court in Anderson v. Baxter does not appear to have attached any importance to that fact; besides which, the report does not state whether there was any such obligation in the case or not.

But I apprehend the true doctrine to be, that the remedy upon the note and mortgage is like the transaction itself, two-fold. The making and delivery of the note, and the failure to pay the same according to its tenor, gives the holder thereof a right of action against the maker upon which he can obtain a personal judgment for the sum due thereon. So, the execution and delivery of the mortgage creates a lien upon the property included in it, to secure the payment of the sum mentioned in the note, and in case of a default in such payment, a suit may be maintained upon this "sealed instrument," the mortgage, to enforce such lien for the purpose of paying the debt.

Notwithstanding section 410 of the Code provides that in a suit "to foreclose a lien," where there is also a personal obligation for the payment of the debt, "in addition to the decree of foreclosure and sale," a decree may be given against the person giving the same for the amount thereof, yet I apprehend that either the remedy upon the personal obligation or the mortgage may be pursued for the collection of the deed without reference to the other. Roosevelt v. Carpenter, 28 Barb. 429; Pratt v. Huggins, 29 Barb. 282; Waltermire v. Westover, 16 N. Y. 19. In Pratt v. Huggins, it was held that a debt may be collected by the enforcement of the lien of a mortgage created by sealed instrument after an action upon the promissory note given for the same is barred. To the same effect is Thayer v. Mann, 19 Pick. 537; Eastman v. Foster, 8 Metc. [Mass.] 24; Bank of the Metropolis v. Guttschlick, 14 Pet. [39 U. S.] 32. In the last case, it is distinctly held that the extinguishment of a note by a judgment upon the same did not operate to extinguish a collateral remedy for the same debt under a deed of trust—in effect a mortgage. These authorities go to show that the holder of a note and mortgage has two distinct remedies for the collection of his debt, and that they exist and may be pursued independently of each other. Apply this conclusion to this case. But for the fact that the mortgagor and maker of the note has been absent from the state since before the note became due, the remedy upon the note would have been barred in six years. Not so, however, with the remedy

upon the mortgage, which is not barred until the lapse of ten years. The supreme court of the state having decided that the absence of the debtor from the state, which prevents the statute of limitations from running as to the remedy upon his personal obligation, does not affect the remedy upon the mortgage, because the latter remedy may be as well pursued during the debtor's absence as his presence, it follows that the remedy upon the mortgage is barred, irrespective of that upon the note. The remedies are not identical nor necessarily co-existent.

This property now belongs to Leveridge, and, as was said in Wood v. Goodfellow, 43 Cal. 189, he stands in the same relation to the plaintiff as if he had originally made this mortgage upon his own property to secure the debt of Chapman. Chapman has now no interest in the property, and Leveridge never was under any personal obligation to pay this debt. True, if when the latter purchased the property it was charged with the payment of the grantors' debt, then he took it cum onere. But the mortgage by which alone this burden was imposed is a contract under seal. The law which entered into and became a part of this contract expressly provided that the lien or security thereby created should not be enforced by suit unless brought within ten years of the time the cause of suit occurred. The only ground upon which the plaintiff can or does claim that the lien of the mortgage ought to be enforced in this case, notwithstanding the lapse of time, is the absence of the mortgagor from the state. But Anderson v. Baxter decides that fact does not prevent the statute from running, and therefore the question is not an open one in this court. Upon the authority of that case then, and even in my judgment upon the reason in the matter, the demurrer must be sustained.

EUGENIE, The JEUNE. See Case No. 7,301.

EUNSON v. PEDDIE. See Case No. 9,991.

EUPHEMIA, The (QUIMBY v.). See Case No. 11,512.

Case No. 4,545.

The EUPHRASIA.

BETHEL et al. v. The EUPHRASIA.

[4 Adm. Rec. 136.]

District Court, S. D. Florida. May 2, 1848.

SALVAGE—COMPENSATION.

[1. A vessel ashore on a part of Carrysfort reef, in no great peril or pressing danger provided the weather held good, accepted assistance consisting of lightening her by transferring the cargo, planting an anchor, heaving the ship off, and navigating her through an intricate and difficult channel to the open sea; and the vessel and cargo, valued at about $46,470, were saved practically without injury, but it was highly probable that, but for the assistance rendered, there would have been a great, if not a total, loss. *Held*, that the salvors were entitled to $15,000 as compensation.]

[Cited in The John and Albert, Case No. 7,333.]

[2. As a matter of policy, as large a compensation should be given where a ship and cargo are saved comparatively without injury as in cases where the ship is lost, but the cargo or a portion of it saved; otherwise there is strong inducement to bad faith on the part of wreckers.]

[This was a libel by William H. Bethel and others against the ship Euphrasia and cargo (Simpson, claimant) for salvage services.]

S. R. Mallory, for libellants.

Wm. R. Hackley, for respondent.

MARVIN, District Judge. The American ship Euphrasia (Simpson, master), bound on a voyage from New Orleans to Liverpool, laden with cotton, about one o'clock on the night of the 24th of April last, ran ashore on the inside of Pickle's reef, a part of Carrysfort reef, on this coast. The ship was going at the rate of about six knots an hour when she struck, and she was driven considerably out of the water. Soon after the ship struck the reef she was discovered by Captains Bethel, Roberts, Stickney, and Gordon, who lay with their respective wrecking vessels (sloops) at Key Tavernier, the harbor most used by the wreckers on that part of the coast. They immediately got under way, and proceeding to the ship, offered their assistance to the master, who at the time declined it, intending to use his own efforts to get the ship off, and hoping for success at the return of the tide, about one o'clock in the day. The situation of the ship was not one of immense peril or pressing danger as long as the weather remained good and there was but a moderate sea. She lay in a bight of the reef considerably careened. She did not thump nor rise and fall with the sea. But she was surrounded on almost all sides by reefs and shoals, which however were not of sufficient extent and did not come near enough out of the water to protect the ship from the action of the sea if the weather became at all windy. At one o'clock in the day, it being high-water, and the ship appearing to be still hard aground, the master accepted the assistance of libellants to lighten and get off the ship. The libellants commenced to lighten the ship by transferring the cargo on board their vessels, and at the same time carried out and planted an anchor by which to heave the ship off. By one o'clock at night they had lightened the ship of 530 bales of cotton, and it being near high water, they commenced and continued for some time to heave upon the anchor, when the ship came off the reef and swung to her anchor. In the morning they got her under way, and, navigating her out from among the reefs which surrounded her through an intricate and difficult channel into the open sea, they arrived with her at this port on the 27th.

The ship appears to have been but little injured on the reef, and is considered in a fit condition to proceed on her voyage without repairs. The ship has been appraised at $12,-

000, the cotton at $34,470, making the aggregate value of the property saved $46.470.

Such are the principal facts in the case. Upon a careful consideration of these facts, it appears to me that this ship and cargo were in considerable peril of total loss while on the reef, and they have been saved from this peril mainly by the exertions of the salvors. It is true that the master of the ship retained the command and supervised, and directed as far as his knowledge of the reef would enable him the labors and efforts of the wreckers and the preservation of the ship and cargo are to some degree to be attributed to him. But in my opinion he could have accomplished but little towards saving the ship and cargo without more assistance than his crew could afford. He might and probably would if no other assistance had been at hand have carried out an anchor, and he might have thrown overboard a portion of his cargo to lighten his ship. And he might have succeeded in getting his ship afloat with the loss of a considerable portion of his cargo. And it is within the range of possibility that he might have succeeded in getting his ship to sea again. But when it is considered that the master was entirely ignorant of the extent, nature, and locality of the reefs and shoals around him and of the channel, and that he must consume much time in sounding to obtain the information necessary to enable him to act understandingly, that a heavy anchor was to be carried out, and the ship lightened of nearly one third of her cargo, and that after the ship had got afloat she had to be navigated for a considerable distance through a difficult channel, of which the master was entirely ignorant, and which it is evident from his own testimony he would not readily have discovered at all, he thinking it lay in an entirely different direction, where it is well known to pilots and the salvors there is no channel for a ship, that a slight increase in the wind or a change in its direction would have so much increased the sea upon the reefs as to have greatly endangered the ship, it does not appear to me probable that the captain would or could have extricated the ship from these difficulties and dangers without assistance. Whether the ship and cargo would have been lost under these circumstances had no assistance been employed cannot certainly be known.

In arriving at an opinion on such a point, it is the duty of the court to consider the well established facts in the case, and not permit itself to be too much influenced by the opinions of the witnesses. The opinions of parties or witnesses are of but little value unless well supported by facts and satisfactory reasons. In the present case the captain thinks he could have saved his ship and two thirds of his cargo by a jettison of the other third. On the other side, the salvors are equally confident that he could not have done so. Judging solely from the facts of the case, the situation of the vessel on the reef, the locality and extent of the shoals, the blindness and intricacy of the channel (and there was but one) the time that must necessarily be consumed in finding out this channel and in heaving overboard cargo, the liability of the winds to vary and increase in force, from what they were at this season of the year, and the further fact, within the historical knowledge of the court, of the loss of several ships, on the same reef, within the last ten years, situated quite as favorably for their safety as this one, and it appears to me that a strong presumption arises that but for the efforts of the salvors, this ship and cargo would have been lost.

Taking it, then, as established by the facts of the case that this ship and cargo were in actual peril of total loss, the services of the salvors are greatly increased in value by the further fact that they have been saved by them without damage or injury to the ship and cargo. The ship was in actual peril, and was rescued from it in an unusually short period of time by the very active and persevering efforts of the salvors. Had they labored less diligently or less skilfully, the ship may not have been got off at the high-water she was; and had she been on the reef at the succeeding high-water, no person can say how much injury she may have sustained,—perhaps enough to require her discharge in this port, incurring thereby heavy charges of wharfage, storage, labor, and repairs, with considerable delay in again entering upon her voyage.

In such a case, then, where it is evident that the ship was in peril, the fact that she was rescued in a short period of time, and without material injury becomes a fact of positive merit, entitling the salvors to the very favorable consideration of the court. I have given in several cases, lately decided, wherein the ship had been lost and the cargo only saved, the one third of the property saved to the salvors. The amount of property saved in these different cases was about the same, and it would be difficult to distinguish them by any material difference except by the fact that in the cases referred to the ship was lost and in the present one saved. Ought I to give less than the one third in the present case? If so, upon what principle? If upon the principle that the loss of the ship makes it demonstrable that the cargo was in great peril, and was most certainly saved by the salvors, and no other proof of the peril of the cargo is or can be taken as satisfactory but the loss of the ship, do I not hold out to the wreckers on this coast a sure inducement, a strong motive, to suffer ships to be lost, as the only means by which they can satisfy the court that the cargo was in danger, and so increase their compensation by their own positive inertness, misconduct or bad faith, and by the destruction of ships on the reef? It appears to me that, upon sound principles of justice and policy, I am bound to decree the salvors

as large a compensation or larger in the present case than in cases where the ship has been lost and the cargo only saved.

Let it be generally understood among the wreckers, that their interest is most promoted in all cases by saving the ship and cargo, and but few ships will be lost upon this reef, that can possibly be saved. I think that the one third of the value of the ship and cargo should be decreed the salvors in the present case, or rather I shall decree the sum of $15,000, which is very nearly the one third. The ship's portion of the salvage is $3,873.50, the cotton's portion $10,481, and the lard's portion is $645.50. As the lard lies in the bottom of the ship, the salvage on it will be rendered to be paid by a sale of cotton. The master proposes to raise and pay the salvage and expenses on the ship in money.

It is ordered, adjudged, and decreed that the libellants in the present case are entitled to have and receive in full compensation for their services rendered to the ship Euphrasia and cargo the sum of $15,000, as the whole salvage, of which the ship's portion, $3,873.50, which said sum of $3,873.50 the marshal will receive from said master of said ship, together with the ship's portion of the costs and expenses of this suit, in full compensation for the salvage and expenses on said ship, and thereupon restore said ship to the master, for and on account of whom it may concern. That the clerk and marshal proceed to set off and assign to the salvors five hundred and forty bales of the cotton, in full compensation for their salvage in saving the same. That, after setting off the said 540 bales, the marshal proceed to advertise and sell the same, at public auction, and bring the proceeds into court, to be distributed among the salvors. That the marshal also proceed to advertise and sell so much of the residue of said cotton belonging to said cargo as will make the sum of $645.50; as the salvage on the lard, also sufficient to pay the cargo's proportion of the costs and expenses of this suit. That the expenses of the sales of the 540 bales assigned to the salvors be paid by them, and that, on executing this decree, he restore said cargo to the master of the ship, for and on account of whom it may concern.

Case No. 4,546.

The EUPHRATES, ETC.

[1 Gall. 451.][1]

Circuit Court, D. Rhodes Island. June Term, 1813.[2]

PRIZE—PRACTICE—DELIVERY ON BAIL—SALE PENDING PROCEEDINGS.

When delivery on bail shall be or not. When a sale decreed pending proceedings.

[Cited in The Ella Warley, Case No. 4,370.]

[See note at end of case.]

[1] [Reported by John Gallison, Esq.]

[2] [Affirmed in 8 Cranch (12 U. S.) 385.]

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

These were prize causes, in which applications were made on behalf of the claimants, and also on behalf of the captors, for a delivery of the property on bail. [The property libeled consisted of the cargoes of the ships Euphrates and Francis, which were captured and seized as enemy's property. The United States claimed a forfeiture of the goods under the fourth section of the act of July 6, 1812 (2 Stat. 780). Other claims were interposed on behalf of the alleged legal owners. From a decree of the district court condemning the property (case unreported), the United States appealed.]

STORY, Circuit Justice. The principles, which govern applications of this nature, have been settled in England, in a good degree, by statute. In the United States, they remain under the general regulations of admiralty proceedings. In prize causes, before a hearing, the property is never delivered to either party on bail, unless by consent. If it be perishable, the proper remedy is by an appraisement and sale. The Copenhagen, 3 C. Rob. Adm. 178. And in like manner the court will decree a sale, pending the proceedings, for any other justifiable cause. And upon sales under such decrees, the proceeds must be brought into court, and deposited in the registry, subject to the future order of the court. After a hearing, the property may, in the discretion of the court, be delivered on bail. In cases ordered for further proof, a delivery on bail is sometimes allowed to the claimants; and if they decline, to the captors. But it is a proceeding adopted with extreme caution, as it opens a door to many inconveniences, and sometimes to frauds. To avoid these, a decree of sale and deposit of the proceeds is usually and properly resorted to, especially on applications as to the cargo. And in no case should a delivery on bail take place, until the court is fully satisfied, that the appraisement is perfectly fair, and the property estimated at its full value. Where, on the hearing, the property is acquitted, and an appeal is interposed to a tribunal not sitting within the same jurisdiction, or into which the property does not follow the cause, (as is the case of the supreme court of the United States in relation to this court,) the claimants are generally allowed a delivery of the property, or, in case of sale, of its proceeds, on giving bail. Where there is a decree of condemnation, the same rule is in general adopted, as to the captors. But it is always an application to the sound discretion of the court, and if there be danger of injustice, the court will withhold it from either party, and content itself with retaining the property, or with ordering a sale thereof, and a deposit of the proceeds in the registry. In the various claims before the court, it seems to be conceded on all sides, that if the property is not to be de-

livered on bail, a sale thereof would be for the benefit of all parties. I should feel an extreme reluctance to deliver the property in any of these claims on bail, by appraisement, notwithstanding some of them are cases ordered for further proof. The goods were destined for this market, and it is more fair and just to all parties, to ascertain the value by a free and fair sale, than by an appraisement, which may be liable to many exceptions, and depends so much upon opinion.

I shall therefore direct a general sale, and a deposit of the proceeds in court, in all cases, except where a sentence of acquittal or condemnation has passed upon the property. In cases of condemnation, where the claimants have abandoned an appeal, and the United States alone have interposed an appeal, upon a claim to the property founded upon a supposed forfeiture, accruing from a breach of the non-importation act, as I have had little difficulty upon the principal hearing in rejecting this claim, I shall, after a sale, order the proceeds to be delivered over to the captors, upon giving bail. In the other cases of condemnation, I shall, under the circumstances, retain the proceeds of the property, which is to be sold, in court; and where the property has been heretofore delivered to the claimants on bail, I shall not order a payment of the value into court, but suffer it to remain until the final decision.

[NOTE. Matthias Bruen, who had interposed a claim to certain merchandise on board of the Euphrates, appealed from this decree to the supreme court. He did not there contend that there was any error in the sentence of the circuit court, but applied for an order allowing the taking of further proof. This order was refused, and the decree of condemnation affirmed. The Euphrates, 8 Cranch (12 U. S.) 385.]

EUPHRATES, The (TODD v.). See Case No. 14,074

Case No. 4,547.

The EUREKA.

[2 Lowell, 417.][1]

District Court, D. Massachusetts. July, 1875.

BOTTOMRY—AUTHORITY OF MASTER—GOOD FAITH — HYPOTHECATION FOR NECESSARY SUPPLIES — BOND TAKEN BY AGENTS OF THE SHIP—APPLICATION OF PROCEEDS—COMMISSIONS — PREPAID FREIGHT.

1. Whether the maritime law of the United States requires a master to communicate with his owners before giving a bottomry bond, quaere? It has not yet been decided that a separate communication must be made with the owners of the cargo before including it in the hypothecation.

[Cited in The Julia Blake, Case No. 7,578; The Edward Albro, Id. 4,290.]

2. If a bottomry bond is given in good faith for necessary supplies, the objection of want of authority will only go to reduce the premium, so far as the ship is concerned, since by our law the ship is hypothecated without a bond, and a bad title will not merge a good one, in the absence of fraud.

[Cited in The Edward Albro, Case No. 4,290.]

3. Where the bond is taken by the agents of the ship, they may be bound to see to the application of the money.

4. Where the agents, taking a bond, advertised for bids, but gave a wholly insufficient notice, it was taken for granted that they feared a lower bid, and their premium was reduced.

5. Commissions paid the master by the bondholder are not to be included in the bond, though if the master has paid them to the owner, he is to repay them without interest.

6. Freight prepaid is not liable to the bottomry holder.

In admiralty.

F. Goodwin, for libellants.
J. B. Richardson, for ship-owners.
J. C. Dodge, for owners of cargo.
C. W. Storey, for charterers.

LOWELL, District Judge. The principal objection taken to this hypothecation is that the master did not write sufficiently to the owners of the ship, and not at all to the owners of the cargo. Whether this objection is open upon the pleadings, is a serious question; but as the case was carefully argued upon its merits, I will decide them, without prejudice to the libellants' right to take this point in the appellate court, if my judgment could prejudice him in that respect.

The vessel put into Cape Town in distress, and leaking. Some of the damage had been caused by heavy weather, and as much or more by worms. The captain's letters to the managing owner show an intention of concealing from the underwriters the extent of that part of the damage for which they would not be responsible. Whether the owners have either rebuked or repudiated his conduct in this respect, I have no means of knowing, and I certainly shall not assume that they approved it; but, so far as communication goes, his letters to them appear to have been full and frank, unless in one particular, which I shall presently notice; and if communication is required by the law, they seem to have received it. Letters much less explicit were considered sufficient in The Gratitudine, 3 C. Rob. Adm. 240, and The Bonaparte, 8 Moore, P. C. 459.

This point of law is not settled by decisions in this country. In England, it has come to be the law, and is laid down as a general rule, that the master must communicate, if reasonably possible, with the owner of the ship, before hypothecating it; and separately and distinctly with the owners of the cargo, before he includes that in the security to the bondholder; and it would seem that the lender is bound to see that such communication is made. The Oriental, 7 Moore, P. C. 398; The Bonaparte, 8 Moore, P. C. 459; The Hamburg, 2 Moore, P. C. (N. S.) 289; The Onward, L. R. 4 Adm. & Ecc. 38, 57.

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

So far as the cargo is concerned, a judge whose learning in the foreign law is extensive has expressed the opinion that this doctrine of which, however, he appears to approve as just, is peculiar to the jurisprudence of England. Sir R. Phillimore, in The Karnak, L. R. 2 Adm. & Ecc. 289. In a case which touched only the ship, the cargo not having been hypothecated, it was said by the lord chancellor of England, as late as 1847, that there was no law requiring the owner to be notified. Glascott v. Lang, 2 Phil. Ch. 310. And Dr. Lushington took occasion to say more than once that he had been ignorant of any such law as to either ship or cargo, until instructed by his official superiors. The Olivier, Lush. 490; The Hamburg, 2 Moore, P. C. (N. S.) 304.

No such general rule has been adopted in the United States. By our law a master may hypothecate his vessel for supplies and repairs in any port out of his own state, and in the many cases in which this subject has been discussed not an intimation has been made that he must first consult his owners. This silence is conclusive of the question, because there has been scarcely a case of late years in which such notice might not have been readily given.

In this country, therefore, if notice is necessary, the want of it goes only to the validity of the maritime premium. See 1 Pars. Shipp. & Adm. p. 142. And how far this is to be invalidated will depend upon circumstances; because, as is pointed out by Pardessus, a bottomry bond, notwithstanding the premium, may sometimes be more beneficial for the ship-owner than the ordinary loan for necessaries, which binds not only the ship, but also the owner, though the ship should not reach her home port. 3 Pard. Droit Com. No. 911.

That a bond taken in good faith and for an honest advance, but turning out to be invalid for some technical reason, will not destroy the tacit hypothecation, I hold to be well settled, notwithstanding that Mr. Justice Nelson, in delivering the opinion of the supreme court, reserved his opinion upon it; for, besides several decisions never overruled, it is a just rule adopted by all courts which are governed by equitable principles, and one of wide application, that a good title shall never merge in a bad one, excepting, of course, in cases of fraud (The Hunter [Case No. 6,904]; The William & Emmeline [Id. 17,687]; The Virgin, 8 Pet. [33 U. S.] 550, per Story, J.); and so in the law of France (3 Pard. Droit. Com. No. 911).

I am not acquainted with any decision or dictum in the courts of the United States that requires a direct and separate communication to be made with the owners of the cargo under any circumstances; but there are a few dicta and one decision in respect to the ship-owner. The decision is The Circassian [Case No. 2,724]. I do not say there is no such law, but, so far as the cargo is concerned, I shall reserve my opinion. And as to both I am prepared to say that there is no general rule which throws upon the bondholder the burden of either proving such notice or excusing the want of it. The dicta which I have referred to do not carry us far; but I think it has been generally admitted, or taken for granted, that as maritime interest should not be paid without necessity, therefore, if the master was in a position to ask for money from his owners, whether by mail or telegraph, and to obtain an answer immediately or without any injurious delay, he should write, before promising to pay a large premium. Thus Marshall, C. J., says the bond may be given "wherever the owner himself or his known or authorized agent could not be consulted, without endangering or retarding the voyage." Selden v. Hendrickson [Id. 12,639]. This saying resembles very closely, and perhaps not accidentally, the provision in the laws of Oleron, concerning the right and duty of the master to sell a part of his cargo in order to raise money for the necessities of the ship. "Certain merchants, or one," says this venerable code, "freighteth a ship and setteth it in way. The said ship entereth into a haven, and is there so long that money faileth them. The master ought for to send in haste into his country for money, but he ought not to lose his time, for if he do he is bound to redress all the damages of the merchants. But he may take of the wine and of the merchants' goods, and make sale for his store," &c. Laws of Oleron, art. 23, Black Book of Ad. vol. 1, p. 119. It will be remembered that it was upon the power of the master to sell part of the goods that Lord Stowell chiefly relied, in admitting his power to hypothecate the whole, in his famous judgment in The Gratitudine, 3 C. Rob. Adm. 240.

The first decision in England and the only one in the United States were made in cases where the master was in direct telegraphic communication with the ship-owner, and all that he need do, when the demand for a bottomry security was made upon him, was to ask instructions, which he could receive in a few hours. The Oriental, 7 Moore, P. C. 398; The Circassian [supra]. But it cannot be admitted that when the defendant has proved the time which the mail will take and the time the ship was detained, and that the latter exceeds the former, this burden is sustained, and the bondholder is put upon his defense. I do not understand that the English cases, rightly read, sustain any such notion; but some of the sayings of learned judges may seem to look in that direction.

In this case no questions were asked, even in cross-examination, to develop the essential facts, upon which alone this point could be decided: such as, whether the delay was expected to be so long as it was; when the necessity of a bond was first apparent; under what dangers of loss a still greater delay for instructions would have brought the ad-

venture; what was the supposed value of the vessel when repaired. And only at the trial, from witnesses who happened to be accessible, was any testimony given about the course of the mails, and the facilities at Cape Town for transshipment. Not a word is said about this matter in the pleadings; not a word is asked of the bondholder about it when his deposition is taken; and, in short, the elements for a just determination of the question have not been brought out. It appears to have been an after-thought.

Even in England the admiralty court appears to insist that a want of due communication should be specially pleaded; though I am not sure whether the privy council agree in this. See The Olivier, Lush. 490; Glascott v. Lang, 2 Phil. ch. 310; The Bonaparte, 8 Moore, P. C. 460. Taking the evidence exactly as it stands before me, and taking the captain's letters to be honest, which they seem to be, and laying aside all consideration of the burden of proof, the case does not appear to be one in which the master could well have waited for funds after he found out his need of more money than the sales of damaged cargo would supply. The Staffordshire, 25 Law T. (N. S.) 137; 8 Moore, P. C. (N. S.) 443; L. R. 4 P. C. 194; The Gratitudine, 3 C. Rob. Adm. 240. In the latter case, which is the great fountain of learning and suggestion on this subject, will be found many remarks applicable to the case at bar. See pages 262 and 274. The learned judge sustained the bond upon the cargo under circumstances which strike me as far less favorable to the holder in this matter of communication than is that now before me. Here the mail took three months to go and return, and there is much reason to say that the master had no expectation of staying so long at Cape Town. In his letters he regrets, in terms which have every appearance of sincerity, that he is so distant as to be practically beyond the advice and assistance of his owners.

There is one piece of evidence, indeed, that might lead one to suspect that the master had held back information. The libellants, who transacted all the business with the master, say that already in May there was an arrangement for a bottomry bond. If this were so, I think the master ought to have informed the managing owner. But the master denies the fact. There may have been a misunderstanding between the parties; or it may be that the agreement was conditional on a state of circumstances which the master thought would never happen, that is, that the repairs would exceed the value of the damaged sugar to be sold, and so the conversation escaped his recollection. I do not feel justified in finding fraud, which there must have been, if so important an agreement was purposely kept back.

Most of the contested cases in England have been cases about cargo, because the master almost always does inform his owners of all that happens to him, and such notice is all that can usually be required, and is equivalent in most cases to a demand for money; and an absence of such usual communication would be strong evidence of fraud. But as applied to the freighters, the doctrine is admitted to be peculiar to England, and believed by many learned judges there to be novel. I reserve my judgment upon it, except that, if it is understood that any rigid and arbitrary test of an agent's good faith and prudent action is likely to be adopted in the maritime law, I do not share that opinion.

The pleadings and evidence which I have already referred to make it unnecessary to dwell more upon the law. If the English cases were of authority here, they would not require this bond to be set aside.

Coming, then, to the items of the account, several objections are made:

1. To the premium for insuring the risk being included; and this is abandoned by the libellants.

2. To the amount of the charge for maritime interest. This charge is called fifteen per cent., but is in fact a little above twenty per cent., because the sum or principal upon which it is charged includes a charge for the bill of exchange, which was not accepted. It seems that the libellants, acting for the master, whose agents they were, advertised for money on bottomry; but they published the advertisement in the morning, and gave only until the same day at one o'clock in the afternoon for proposals. They appear to have acted on one of those supposed conventional rules that I have referred to, and to have thought that a publication was necessary, but might be merely formal. We must take them upon their own ground, and assume the notice to have been necessary or desirable; and from its inadequacy we ought to presume that a lower bid was feared, if time had been given to make one. Indeed, it is by no means clear that a lower offer was not made; but the evidence is somewhat obscure, and I do not rely upon it. I shall allow twelve per cent. upon the advances actually made, which will amount to nearly fifteen, because the advances were partly by a loan of credit, entirely justifiable and proper, but which gave the libellants a further premium than that appearing on the face of the bond.

3. The captain received in money from the libellants £88, for discounts, which the libellants testify would have been allowed him for his own use by the several tradesmen, if he had settled his bills himself. This practice of agents procuring discounts on the bills of their principals is a most immoral one, but, unfortunately, very extensive and very persistent. The courts have discouraged it in vain. The master, however, swears that he has accounted for the money to his owners. If this is so, there is no reason, perhaps, in this particular case, why

they should retain it, though they certainly ought not to pay interest and premium upon it. I understood the managing owner to say he had received only part of it. He may prove by affidavit how much he has received in account, and for that he should be charged without interest.

4. £630 paid to the master. I think I ought to order a further examination of this item, both upon the law and the facts, if the claimants desire it. It was decided in The Royal Stuart, 2 Spinks, 258, cited at the argument, that an agent who takes a bond is bound to see to the application of the money borrowed, though an ordinary lender may accept the captain's assurance that it is wanted for the legitimate uses of the ship. I should wish further light upon the law, and, if it is as ruled in the case cited, as to the facts of this expenditure.

5. In marshalling the funds, it is claimed by the charterer that he should be repaid the sum of £271 3s. 9d., advanced by him at Java, on account of the freight. This is a valid demand by the law of England, and has been adopted in New York by the district and circuit courts. See The John, 3 W. Rob. Adm. 170; The Catherine, Swab. 263; The Salacia, Lush. 578; The Karnak, 6 Moore, P. C. (N. S.) 136; 5 Moore, P. C. (N. S.) 545; The Anastasia [Case No. 347].

I ought to follow these precedents, unless fully satisfied that they are wrong, which I am not, by any means. This claim is therefore allowed.

Bond pronounced for, excepting as above stated. Further hearing upon the £630, if asked for by claimants within five days; otherwise, decree to be made up in conformity with this opinion.

Case No. 4,548.

EUREKA CONSOL. MIN. CO. v. RICHMOND MIN. CO.

[4 Sawy. 302;[1] 9 Morr. Min. Rep. 578.]

Circuit Court, D. Nevada. Aug. 22, 1877.[2]

VEIN AND LODE DEFINED — OBJECTIONS TO PATENT TO MINING CLAIM, WHEN MADE—DOCTRINE OF RELATION NOT APPLICABLE TO MINING PATENT — SILENCE OF FIRST LOCATOR A WAIVER—PROVISION AS TO PARALLEL LINES DIRECTORY—END LINES TO MINING CLAIM IMPLIED IN ACT OF 1866—PRESUMPTIONS AS TO OFFICIAL DUTIES—LODE MAY BE FOLLOWED ON DIP, NOT ON VEIN BEYOND END OF CLAIM—MINING ACTS OF 1866 AND 1872 CONSTRUED — AGREEMENT CONSTRUED —DIVIDING LINE FOLLOWS DIP.

1. The terms "vein" and "lode" as used by miners, and in the mining acts of congress, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

[Explained in Mt. Diablo Mill & Min. Co. v. Callison, Case No. 9,886. Cited in Richmond Min. Co. v. Rose, 114 U. S. 580, 5 Sup. Ct. 1057; Iron Silver Min. Co. v. Cheesman, 116 U. S. 533, 6 Sup. Ct. 483; Cheesman v. Shreeve, 40 Fed. 793; Blue Bird Min. Co. v. Largey, 49 Fed. 290; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 420, 12 Sup. Ct. 551; Book v. Justice Min. Co., 58 Fed. 121. Distinguished in Doe v. Waterloo Min. Co., 54 Fed. 935.]

2. Under the mining acts of congress, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent, or form, or because of asserted prior location, must come forward with his objections and present them, or he will be afterward precluded from objecting to the issue of the patent.

[Cited in Northern Pac. R. Co. v. Cannon, 54 Fed. 257.]

3. The doctrine of "relation" cannot be applied so as to cut off the rights of the earlier patentee under a later location.

4. The silence of the first locator when a subsequent locator applies for a patent is, under the statute, a waiver of his priority.

5. The provision of the statute of 1872, requiring the lines of each claim to be parallel to each other is merely directory, and no consequence is attached to a deviation from its direction.

6. "End lines" are not named in the act of 1866, but they are necessarily implied in it. By allowing a certain number of feet on a ledge, the mining law meant that a locator might follow his vein for that distance on the course of a ledge, and to any depth within that distance. 14 Stat. 251.

7. The presumption of law is, that the officers charged with the supervision of applications for mining patents, do their duty. If, under any circumstances, a patent for a mining location, issued after the passage of the act of 1872, may be valid without the parallelism of lines required by that act, the law will presume that such circumstances existed.

[Cited in Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 419, 12 Sup. Ct. 550.]

8. The patents allowed by these acts do not authorize the patentee to follow the vein outside of the end lines of the claim vertically drawn down through the lode; but authorize him to follow his vein with its dips, angles and variations to any depth, though it may enter the land lying on the side of the claim. Lines drawn down vertically through the ledge or lode, at right angles with a line representing the course at the ends of the claimant's line of location, will carve out a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass.

9. The act of 1866 allowed so many lineal feet of the particular lode located and surface ground for the convenient working thereof. The act of 1872 granted certain surface ground and the particular lode located and all other lodes, the top or apex of which lies within the surface-lines, subject to the limitation that in following the lodes to any depth, the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location. The act of 1872 in terms annexes this condition to the possession not only of claims subsequently located, but to the possession of those previously located. 17 Stat. 91.

10. In the case of lode claims, a dividing line between them, fixed by agreement, upon the surface at a given point, or for a given distance, must be extended along the dip of the lode, so far as that goes, and must necessarily divide all that the location on the surface carries, or it

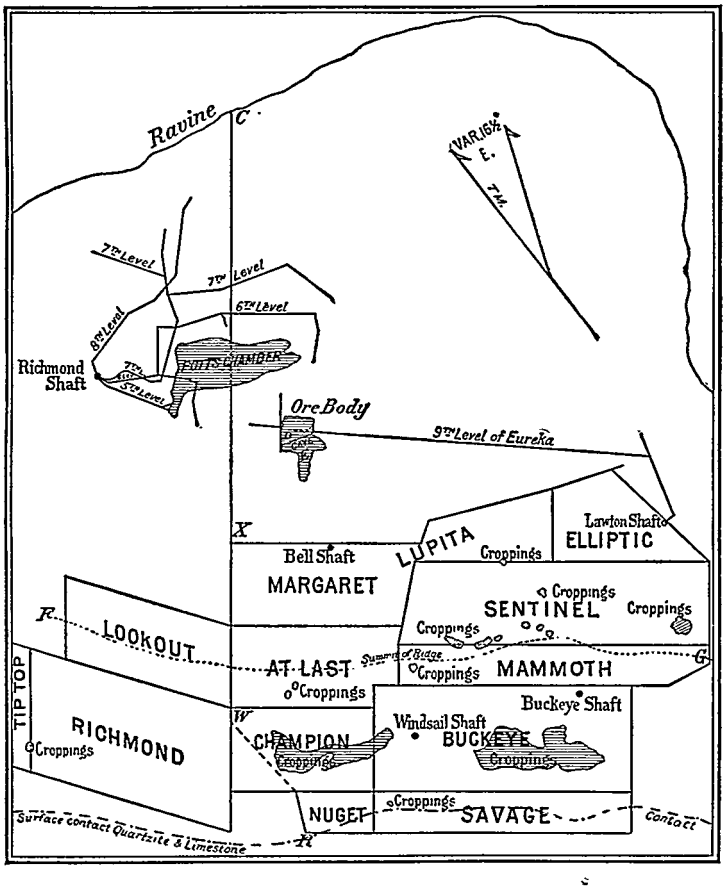
[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission.]

[2] [Affirmed in 103 U. S. 839.]

will not constitute a boundary between the claims.

[See note at end of case.]

The accompanying diagram represents the surface location of the Champion, At Last, Margaret or Lupita, Nugget, Savage, Buckeye, Mammoth, Sentinel and Elliptic mining claims of the Eureka Company, plaintiff, and of the Richmond, Lookout and Tip-top claims of the Richmond Company, defendant; the Lawton or Eureka shaft, and the ninth level therefrom connecting with ore body D E; the Richmond shaft and levels therefrom, and the Potts chamber from which ore has been



taken through the Richmond fifth level; the line R W X, described in the agreement, and this line extended to C. The dotted line represents the surface line of contact between the quartzite and limestone. South of this line is a belt of quartzite, and north of it a belt of metamorphosed limestone, and north of this limestone is a belt of shale. The ore bodies are found in the metamorphosed limestone between the quartzite and shale. This belt of limestone bounded by the quartzite and shale extends nearly east and west over one mile, and varies in width from five to eight hundred feet on the surface to from two to four hundred feet at the greatest depth of working, which is about nine hundred feet. The Potts chamber is about five hundred feet below the surface. The quartzite and limestone dip to the northward at an angle of about 45° from the horizon.

In 1873, the Eureka Company, owned the Lookout claim, and the Richmond Company found on the surface in the Richmond claim, and followed down on its dip to the northward under the Lookout surface a large body of ore. The Eureka Company claiming the ore under the Lookout surface, thereupon sued the Richmond Company to determine the title thereto, and in settlement of that litigation an agreement in writing was made on the sixteenth day of June, A. D. 1873, between the plaintiff, the Eureka Consolidated Mining Company, of the first part, and the defendant, the Richmond Mining Company of Nevada, party of the second part, which provided:

"Whereas, differences have arisen, and now exist, between the parties hereto in respect to the ownership and right of possession of certain mining ground, known as the Lookout ground or claim * * * and of the ores, metals and deposits found in and under said ground; and whereas an action is, or certain actions are, now pending in the courts of the state of Nevada, wherein the party hereto of the first part is plaintiff, and the

party hereto of the second part and others are defendants, for the recovery * * * of the possession of the ground and of the ores therein contained, etc.; and whereas, the said parties have agreed to settle all the differences between them, and put an end to the litigation now pending as aforesaid;

"Now, therefore, this agreement witnesseth, that the said party of the first part, for and in consideration of the sum of $85,000 * * * and the further covenants, agreements, and conditions hereinafter contained * * * has agreed, and does hereby agree, to convey to the said party of the second part, its successors and assigns, with warranty against its own acts, all that certain lot, piece or parcel of land or mining ground * * * known as the Lookout ground or claim; and also all the mining ground and claim lying on the north-westerly side of a certain line, commencing at the north-easterly corner of the Margaret mining ground or claim, which corner is marked X on the map or plan hereto annexed, and made part of this agreement; running thence in a south-westerly direction along the edge of said Margaret ground, the At Last ground, and the Champion ground, to a point marked W on said map; thence southerly to the north-easterly corner of the Nugget ground; thence in a south-westerly direction along the edge of said Nugget ground, to the north-westerly corner thereof at the point marked R on said map or plan; together with all the ores, precious metals * * * and all veins, lodes, ledges, deposits, dips, spurs or angles on, in, or under the same contained * * *; and the said party of the first part further agrees not to protest against or put any obstacle in the way of the party of the second part in their application for a United States patent to the Richmond or other lodes or veins, provided such application does not conflict or cross the aforesaid line agreed upon * * *; and the said party of the second part, for the consideration aforesaid, hath further agreed, and doth hereby further argee to convey unto the said party of the first part, with warranty against its own acts, all right, title, or interest in or to any and all the land or mining ground, * * * on the south-easterly side of the line hereinbefore mentioned and laid down on the said map hereto annexed, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs and angles on, in or under the said land or mining ground, or any part thereof. It being the object and intention of the said parties hereto to confine the workings of the party of the second part to the north-westerly side of the said line continued downward to the centre of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

Conveyances were also made in pursuance of this agreement. After this agreement and settlement, the defendant followed the ore body found in the Richmond and Lookout claims downward toward the northward on the dip, and eastward on the general course or strike of the underlying quartzite and overhanging shale to the Potts chamber, where the body of ore extended eastward across the line W X, produced northward from X to C. The ore body on the line from the Richmond to the Potts chamber varied greatly in size at different points, being alternately contracted or pinched to a small seam, then widening into larger bodies, but there was a continuous connection. The defendant claimed and worked that part of the chamber to the eastward of said line W X produced to C, whereupon the plaintiff claiming that portion of the ore body as being on the dip of its portion of the lode brought this action to recover the possession.

The other facts are sufficiently stated in the opinion of the court.

S. Heydenfeldt, R. S. Mesick, H. K. Mitchell, and Garber & Thornton, for plaintiff.

Thos. Wren, S. M. Wilson, R. M. Clarke, A. M. Hillhouse, C. J. Lansing, Crittenden Thornton, and Williams & Thornton, for defendant.

FIELD, Circuit Justice. This is an action for the possession of certain mining ground, particularly described in the complaint, situated in Eureka mining district, in the county of Eureka, in the state of Nevada. The plaintiff is a corporation created under the laws of California, and the defendant, the Richmond Mining Company, is a corporation created under the laws of Nevada. The other defendants, Thomas Wren and Joseph Potts, are citizens of the latter state. The action was originally commenced in a state court of Nevada, but upon application of the plaintiff, and upon the ground of its incorporation in another state, and the presumed citizenship, from that fact, of its corporators or stockholders in that state, it was transferred to the circuit court of the United States. The complaint in the state court, in addition to the usual allegations of a declaration in ejectment, set forth various grounds upon which was based a prayer for an order restraining the defendants from working the premises in controversy pending the action. The defendants, in their answer to the complaint, not only denied the title of the plaintiff, but made various averments upon which a like restraining order against the plaintiff was asked. Both orders were granted. This union of a demand in ejectment for the property in controversy, with a prayer for provisional equitable relief, is permitted by the system of procedure which obtains in the state courts. thus saving the parties the necessity of litigating in two suits what can as readily and less expensively be accomplished in one. But this union is not permitted in the federal courts; and upon the transfer of the present action, the pleadings of the plaintiff were amended, by substituting a regular complaint in ejectment on the law

side of the court; and a bill was filed for an injunction on its equity side. The defendants answered both, and also filed a cross-bill for an injunction against the plaintiff.

By arrangement of the parties, the defendants, Messrs. Wren and Potts, are dropped out of the controversy, and their names may be stricken from the pleadings. The claim for damages is also waived in this action, without prejudice to any future proceedings with respect to them. By stipulation, the case at law—the action of ejectment—is tried by the court without the intervention of a jury, and the judges sit at San Francisco, instead of Carson, their finding and judgment to be entered in term time in the latter place as though the case were heard and decided there. The testimony taken in the action at law is to be received as depositions in the equity suit, and both cases are to be disposed of at the same time, to the end that the whole controversy between the parties may be settled at once.

The premises in controversy are of great value, amounting, by estimation, to several hundred thousands of dollars, and the case has been prepared for trial with a care proportionate to this estimate of the value of the property; and the trial has been conducted by counsel on both sides with eminent ability.

Whatever could inform, instruct or enlighten the court, has been presented by them. Practical miners have given us their testimony as to the location and working of the mine. Men of science have explained to us how it was probable that nature, in her processes, had deposited the mineral where it is found. Models of glass have made the hill, where the mining ground lies, transparent, so that we have been able to trace the course of the veins, and see the chambers of ore found in its depths. For myself, after a somewhat extended judicial experience, covering now a period of nearly twenty years, I can say that I have seldom, if ever, seen a case involving the consideration of so many and varied particulars, more thoroughly prepared or more ably presented. And what has added a charm to the whole trial has been the conduct of counsel on both sides, who have appeared to assist each other in the development of the facts of the case, and have furnished an illustration of the truth that the highest courtesy is consistent with the most earnest contention.

The mining ground which forms the subject of controversy is situated in a hill known as "Ruby Hill," a spur of Prospect mountain, distant about two miles from the town of Eureka, in Nevada. Prospect mountain is several miles in length, running in a northerly and southerly course. Adjoining its northerly end is this spur called "Ruby Hill," which extends thence westerly, or in a southwesterly direction. Along and through this hill, for a distance slightly exceeding a mile, is a zone of limestone, in which, at different places throughout its length, and in various forms, mineral is found, this mineral appearing sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times in what would seem to be scattered grains. And our principal inquiry is to ascertain the character of this zone, in order to determine whether it is to be treated as constituting one lode, or as embracing several lodes, as that term is used in the acts of congress of 1866 and 1872, under which the parties have acquired whatever rights they possess. In this inquiry, the first thing to be settled is the meaning of the term in those acts. This meaning being settled, the physical characteristics and the distinguishing features of the zone will be considered.

Those acts give no definition of the term. They use it always in connection with the term "vein." The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should, therefore, be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a "lode" given by geologists is, that of a fissure in the earth's crust filled with mineral matter, or more accurately, as aggregations of mineral matter containing ores in fissures. See Von Cotta's Treatise on Ore Deposits, Prime's Translation, 26. But miners used the term before geologists attempted to give it a definition. One of the witnesses in this case, Dr. Raymond, who for many years was in the service of the general government as commissioner of mining statistics, and in that capacity had occasion to examine and report upon a large number of mines in the states of Nevada and California, and the territories of Utah and Colorado, says that he has been accustomed, as a mining engineer, to attach very little importance to those cases of classification of deposits which simply involve the referring of the subject back to verbal definitions in the books. The whole subject of the classification of mineral deposits he states to be one in which the interests of the miner have entirely overridden the reasonings of the chemists and geologists. "The miners," to use his language, "made the definition first. As used by miners, before being defined by any authority, the term 'lode' simply meant that formation by which the miner could be led or guided. It is an alteration of the verb 'lead;' and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find

ore, was his lode." The term "lode-star," "guiding-star," or "north star," he adds, is of the same origin. Cinnabar is not found in any fissure of the earth's crust, or in any lode, as defined by geologists, yet the acts of congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of "lode," as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any one of them. Those acts were not drawn by geologists or for geologists; they were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms "vein" and "lode" in connection with each other in the act of 1866, and their use in connection with the term "ledge" in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose.

It is difficult to give any definition of the term as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

Examining, now, with this definition in mind, the features of the zone which separate and distinguish it from the surrounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness; and on its north side, for a like extent, by a belt of clay, or shale, ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam, less than an inch in width. From that point they diverge, until, on the surface in the Eureka mine, they are about five hundred feet apart, and on the surface in the Richmond mine, about eight hundred feet. The quartzite has a general dip to the north, at an angle of about forty-five degrees, subject to some local variations, as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface, these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked, they are now only from two to three hundred feet apart.

The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of the men of science, to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed and fissured condition pervades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part, operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

In this zone of limestone numerous caves or chambers are found, further distinguishing it from the neighboring rock. The limestone being broken and crushed up as stated, the water from above readily penetrated into it, and, operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing such action from the water above.

Oxide of iron is also found in numerous places throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

This broken, crushed and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone, in the eyes of the practical miner, an individuality, a oneness as complete as that which the most perfect lode in a geological sense ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused by the same forces operating at the same time upon the whole body of the limestone.

Thoughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinions of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would therefore naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffused to justify giving to the limestone the general designation of mineralized matter—metal-bearing rock. The three scientific experts produced by the plaintiff, Mr. Keyes, Mr. Raymond and Mr. Hunt, all of them of large experience and extensive attainments, and two of them of national reputation, have given it as their opinion, after examining the ground, that the zone of limestone between the quartzite and the shale constitutes one "vein" or "lode," in the sense in which those terms are used by miners. Mr. Keyes, who for years was superintendent of the mine of the plaintiff, concludes a minute description of the character and developments of the ground, by stating that in his judgment, according to the customs of miners in this country and common sense, the whole of that space should be considered and accepted as a lead, lode, or ledge of metal-bearing rock in place.

Dr. Raymond, after giving a like extended account of the character of the ground, and his opinion as to the causes of its formation, and stating with great minuteness the observations he had made, concludes by announcing as his judgment, after carefully weighing all that he had seen, that the deposit between the quartzite and the shale is to be considered as a single "vein" in the sense in which the word is used by miners—that is, as a single ore deposit of identical origin, age and character throughout.

Dr. Hunt, after stating the result of his examination of the ground and his theory as to the formation of the mine, gives his judgment as follows: "My conclusion is this: That this whole mass of rock is impregnated with ore; that although the great mass of ore stretches for a long distance above horizontally and along an incline down the foot wall, as I have traced it, from this deposit you can also trace the ore into a succession of great cavities or bonanzas lying irregularly across the limestone and into smaller caverns or chasms of the same sort; and that the whole mass of the limestone is irregularly impregnated with the ore. I use the word 'impregnation' in the sense that it has penetrated here and there; little patches and stains, ore-vugs and caverns and spaces of all sizes and all shapes, irregularly disseminated through the mass. I conclude, therefore, that this great mass of ore is, in the proper sense of the word, a great 'lode,' or a great 'vein,' in the sense in which the word is used by miners; and that practically the only way of utilizing this deposit, is to treat the whole of it as one great ore-bearing lode or mass of rock."

This conclusion as to the zone constituting one lode of rock-bearing metal, it is true, is not adopted by the men of science produced as witnesses by the defendant, the Richmond Company. These latter gentlemen, like the others, have had a large experience in the examination of mines, and some of them have acquired a national reputation for their scientific attainments. No one questions their learning or ability, or the sincerity with which they have expressed their convictions. They agree with the plaintiff's witnesses as to the existence of the mineralized zone of limestone with an underlying quartzite and an overlying shale; as to the broken and crushed condition of the limestone, and substantially as to the origin of the metal and its deposition in the rock. In nearly all other respects they disagree. In their judgment, the zone of limestone has no features of a lode. It has no continuous fissure, says Mr. King, to mark it as a lode. A lode, he adds, must have a foot-wall and a hanging-wall, and if it is broad, these must connect at both ends, and must connect downward. Here, there is no hanging-wall or foot-wall; the limestone only rests as a matter of stratigraphical fact on underlying quartzite, and the shale overlies it. And distinguishing the structure at Ruby hill from the Comstock lode, the same witness says that the one is a series of sedimentary beds laid down in the ocean and turned up; the other is a fissure extending between two rocks.

The other witnesses of the defendant, so far as they have expressed any opinion as to what constitutes a lode, have agreed with the views of Mr. King. It is impossible not to perceive that these gentlemen at all times carried in their minds the scientific definition of the term as given by geologists, that a lode is a fissure in the earth's crust filled with mineral matter, and disregarded the broader, though less scientific, definition of the miner who applies the term to all zones or belts of metal-bearing rock lying

within clearly marked boundaries. For the reasons already stated, we are of opinion that the acts of congress use the term in the sense in which miners understand it.

If the scientific definition of a lode, as given by geologists, could be accepted as the only proper one in this case, the theory of distinct veins existing in distinct fissures of the limestone would be not only plausible, but reasonable; for that definition is not met by the conditions in which the Eureka mineralized zone appears. But as that definition cannot be accepted, and the zone presents the case of a lode as that term is understood by miners, the theory of separate veins, as distinct and disconnected bodies of ore falls to the ground. It is, therefore, of little consequence what name is given to the bodies of ore in the limestone, whether they be called pipe veins, rake veins or pipes of ore, or receive the new designation suggested by one of the witnesses, they are but parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone, from the Jackson mine to the Richmond, inclusive.

The acts of congress of 1866 and 1872 dealt with a practical necessity of miners; they were passed to protect locations on "veins" or "lodes," as miners understood those terms. Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the supreme court of the United States, singing birds were held not to be live animals, within the meaning of a revenue act of congress. Reiche v. Smythe, 13 Wall. [80 U. S.] 162. And in a previous case, arising upon the construction of the Oregon donation act of congress, the term, "a single man," was held to include in its meaning an unmarried woman. Silver v. Ladd, 7 Wall. [74 U. S.] 219. If any one will examine the two decisions, reported as they are in Wallace's Reports, he will find good reasons for both of them.

Our judgment being that the limestone zone in Ruby hill, in Eureka district, lying between the quartzite and the shale, constitutes, within the meaning of the acts of congress, one lode of rock bearing metal, we proceed to consider the rights conveyed to the parties by their respective patents from the United States. All these patents are founded upon previous locations, taken up and improved according to the customs and rules of miners in the district. Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument, or appear from the record of its entry in the local land-office, the patent will take effect by relation as of that date, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872. As in the system established for the alienation of the public lands, the patent is the consummation of a series of acts, having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property. As was said by the supreme court in the case of Shepley v. Cowan, 91 U. S. 338, where two parties are contending for the same property, the first in time, in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

But this principle has been qualified in its application to patents of mining ground, by provisions in the act of 1872, for the settlement of adverse claims before the issue of the patent. Under that act, when one is seeking a patent for his mining location and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from a subsequent location of school warrants or a subsequent purchase from the state, as in the case of Heydenfeldt v. Daney Gold & Silver Min. Co., 93 U. S. 634, the doctrine cannot be applied so as to cut off the rights of the earlier patentee, under a later location where no opposition to that location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority.

But from the view we take of the rights of the parties under their respective patents, and the locations upon which those patents were issued, the question of priority of location is of no practical consequence in the case.

The plaintiff is the patentee of several locations on the Ruby hill lode, but for the purpose of this action it is only necessary to refer to three of them—the patents for the Champion, the At Last, and the Lupita or Margaret claims.. The first of these patents was issued in 1872, the second in 1876, and the third in 1877. Within the end lines of the locations, as patented in all these cases, when drawn down vertically through the lode, the property in controversy falls. Ob-

jection is taken to the validity of the last two patents, because the end lines of the surface locations patented are not parallel, as required by the act of 1872. But to this objection there are several obvious answers. In the first place, it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations was not required. The presumption of the law is, that the officers of the executive department, specially charged with the supervision of applications for mining patents and the issue of such patents, did their duty; and in an action of ejectment, mere surmises to the contrary will not be listened to. If, under any possible circumstances, a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. A patent of the United States for land, whther agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences. In the second place, the provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode. In the third place, the defect alleged does not concern the defendant, and no one but the government has the right to complain.

The defendant, the Richmond Mining Company, also holds several patents issued to it upon different locations; but in this case it specially relies upon the patents of the Richmond and Tip-top claims. It is alleged that these patents were issued upon locations made earlier than any upon which the patents to the plaintiff were issued. Assuming this to be the fact, and claiming from it that the patents, by relation back to such locators, antedate in their operation the patents of the plaintiff; and the further fact that the locations were made under the act of 1866, the defendant relies, upon the facts assumed, to defeat the pretensions of the plaintiff. It contends that, inasmuch as the croppings of the vein it works are within the surface of its patented locations, it can follow the vein wherever it leads, though it be outside of the end lines of the locations when vertically drawn down through the lode. Its position is that, whenever under the law of 1866 a location was made on a lode or vein, a right was acquired to follow the vein wherever it might lead, without regard to the end lines of the location. This position is urged with great persistence by one of the counsel of the defendant, and with the ability which characterizes all his discussions.

The second section of the act of 1866, upon the provisions of which this position is based, provides: "That whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and improved the same according to local customs or rules of miners in the district where the same is situated, and having expended, in actual labor and improvements thereon, an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended, laterally or otherwise, as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It will be seen by this section that, to entitle a party to a patent, his claim must have been occupied and improved, according to the local customs or rules of miners of the district, and that his diagram of the same, filed in the land-office, in its extension laterally or otherwise, must be in conformity with them.

The rules of the miners in the Eureka mining district, adopted in 1865—laws of the district, as they are termed by the miners—provided that claims of mining ground should be made by posting a written notice on the claimant's ledge, defining its boundaries, if possible; that each claim should consist of two hundred feet on the ledge, but claimants might consolidate their claims by locating in a common name, if, in the aggregate, no more ground was claimed than two hundred feet for each name, and that each locator should be entitled to all the dips, spurs and angles connecting with his ledge; and that a record of all claims should be made within ten days from the date of location. The rules also allowed claimants to hold one hundred feet each side of their ledge for mining and building purposes, but declared that they should not be entitled to any other ledge within this surface.

It will be perceived by these rules that they had reference entirely to locations of claims on ledges. It would seem that the miners of the district then supposed that the mineral in the district was only found in veins or ledges, and not in isolated deposits. In February, 1869, new rules were added to those previously passed, authorizing the location of such deposits. These new rules provided that each deposit claim should consist of one hundred feet square, and that the location should take all the mineral within the ground to any depth.

Under these rules, square locations and lin-

ear locations were made by parties, through whom the defendant derives title on what is called the Richmond ledge, and linear locations were made on what is called the Tip-top ledge, with surface locations for mining purposes, both parties claiming with their locations all dips, spurs and angles. It is only of the linear locations we have occasion to speak; it is under them that the defendant asserts title to the premises in controversy.

Now, as neither the rules of miners in Eureka mining district nor the act of 1866, in terms, speak of end lines to locations made on ledges, nor in terms impose any limitation upon miners following these veins wherever they may lead, it is contended that no such limitation can be considered as having existed and be enforced against the defendant. The act of 1866, it is said, recognizes the right of the locator to follow his vein outside of any end lines drawn vertically down when it permits him to obtain a patent granting his mine, "together with the right to follow such vein or lode with its dips, angles and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the state were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein with its dips, angles and variations, to any depth, although it may enter land adjoining—that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass.

As the act of 1866 requires the applicant for a patent to file in the local office a diagram of his claim, such diagram must necessarily present something more than the mere linear location. It is intended that it should embrace the surface claimed for the working of the mine. In this way each of the patents of the parties embraces one or more acres and the fraction of an acre of surface ground and some hundred linear feet on the lode.

The act of 1872 preserves to the miner the rights acquired under the act of 1866, and confers upon him additional rights. Under the act of 1866, he could only hold one lode or vein, although more than one appeared within the lines of his surface location. The surface ground was allowed him for the convenient working of the lode or vein located, and for no other purpose; it conferred no right to any other lode or vein. But the act of 1872 alters the law in this respect; it grants to him the exclusive right of possession to a quantity of surface ground not exceeding a specified amount, and not only to the particular lode or vein located, but to all other veins, lodes and ledges, the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes or ledges to any depth. But these additional rights are granted subject

to the limitation that in following the veins, lodes or ledges, the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location, and a further limitation upon his right in cases where two or more veins intersect or cross each other. The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines.

Our opinion, therefore, is that both the defendant and the plaintiff, by virtue of their respective patents, whether issued upon locations under the act of 1866, or under the act of 1872, were limited to veins or lodes lying within planes drawn vertically downward through the end lines of their respective locations; and that each took the ores found within those planes at any depth in all veins or lodes, the apex or top of which lay within the surface lines of its locations.

The question of priority of location is therefore, as already stated, of no practical importance in the case. This question can only be important where the lines of one patent overlap those of another patent. Here neither the plaintiff nor defendant could pass outside of the end lines of its own locations, whether they were made before or after those upon which the other party relies. And inasmuch as the ground in dispute lies within planes drawn vertically downward through the end lines of the plaintiff's patented locations, our conclusion is that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor.

The same conclusion would be reached if we looked only to the agreement of the parties made on the sixteenth of June, 1873. At that time the plaintiff owned the patented claim called the Lookout claim, adjoining on the north the Richmond claim. The defendant had worked down from an incline in the Richmond and Tip-top into the ore under the surface lines of the Lookout patent. The plaintiff thereupon brought an action for the recovery of the ground and the ores taken from it. A compromise and settlement followed which are contained in an agreement of that date, and were carried out by an exchange of deeds. A map or plat was made showing the different claims held by the two parties. A line was drawn upon this map, on one side of which lay the Champion, the At Last and the Margaret claims, and on the other side lay the Richmond and the Lookout claims. By the agreement of the parties, the plaintiff on the one hand, was to convey to the defendant the Lookout ground, and also all the mining ground lying on the north-westerly side of the line designated, with the ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same, and to dismiss all pending actions against the defendant; and on the other hand, the defendant was to pay to the plaintiff the sum of $85,000, and to convey, with warranty, against its own acts, all its right, title or interest, in and to all the mining ground situated in the Eureka mining district, on the south-easterly side of the designated line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs or angles, on, in or under the same. "It being," says the agreement, "the object and intention of the said parties hereto to confine the workings of the party of the second part (the Richmond Mining Company), to the north-westerly side of the said line continued downward to the centre of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

The deeds executed between the parties the same day were in accordance with this agreement. The deed of the Richmond Mining Company to the plaintiff conveyed all the mining ground lying on the south-easterly side of the designated line, "together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed."

The line thus designated extended down in a direct line along the dip of the lode would cut the Potts chamber, and give the ground in dispute to the plaintiff. That it must be so extended necessarily follows from the character of some of the claims it divides. As the Richmond and the Champion were vein or lode claims, a line dividing them must be extended along the dip of the vein or lode, so far as that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location on the surface carries, and would not serve as a boundary between them if such were not the case. The plaintiff would, therefore, be the owner of the ground in dispute by the deed of the defendant, even if it could not assert such ownership solely upon its patented locations. Our finding, therefore, is for the plaintiff, and judgment must be entered thereon in its favor for the possession of the premises in controversy.

[NOTE. The Richmond Mining Company took an appeal and writ of error in these cases, and the decision was affirmed by the supreme court. Richmond Min. Co. v. Eureka Consol. Min. Co., 103 U. S. 839. That court held that the rights of the parties were conclusively fixed by the compromise agreement of June 16, 1873. Referring to the line of division established by that agreement, Mr. Justice Waite, delivering the opinion of the court, said:

["In establishing this line it is to be presumed that the parties had in view the peculiar character of the property about which they had been contending. They were settling, as between themselves, their rights to mining property, and for the purpose of carrying on mining operations in that locality. They must have known perfectly well, from the observations they had already made, that but a small part of the immense mineral deposit in that zone would probably be found between the exposed surface of the limestone and the quartzite immediately underneath. What they wanted was to fix as between themselves their rights in following what is called in the findings 'the zone of metamorphosed limestone,' so as to reach the anticipated deposits in the depths below. A compromise which only settled their controversies to what was directly under the surface would not have accomplished this. The Richmond wanted to be relieved from all embarrassments in getting under the Lookout, and it is to be presumed the Eureka wanted similar privileges under the surface for the Champion and its other claims. For this purpose the parties had to secure the necessary grants from the United States, and the fair inference from what was done is that the Eureka was not to be interfered with in getting what it could on the south and east of the line, and the Richmond was to have the same privilege on the north and west.

["The language used is to be construed with reference to the peculiar property about which the parties were contracting. Whether the limestone was or was not, within the meaning of the acts of congress and the understanding of miners, a single vein, lode, or ledge, it was all mineralized or metal-bearing rock, as distinguished from the barren walls in which it was inclosed. It descended into the earth on an angle, and, unless parties in working it could follow its course as it went down, they could not avail themselves, to the full extent, of the wealth it contained. When, therefore, we find parties contending about their rights to its possession, and finally agreeing on a line of division between themselves which shall be continued downward towards the center of the earth, the conclusion is irresistible that the line was to be extended downward through the property in its course towards the center of the earth. Anything less than this would make their settlement a mere temporary expedient to get rid of a present difficulty, and leave their most important rights as much in dispute as ever. Such we cannot believe was the understanding."

[For further proceedings had in the circuit court pending the appeal, see Case No. 4,549.]

Case No. 4,549.

EUREKA CONSOL. MIN. CO. v. RICHMOND MIN. CO.

[5 Sawy. 121.][1]

Circuit Court, D. Nevada. March 22, 1878.

JURISDICTION AFTER BILL DISMISSED—INJUNCTION—STATUTORY PROVISIONS.

1. Where an injunction against working a mine pending a suit in equity has been dissolved by decree upon final hearing, the bill dismissed without qualification, the decree enrolled, and an appeal taken in such form as to operate as a supersedeas, the court rendering the decree has no jurisdiction thereafter to restrain the successful party from working the mine pending the appeal.

2. Section 1182, Rev. St. Nev., authorizing the court to require the complainant to give security for injuries resulting to defendant from his acts pending the litigation, and in default thereof to dissolve any injunction in his favor, relates to cases still pending, not to cases already in judgment and closed.

The Eureka Consolidated Mining Company brought an action against the Richmond Mining Company to recover possession of a portion of a silver mine. It also filed a bill on the equity side of the court against the same defendant, alleging ownership of the portions of the mine sought to be recovered in the action at law; that defendant was in possession, working the mine and carrying away the ore; and praying an injunction pending the litigation, and that upon the hearing the injunction be made perpetual. A temporary injunction was issued. The defendant in these actions thereupon filed a cross-bill in the equity suit, alleging that the complainant in the original bill was also in possession of, and working, a portion of the mine in controversy, and praying an injunction, which was also temporarily granted. The parties then waived a jury in the law case, and the law case was tried, and the bill and cross-bill in equity were heard at the same time, during the March term, 1877, upon the same evidence, before Mr. Justice Field, Sawyer, Circuit Judge, and Hillyer, District Judge, the cases having been prepared and argued on both sides with consummate elaboration and ability. The court found for the plaintiff in the law case, and gave judgment for the possession of the mine; and in the equity case a decree was entered for the complainant in the original bill, making the injunction perpetual, and a decree dismissing the cross-bill and dissolving the temporary injunction issued thereon, and for costs. The decree of dismissal was absolute, without any limitation or qualification. The case is reported in 4 Sawy. 302 [Case No. 4,548], where the facts are fully stated. Both parties had drifts running in various directions through the lode on different levels. The Richmond Company took an appeal in the equity case, sued out a writ of error in the action at law, and gave the bonds necessary to operate as a supersedeas. After the appeal the Eureka Company continued to work the mine, and extended its drift on one of its lower levels so as to cut the body of ore in what is known as the "Potts Chamber," as indicated in the report of the case in 4 Sawy. 304, being the body of ore which the Richmond Company was working at the time of the institution of the actions; but did not enter or take possession of, or interfere with, any of the Richmond Company's shafts, winzes, or drifts. Thereupon, at the March term, 1878, of the circuit court, the Richmond Company, upon affidavits stating the appeal, supersedeas, and the acts of the Eureka Company in working the mine in the disputed territory, applied for an order restraining the further working of the mine pending the appeal. It

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

was claimed on the argument, that the working of the mine, although not a technical, was a substantial, violation of the supersedeas; and that the court, for the purpose of preserving the subject-matter in dispute pending the litigation, should issue the order sought. Separate notices of the motion were given in the suit in equity and action at law.

J. J. Williams and Crittenden Thornton, for the motion.

S. Heydenfeldt, John Garber, and H. I. Thornton, opposed.

SAWYER, Circuit Judge. We will consider the equity case first. In this suit, upon the final hearing, the preliminary injunction was dissolved, and the cross-bill of the Richmond Company dismissed absolutely without limitation or qualification, the decree enrolled, and the term adjourned. An appeal to the supreme court was taken in proper time and form, to operate as a supersedeas; but there was nothing to supersede except the decree for costs. The court granted no affirmative relief on the cross-bill. It simply denied the relief asked by the Richmond Company, and dismissed the bill out of court. The Eureka Company was not doing anything under or by virtue of the decree. It was not proceeding to collect the costs, either by execution or otherwise. The case was ended in this court, the jurisdiction exhausted, and the term adjourned. There was no longer any case pending in the court in which any order could be made. The court, therefore, has no further jurisdiction in the case except to execute the decree for costs when the supersedeas is removed, if it should be removed, or till the decree is reversed on appeal to the supreme court, and the cause thereby re-opened upon the receipt of the mandate from the appellate court. To issue a restraining order, would be to exercise a new original jurisdiction without any suit pending in which it could be issued. The cases of Galloway v. Mayor, etc., of London, 3 De Gex, J. & S. 60, and Coleman v. Hudson River Bridge Co. [No. 2,983], are in point. The former case was a bill to restrain the corporation of London from taking certain property under statutory powers. The master of the rolls dismissed the bill, and the order of dismissal was affirmed on appeal, the lords justices differing in opinion. An appeal having been taken to the house of lords, it being probable that the corporation would take the property, and pull down the building pending the appeal, the appellant applied to the lords justices for an injunction to restrain the corporation from proceeding till the appeal could be heard. Although the lords justices expressed themselves as being as willing as they ought to be to grant the injunction, it was denied on the ground that their jurisdiction was gone on the dismissal of the bill. Lord Justice Turner said: "I cannot but think that by reason of the dismissal of the bill, the power of the court is gone. I think that the plaintiff, if he intended to appeal to the house of lords, ought, at the hearing, to have asked the court so to frame its order as to keep alive its jurisdiction pending the appeal."

In Coleman v. Hudson River Bridge Co. [supra] the judges of the circuit court not agreeing, certified a division of opinion to the supreme court. The justices of the supreme court were also equally divided in opinion on the questions certified. The consequence was a dismissal of the certificate of division by the supreme court. In the opinion dismissing the certificate, the court suggest that the bill must be dismissed, and that the complainant could then appeal from the decree dismissing the bill. The defendant filed the mandate and moved to dismiss the bill; whereupon, the complainant's counsel asked the court to so modify the decree of dismissal as to retain the provisional injunction until the decision of the supreme court on appeal from the decree of dismissal. It was argued that the injunction did not necessarily fall with a dismissal of the bill; or, if it did, prima facie, that it was in the power of the court to continue the injunction till the decision of the appeal. Mr. Justice Nelson, in delivering the opinion of the court, says: "The court cannot agree with either of these positions. The legal result of the division of opinion of the judges is a dismissal of the bill, without any qualification. Indeed, the condition of the court renders any qualification or modification of the dismissal impracticable. The case is out of court, so far as it respects any proceedings, except an appeal to review the decree. The judges are disabled, from a contrariety of opinion, to annex any condition, and it certainly requires no argument to show that in case of an unqualified dismissal of a bill, all incidents fall with it. We agree that the chancellor may, in his discretion, direct a modified dismissal, and thereby annex to it such conditions as may seem to him just and equitable. Having the possession and entire control of the cause, this qualified exercise of power is practicable. But such a case is very different from this one, where the dismissal is the result of law, and absolute; and where from the condition of the court no modification can be annexed. It was insisted that an appeal, when taken within the time and in the mode prescribed by the acts of congress of September 24, 1789 (1 Stat. 85, § 23), and March 3, 1803 (2 Stat. 244, § 2), will operate under and by virtue of those acts to continue the injunction. But it is quite clear that these provisions deal only with the writ of execution founded upon the decree rendered, and which is awarded by it, and have no application to the provisional writ of injunction, or other incidental proceedings in the progress of the cause."

This case is clearly an authority directly

upon the point, that when a bill is dismissed without qualification, it is out of court; that all incidents go with it, and the jurisdiction is gone. The very object of the motion was to obtain a modification of the dismissal so as to avoid this result. Mr. Justice Nelson also observes that the point was a subject of consideration in the supreme court, and that no doubt was entertained of it by any of the judges. It may, therefore, be regarded as the decision of the supreme court, and as settling the question. The conclusion is so obvious that the counsel in the last case, in their motion proceeded upon the theory, that unless they could procure a modified decree to preserve the jurisdiction, the jurisdiction would be gone. The two cases cited are the only ones brought to our notice, or that we have been able to find, directly deciding the point. Occasions for continuing injunctions pending an appeal must have been frequent and pressing; and the fact that no instance can be found in practice of their continuance where the bill has been dismissed absolutely, is the best evidence that court and bar have regarded the jurisdiction as gone.

Counsel for the Richmond Company relied upon two cases,—Goddard v. Ordway, 94 U. S. 672, and Hart v. Mayor, etc., of Albany, 3 Paige, 381,—neither of which touches the point in this case. In the former case, there was a receiver; and at the time the supersedeas was perfected, the receiver had twenty-five thousand dollars of the fund in his hands, which required an order of the court to enable him to pay it over to the defendant in pursuance of the decree; which order the court was asked to make. The supreme court say: "Such an order would be in aid of the execution of the decree, which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would defeat its jurisdiction." There the fund was in court, in its custody and control. But in this case, there is nothing to stay, except the collection of the costs. The court has no custody of the subject-matter. There is no fund in court, or under its control. In the case cited from Paige, the master out of court, upon an ex parte application, had granted a preliminary injunction restraining the defendant from destroying and removing his building. Upon the coming in of the answer, the defendant moved, on bill and answer, to dissolve the preliminary injunction, which motion was granted. An appeal was taken from the order dissolving the injunction. There was no dismissal of the bill, no final decree in the case. The appeal was from the interlocutory order. The case still remained in court, and the chancellor had full authority to make any other order that the exigencies of the case demanded. In this condition of things, upon application, and upon terms, he made a new order restraining for a brief time the destruction of the property in controversy. He did not continue the former injunction, but as he says in terms, exercised a new and original jurisdiction in making the new order; that is not this case. Here the bill is dismissed absolutely, and the case is wholly out of court. There is no suit pending in which any order can be made. It follows that the motion in the suit in equity must be denied.

In the action at law, this court never had jurisdiction to issue an injunction. And it was for this reason that the bill in equity was filed. The court never had the custody of the subject-matter. The supersedeas undoubtedly stays the issue of a writ of restitution and execution for costs. But none has been issued or asked for. The Eureka Company are doing nothing whatever by authority, or under, or in pursuance of, the judgment, or of any process issued thereon. It is doing nothing more than it was doing before these actions were commenced, except that it has extended its drifts further into the mine, so as to work the body of the ore which it was seeking by these same means to obtain, prior to the institution of any of these suits. It is simply doing what it was restrained from doing by the injunction issued on the cross-bill while it was in force. It is proceeding under the same claim and authority now, as it was before, nothing more, nothing less. The court has made no order in this case other than to enter judgment for the possession and costs in favor of the Eureka Company, and it can make none.

Undoubtedly, if the court had inadvertently, or otherwise, issued an execution after the perfection of the supersedeas, and the plaintiff had been thus wrongfully put in possession, or was about to be so put in possession under the writ, it could by virtue of its control over its process, have stayed the execution of the writ, or have restored the possession improperly given, had the writ been executed. But nothing of the kind has occurred. Nothing in the custody or control of the court in this action is in any manner affected by the acts of the Eureka Company, and the court is without power to interfere. If there is any power to issue the restraining order asked, it lies with the appellate court. Whether that tribunal can make the order, must be determined by itself. Under its rules, however, upon a proper showing, it can afford a speedy remedy by advancing the cause and bringing it to an early hearing. If deemed a proper case, this would perhaps be the better remedy. While on the one hand the working of the mine might consume the subject-matter of litigation, and leave little for the Richmond Company in case of ultimate success;. on the other, to restrain the working of the mine adjudged

to belong to the Eureka Company for the period of three years, the time suggested as likely to be required for the disposition of the case, would be scarcely less calamitous should the decision be affirmed. To those familiar with the subject, it requires no argument to show that it would be extremely disastrous to allow an open mine, with all its vast extent of shafts, drifts, winzes, etc., to fill with water, fall in and become destroyed, and its machinery, hoisting works, mill and mine itself, to be disused for so long a period. Section 1182 of the Statutes of Nevada, also relied on by the Richmond Company, relates to proceedings in a case pending, over which the court still has control. But this case is ended and gone beyond the reach of this court. The statutory provision, therefore, has no application.

It follows that the motions must be denied, and the order issued restraining the Eureka Company from working pending the motion, vacated and dissolved, and it is so ordered.

Case No. 4,550.

In re EUREKA MANUF'G CO.

In re INVENTORS' MANUF'G CO.

[1 Lowell, 500.][1]

District Court, D. Massachusetts. 1870.

BANKRUPTCY—PRIORITY OF CLAIMS.

Where A. had fraudulently overdrawn his bank account by collusion with the cashier of the bank, and had given the checks to an incorporated manufacturing company of which he was the principal shareholder, and A. was always largely in advance to the company, and both A. and the company became bankrupt: *Held*, the bank could prove as a creditor directly against the company to the exclusion of the assignee of A.

In bankruptcy. These manufacturing companies were duly organized as bodies corporate under the general statute of Massachusetts; they had their general place of business at Boston, and their factories in Connecticut, and became bankrupts in this judicial district. Alexander C. Felton, who was the principal stockholder, and president of both companies, is also a bankrupt, and the controversy here was whether his assignees could prove for a large balance of account against the estate of the respective companies, or whether proof could be made against them for a nearly equal amount by the National Hide & Leather Bank of Boston, to the exclusion of Felton's assignees. This was a very important question to the parties, because the companies were expected to pay a considerable dividend, which, in the one case would go to all Felton's creditors, and in the other to the bank only. The evidence tended to show that Felton in fact transacted most of the financial business of the manufacturing companies, and furnished them with the money they needed, usually by checks on the Hide & Leather Bank; but that he was not the treasurer, and the form of dealing between the parties was that Felton was credited with all moneys that he paid, and charged with all moneys which he received, and having paid out much more than he received, there was a large balance appearing to be due him on the books of each of the companies. Neither corporation kept any bank account, and Felton was in reality their banker. He had dealt with the Hide & Leather Bank for some years, beginning before these corporations were organized; and his pass-book was always in the name of "A. C. Felton, Treasurer," and this form was adopted when he was treasurer of a mining company. The evidence did not show that the bank was ever notified or had reason to believe that the title "Treasurer," on his book, was intended to apply to either of these companies. Felton was in the habit of overdrawing his account at the bank, and the balance against him was constantly increasing, until, at the time of his failure it had reached the amount of at least three hundred thousand dollars, and probably much more. It could be proved that many of the checks drawn by Felton were for the use and benefit of the corporations respectively. Sometimes the checks were drawn by Felton, and the bank-notes were paid to the treasurer here or sent to the superintendent, or paid to the creditors; and in other instances the checks were paid directly to creditors, or sent by Felton or by the treasurer here, to the superintendents of the factories in Connecticut. In what way these last were collected by the superintendent was not explained in evidence. [James D.] Martin, the cashier of the bank, was fully acquainted with the overdrafts; but it did not appear that any other officers of the bank or of the manufacturing companies, excepting Felton and Martin, had such knowledge.

[For proceedings against Felton and Martin for conspiring together to abstract funds from the National Hide & Leather Bank, see U. S. v. Martin, Case No. 15,728.]

G. O. Shattuck, for the bank.

A. A. Ranney and N. Morse, for assignees of Felton.

LOWELL, District Judge. I cannot presume, as it is argued that I should, that the cashier's action was approved by the bank, and that these enormous advances were made as an ordinary debt from Felton to the bank. Special authority must be proved for the action of the cashier so far beyond the limits of his ordinary duty and authority. Upon the face of the transaction it was a fraud on the bank.

The question then is whether the bank can follow the moneys into the hands of the companies, or must be content with holding the debt against Felton. And this is substan-

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

tially the same question as would arise in an action of assumpsit between the same parties, if they had all remained solvent. The right to maintain an action for money had and received does not always depend on privity of contract, or upon contract at all. It is often sustainable on the same evidence that would support trover if chattels and not money were in question: Neate v. Harding, 6 Exch. 349; Clarke v. Shee, Cowp. 200; Mason v. Waite, 17 Mass. 560. It is enough to prove that the defendant has money of the plaintiff, which in equity and good conscience he ought not to retain. Where, indeed, the defendant is bound by a valid contract (to which the plaintiff is not a party or privy) to pay the money to some one else, the plaintiff cannot prevail, not because privity of contract is essential to this form of action, but because it is essential to that particular case, which has its foundation in a valid contract; or, in other words, because the plaintiff, in that particular case, has failed to show, that, as between the parties, the money is equitably his. The law does not imply a contract to pay A., when the debtor is already bound by a valid contract to pay B. In cases not founded on a direct contract, the inquiry is, not concerning privity of contract, but concerning identity of property.

I have not thought it necessary to consider, in this case, whether Felton was so far the agent of the manufacturing companies that his fraud can be imputed to them, because it appears that his balance of account against each corporation is about equal to the amount of checks which the bank can prove were used for the benefit of the corporation. In this state of the accounts, I am of opinion that the bank can prove the amount of these checks against each company to the extent of its debt to Felton, without showing knowledge of the fraud. The reason is, that to this extent the corporations were not holders for value. All that they ever gave for these checks was an implied promise to repay the amount of them when able, and they never have repaid it, but have always been indebted to Felton by a constantly increasing balance of account. They cannot set up Felton's title to the checks, because that was fraudulent. Their obligation to pay him, must yield as soon as the fraud is shown. In this respect the case is analogous to an asserted title to a chattel derived through a thief. The only difference is, that in the case of money, the defendants may rely on any payment or set-off made or acquired without knowledge of the fraud: Lime Rock Bank v. Plimpton, 17 Pick. 159; Watson v. Russell, 3 Best & S. 40; but this defence is wanting here, as we have seen, to the extent of Felton's balance of account against the companies. Is there, then, such identity shown, such a tracing of the money, as will enable the bank to say that its money has come to the hands of the corporations respectively? I think there is. In those instances in which the officers of the corporation acting in its behalf, drew out the bank-bills upon the fraudulent checks, it is impossible to deny that the bank might instantly have reclaimed those bills, on discovering the fraud, and proving that the corporation gave no value for the checks. And the same result would follow whenever the proceeds of checks were traced to their possession, whether in the identical bills or not: Allanson v. Atkinson, 1 Maule & S. 583; Follett v. Hoppe, 17 Law J. C. P. 76. And in the case of all checks paid directly to the treasurer or superintendent of the company, it would be presumed that they drew them or caused them to be drawn. In those instances in which the checks were paid directly to creditors of the manufacturing companies, it might be somewhat more difficult to say that the money of the bank had come to the hands of the companies themselves. Whether any of these checks are now traced and relied on in this offer of proof, I am not advised. This hearing was merely preliminary, to enable the parties to argue the questions of law; the accounts are now to be settled either by the parties or by an assessor, and when the details are found, my final order will be made, and either party aggrieved thereby can appeal. In settling that account, I should wish that discrimination should be made, if now practicable, between those checks which were paid to the creditors of the companies and to the companies themselves. I do not mean to say that the former cannot be proved; perhaps they may be on the ground that the checks being fraudulent, and the corporations having received full value for them, on the credit of the bank, the latter may allege that its money has gone directly to the corporations, or has been paid to their use.

Order, that it be referred to the register to ascertain the amounts due from each of the corporations respectively upon the basis of this opinion. The claim of Felton's assignee is suspended until the above-mentioned accounts are taken. Either party may apply for further directions at any time.

EUROPEAN & N. A. RY. CO. (WIGGINS v.). See Case No. 17,626.

EUSTIS (HATCH v.). See Case No. 6,207.

EUSTIS (HAUGHTON v.). See Case No. 6,224.

Case No. 4,551.

In re EVANS.

[1 Lowell, 525.][1]

District Court, D. Massachusetts. Jan., 1871.

BANKRUPTCY—ENJOINING PROCEEDINGS AT LAW—JURISDICTION OF DISTRICT COURT—BILL FOR AN ACCOUNT AGAINST FRAUDULENT VENDEE OF BANKRUPT.

1. Where a trader had given a fraudulent bill of sale of his stock and fixtures, and the

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

vendee had taken possession of the fixtures and converted them into money, and the stock had then been attached by a deputy-sheriff as the property of the trader, and the trader had afterwards become bankrupt, and the officer had delivered the goods to his assignee in bankruptcy, and the fraudulent vendee of the stock had sued the officer at law: *Held*, the district court would not enjoin the suit against the officer, because he had an adequate and complete defence at law.

2. Whether the district court has jurisdiction to restrain such an action, quaere?

3. The court will retain the bill in such a case against the vendee himself, for an account of the fixtures converted.

4. Such a bill must be filed in the district court as a distinct suit, and not as a petition in the bankruptcy.

[Cited in Ferguson v. Peckham, Case No. 4,741.]

This petition was filed in bankruptcy, but in its form was a bill in equity, in which the assignee of the bankrupt [H. S. Evans] and B. F. Bayley, a deputy-sheriff, complained that one Jeffers had a bill of sale of the bankrupt's stock in trade, and had sued Bayley in an action in the nature of trover in a state court for attaching it as the property of Evans. The prayer of the petition was, that Jeffers be restrained from further prosecuting his suit against the officer, and from bringing any suit against the assignee, and be required to deliver up his bill of sale to be cancelled. The stock was attached before the bankruptcy, and the attaching creditors required the sheriff to retain his possession of it, and after the bankruptcy he delivered it to the assignee, who disposed of it as assets. The bill of sale was alleged to be fraudulent and void, and Jeffers was said to have taken possession of the lease and fixtures which were not attached, and for which the assignee asked an account.

J. D. Ball, for petitioners.

G. A. Somerby, for respondent.

LOWELL, District Judge. It is said to have been decided by Mr. Justice Clifford, sitting in the district of Rhode Island, that actions by assignees against persons "claiming an adverse interest" should be by regular suits at law or in equity as the facts may require, and not by summary petitions in the court of bankruptcy. I suppose this decision is to be taken subject to the qualifications of sections 6 and 25 of the bankrupt act of 1867 [14 Stat. 520, 528], the first of which gives power to any persons who choose to submit to the jurisdiction to take the opinion of the district court on a case stated, and the latter gives the court of bankruptcy power to order the sale of property in the actual possession of the assignee, who is to hold the proceeds instead of the property, subject to all lawful claims and liens. And I may add that, on general principles the assignee, who is an officer of the bankrupt court, may be proceeded against by summary petition in respect to any fund in his hands, if the opposing party chooses to proceed in that way, though the assignee himself has no right to take similar action against third persons. The decision to which I refer has not yet been written out; but I take it to be the law that, subject to the exceptions which I have referred to, the assignee must bring his action. The petition here is a bill in equity in all its substance, and even in most matters of form, and may be transferred to the district court, if the assignee shall be so advised. A similar order was made in the Rhode Island case.

In the mean time, as the merits of the case have been fully argued, I see no impropriety in giving my opinion upon them. Assuming that the bill of sale by Evans to Jeffers was voidable by the creditors of the former, as I must assume on demurrer, I yet cannot restrain the suit of Jeffers against the attaching officer, because the latter has a valid defence, and one which the state courts are ready to uphold. It has been twice decided by the supreme judicial court of Massachusetts, that an officer may prove in reduction of the damages in such an action that the conveyance was a fraud on the bankrupt act, and that he has given over the property to an assignee in bankruptcy. This works more complete justice than would an injunction, because a fraud on the bankrupt act is no fraud unless bankruptcy intervenes within four months or six months, and therefore a suit begun before the bankruptcy by one whose title is good against every one but the assignee, was rightly brought, and ought to hold good for the costs, unless under such peculiar circumstances that the state court would refuse them. The cases to which I refer are Perry v. Chandler, 2 Cush. 237, and Hanson v. Herrick, 100 Mass. 323. Indeed I do not know where to find the jurisdiction of this court to try a case between an attaching officer and a stranger to the bankruptcy, or to enjoin such an action pending in the court which has jurisdiction of it. I find by examination of the files in Maynard's Case,[2] pending in 1842, part of which is recited in Perry v. Chandler, ubi supra, that Judge Sprague was asked to enjoin that suit against the sheriff, but did not do so. The first draft of the decree contains such an order, but it is stricken out and forms no part of the completed record. Judge Sprague did order the mortgage in that case to be cancelled. In this case it does not appear that the assignee has been or is about to be sued or molested in respect to the property, and it seems entirely fit that the case now pending in the state court should be unembarrassed by any preliminary action of this court in equity.

The defendant is bound to account to the assignee for the fixtures and other things which he actually received under the bill of sale, and if the decree here should pre-

[2] [See Arnold v. Maynard, Case No. 561.]

cede the trial in the state court, valeat quantum. In Maynard's Case the opposing interest was that of a mortgagee, and this court being possessed of the property was the proper tribunal in which to ascertain and establish or set aside all asserted incumbrances and liens, and if the mortgagee did not proceed the assignee was bound to do so. In the case of a person claiming not a mortgage but an absolute adverse title, this court has no such exclusive authority, and it is now well settled by the cases above cited, that the state court will give full effect to the defence set up by the officer under the bankrupt law, and thus try the case upon the same title and rules as would be followed here.

Case dismissed as to Bayley. Retained for an account by the defendant to the assignee, and for this purpose to be transferred to the district court.

Case No. 4,552.

In re EVANS.

[3 N. B. R. 261 (Quarto, 62).][1]

District Court, W. D. Texas. 1869.

BANKRUPTCY—PREFERENCE FOR COUNSEL FEES.

1. Lawyers were employed by bankrupt to prepare petition and schedules, soon to be filed in voluntary bankruptcy, and by agreement bankrupt gave them his note of hand for the amount due, secured by mortgage of his real and personal property, set forth in the schedules as assets. *Held*, the mortgage was made contrary to provisions of the 35th section of the act [of 1867 (14 Stat. 534)], is a nullity, but they can prove their claim as unsecured creditors.

[2. Cited in Re Mallory, Case No. 8,990; Re Gies, Id. 5,407; disapproved in Re Kennedy, Case No. 7,700,—as to the holding that solicitors must prove their claim as unsecured creditors.]

3. Bankrupt can no more execute a conveyance declared by the law to be null and void, in order to secure a fee to his lawyer, than to secure the claims of any other creditor.

[Cited in Re Jaycox, Case No. 7,239.]

4. Provisions of section 39 relate exclusively to proceedings in involuntary bankruptcy.

[Cited in Bingham v. Richmond, Case No. 1,415.]

[In bankruptcy. In the matter of Thomas C. Evans.]

DUVAL, District Judge. The question certified to me for decision in this case, arises upon a difference of opinion between a creditor and the assignee of the bankrupt. From an agreed statement of facts between the creditors' attorney and the assignee, it appears that on the 24th December, 1868, the bankrupt being on the eve of going into bankruptcy, and having but a few days in which to prepare his petition and schedule, and file the same in the court at Austin, prior to the 1st January, 1869, employed Messrs. Strickland & Evans, attorneys at law, to perform the service, and agreed to pay them five hundred dollars, for which amount he executed his note, and, to secure the payment of the same, gave a mortgage on nearly all the property, real and personal, named in his schedules. Under this state of facts, and in view of the law applicable to them, the assignee, J. H. Hutchins, Esq., regarding the mortgage as a nullity, refused to consider the claim as a secured one, but approved and registered the same as an unsecured debt against the estate of the bankrupt. A short time subsequently, he amended his action in the premises, and rejected the claim in toto.

While it is apparent that no actual fraud was intended in this transaction by either the bankrupt or his attorneys, there can be no doubt, I think, that the mortgage in question was made contrary to the provisions of the 35th section of the bankrupt act, relating to sales, transfers, assignments, etc., made by a bankrupt four and six months before the filing of the petition by him. The mortgage was, therefore, technically a fraud upon the act, as being in contravention of those provisions, and I think the assignee did right in holding it to be a nullity. A bankrupt can no more execute a conveyance, declared by this law to be null and void, in order to secure a fee to his lawyer, than to secure the claim of any other creditor. The claim of a lawyer for professional services rendered the bankrupt, no matter how meritorious or necessary such services may have been, is not a preferred one. It stands like a claim of any other creditor, and cannot be secured by a conveyance which the law denounces as a nullity. I think, however, the assignee has gone too far in rejecting the claim entirely. He seems to have been influenced to this course by the last clause of section 39. This clause prohibits a creditor, under certain circumstances, from proving his debt in bankruptcy, and I suppose the assignee regarded those circumstances as existing in the present case. But this whole section has reference solely to proceedings in involuntary bankruptcy, and its provisions are applicable only to persons adjudged bankrupt on the petition of one or more of their creditors. I do not think that the prohibition contained in this section against certain creditors proving their debts can be justly applied to the creditors in this case. Upon the whole, my opinion is that the claim of the creditors, Strickland & Evans, should be allowed by the assignee as an unsecured debt, and that the same is entitled to be paid out of the assets of the bankrupt as any other debt of that character.

[1] [Reprinted by permission.]

Case No. 4,553.

EVANS v. BLAKENEY.

[1 Cranch, C. C. 126.] [1]

Circuit Court, District of Columbia. June Term, 1803.[2]

EVIDENCE—VARYING WRITTEN AGREEMENT BY PAROL — LOST INSTRUMENT — CONTRACTS — JOINT PERFORMANCE BY TWO IN NAME OF ONE.

1. If it be agreed that the plaintiff's work shall be measured and valued agreeably to the customary mode in Alexandria, and if it has been so measured and valued, and such measurement and valuation be reduced to writing, the defendant cannot give parol testimony to prove that the plaintiff's work was not worth so much as was certified by the report of those who measured and valued it.

2. If the measurement and valuation of work be reduced to writing, parol evidence of the contents of that writing cannot be given, unless the writing be lost or destroyed or not in the power of the party.

3. If the plaintiff contract to do work on certain terms, and it be done by plaintiff and another, the plaintiff may recover for the whole in his own name.

[See note at end of case.]

Assumpsit, on a written agreement, by which the plaintiff and defendant, one being a bricklayer and the other a carpenter, and each being about building a house for himself, agreed to do the work in his trade to the other's house: "Each work and materials to be measured and valued agreeable to the customary mode in Alexandria, and whatever balance there may be on either side, at any time they choose to have the work and materials valued, is to be paid in cash on demand. (Signed) Abel Blakeney. Jno. Evans." The defendant offered to prove, by parol testimony, that the work done by the plaintiff was not worth so much as the valuers had alleged. The plaintiff objected, that if he proved that the work and materials were measured and valued agreeably to the customary mode in Alexandria, and that according to such measurement and valuation, such a balance was due, it is conclusive; and THE COURT were of that opinion, and refused to receive such evidence. It appeared, from the testimony of the witness, that the valuers had reduced the result of their valuation to writing and delivered it to the parties.

THE COURT decided that parol testimony could not be admitted of the contents of that paper, without showing it to be lost, &c. The plaintiff produced and offered in evidence a writing signed by one Bishop, and McLane, the witness, in which they state that, having been called upon by Evans and Burford, to measure and value, &c., they find a balance of £54. 10s. 1d. due from Blakeney to Evans and Burford. The defendant objected, that this does not appear to be an award between the same parties. But THE COURT overruled the objection, and permitted it to be read in evidence. Verdict and judgment for the plaintiff.

[NOTE. This case was taken to the supreme court on writ of error, and was presented on the transcript of the record without argument. In respect to the single question presented for adjudication, the court remarked that "the meaning of the agreement was that each party should procure the work to be done, and not that they should do it personally." The judgment was affirmed, with 10 per cent. damages and costs. Blakeney v. Evans, 2 Cranch (6 U. S.) 185.]

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

[2] [Affirmed in 2 Cranch (6 U. S.) 185.]

Case No. 4,554.

EVANS v. BOLLEN.

[4 Dall. 342.]

Circuit Court, D. Pennsylvania. April Term, 1800.

JURISDICTION OF CIRCUIT COURTS—ACTION FOR PENALTY—SLAVE TRADE.

[An action was brought in the circuit court for the district of Pennsylvania to recover the penalty of $2,000 for aiding and abetting in the fitting out of a vessel to be employed in the slave trade, contrary to section 2 of the act relating thereto. It was objected that the court had no original jurisdiction, because the suit was for a penalty or forfeiture, and was therefore within the exclusive cognizance of the district courts under the judiciary act; also that, as the offence was committed in New York, it ought to be tried there. *Held*, that the circuit court for the district of Pennsylvania had no jurisdiction.]

This was a qui tam action, in which the following declaration was filed:

"October Session 1797. In the Circuit Court of the United States for the Pennsylvania District of the Middle Circuit. District of Pennsylvania, ss. George Bollen, late of the district of Pennsylvania, yeoman, was summoned to answer to the United States and to John Evans, who sues in this behalf, as well for the said United States as for himself, of a plea that he render to the said United States, and to the said John who sues as aforesaid, the sum of two thousand dollars, which to them he owes, and from them unjustly detains: and whereupon the said John, who sues in this behalf, as well for the said United States, as for himself, by Joseph Thomas his attorney, saith that the said George, on the first day of April in the year of our Lord one thousand seven hundred and ninety-seven, at the port of New-York, to wit, at the district aforesaid, was aiding and abetting, in preparing and sending away from a port within the said United States, to wit, from the port of New-York, a certain vessel called the Betsey, intending that the same should be employed for the purpose of procuring from a foreign country, to wit, from the coast of Africa, the inhabitants of such foreign country, to be transported to a foreign country, to wit, to the island of Saint Croix, to be disposed of as slaves, against the form of the statute in such case made and provided; by means whereof, and by force of the statute in such case made and

provided, an action hath accrued to the said John, who sues in this behalf, as well for the said United States, as for himself, to have and demand of and from the said George the said sum of two thousand dollars: yet the said George (although often requested) hath not paid the said two thousand dollars, or any part thereof, to the said John, who in this behalf sues for the United States as well as for himself, but the same to him to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said John, who sues as aforesaid, five hundred dollars. And thereof he brings suit, &c. Pledges, &c. John Doe. Richard Roe."

Joseph Thomas, for plaintiff.

The action was founded on the act of congress, "to prohibit the carrying on the slave trade, from the United States to any foreign place or country," (volume 3, p. 22, Swift's Ed. [1 Stat. 347]), of which the following were the material sections, in the discussion:

"Section 1. Be it enacted, &c. that no citizen or citizens of the United States, or foreigner, or any other person coming into, or residing within the same, shall, for himself or any other person whatsoever, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare any ship or vessel, within any port or place of the said United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; or for the purpose of procuring, from any foreign kingdom, place, or country, the inhabitants of such kingdom, place, or country, to be transported to any foreign country, port, or place whatever, to be sold or disposed of, as slaves: and if any ship or vessel shall be so fitted out, as aforesaid, for the said purposes, or shall be caused to sail, so as aforesaid, every such ship or vessel, her tackel, furniture, apparel, and other appurtenances, shall be forfeited to the United States; and shall be liable to be seized, prosecuted, and condemned, in any of the circuit courts, or district court for the district, where the said ship or vessel may be found and seized.

"Sec. 2. And be it further enacted, that all and every person, so building, fitting out, equipping, loading, or otherwise preparing, or sending away, any ship or vessel, knowing, or intending, that the same shall be employed in such trade or business, contrary to the true intent and meaning of this act, or any ways aiding or abetting therein, shall severally forfeit and pay the sum of two thousand dollars, one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same."

The facts were proved, as stated in the declaration, but the defendant's counsel made two objections to the jurisdiction of the court: 1st. That this was a suit under the second section, and the circuit court could not take original cognizance of a case of penalty, or forfeiture, as the judicial act expressly declared, that the district court should have "exclusive original cognizance of all suits for forfeitures and penalties incurred under the laws of the United States." Vol. 1, pp. 53, 54, § 9 [1 Stat. 77]. 2d. That the offence was committed, in the state of New-York; and ought to be tried there, upon the principles of the common law, adopted by the constitution of the United States, and various acts of congress. Const. art. 3, § 2, vol. 1, p. 29, § 67 [1 Stat. 17]; Const. Amend. arts. 8, 9 [1 Stat. 21]; 4 Bl. Comm. 350; 3 Bl. Comm. 359, 360; U. S. v. Insurgents [Case No. 15,443].

It was agreed, that a verdict should be given for the plaintiff, subject to the opinion of the court on these points; and after argument by E. Tilghman, for the plaintiff, and Levy, for the defendant,

THE COURT declared, that they had no jurisdiction of the cause; and directed a non pros. to be entered.

Case No. 4,555.

EVANS v. CHAMBERS.

[2 Wash. C. C. 125;[1] 1 Robb, Pat. Cas. 7.]

Circuit Court, D. Pennsylvania. Oct. Term, 1807.

PATENTS—VALIDITY.

Action for a violation of a patent-right. If the allegations and suggestions in the petition for a patent are substantially recited in the patent, it will be sufficient; but the omission to do this will invalidate it.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 481.]

This was an action for infringing the plaintiff's patent-right, to certain improvements made in the manufactory of wheat, &c. by means of a hopperboy. The petition, the patent, dated 18th December, 1790, and the specification, were read; with proof that the defendant had erected similar machinery in his mill without permission.

Hare and Binney, for plaintiff.

Mr. Rawle, for defendant.

A nonsuit was moved for on the following grounds. First, that the patent does not recite that a petition was presented, and the suggestions and allegations of which are recited in the patent. It begins with reciting, that the plaintiff "hath invented," &c. Second; the allegations and suggestions of the petition are not recited. Third; there is an interlineation in the patent, and it is this alone which speaks of the hopperboy. This avoids the patent, as it will any deed. That it was interlined after executed, is to be presumed [Morris v. Vanderen] 1 Dall. [1 U. S.] 64. Fourth; it does not appear that the patent was recorded. Fifth; the patent is for

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

more than the discovery, and it is therefore void; Bull. N. P. 77. The discovery is only of the cross piece to the upright shaft for moving and cooling the flour; and it has been proved that the upright shaft, with a different kind of cross piece, had been used long before the date of this patent; so that the patent gives the exclusive use to that in which the plaintiff was not entitled to the exclusive property.

For the defendant, it was stated, that the law does not require that the presentation of a petition should be recited. Second; we have produced the petition, and the material suggestions are recited. Third; it is too late to object to the patent, on account of the interlineation, after it has been read. Fourth; the recording of the patent is merely directory to the officer. The right vests independent of it, by the express words of the act of 1790 [1 Stat. 109]. Fifth; the patent only grants a right to the upright shaft, and the other parts of the machinery, with the improvement of the hopperboy annexed. No person is precluded from using every part of the machine, without the newly invented hopperboy.

BY THE COURT. The second ground for a nonsuit is not to be gotten over. If the allegations and suggestions of the petition are substantially recited, it will be sufficient. But in this case they are not. All the recitals in the patent refer to the elevators, and other parts of the mill machinery, except, that the use of the hopperboy is incidentally mentioned; without any description of its use, and the manner in which it is to work. But the petition gives a minute and full description of it, which substantially ought to have been recited; particularly in this case, where the patent does not in any manner refer to the petition which has been read. Not that we mean to say that such a reference was necessary, if the suggestion of the petition had been substantially recited. Nonsuit awarded.

[NOTE. For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.]

Case No. 4,556.

EVANS et al. v. The CHARLES.

[1 Newb. 329.] [1]

District Court, D. Louisiana. Nov., 1842.

SALVAGE — DERELICT—"SALVOR"—PARTICIPATION BY OWNERS OF SAVING VESSEL IN SALVAGE COMPENSATION—RATE OF COMPENSATION — REFUSAL OF CERTAIN SALVORS TO ASSERT THEIR CLAIM—COMPROMISE.

1. Where a vessel is found entirely deserted or abandoned at sea, she is, in the sense of the maritime law, a derelict.

2. A salvor is a person who without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship.

3. The owners of the saving vessel are clearly entitled to be paid a proportion of the amount awarded by the court as salvage compensation; and one-third is the proportion usually awarded to such owners because of the risk and danger to which their property is exposed in the performance of the salvage service.

[Cited in Sewell v. Nine Bales of Cotton, Case No. 12,683.]

4. In cases of salvage, a court of admiralty will not indulge mere possible conjectures. If the fact that the vessel has been saved be clear, the presumption that she might otherwise have been saved is mere matter of conjecture in nubibus. Salvors are not to be driven out of court upon the suggestion that if they had not touched a derelict ship and cargo, the latter might, in some possible way, have been saved from all calamity, and therefore that the salvors have little or no merit.

5. It has been customary to award a molety in cases of derelict, but the rule is by no means inflexible, and courts of admiralty, both in England and America, have been governed in their decrees, by the peculiar circumstances of each particular case.

6. Where some of the salvors decline asserting a claim for salvage compensation, their proportion will not accrue to the benefit of either their co-salvors or to the owners of the saving vessel.

[Cited in The Blackwell, 10 Wall. (77 U. S.) 12.]

7. In salvage cases, which are frequently of great importance, and where propositions of compromise are often ambiguously made, and often liable to misconception, the admiralty court in England disregards all tenders, except those formally made by acts of court. It is not known that this doctrine has been adopted by the courts of the United States; but the general practice is in salvage cases, to make tenders by formal acts of court, which are legal memoranda of the nature of pleas.

[In admiralty. Suit by Michael Evans and others (S. Peterson and others and Joseph Clarke and others, interveners) against the ship Charles and the Merchants' Insurance Co., claimants.]

J. T. Preston and C. Roselius, for libelants.

J. P. Benjamin, for respondents.

McCALEB, District Judge. This is a libel for salvage against the ship Charles, found derelict at sea, on the 4th of June last, about eighteen miles from South Point light-house, at the Balize, by the captain of the tow-boat Tiger. At the time she was discovered, she had all her sails set, and was apparently standing in towards the Balize. She had on board a cargo of lumber and staves, but was entirely abandoned. It appears that she left this port about the first of June last, under the command of a Captain Gorham, bound for the port of Bordeaux in France: that she had proceeded on her voyage about forty miles from the Balize, when she was abandoned by the master, crew and passengers under the belief that she was sinking. The ship Louis Quatorze was sailing within a

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

short distance of the Charles, at the time the determination to desert the latter was formed, and a signal being given, the master of the Louis Quatorze went to the assistance of the passengers on board the Charles and received them all on his own vessel. The master and crew of the Charles afterwards hailed and got on board a vessel bound to the port of Charleston; and the passengers pursued their voyage to France. With the ill-grounded apprehensions which led to the abandonment of the vessel to the mercy of the winds and waves, without a single human being on board, I have fortunately, so far as Capt. Gorham and his crew are concerned, nothing to do in passing an opinion upon the merits of the case; and I willingly take leave of this part of the evidence with the single remark that there seems to be not the slightest justification for the course of conduct they pursued. For, admitting that the vessel was making water and was thus rendered unseaworthy and insufficient to encounter the dangers of so long a voyage, it is yet fully established by the testimony of several intelligent and respectable witnesses, whose knowledge of nautical affairs cannot be questioned, that it was not only not probable, but not possible for the ship to have gone down with such a cargo as she then had on board. The plain, nay, the only course which honesty and the most ordinary knowledge of nautical affairs would have suggested, was to return immediately to the port of departure, where the vessel could have been refitted and again dispatched upon her voyage. Capt. Kroll of the tow-boat Tiger, which went to the relief of the derelict vessel, states that on hailing her and seeing no one on board, he ordered the crew of the tow-boat to go on board of her and examine her hold and cabin: that they refused to go, but that Mr. Clarke, the pilot, finally complied with his request, and found upon examination that the baggage of the passengers and crew, as well as the bedding, had been removed, and that everything had been taken out of her except a small quantity of stores, and the cargo of staves and lumber, which has already been mentioned. The captain of the Tiger proceeds to say, that believing that the crew and passengers had either deserted her from apprehensions that she was sinking (his pilot having reported that she had thirty inches of water in her hold), or had been taken by pirates, he looked in every direction to see if he could find anything which could solve the doubts which hung upon his mind, and finally descried a small boat, which he immediately approached and found on board of it a dog! After cruising about in different directions for two or three hours, he returned to the Charles and took her in tow: that in returning to the Balize he encountered a severe gale, which lasted three-quarters of an hour. This gale, he thinks, would have driven the Charles ashore about 9 or 10 o'clock that night, had she not been relieved. He states that he was engaged forty-eight hours in towing her with two other vessels up to the city: that he hired six hands on board the ship Powhattan to go on board of her and pump her; and that these hands were engaged one-third of the time in working one pump. The reason that he employed the hands on board the Powhattan, was the positive refusal on the part of the crew of the tow-boat Tiger to have anything to do with the Charles. They declined in the first instance, to go on board of her to examine her, and refused to pump her, because they said they were not paid for pumping out other ships or vessels than the one upon which they were employed. According to the testimony of Captain Kroll, it appears that the crew of the tow-boat Tiger did nothing but their ordinary duties on board their own vessel, which is employed in towing vessels from the sea up to this port: that all the assistance he received, in saving the Charles, was derived from the meritorious exertions of his pilot, Mr. Clarke, the six men hired on board the Powhattan, and two other men whose names are not given and not remembered either by himself or Mr. Clarke, who was also examined as a witness on behalf of the intervening libelants, Clark, Grant and others, owners of the tow-boat Tiger. There is not a tittle of evidence to show whether or not these two men are of the number of the crew who appear as the original libelants. The testimony of Clarke, the pilot, coincides almost entirely with that of Captain Kroll, and especially with that part of it which relates to the refusal of the crew of the tow-boat, to aid in rendering relief to the Charles. They both say that the service they themselves rendered the derelict ship, was performed in the regular discharge of their accustomed duties, in towing vessels from the sea to this port, and they modestly refuse to receive any extra compensation, or to assert any claim for salvage. They also state that the tow-boat was subjected to an inconsiderable delay by the service rendered to the Charles, and that they were not prevented from bringing up other vessels as usual.

From a candid and impartial view of this testimony, I have no difficulty in coming to the conclusion, that the claim of the original libelants for salvage, should be dismissed. They have not only failed to show that they have rendered any service out of the line of their regular duty, as the crew of the tow-boat Tiger, but it is very clear from the testimony given, which is entirely disinterested, that they refused to render the very service for which they now demand a salvage compensation. The same must be said of the claim of the intervening libelants, Simon Peterson, the carpenter, Levi Sprinkle, first engineer, Augustus Ducoing, second engineer, and James M. Brown, the mate on board the Tiger; for there is nothing in the evidence to show that they performed a single act out of the line of their ordinary duty.

They neither said nor did anything which indicated a wish or disposition to co-operate with the captain and pilot in their laudable efforts to bring the derelict vessel out of danger. The remark of the proctor at the bar, that the occupation of an engineer is such, that it would have been impossible for him with safety to the tow-boat, to have abandoned his post, is all very true; but it might with the same propriety be made with reference to the pilot or the fireman, who had each their separate and peculiar duties to perform, and we cannot say that because they could not do an act, that therefore they should be rewarded for its performance by another, when it is not shown that there was even a wish expressed, or a disposition exhibited, to render the service desired. In reply to the question, what is a salvor? Lord Stowell, in the case of The Neptune, 1 Hagg. Adm. 227, replies that "it is a person who without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship." Now there is nothing in the evidence to show that any of these intervening libelants either proffered or gave any useful service to this derelict vessel, and I have no hesitation in saying that their claim for salvage is without foundation, and ought to be dismissed.

I am now to consider the claim of the owners of the Tiger, who also appear here as intervening libelants; and my attention is first called to the ingenious remarks of the counsel of the respondents, as to their right to be recognized as salvors at all. The definition of the term "salvor," just quoted from Lord Stowell, has reference to one who claims to be considered as such, from an active participation in the service and peril for which he expects to be rewarded. But there are others, who had been repeatedly regarded by our ablest admiralty judges, as entitled to share in the quantum of salvage. On this point, I need only quote from the decision of Judge Story, in the case of The Henry Ewbank [Case No. 6,376]: "The owners, then, have a just claim to share in the salvage in all cases, where their property is put at risk, in effecting the salvage service." And again, he continues: "But the law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It has a more enlarged and a higher aim. It looks to the common safety and interest of the whole commercial world, in cases of this nature; and it bestows upon the owner a liberal bounty and reward to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions, which should interdict his master from any salvage service. If a bare compensation for loss and risk were allowed, what motive could any owner have to suffer his voyage to be retarded, his just expectations of profit to be frustrated, his whole commercial arrangements to be suspended upon risks, which he could neither foresee nor guard against by any common prudence? The law has a wise regard to considerations of this nature; and it offers, not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast. While I agree with Lord Stowell, 'that the master and crew are, in strict language, the only salvors,' I cannot agree to the justice of the remark, 'that the owners in general have no great claim; as to labor and danger, none;' and that they come in only upon the equitable consideration of the court, for damage or risk which their property might have incurred. This latter remark is not borne out by the subsequent practice of that eminent judge; for he has been liberal in awarding salvage to the owners. I can, with far more satisfaction, unite in the opinion of Mr. Chief Justice Marshall, in speaking on this subject in the great case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 269, where he says: 'The proportion allowed to the owners of the firm' (the saving ship), 'and her cargo, is not equal to the risk incurred; nor does it furnish an inducement to the owners of vessels to permit their captains to save those found at sea, in any degree proportioned to the inducements offered to the captains and crews.' To this," Judge Story continues, "it may be added, that it furnishes a strong inducement to officers and seamen, not to desert their own proper duty to their owner and his interests, for selfish purposes, by making them share only in subordination to, and in connection with those interests." In addition to these high authorities, the communication signed by the counsel of the respondents, proposing a settlement of the claims of the owners and the other libelants, seems to treat and recognize them as entitled to claim salvage. I am clearly of the opinion, therefore, that these owners of the tow-boat are properly before the court, and have a right to receive a compensation and reward for the services rendered by their tow-boat. This compensation or reward is to be accorded, however, upon different principles, and for different reasons than it would be bestowed upon the captain and pilot, were they now urging their claims before the court. There are many facts detailed in the evidence given upon the trial, which must exercise necessarily an important influence upon my mind in decreeing the quantum of salvage. It is clearly established, that a vessel and cargo entirely derelict, has been saved by the captain and pilot of a steamboat, which is employed by the owners in the business of towing vessels from the sea to this port. It is also established, that although the aid by which they were restored to safety, was afforded in weather which was for the most part favorable to the salvors, yet that it was in time to save them from the probable consequences of

a violent gale, which the tow-boat and her charge encountered while steering their course to the Balize; and which in the opinion of Captain Kroll, would in all probability, have driven the former ashore, some time in the course of the following night. In this opinion he is sustained by that of his pilot, Mr. Clarke, who also states, that he considered the gale sufficiently violent to have dismasted the Charles; or if it had struck her with her sails set, as they were when she was discovered by the officers of the tow-boat, to have driven her so far under, stern foremost, that she would have filled. Both of the witnesses seem to be quite confident in the opinion that she would have been driven in a short time by the winds and waves on shore. In such an event, she would, in all probability have been a total loss. To weaken the opinion expressed by these two witnesses on this subject, that of Captain Hernman, was asked by the counsel of the respondents. And although this last witness thought that it was impossible for the ship to have been driven ashore in so short a time as stated by Captain Kroll and the pilot, yet he did not say that it was impossible for her to have shared this fate in a somewhat longer time. Upon this point, I can entertain but little doubt, when I recollect that the master of the Louis Quatorze, stated, that she was abandoned at the distance of forty miles from the Balize, about twenty-four hours before she was discovered, only eighteen miles from the South Point light-house.

I will conclude my view of this part of the case by another quotation from the able decision of Judge Story in the case of The Henry Ewbank [supra], which I am induced to insert here by a remark which fell from the counsel of the respondents, to the effect that the ship was lying in the track of vessels passing to and from the Balize, and would, in all probability, have been discovered and brought in by some other vessel if she had not been relieved by the Tiger. "We are not," says Judge Story, "to indulge mere possible conjectures on such subjects. The fact that she was saved is clear; the presumption that she might otherwise have been saved, during this long period, is mere matter of conjecture, in nubibus. It is not the habit of any court of justice to yield themselves up, in matters of right, to mere conjectures and possibilities; and, least of all, do courts of admiralty, in cases of salvage, yield themselves to imaginations of this sort. Salvors are not to be driven out of court upon the suggestion that if they had not touched a derelict ship and cargo, the latter might, in some possible way, have been saved from all calamity, and therefore, that the salvors have little or no merit."

Having satisfied my mind that the owners of the saving vessel are entitled to compensation and reward, I shall now proceed to determine the quantum of salvage to be allowed; and I may here remark that I cannot agree with the counsel of the owners in the estimate they have formed of the services rendered. It is true that this is a clear case of derelict, and I admit that in cases of this nature there are many precedents and high authorities for allowing a moiety to the salvors. Yet a review of these precedents and authorities will show that the rule is not inflexible; and the admiralty courts, both in England and in this country, have been governed in their decrees by the peculiar circumstances of each particular case. A candid consideration of the facts already detailed, has led me to regard the services rendered to the Charles as highly meritorious, but totally unattended by any peril to the salvors, and with little difficulty, save what they encountered in consequence of the gale they experienced in towing the ship to the Balize. After entering the Balize, no further impediment was offered by the winds; and the only obstacle that presented itself to their progress, was the current of the Mississippi river, which the tow-boat is required daily to encounter. The salvors were not even prevented from bringing up other vessels from the Balize, and were consequently subjected to no loss, and but little delay in following their usual occupation. And although there has been a valuable service rendered to the owners of the derelict vessel, it is yet difficult to meet with an instance of salvage, wherein those through whose agency it may have been effected have been subjected to so little actual loss, or so little personal difficulty and peril. In awarding compensation for services of this nature, while I cheerfully acknowledge the merit to which they are entitled, I am, at the same time disposed, in the language of Judge Hopkinson, in the case of Hand v. The Elvira [Case No. 6,015], "to teach the salvors that they may not stand ready to devour what the ocean may spare: that they must not be permitted to believe that they bring in a prize of war, and not a friend in distress." This view of the case would forcibly apply to the captain and pilot of the tow-boat, were they now before the court as claimants of salvage; and far more forcibly do they apply to the owners, who, in all the cases of this nature that I have examined, have been regarded as entitled only to a particular proportion of the whole quantum of salvage decreed. The ingenious proctors of the owners have contended for the rights of their clients upon a principle which, with due deference to the signal ability they displayed in the argument, I cannot recognize as the legitimate basis of the decree I am now called upon to render. They seem to think, that because the crew of the tow-boat Tiger have failed to make out their claim for salvage, and the captain and pilot have declined asserting a right to compensation for their services, they

(the owners) should receive a full moiety of the whole property saved, or the whole quantum of salvage which ought to be, or usually is decreed in such cases, to be divided among all the salvors. To the correctness of this principle I cannot assent. From the evidence upon which this case must turn, I cannot, in the first place, reconcile it to my ideas of strict justice, that a moiety ought to be decreed, even if the crew had proven the allegations of their libel, and the captain and pilot had also claimed as salvors. In the second place, I cannot adjudge the owners entitled to receive the portion which might have been claimed by the captain and pilot. This would be acting upon the principle of awarding to cupidity the portion which modesty had declined receiving.

From an attentive consideration of all the facts of the case, I am of the opinion that one-third of the value of the ship and cargo, would be not only a fair but a liberal quantum of salvage to be awarded to the crew, captain, pilot and owners, if they were all before the court, and had legally established their right to salvage. But, as the owners are alone to be rewarded, and as it is shown that they themselves have not been subjected to either difficulties or dangers, and that their property (the tow-boat) was not exposed to any danger in the service which she rendered to the Charles, I am of the opinion that the proportion of one-third of the whole quantum before mentioned, will be a fair and liberal compensation to be allowed them. In this opinion I am fully sustained by Judge Story, in the case of The Henry Ewbank, from which I have already made liberal quotations, and which I have adopted as my principal guide in deciding upon the merits of this case, both because his opinion must be regarded as of very high authority, and because the decision itself contains a full and able review of the various important cases, of a like nature, decided in this country, by our highest admiralty tribunals. "If I had been called," says he, "for the first time, to say what, under ordinary circumstances, should constitute the proportion of the owner, I might have hesitated; but I incline to think that it would have occurred to me that one-third would be a suitable proportion. But if I had found that proportion to have been adopted in other cases, and to have become in some sort a habit in our courts of admiralty, my own judgment would have reposed upon it with an undoubting confidence. Now, upon looking into the cases decided in the superior courts exercising admiralty jurisdiction, it appears to me that it will be found to have been, throughout, at least to some extent, a habit of these courts to award to the owner one-third of the salvage. That amount has certainly been not unusual in our most commercial districts, and especially in New York and Pennsylvania. See Concklin v. The Harmony [Case No. 3,089]; Bond v. The Cora [Id. 1,620]. My brother, Mr. Justice Washington, adopted it after grave examination, in the case of Bond v. The Cora [Id. 1,621]; and I find that it has prevailed more than any other rule in contested cases brought before the courts of the districts in which he presided. But what is of most powerful influence in this case, it was adopted by the supreme court in the case of Morris v. The Blaireau, 2 Cranch [6 U. S.] 240, 269, 271, after the fullest deliberation upon solemn argument. It seems to me that that case ought to furnish a guide for all subordinate courts under common circumstances. I do not say that the rule should be absolutely inflexible, and not yield to any extraordinary merits, or perils, or losses on the part of the owners. Cases may exist in which it may be quite fit to allow the owner one-half, as was done in several cases stated at the bar. But all such cases must stand upon very peculiar and pressing circumstances." By this decision I am prepared to abide, with the single remark that the peculiar and pressing circumstances therein mentioned, are not to be found in the facts of this case.

My next duty is to put an estimate on the ship and cargo; and I regret that the evidence does not furnish me with some safe guide in coming to a conclusion on this point. There were no appraisers appointed by the parties in interest, and I am therefore compelled to make as fair an estimate as I can from the ex parte appraisements of the ship, made at different times, at the request of the owners of the Tiger and the agent of the respondents. The first appraisers considered the vessel alone, worth the sum of $7,500; one of them (Gregory Byrne) states, that he considered this sum to be her value when she first returned to port, and that she depreciated in value afterwards, about $1,000. Mr. Spedden and Mr. Robinson considered her in the month of October, to be worth about $4,500, and the cargo to be worth $3,300, making both vessel and cargo worth the sum of $7,800. From an attentive review of the whole evidence, I am inclined to think that the first estimate was too high, and the last much too low, as far as related to the ship. The estimate placed upon the cargo, seems so nearly correct, that I am unwilling to interfere with it, especially as it seems from the date of the appraisement, to have been made during the last month. The value of the ship, should, I think, be estimated at $6,000; this is allowing $1,500 as the amount she depreciated in value after the first estimate, and the allowance, I think, is sufficiently liberal, notwithstanding the testimony of Mr. Whitney, that he made several efforts during the summer, to sell her for the sum of $4,000, and failed. I have no doubt, whatever, that his statement is strictly true; but in a deserted city such as this was during the prevalence of the epidemic,

and at a time too, when large cash prices could not be obtained for the best vessels, it is not surprising that the most strenuous efforts to dispose of her, should have proved unsuccessful. But this fact cannot be justly taken as a criterion, by which we are to find out her intrinsic value. She could not have so far depreciated in value, when we take into consideration the fact, that as soon as she was bonded, the agent of her owners considered her capable of performing a voyage to Europe, and that she was actually dispatched upon that voyage.

Before making the decree in accordance with the above estimate, I wish to observe, that I have maturely considered the facts set forth in the supplemental answer and claim, filed by the counsel of the respondents a few days before the final trial of the cause; and although I cannot but regard the conduct of one of the owners of the Tiger (Clark), as highly censurable, yet I cannot say that there is any fact connected with the negotiations for a compromise, which a court could legally consider a ground for refusing salvage to the party and mulcting him in the costs of suit. There has been no legal tender of a specific amount, by a deposit of the money in court, nor have the propositions for a compromise been so made as that they can now be made a matter of judicial cognizance. "In salvage cases," says Dunlap in his Admiralty Practice, "which are frequently of great importance, and where propositions of compromise are often ambiguously made, and often liable to misconception, the admiralty court in England, disregards all tenders, except those formally made by acts of court. It is not known that this doctrine has been adopted in the courts of the United States; but the general practice is, in salvage cases, to make tenders by formal acts of court, which are legal memoranda of the nature of pleas." Adopting this rule, which seems to be a safe and sound one, as my guide in this case, I cannot concur in the reasons urged by the proctor of the respondents, in support of the pleas set up in his supplemental answer and claim. Besides, the detention of the vessel cannot be said legally, to have been caused by the owners of the Tiger, when the record of the case shows that she was in the custody of the marshal, at the suit of the crew, before the written proposition for a compromise relied upon by the proctor for respondents, was made.

It is therefore ordered, adjudged and decreed that the owners of the Tiger do recover from the respondents and claimants of the ship Charles and her cargo, the one-ninth of the sum of $9,300, and the sum of $30, paid by the captain of the Tiger, to the six hands taken from the ship Powhattan to pump out the ship Charles, and also the sum of six dollars, paid by the said owners for taking care of her in port. And it is further ordered, adjudged and decreed that the said respondents and claimants pay the costs of suit.

Case No. 4,557.

EVANS v. CLEVELAND & P. R. CO.

[21 Leg. Int. 29;[1] 2 Pittsb. Rep. 483; 5 Phila. 512; 11 Pittsb. Leg. J. 193.]

Circuit Court, W. D. Pennsylvania. 1864.

RAILROAD COMPANIES — GUARANTY OF MUNICIPAL AID BONDS—BONDS PAYABLE TO BEARER — DEMAND OR NOTICE—SUIT AGAINST RAILROAD COMPANY IN THE FIRST INSTANCE.

1. The Cleveland & Pittsburg Railroad Company had full power to execute a contract guaranteeing the punctual payment of the coupons attached to the bonds of Allegheny county.

2. The bonds and coupons being made payable to bearer, they pass by mere delivery, and no assignment is necessary to enable the holder to sue.

3. In order to maintain an action on the guarantee, it is not necessary for the holder to sue the county of Allegheny in the first instance, or pursue it to insolvency; nor is any demand or notice required.

4. The courts of the United States receive the statutes and judicial precedents of the different states as evidence of the law of each state without special plea or proof of witnesses.

This was an action of debt, brought [by J. B. Evans] to recover the sum of $15,000 for over-due coupons on the bonds of the county of Allegheny, guaranteed by the Cleveland & Pittsburg R. R. Company. The coupons were in the usual form. The contract of the defendants was endorsed on the bonds, and read as follows: "Office of the Cleveland & Pittsburg R. R. Company, Cleveland, Ohio, Oct. 20, 1853. For value received, the Cleveland & Pittsburg Railroad Company assign the within bond to ——, or bearer, and guarantee the punctual payment of the interest thereon, as it may fall due, at the place and time specified. By order of the Board of Directors of the said company. Signed, Cyrus Prentiss, President." The coupons were made payable semi-annually on the 15th day of March and September, at the office of the Ohio Life Insurance & Trust Company in New York. The case arose on a demurrer to the plaintiff's declaration, and was argued by—

John C. Knox, of Philadelphia, for plaintiff.

W. S. C. Otis, of Cleveland, and A. W. Loomis, of Pittsburg, for defendants.

The points made by the defendants' counsel were—1st. That the company had no power to execute the contract of guarantee. 2d. That due diligence had not been used to enforce payment against the county. 3d. That suit would not be upon the guarantee in the name of the holder of the bonds.

The answers to these points by the plaintiff's counsel were—1st. That the presumption was in favor of the authority of the board of directors to execute the guarantee. 2d. That the contract was made in Ohio, to be executed in New York, and that by the laws of both of these states such a contract is an original undertaking, upon which the com-

[1] [Reprinted from 21 Leg. Int. 29, by permission.]

pany was liable to be sued on non-payment of the interest at the time and place specified, and therefore the plaintiff was not bound to proceed against the county in the first instance. 3d. That the guarantee was to "the bearer" of the bonds, and that he alone could maintain the suit.

GRIER, Circuit Justice. First, as to the power of the corporation to make the contract on which this suit is founded. It is not necessary to notice the many metaphysical platitudes to be found in the books, by which corporations were wont to evade responsibility for their acts. Their powers will be strictly construed as between themselves and the state. But modern corporations are but partnerships, where the individuals are too numerous to act in their own names. They may make contracts and bind themselves in their corporate name on any subject necessary to the object of the association. Without noticing the extensive powers given by the act of incorporation, it is plain that a railroad must have power to contract with operatives, to bind themselves to pay money, to raise funds by borrowing and otherwise. It is only when called upon to pay their obligations that the conscience of a corporation (if they can be said to have any,) suggests these astute doubts as to their power to contract. This corporation had given certain shares of stock to the county of Allegheny in exchange for their bonds—a contract which the two corporations were authorized to make. But county bonds are not money, and railroad companies must have money to make their roads. Whatever the wealth and respectability of the citizens of that county may have been, and their plenary ability to pay the bonds in question, those who purchased them might well doubt their punctuality. But a few years before this transaction, the executive officers of the county neglected or refused to collect taxes sufficient to pay the current expenses of the county, and with an utter disregard of the laws of the land they flooded the country with an illegal and irredeemable currency. The citizens who were thus relieved from paying their taxes by this scheme kept the currency afloat by common consent, without regard to the law. However unjust the suspicion might have been as regards very many of the respectable citizens of the county, a purchaser of their bonds might well doubt the punctuality of the payment of the interest, if not dishonest attempts at repudiation of the principal. Hence if the railroad desired to raise money by putting those bonds, into the market, it was their interest to give them all possible credit. That for this purpose, they might make this contract of guarantee, cannot be doubted, if they could make any binding contract at all.

What is the meaning of this contract? It is to "guarantee to the bearer of the bond the punctual payment of the interest thereon as it may fall due at the place and time specified." The intention of the parties should govern in all contracts. There is no magic in any particular word used which might be so defined by grammarians or judges as to make the contract an absurdity. These bonds were payable to bearer, and passed by mere delivery. They required no assignment to satisfy the requirements of any state statute, or to enable the holder to sue on them in his own name. They are a species of commercial securities introduced into this country. They are construed according to the commercial usages of the world. By the custom of all civilized nations, and for the benefit of commerce, confirmed by judicial decisions of every nation and state, they have received such construction as will most enhance their commercial value. It is vain for any judge or court to stand up, with Blackstone in hand, and attempt to arrest the will of all the rest of the world by the application of obsolete doctrines to a new species of security. There is no reason, founded in policy or morality, why a state or other corporation may not bind themselves to pay to bearer both principal and interest, by instruments under seal. To construe the contract of defendants to be a mere warranty of the solvency of the county of Allegheny would be no better than a stultification of the parties to it. What the parties evidently meant was an additional security for punctuality of payment of the interest on the day and at the place mentioned in the bond. If the county has failed to have funds ready at the time and place, then the covenant of defendants is broken, and an action lies thereon.

It is not necessary to notice the various decisions of the Pennsylvania courts as to their construction of such a covenant. The contract is made in Ohio, to be executed in New York, where the law is not hampered by judicial decisions which would compel a construction of a contract directly contrary to the plain intention of the parties. The contract is "with —— or bearer." If necessary the plaintiff might insert his name in the blank. He does not sue as assignee of the bond, under the peculiar statute law of the state of Pennsylvania, or any other state. Plaintiff declares on an original contract made with himself. No demand or notice is necessary to create the liability of the defendants under this contract. The courts of the United States do not require the common law as received in each state to be proved like those of China or Japan. Their statute books and judicial precedents are received as evidence without special plea or proof of witnesses. The plaintiff is entitled to judgment on the demurrer. But the defendant has leave to withdraw his demurrer, and to plead issuably if he sees fit. Otherwise let judgment be entered for plaintiff.

Case No. 4,558.

EVANS v. DAVENPORT.

[4 McLean, 574.][1]

Circuit Court, D. Michigan. June Term, 1849.

PLEADING AT LAW — ORDER OF PLEAS — PLEA TO JURISDICTION — DENIAL OF CITIZENSHIP—WHAT CONSTITUTES CITIZENSHIP—AVERMENT OF RESIDENCE.

1. The common law order of pleading is observed in this court. A plea to the jurisdiction must be first pleaded.

[Cited in Wittemore v. Malcomson, 28 Fed. 606.]

2. The citizenship alleged in the declaration need not be proved unless specially denied by plea.

[Cited in Bland v. Fleeman, 29 Fed. 672.]

3. A person may reside in one state, and be a citizen in another.

4. An averment in a plea of residence is not sufficient.

[At law. Action by Ira P. Evans against Ira Davenport.]

Wilcox & Gray, for plaintiff.

Barstow & Lockwood, for defendant.

OPINION OF THE COURT. This is a declaration in ejectment, under the forms provided by a statute of the state. The defendant first pleads the general issue. 2d. To the jurisdiction of the court, alledging the defendant to be a resident of New York, instead of Michigan. And the plaintiff demurs for irregularity in the order of pleading. The declaration alleges the plaintiff to be a citizen of New York, and the defendant to be a citizen of the state of Michigan.

It is contended that the facts stated in the plea are conclusive against the jurisdiction of the court. The plea denies a material averment in the declaration, which can only be traversed by a special plea. And it can make no difference that another plea taking issue generally, is on record first. The pleas are filed simultaneous, both are good, it is contended, as pleas in bar. And it is further urged, that a want of jurisdiction in a court of special and limited jurisdiction, may be shown at any stage of the cause. A plea in abatement should give the plaintiff a better writ. But in this case if the facts be true as stated, they show that this court can exercise no jurisdiction in the case. This court follows the rule of the common law which requires that the jurisdiction of the court shall first be pleaded. And it is well established (1 Chit. Pl. 440) to file any other plea is a waiver of the want of jurisdiction of the court. From the face of the declaration it appears that there is jurisdiction on the ground of the parties being citizens of different states, the plaintiff being stated to be a citizen of New York, and the defendant a citizen of Michigan.

It was laid down by Mr. Justice Washington, in his reports, that a want of jurisdiction may be taken advantage of at any time in the progress of the cause; and it was held at one time that as the averment of citizenship, in the declaration, was a material one, it was denied by the general issue, and the plaintiff was bound to prove it on the trial. But these decisions have long since been overruled, and the settled practice now is, to require a plea to the jurisdiction where there is no want of jurisdiction apparent upon the face of the declaration. Where this averment of citizenship is omitted in the declaration, advantage may be taken of it in a motion to arrest the judgment or by a writ of error.

The circuit courts of the United States, though exercising a limited jurisdiction, yet are not inferior courts, which must show in their proceedings jurisdiction, or their judgments will be nullities. This is not the case with the judgments of the circuit court although the citizenship does not appear in the proceedings. Their judgments are valid until reversed.

The order of pleading by the common law, is founded in good sense and practical convenience. If the plea to the jurisdiction be sustained, there is an end to the cause on the state of the pleadings; and this necessarily arrests the further progress of the case. And this plea should always be the first pleaded, for this and other considerations. But there is an objection to this plea which has not been noted in the argument. It avers that the defendant is a resident of New York. Now the plea may be true and yet the court have jurisdiction of the case. A citizen of Michigan may reside in New York, for any length of time and still maintain his citizenship in Michigan. A change of citizenship from one state to another is shown by the acts of the party. If he refrains from exercising the rights of a citizen in the state where he resides, and claims to be a citizen of the state he left, he does not lose his citizenship in such state. We suppose that the attention of the pleader was not particularly drawn to the difference between a citizen and resident. Leave will be given to the defendant to amend his plea, both as to the order of pleading and the averment of the plea.

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

EVANS (DOLL v.). See Case No. 3,969.

Case No. 4,559.

EVANS v. EATON.

[Pet. C. C. 322;[1] 1 Robb, Pat. Cas. 68.]

Circuit Court, D. Pennsylvania. Oct. Term, 1816.[2]

PATENTS—EXCLUSIVE CHARACTER OF GRANT—EXPIRATION—CONSTRUCTION — PRACTICABILITY OF INVENTION — NOVELTY — PATENTABLE IMPROVEMENT — NEW COMBINATIONS — ABANDONMENT—CONSTITUTIONAL LAW—VIOLATION OF CONTRACT —OBLIGATIONS BY CONGRESS — EVIDENCE — NOTICE OF SPECIAL MATTER — EXAMINATION OF WITNESS CALLED IN REBUTTAL.

1. A grant by the legislature of a state, of an exclusive privilege in an invention for a limited time, does not imply an irrevocable contract with the people, that at the expiration of the period the invention shall become their property. The state may revive the grant, or refuse it, and in the latter case, at the end of the period, the invention may be used by any one.

[Cited in Wilson v. Rousseau, Case No. 17,832; Jordan v. Dobson, Id. 7,519; Knox v. Lee, 12 Wall. (79 U. S.) 671.]

2. There is nothing in the constitution of the United States, which forbids congress to pass laws violating the obligation of contracts, although such a power is denied to the states.

[Cited in Knox v. Lee, 12 Wall. (79 U. S.) 671; Buckner v. Street, Case No. 2,098; Re Smith, Id. 12,986; Brooke v. McCraken, Id. 1,932; Re Smith, Id. 12,996.]

3. In the notice of special matter, to be given in evidence by the defendant, certain mills were mentioned, where a machine, of which the plaintiff claimed to be the inventor, was in use prior to the date of the alleged discovery of the plaintiff. It is competent to the defendant to give evidence of the use of the machine in other mills, than those mentioned in the notice of special matter.

[See note at end of case.]

4. If a witness is sworn on his voir dire, no other evidence to prove him incompetent can be given. But if, in any part of his examination, it should afterwards appear that the witness was incompetent, his testimony will be set aside by the court.

5. The court will not permit the plaintiff to put a question to a witness, called by him to rebut the defendant's testimony, which is not intended to contradict or discredit the defendant's witnesses, and which question is not rendered necessary by evidence given by the defendant.

6. Although counsel profess that the object of testimony which is offered by them is to discredit one of the witnesses of the opposite party, yet if the court consider the testimony cannot have that effect, they will not permit it to be given.

7. The patent granted to Oliver Evans, contains no grant of a right to the several machines, but is confined to the improvements in the art of manufacturing flour by those machines; although the act of congress, authorising the grant of the patent, authorised the issuing of a patent for the several machines, as well as for the entire improvement.

8. The schedule annexed to letters patent, is part of the patent, so far as it is a description of the machine, but no further.

9. Summary of the provisions of the patent laws.

10. A patent may be for a new and useful art; but it must be practical, and it must be explicable, and referrible to something which may prove it to be useful.

11. The discovery must not only be useful, but new, and it must not have been known and used before in any part of the world; and the title of the patentee to an invention may be impeached, although he was ignorant at the time he received the letters patent, that the invention had been in use before his discovery.

[Cited in Brooks v. Bicknell, Case No. 1,944.]

12. If the discovery be of an improvement only, it must be an improvement in the principles of a machine, art, or manufacture before known or used; if the form or proportions are improved, it is not a discovery.

[Cited in Smith v. Pearce, Case No. 13,089.]

13. The grant of an exclusive privilege by the patent, can only be for the discovery recited and described in the patent and specification.

14. If the patentee is the discoverer of an improvement, and the patent is for the whole machine, it is void.

[Cited in Whitney v. Emmett, Case No. 17,585.]

[See, contra, Goodyear v. Mathews, Case No. 5,576.]

15. A machine or an improvement, may be new and entitled to a patent, although parts of it were before known and used.

[Cited in Whitney v. Emmett, Case No. 17,585.]

16. The combination of old machines to produce a new and useful result, is a discovery for which a patent may be granted.

17. A recovery cannot be had by the patentee of the discovery of a useful combination of known machines, in an action against any one who may use one of the known machines of which the combination is formed.

18. Quere. If in an action for the violation of a patent for a new and useful improvement by the combination of machines, the plaintiff can recover against one who has used one of the machines, employed in such combination, although he may have been the inventor of the machine used by the defendant. In such a case, the inventor should take out a patent for each machine of which he may have been the discoverer, and he should institute an action for the violation of his rights under such a patent.

19. An offer to the patentee of an invention, to take from him a license to use his alleged discovery, does not take away the right of the person who made the offer to deny afterwards that the patentee was the original inventor.

20. There is no limitation of the period in which, when the general issue is pleaded to an action on a patent, the defendant may give in evidence that the patentee is not the original inventor.

21. If the original inventor of a machine abandons the use of it and does not take out a patent for it, no other person can entitle himself to a patent for the machine.

Action for a violation of the plaintiff's patent right to his improvement in the art of manufacturing flour, &c.

The declaration contains a number of counts, charging a breach of the whole patent, and also charging the defendant with having made and used each particular machine, by means of which this manufacture

[1] [Reported by Richard Peters, Jr., Esq.]

[2] [Reversed in 3 Wheat. (16 U. S.) 454.]

is performed and which are particularly described in the schedule.[3]

To this declaration the general issue was pleaded, and notice of the special matter of defence intended to be relied on at the trial, was given to the plaintiff. The material defence stated in the notice was, that the plaintiff is not the original inventor of the hopperboy described in the schedule, but that the same had been used in certain mills, which are named, and in sundry others which are not enumerated, long before the pretended discovery of the plaintiff.[4]

The plaintiff gave in evidence, an act of the legislature of Pennsylvania, dated the 29th of March, 1787, granting to the plaintiff the exclusive privilege of making, using, and vending to be used, his invention of the art of manufacturing flour, for fourteen years. Also the patent upon which this action is brought, dated the 22d of January, 1808. It recites the allegation of the plaintiff, that he had invented a new and useful improvement in the art of manufacturing flour and meal, by means of certain machines, which he terms an improved elevator, an improved

[3] To James Madison, Esq. Secretary of State:

The petition of Oliver Evans, of the city of Philadelphia, a citizen of the United States, respectfully showeth,

That your petitioner having discovered certain useful improvements, applicable to various purposes, but particularly to the art of manufacturing flour and meal, prays a patent for the same, agreeably to the act of congress, entitled, "An act for the relief of Oliver Evans."

The principles of these improvements consist,

1. In the subdivision of the grain, or any granulated or pulverized substance; in elevating and conveying them from place to place in small separate parcels; in spreading, stirring, turning and gathering them by regular and constant motion, so as to subject them to artificial heat, the full action of the air to cool and dry the same when necessary, to avoid danger from fermentation, and to prevent insects from depositing their eggs during the operation of the manufacture.

2. In the application of the power which moves the mill, or other principal machine, to work any machinery which may be used to apply the said principles, or to perform the said operations by constant motion and continued rotation, to save expense and labour.

The machinery by him already invented, and used for applying the above principles, consists of an improved elevator, an improved conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier. For a particular explanation of the principles, and a description and application of the machines which he has so invented and discovered, he refers to the

[4] Evans v. Eaton.

Sir: Please to take notice, that upon the trial of these causes respectively, the respective defendants will give in evidence, under the general issue, the following special matters, viz:

1. That the improved hopperboy, per which inter alia, the plaintiff in his declaration alleges, that he has obtained a patent, was not originally discovered by the patentee, but had been in use anterior to the supposed discovery of the patentee, in sundry places, viz. at the mill of George Fry and Jehu Hollingsworth, in Dauphin county, Pennsylvania, at Christian Stouffer's mill, in Warwick township, Lancaster county, Pennsylvania, at Jacob Stouffer's mill in the same county, at Richard Downing's mill in Chester county, Pennsylvania, at Buffington's mill on the Brandywine, at Daniel Hutton's mill in Lancaster county, Pennsylvania, at Henry Stouffer's mill in York county, Pennsylvania, at Diehl's mill in the same county, or at some of the said places; and also in sundry other places in the said state of Pennsylvania, the state of Maryland, and elsewhere in the United States.

2. That the patent given to the plaintiff, as he alleges in his declaration, is more extensive than his discovery or invention, for that certain parts of the machine in the said patent, called an improved hopperboy, and which the plaintiff claims as his invention or discovery, viz. the upright shaft, arms, and flights, and sweeps, or some of them, and those parts by which the meal is spread, turned, and gathered, at one operation; and also several other parts were not originally invented or discovered by him, but were in use prior to his said supposed invention or discovery, viz. at the places above mentioned or some of them.

3. That the said patent is also more extensive than the plaintiff's invention or discovery, for that the application of the power that moves the mill, or other principal machine to the hopperboy, is not an original invention or discovery by the plaintiff, but was in use anterior to his said supposed invention or discovery, viz. at the places above mentioned, or at some of them.

4. That the said patent is void, because it purports to give him the exclusive property, in an improvement in the art of manufacturing meal, by means of a certain machine, termed an improved hopperboy, of which the said plaintiff is not the original inventor or discoverer, parts of the machine, in the description thereof referred to, by the patent, having been in the use anterior to the plaintiff's said supposed discovery, viz. at the places above mentioned, or some of them, and the said patent and description therein referred to, contains no statement, specification, or description, by which these parts, so used as aforesaid, may be distinguished from those, of which the said plaintiff may have been the inventor or discoverer; protesting at the same time, that he has not been the inventor or discoverer, of any of the parts of the said machine.

5. That the improved elevator described in the declaration, or referred to therein, was not originally discovered by the plaintiff, but was anterior to his said supposed discovery or invention, described in certain public works or books, viz. in Shaw's Travels, in the first volume of the Universal History, in the first volume of Mortimer's Husbandry, in Ferguson's Mechanics, in Vitruvius, in Bossue's Histoire des Mathematiques, in Wolf's Cours de Mathematiques, in Desagulier's Experimental Philosophy, and in Promey's Architecture Hydraulique, or in some of them.

6. That the said patent is more extensive, than the invention or discovery of the plaintiff, because certain parts of the machine, called an improved elevator, were anterior to the plaintiff's said supposed invention or discovery, described in certain public works or books, viz. the works or books above mentioned, or some of them; and that the said patent is void, because it neither contains, nor refers to any specification or description, by which the parts so before described, in the said public works (or books,) may be distinguished from those parts, of which the plaintiff may be the inventor or discoverer; protesting at the same time, that he has not been the inventor or discoverer, of any of the parts of the said machine.

I am, respectfully, your obedient servant,

Hor. Binney, for Defendant.

C. J. Ingersoll, for Plaintiff.

March 8, 1816.

conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier, which machines are moved by the same power that moves the mill, or other principal machinery; and in their operation, subdivide any granulated or pulverized substance, elevate and carry the same from place to place, in small and separate parcels; spread, stir, turn, and gather them, by regular and constant motion, so as to subject them to artificial heat, and the air to dry and cool when necessary. It then recites the material parts of the act of congress, passed on the 21st of January, 1808 [6 Stat. 70], "for the relief of Oliver Evans," and concludes by granting "to the said Evans for fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Oliver Evans himself, in the annexed schedule, and is made a part of these presents."

The schedule describes the principles of the machine in the manner, but more fully than they are stated in the patent, and also the principles, the form and use of each particular machine; and claims as his invention, the peculiar properties or principles which each machine possesses; and in particular as to the hopperboy, the spreading, turning and gathering the meal, at one operation, and the rising and lowering of its arms by its motion, to accommodate itself to the quantity of meal it has to operate upon.

The plaintiff gave evidence, to prove his discovery to have been as early as the year 1783, and to have been brought into use in the year 1785. He also proved it to be a highly useful invention, in the saving of manual labour, increasing the quantity and improving the quality of the flour. He also proved that the defendant had in use in his mill, a hopperboy, constructed precisely like the plaintiff's. That he had offered to take out a license from the plaintiff, but refused to pay the sum demanded. The plaintiff having closed his evidence, a motion was made to nonsuit the plaintiff. It was contended, that after the expiration of the plaintiff's privilege granted to him by this state, the right to his invention became vested in the people of the state, by an implied contract with the government; and that therefore congress could not, consistently with the constitution of the United States, grant to the plaintiff an exclusive right to the invention.

BY THE COURT. Neither the premises upon which this motion is founded, nor the conclusion can be admitted. It is not true that the grant of an exclusive privilege to an

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specifications and drawings hereunto annexed; and he is ready, if the secretary of state shall deem it necessary, to deliver models of the said machines. Oliver Evans.

Description.

Of the several machines invented by Oliver Evans, and used in his improvement on the process of the art of manufacturing flour or meal from grain, and which are mentioned in his specification as applicable to other purposes.

No. I.—The Elevator.

Plate vi. Fig. 1. AB. represents an elevator for raising grain for the granary O, and conducting it by spouts into a number of different garners as may be necessary, where a mill grinds separate parcels for toll or pay. The upper pulley being set in motion, and the little gate A drawn, the buckets fill as they pass under the lower, and empty as they pass over the upper pulley, and discharge into the moveable spout B, to be by it directed to any of the different garners.

Fig. 2. Part of the strap and bucket, showing how they are attached.

A, a bucket of sheet iron, formed from the plate 8, which is doubled up and riveted at the corners, and riveted to the strap.

B, a bucket made of tough wood, say willow, from the form 9, being bent at right angles at e c, one side and bottom covered with leather, and fastened to the strap by a small strap of leather, passing through the main strap, and tacked to its sides.

C, a lesser bucket of wood, bottomed with leather, the strap forming one side of it.

D, a lesser bucket of sheet iron, formed from the plate 11, and riveted to the strap which forms one side of the bucket.

Fig. 6. The form of a gudgeon for the lower pulley.

7. The form of the gudgeons of the shaft of the upper pulley.

12. The form of the buckle for tightening the elevator strap.

Fig. 17, Plate vii. represents an elevator, applied to raise grain into a granary, from a wharf, &c. by a horse.

16. represents an elevator raising the meal in a grist-mill.

18, represents an elevator wrought by a man.

Plate viii. 35, 39, represents an elevator raising grain from the hold of a ship.

33, 34, represents an elevator raising meal from three pair of stones, in a flour-mill, with all the improvements complete.

Plate ix. Fig. 1, CD represents an elevator raising grain from a waggon. E represents the moveable spout, and manner of fixing it, so as to direct the grain into the different apartments.

Plate x. 2, 3, and 11, 12, represents elevators, applied to raise rice in a mill for hulling and cleaning rice.

The straps of elevators are best made of white harness leather.

No. II.—The Conveyor.

Plate vi. Fig. 3, represents a conveyor for conveying meal from the millstones into the elevator, stirring it to cool at the same operation, showing how the flights are set across the spiral line, to change from the principle of an endless screw, to that of a number of ploughs, which answer better for the purpose of moving meal, showing also the lifting flights set broadside foremost, and the manner of connecting it to the lower pulley of the elevator which turns it.

Fig. 4. The gudgeon of the lower pulley of the elevator connected to the socket of the conveyor.

5. An end view of the socket, and the band which fastens it to the conveyor.

Plate viii. 37, 36,—4 represents a conveyor for conveying grain from a ship to the elevator 4—5, with a joint at 36, to let it rise and lower with the tide.

44—45. A conveyor for conveying grain to different garners from an elevator.

31—32. A conveyor for conveying tail flour

invention for a limited time, implies a binding and irrevocable contract with the people, that at the expiration of the period the invention shall become their property. The state has a perfect right to renew the grant at the end of the period or to refuse to do so; and in the latter case, it is a matter of course that the invention may be used by any person who chooses to do so. In like manner may congress renew a patent right or decline to do so. But even if the premises were true, still there is nothing in the constitution of the United States which forbids congress to pass laws violating the obligation of contracts, although such a power is denied to the states individually.

The defendant produced a number of witnesses who described a machine called Stouffer's machine or hopperboy, which had been in us in many mills from the year 1764. The construction of this machine is an upright shaft, sometimes round but most commonly square, passing through a board somewhat in the form of an S, with strips of wood nailed on the lower side for the purpose of moving, stirring, mixing and delivering the flour into the hopper-chest; this machine is moved by the bolting gears. The witnesses stated, that the action of this machine cools and dries the flour sufficiently to be packed from the bolting chest. Some of the witnesses were of opinion that this machine does not cool the flour as well as the plaintiff's, even independent of the elevators; many witnesses, however, expressed a different opinion.

The plaintiff objected to the defendant giving any evidence to prove that this machine was used in mills, other than those particularly named in the notice. This objection was overruled, for the reasons stated in the case of Evans v. Kremer [Case No. 4,565]. (To this opinion an exception was taken.) A question also arose, whether, when a witness is sworn on his voir dire, any evidence can be given to prove him to be incompetent, except such as arises from his own acknowledgments. The court decided that it could not. But if it should in any subsequent stage of the examination, appear, by other evidence, that he is not a competent witness, the court will set him aside. The plaintiff's counsel asked one of their own witnesses, called to rebut the evidence given by the defendant, whether John, Peter and Jacob Stouffer, who it had been proved, had the Stouffer hopperboy in their mills, had taken out licenses under the plaintiff. This was objected to, and the objection was decided by the court to be well taken; it not being stated that the question was intended to contradict or discredit any of the defendant's witnesses; nor that it was rendered necessary by any evidence given by the defendant. If the license was purchased by those persons, it neither directly, nor by fair inference, proves

to the meal elevator, or the coarse flour to the eye of the stone.

Plate ix. Fig. 11, represents a conveyor for conveying the meal from two pair of stones, to the elevator connected to the pulley, which turns them both.

Plate x. 2—11, represents conveyors applied to convey rice, in a rice mill, from a boat or waggon to the elevator, or from the fan to an elevator.

No. III.—The Hopperboy.

Plate vii. Fig. 12, represents a hopperboy complete for performing all the operations specified, except that only one arm is shown.

AB, the upright shaft; CED, the arms, with flights and sweeps.

E, the sweeper to fill the bolting hoppers HH. CFE, the brace, or stay, for steadying the arms.

P, the pulley, and W, the weight, that is to balance the arms, to make them play lightly on the meal, and rise or fall, as the quantity increases or diminishes.

ML, the leader. N, the hitch stick, which can be moved along the leading line, to shorten or lengthen it.

Fig. 13. SSS, the arms turned bottom up, showing the flights and sweepers complete at one end, and the lines on the other end show the mode for laying out for the flights, so as to have the right inclination and distance, according to the circle described by each, and so that the flights of one end may track between those of the other. The sweepers and the flights at each end of the arms are put on with a thumb screw, so that they may be moved, and so that these flights may be reversed, to drive meal outwards from the centre, and at the same time trail it round the whole circle: this is of use sometimes, when we wish to bolt one quantity which we have under the hopperboy, without bolting that which we are grinding, and yet to spread that which we are grinding, to dry and cool, laying round the hopperboy, convenient to be shovelled under it, as soon as we wish to bolt it.

Fig. 15. The form of the pivot for the bottom of the upright shaft.

14. The plate put on the bottom of the shaft to rest on the shoulder of the pivot; this plate is to prevent the arm from descending so low as to touch the floor.

Plate viii. Fig. 25, represents a hopperboy attending two bolts in a mill, with all the improvements complete.

Plate ix. The hopperboy is shown over QQ. Fig. 4 is the arm turned upside down, to show the flights and sweepers.

No. IV.—The Drill.

Plate vi. Fig. 1. HG represents a drill conveying grain from the different garners to the elevator, in a mill for grinding parcels for toll or pay.

Plate vii. Fig. 16. Bd, a drill, conveying meal from the stones in a grist mill, to the elevator. The strap of this machine may be made broad, and the substance to be moved may be dropped on its upper surface, to be carried and dropped over the pulley, at the other end: in this case it requires one bucket like those of the elevator, to bring up any that may spill off the strap.

For full and complete directions for proportioning all the parts, constructing, and using the above described machines, see the book which I have published for that express purpose, entitled, "The Young Millright and Miller's Guide." See plate viii. representing a mill, with three pair of millstones, with all the improvements complete, except the kiln-drier.

No. V.—The Kiln-Drier.

Plate ix. Fig. 2. A, the stove, which may be constructed simply of six plates, and inclosed by a brick wall, lined with a mortar composed of pulverized charcoal and clay. B, the pipe for carrying off the smoke. CC, the air-pipes, connecting the space between the stove and wall,

any thing in relation to the matter in controversy. (This opinion was excepted to.) The plaintiff offered to prove that the father of Mr. Rine, one of the defendant's witnesses, had taken a license from the plaintiff, for the purpose, as the counsel stated, to discredit the witness.

BY THE COURT. Although the counsel proposes to offer this evidence to discredit one of the defendant's witnesses, yet as it is obvious that it cannot in the most remote degree have this effect, it is improper to give it. (Motion overruled.)

It was contended by the plaintiff's counsel, First. That an art as well as a machine may constitute a patentable interest; so likewise the application of a new principle to an old machine, to produce a new result, or a combination of old machines to produce a new result in an old art; even a principle may be patented, if it be applied to any useful purpose. 8 Term R. 95; 2 H. Bl. 463; Fessen. Pat. 231; Whittemore v. Cutter [Case No. 17,601]. Second. The plaintiff having a patent for the whole improvement, composed of sundry machines, has a right to all and each of the machines, and may maintain an action against any person who makes or uses them separately. The act for the relief of Oliver Evans, authorises a patent to be made to him for the whole and for each machine, and the plaintiff, in his schedule, which is part of the patent, claims an exclusive right to each. Third. It is not necessary that the plaintiff should be the first discoverer, if he was a real bona fide discoverer, without knowing that a similar discovery had previously been made; this is clearly the meaning of the word "true" in the tenth section, with which the word "original" in the sixth section is synonymous. The word first is used in the statute of James, and was no doubt dropped intentionally by congress. Fourth. Though the plaintiff should not be the original discoverer; yet, after the defendant's offer to take a license under him, it does not lie in his mouth to make that defence. Fifth. As the tenth section limits the bringing of a scire facias to three years, under the equity of that section, no person should be permitted, after three years, to set up the de-

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with the conveyor. DD, the pipes for the heated air to escape.

The air is admitted at the air-hole below, regulated by a register, as experience shall teach to be best, so as not to destroy the principle which causes the flour to ferment easily, and rise in the process of baking. The conveyors must be covered close; the meal admitted by small holes as it falls from the millstones.

Oliver Evans.

Witness: Samuel H. Smith.
Jo. Gales, Junr.

The United States of America.

To all to whom these Letters Patent shall come:

Whereas Oliver Evans—of the city of Philadelphia, a citizen of the United States, hath alleged, that he hath invented a new and useful improvement in the art of manufacturing flour and meal, by means of certain machines, which he terms an improved elevator, an improved conveyor, an improved hopperboy, an improved drill, and an improved kiln-drier: which machines are moved by the same power that moves the mill or other principal machinery, and in their operation, subdivide any granulated or pulverized substance, elevate and carry the same from place to place, in small and separate parcels, spread, stir, turn, and gather them by regular and constant motion, so as to subject them to artificial heat, and the air to dry and cool when necessary: a more particular and full description, in the words of the inventor, is hereby annexed in a schedule; which improvement has not been known or used before his application—has affirmed, that he does verily believe, that he is the true inventor or discoverer of the said improvement, and, agreeably to the act of congress, entitled, "An act for the relief of Oliver Evans," which authorizes the secretary of state to secure to him by patent, the exclusive right to the use of such improvement in the art of manufacturing flour and meal, and in the several machines which he has discovered, improved, and applied to that purpose; he has paid into the treasury of the United States, the sum of thirty dollars, delivered a receipt for the same, and presented a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose: These are therefore to grant, according to law, to the said Oliver Evans, his heirs, administrators, or assigns, for the term of fourteen years, from the twenty-second day of January, 1808, the full and exclusive right and liberty of making, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Oliver Evans himself, in the schedule hereto annexed, and is made a part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, this twenty-second day of January, in the year of our Lord, one thousand eight hundred and eight, and of the independence of the United States of America, the thirty-second.

(Seal.) Th: Jefferson.

By the President,
James Madison, Secretary of State.

City of Washington, to wit: I do hereby certify, that the foregoing letters patent were delivered to me on the twenty-second day of January, in the year of our Lord, one thousand eight hundred and eight, to be examined; that I have examined the same, and find them conformable to law. And I do hereby return the same to the secretary of state, within fifteen days from the date aforesaid, to wit: on this twenty-second day of January, in the year aforesaid.

C. A. Rodney,
Attorney-General of the United States.

The Schedule

Referred to in these letters patent, and making part of the same, containing a description, in the words of the said Oliver Evans, of his improvements in the art of manufacturing flour and meal.

My first principle is to elevate the meal as fast as it is ground in small separate parcels, in continued succession and rotation, to fall on the cooling floor, to spread, stir, turn, and expose it to the action of the air, as much as possible, and to keep it in constant and continual motion, from the time it is ground until it be bolted: this I do to give the air full action, to extract the superfluous moisture from the meal, while the heat, generated by the

fence mentioned in the sixth section. Sixth. Admit Stouffer's machine to be similar in principle to the plaintiff's, still, as he never obtained a patent for it, it was thereby abandoned and might be patented by the plaintiff. Whittemore v. Cutter [supra].

Upon the evidence, it was contended, that the two machines differ in form, in principle, and in effect. On the other side it was argued, that this patent is broader than the discovery, it not being possible for the plaintiff to contend that he has any merit beyond that of an improvement. If the discovery amount to any thing, it is to that, and consequently the patent could only be for an improvement, whereas this is for the whole machine, under the name of an improved hopperboy. But though called an improved hopperboy, it is not so described in the specification, nor is it stated in what the improvement consists, which is necessary to the validity of the patent. Whittemore v. Cutter [supra]. Upon the evidence it was contended, that Stouffer's hopperboy is older and was in use a great many years before the plaintiff's discovery; that it is the same in form, in principle and effect; performs all its functions as well, and in the same manner.

WASHINGTON, Circuit Justice (charging jury). The plaintiff derives his title to the patent in question, under the private act of congress, passed for the relief of Oliver Evans, on the 21st of January, 1808. His action however, is founded on his patent, and I should not notice the above act, if the plaintiff's counsel had not relied upon it, to prove that the plaintiff is entitled to an exclusive property, not only in the entire improvement, but in the several machines, which are employed to produce the specified results. It would certainly seem that congress intended this, and why the patent is not as broad as the law, I cannot conjecture, unless it was apprehended that some difficulty might occur in the construction of the patent, in relation to these machines, had it pursued the words of the law. But be this as it may, it is certain that the patent contains no grant of a right to the several machines, but is confined to the improvement

friction of grinding, will repel and throw it off, and the more effectually dry and cool the meal, fit for bolting in the course of the operation, and save time and expense to the miller. Also to avoid all danger from fermentation, by its laying warm in large quantities as is usual; and to prevent insects from depositing their eggs, which may breed the worms often found in good flour. And further to complete the principle, so as to dry the meal more effectually, and to cause the flour to keep sweet a longer space of time, I mean to increase the heat of the meal as it falls ground from the millstones, by application of heated air, that is to say, to kiln-dry the meal as it is ground, instead of kiln-drying the grain as usual. The flour will be fairer and better than if made from kiln-dried grain, the skin of which is made so brittle that it pulverizes and mixes with the flour. This principle I apply by various machines which I have invented, constructed, and adapted to the purposes hereafter specified, numbered 1, 2, 3, 4, 5.

My second principle is to apply the power that moves the mill or other principal machine to work my machinery, and by them to perform various operations which have always heretofore been performed by manual force, and thus greatly to lessen the expense and labour of attending mills and other work.

The application of those principles, including that of kiln-drying the meal, during the process of the manufacture, or otherwise to the improvement of the process of manufacturing flour, and for other purposes, is what I claim as my invention and improvement in the art, as not having been known or used before my discovery, knowing well that the principles once applied by one set of machinery, to produce the desired effect, others may be contrived and variously constructed, and adapted to produce like effects in the application of the principles, but perhaps none to produce the desired effect more completely, than those which I have invented and adapted to the purposes, and which are hereinafter specified.

No. 1. The Elevator. Its use is to elevate any grain, granulated or pulverized substances. Its use in the manufacture of flour or meal is to elevate the meal from the millstones in small separate parcels, and to let it fall through the air on the cooling floor as fast as it is ground. It consists of an endless strap, rope, or chain, with a number of small buckets attached thereto, set to revolve round two pulleys, one at the lowest, and the other at the highest point between which the substance is to be raised. These buckets fill as they turn under the lower, and empty themselves as they turn over the upper pulley. The whole is inclosed by cases of boards to prevent waste.

No. 2. The Conveyor. Its use is to convey any grain, granulated or pulverized substances, in a horizontal, ascending, or descending direction. Its use in the process of the art of manufacturing flour, is to convey the meal from the millstones, as it is ground, to the elevator, to be raised, and to keep the meal in constant motion, exposing it to the action of the air; also in some cases to convey the meal from the elevator to the bolting hopper, and to cool and dry it fit for bolting, instead of the hopperboy, No. 3; also to mix the flour after it is bolted; also to convey the grain from one machine to another, and in this operation to rub the impurities off the grain. It consists of an endless screw, set to revolve in a tube, or section of a tube, receiving the substance to be moved at one end, and delivering it at the other end; but for the purpose of conveying flour or meal, I construct it as follows: instead of making it a continued spiral, which forms the endless screw, I set small boards, called flights, at an angle crossing the spiral line; these flights operate like so many ploughs following each other, moving the meal from one end of the tube to the other with a continued motion, turning and exposing it to the action of the air to be cooled and dried. Sometimes I set some of the flights to move broadside foremost, to lift the meal from one side to fall on the other, to expose it to the air more effectually.

No. 3. The Hopperboy. Its use is to spread any grain, granulated or pulverized substances, over a floor or even surface, to stir it and expose it to the air to dry and cool it, when necessary, and at the same time to gather it from the circumference of the circle it describes, to or near the centre, or to spread it from the centre to the circumference, and leave it in the place where we wish it to be delivered, when sufficiently operated on. Its use in the process of manufacturing flour is to spread the meal as fast as it falls from the elevator over the cooling floor, on the area of a circle of from eight to sixteen feet more or less in diameter, accord-

in the art of manufacturing flour by means of those machines, and therefore the plaintiff can claim no right which is not included in the patent. It has been stated that the schedule is part of the patent, and that this contains a claim of the invention of the peculiar properties and principles of the hopperboy. Without noticing the extraordinary nature of such a claim, it is granted that the schedule is to be considered as a part of the patent, so far as it is descriptive of the machines, but no further; and even if this claim had been stated in the body of the patent, it would have have conferred no right which that instrument does not grant.

I now proceed to state such parts of the law concerning patent rights (2 Laws [Bior. & D.] 348 [1 Stat. 318]) as may be necessary for deciding the questions which have been made in this cause. It authorises the president to grant a patent for the exclusive right to make, construct, use, and vend to be used, any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement in any art, machine, &c. not known or used before the application. As to what constitutes an improvement, it is declared that it must be in the principle of the machine, and that a mere change in the form or proportions of any machine, shall not be deemed a discovery. Previous to obtaining the patent, the applicant is required to swear or affirm that he verily believes that he is the true inventor or discoverer of the art, machine, or improvement, for which he solicits a patent; and he must also deliver a written description of his invention and of the manner of using it, so clear and exact as to distinguish the same from all other things before known, and to enable others, skilled in the art, to construct and use the same.

From this short analysis of the law, the following rules may be deduced:

First. That a patent may be for a new and useful art; but it must be practical, it must be applicable and referrible to something which may prove it to be useful. A mere abstract principle is unsusceptible of appropriation by patent. The intention of congress is very obvious, from the language of this law. The applicant for a patent must show

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ing to the work of the mill, to stir and turn it continually, and to expose it to the action of the air to be dried and cooled, and to gather it into the bolting hoppers, and to attend the same regularly. It consists of an upright shaft made round at the lower end, about two thirds of its length, and set to revolve on a pivot in the centre of the cooling floor; through this shaft, say five feet from the floor, is put a piece called the leader, and the lower end of the shaft passes very loosely through a round hole in the centre of another piece called the arms, say from eight to sixteen feet in length, this last piece revolving horizontally, describes the circle of the cooling floor, and is lead round by a cord the two ends of which are attached to the two ends of the arms, and passing through a hole at each end of the leader, so that the cord will reeve to pull each end of the arms equally. The weight of the arms is nearly balanced by a weight hung to a cord, which is attached to the arms, and passes over a pulley near to the upper end of the upright shaft. to cause the arms to play lightly, pressing with only part of their weight on the meal that may be under it. The foremost edges of the arms are sloped upwards, to cause them to rise over and keep on the surface of the meal as the quantity increases; and if it be used separately and unconnected with the elevator, the meal may be thrown with shovels within its reach, while in motion, and it will spread it level, and rise over it until the heap be four feet high or more, which it will gather into the hoppers, always taking from the surface, after turning it to the air a great number of times. The underside of these arms are set with little inclining boards called flights, about four inches apart next the centre, and gradually closing to about two inches next the extremities, the flights of the one arm to track between those of the other, they operate like ploughs, and at every revolution of the machine, they give the meal two turns towards the centre of the circle, near to which are generally the bolting hoppers. At each extremity of the arms, there is a little board attached to the hindmost edge of the arm to move side foremost; these are called sweepers; their use is to receive the meal as it falls from the elevator, and trail it round the circle described by the arms, that the flights may gather it towards the centre from every part of the circle; without these, this machine would not spread the meal over the whole area of the circle described by the arms. Other sweepers are attached to that part of the arms which passes over the bolting hoppers, to sweep the meal into them.

But if the bolting hoppers be near a wall and not in the centre of the cooling floor, then in this case the extremity of the arms are made to pass over them, and the meal from the elevator let fall near the centre of the machine, and the flights are reversed to turn the meal from the centre towards the circumference, and the sweepers will sweep it into the hoppers. Thus this machine receives the meal as it falls from the elevator on the cooling floor, spreads it over the floor, turns it twice over at every revolution, stirs and keeps it in continual motion, and gathers it at the same operation into the bolting hoppers, and attends them regularly. If the bolting reels are stopped, this machine spreads the meal and rises over it, receiving under it from one, two, to three hundred bushels of meal, until the bolts are set in motion again, when it gathers the meal into the hoppers, and as the heap diminishes, it follows it down until all is bolted. I claim as my invention, the peculiar properties or principles which this machine possesses, viz. the spreading, turning, and gathering the meal at one operation, and the rising and lowering of its arms by its motion, to accommodate itself to any quantity of meal it has to operate on.

No. 4. The Drill. Its use is to move any grain, granulated or pulverized substance, from one place to another: it consists, like the elevator, of an endless strap, rope, or chain, &c. with little rakes instead of buckets, (the whole cased with boards to prevent waste) revolving round two pulleys or rollers. Its use in the process of the manufacture of flour, is to draw or rake the grain or meal from one part of the mill to another. It receives it at one pulley, and delivers it at the other, in a horizontal, ascending or descending direction, and in some cases may be more conveniently applied for that purpose than the conveyor. I claim the exclusive right to the principles, and to all the machines above specified, and for all the uses and purposes specified, as not having been heretofore known or used before I discovered them. They may all be united and combined in one flour mill, to produce my improvement on the art of manufacturing flour complete, or they may each be used separately for any of the

how the principle is to be used and applied to some useful purpose. The granting words of the patent are still more explicit; they are, "to make, construct, use, and vend to be used."

Second. The discovery must be not only useful, but new; it must not have been known or used before in any part of the world. It is contended by the plaintiff's counsel, that the title of the patentee cannot be impeached, unless it is shown that he knew of a prior discovery of the same art, machine, &c. and that true and original are synonymous, in the intention of the legislature. As it is not pretended that true and original mean the same thing in common parlance, I proceed to enquire whether the legislature intended to use them as such. As to this, there can scarcely be two opposed opinions. The first section, referring to the allegations of the applicant for a patent, speaks of the discovery as something not known or used before the application. And in the sixth section it is declared, that the defendant may give in evidence that the thing secured by patent, was not originally discovered by the patentee, but had been in use or had been described in some public work, anterior to the supposed discovery. Now, if original does not mean first, the preceding expressions in the first and sixth sections, most certainly do.

Third. If the discovery be of an improvement only, it must be an improvement in the principle of a machine, art, or manufacture, before known or in use. If only in the form or proportions, it has not the merit of a discovery which can entitle the party to a patent.

Fourth. The grant can only be for the discovery, as recited and described in the patent and specification. If the grantee is not the original discoverer of the art or machine for which the grant is made, the whole is void. If, therefore, the patent be for the whole of a machine, and the discovery was only of an improvement, the patent is void.

Fifth. A machine, or an improvement may be new, and the proper subject of a patent, although the parts of it were before known and in use. The combination, therefore, of old machines to produce a new and useful

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purposes specified and allotted to them, or to produce my improvement in part, according to the circumstance of the case.

No. 5. The Kiln-Drier. To kiln-dry the meal after it is ground, and during the operation of the process of manufacturing flour, I take a close stove of any common form, and enclose it with a wall made of the best nonconductor of heat, leaving a small space between the stove and the wall, to admit air to be heated in its passage through this space. I set this stove below the conveyor that conveys the meal from the millstones as ground, into the elevator, and I connect the space between the stove and the wall, to the conveyor tube by a pipe entering near the elevator, and I cover the conveyor close, and set a tube to rise from the end of the conveyor tube near the millstones, for the heated air to ascend and escape as up a chimney. I make fire in the stove, and admit air at the bottom of the space between it and the wall round it, to be heated and pass along the conveyor tube, meeting the meal which will be heated by the hot air, and the superfluous moisture will be more powerfully repelled and thrown off, and the meal will be dried and cooled as it passes through the operation of the elevator and hopperboy. The flour will be fairer than if the grain had been kiln-dried, and it will keep longer sweet than flour not kiln-dried. I set all my machines in motion by the common means of cog and round tooth, and pinion straps, ropes, or chains, well known to every millwright.

Arrangement and connexion of the several machines, so as to apply my principles to produce my improvements complete.

I fix a spout through the wall of the mill for the grain to be emptied into from the waggoner's bag, to run into a box hung at the end of a scale-beam, to weigh a waggon load at a draught. From this box it descends into the grain elevator, which raises it to a granary over the cleaning machines, and as it passes through them, it may be directed into the same elevator to ascend to be cleaned a second time, and then descends into a granary, over the hopper of the millstones to supply them regularly, and as ground it falls from the several pair of millstones into the conveyors, where it is dried by the heated air of the kiln-drier, and is conveyed into the meal elevator, to be raised and dropped on the cooling floor, within reach of the hopperboy, which receives and spreads it over the whole area of the circle which it describes, stirring and turning it continually, and gathering it into the bolting hoppers which it attends regularly. That part of the flour which is not sufficiently bolted by the first operation, is conveyed by a conveyor or drill, into the elevator, to ascend with the meal to be bolted over again, and that part of the meal which has not been sufficiently ground at the first operation, is conveyed by a conveyor or drill, and let run into the eye of the millstone to be ground over.

Thus the whole of the operations which used to be performed by manual labour, is, from the time the wheat is emptied from the waggoner's bag, or from the ship's measure, until it enters the bolts, and the manufacture be completed in the most perfect manner, performed by the machinery moved by the power which moves the mill, and this machinery keeps the meal in constant motion during the whole process, drying and cooling it more completely, avoiding all danger from fermentation, and preventing insects from depositing their eggs, and performing all the operations of grinding and bolting to much greater perfection, making the greatest possible quantity of the best quality of flour out of the grain, saving much time and labour and expense to the miller, and preventing much from being wasted, by the motion of the machines being so slow as to cause none of the flour to rise in form of dust, and be carried away by the air, and the cases of the machines being made close, prevents any from being lost. Oliver Evans.

Witnesses: Samuel H. Smith.
Jo. Gales, Jun.

Washington County, District of Columbia, viz. This 4th day of November, 1807, personally appeared before me, a justice of the peace in and for said county, Oliver Evans, who, being duly affirmed according to law, declares that he is a citizen of the United States, and that his usual place of residence is in the city of Philadelphia, and that he verily believes that he is the true and original inventor of the improvements herein above specified, for which he solicits a patent. Oliver Evans.

Affirmed before me,
Sam. H. Smith.

result, is a discovery for which a patent may be granted.

The above principles will apply to most of the questions which have been discussed in this cause. It was strongly insisted upon by the defendant's counsel, that the patent in this case is broader than the discovery; the evidence having clearly proved that, in relation to the hopperboy, for the using of which this suit is brought, the plaintiff can pretend to no discovery beyond that of an improvement in a machine known and in use many years before the alleged discovery of the plaintiff. This argument proceeds upon the supposition that the plaintiff has obtained a patent for the hopperboy, which is entirely a mistake. It is for an improvement in the art of manufacturing flour by means of a hopperboy and four other machines described in the specification, and not for other of the machines so combined and used. That the plaintiff is the original discoverer of this improvement is contested by no person; and therefore it cannot with truth be alleged that the patent is broader than the discovery, or that the plaintiff could not support an action on this patent against any person who should use the whole discovery. But, can he recover against a person who has made or used one of the machines, which in part constitutes the discovery? The plaintiff insists that he may, because, having a right to the whole, he is consequently entitled to the parts of which that whole is composed. This may be good logic, but I must be permitted to question the soundness of the conclusion in point of law. For, will it be seriously contended that a person may acquire a right to the exclusive use of a machine, because, when used in combination with others, a new and useful result is produced, which he could not have acquired independent of that combination? If he can, then if A were proved to be the original inventor of the hopperboy, B of the elevator, and so on as to the other machines, and had either obtained patents for their respective discoveries, or chose to abandon them to the public, the plaintiff, although it is obvious he could not have obtained separate patents for those machines, might nevertheless deprive the original inventors in the first instance, and the public in the other, of their acknowledged right to use those discoveries, by obtaining a patent for an improvement which consists in a combination of those machines to produce a new result. An argument which leads to a consequence so glaringly unjust, if not absurd, cannot possibly be a sound one. It would not be more unreasonable to contend, that if the plaintiff were the patentee of the hopperboy, which consists of a shaft, an arm, &c. he might bring an action against any person who, in the manufacturing of flour, should make use of a shaft or any other of the component parts of his hopperboy.

I presume, therefore, that the plaintiff's counsel could not mean to contend for this right, except in a case where the patentee was the original discoverer of the particular machine or part, for which his suit is brought; and if so, we are still brought to the question whether, in point of fact, the plaintiff was the original discoverer of this machine, called the hopperboy. But before I proceed to consider that question, I would ask whether it is quite clear that this action can be maintained, although it were proved beyond all controversy that the plaintiff was the original inventor of this machine? And this inquiry is made, not with a view to decide the question, because it was not discussed at all at the bar, but for the purpose of preventing a conclusion being drawn from the silence of the court, that we considered the action would lie. I will merely suggest some of the difficulties with which, upon a superficial view of the question, we are forcibly struck.

The patent is the foundation of the action, and the gist of the action is the violation of a right which the patent has granted. But is the exclusive right to the hopperboy granted by this patent? It certainly is not, although this machine constitutes a part of the improvement of which the plaintiff was the original discoverer, and it is for that improvement, and that only, for which the grant is made. If the grant then, is not of this particular machine, can it be sufficient for the plaintiff to prove that he was the original discoverer of it, to entitle him to a recovery? Again, could the plaintiff have obtained a separate patent for the hopperboy, in case he was the original inventor of it, without first swearing or affirming that he was the true inventor of that machine? But has he, or could he have taken such an oath in this case? Most assuredly not; because the prescribed form of the oath is, that he is the inventor of the art, machine, or manufacture for which he solicits a patent. Now, as the patent which he solicited was not for the hopperboy, but for an improvement in the manufacture of flour, he might with safety take that oath, although he knew at the time that he was not the true inventor of the hopperboy; and thus it would happen, that he would indirectly obtain the full benefit of a patent right to this machine, which he could not have directly obtained, without doing what it must be admitted in this case he has not done. But this is not all. If the law has provided for fair and original discoverers a remedy where their rights are invaded by others, it has provided likewise correspondent protection to others, where they have not this merit. Now, let me ask, what judgment the district court could render, if upon a scire facias to repeal this patent, it had appeared, incontestably, that the plaintiff was not the true original discoverer of the hopperboy? Certainly not that which the law has prescribed, viz. for the repeal of the patent, because it would be monstrous to vacate the whole patent for an

invention of which the patentee was the acknowledged inventor, because he was not the inventor of one of the constituent parts of the discovery for which no grant was made. But the court would be compelled, either to do this, or to dismiss the scire facias; and if the latter, then the plaintiff would in effect have the exclusive right to a machine which could not be impeached in the way prescribed by law, although he should himself acknowledge that he was not the true and original inventor of it, and that he knew he was not so at the time he applied for his patent. Still further: suppose this jury should find that the plaintiff was not the original inventor of this machine, would not the court be prevented from declaring the patent void, under the provisions of the sixth section of the law, for the reasons assigned why the district court could not render that judgment upon a scire facias? Nay, it may well be doubted whether the defence now set up by the defendant can be made at all in this action, inasmuch as the defendant cannot allege in the words of the sixth section, that "the thing secured by patent was not originally discovered by the patentee," because, in point of fact, the thing patented was originally discovered by the patentee, although the hopperboy may not have been. But if this defence cannot be made, does not that circumstance afford a strong argument against this action?

But, it has been asked by the plaintiff's counsel, can it be right that the plaintiff should be deprived of the benefit of his discovery by the mere omission of the defendant to use one or more of the machines which compose the entirety of his discovery? To this question the answer is obvious. If the plaintiff is not the inventor of the parts, he has no right to complain that they are used, if not in a way to infringe his right to their combined use. If he is the original inventor of the different machines constituting the whole discovery, or any of them, he might have obtained a separate patent for those of which he was the original inventor; in which case, the objections stated, would not have been in his way.

Upon the whole, although we give no positive opinion on this point, we think it at least admits of a serious doubt whether this action can be maintained. But if an action will lie upon this patent, against the defendant for having used the hopperboy, still the plaintiff cannot recover, if it has been shown to the satisfaction of the jury, that he was not the original discoverer of that machine. It appears by the testimony of the defendant's witnesses, that Stouffer's hopperboy was in use many years before the alleged discovery of the plaintiff's. That the two machines differ from each other very little in form, in principle, or in effect. They are both worked by the same power which works the mill, and they both stir, mix, cool, dry and conduct the flour to the bolting chest. Whether the flights and sweepers in the plaintiff's hopperboy are preferable to the cleats used in Stouffer's; or whether, upon the whole, the former is a more perfect agent in the manufactory of flour, than the latter, are questions which the court will not undertake to decide. Because, unless the plaintiff is the original inventor of the hopperboy, he cannot, although he had obtained a separate patent for it, recover in this action however useful the improvements may be which he has made in this machine. If the plaintiff had obtained a patent for his hopperboy, it would have been void, provided the jury should be of opinion, upon the evidence, that his discovery does not extend to the whole machine, but merely to an improvement in the principle of an old one. And if this should be their opinion in the present case, the plaintiff cannot recover.

There remain to be decided, some points of law which were discussed at the bar.

First. It was contended by the plaintiff's counsel, that the defendant having offered to take a license from the plaintiff, if he would have consented to reduce the price of it to forty dollars, he is not now at liberty to deny that the plaintiff is the original inventor of this machine. This argument has no weight in it; not merely because the offer was rejected, and is therefore as if it had not been made, but because the law prevents the plaintiff from recovering, if it appear that he was not the original inventor. If the offer amounted to an acknowledgment that the plaintiff was the original inventor, (and further it could not go) this may be used as evidence of that fact; but it would not entitle the plaintiff to a verdict, if the fact is proved to be otherwise.

Second. The counsel for the plaintiff have strongly insisted that upon the equity of the tenth section of the law, the defence set up in this case, ought not to be allowed after three years from the date of the plaintiff's patent. This argument might, with some propriety perhaps, be addressed to the legislature, but is improperly urged in this place. The law has declared, that, in actions of this kind the defendant may plead the general issue, and give in evidence that the plaintiff was not the original inventor of the machine for which the patent was granted. The legislature has not thought proper to limit this defence in any manner; and shall this court do it? But, what seems to be conclusive upon this point, is, that the argument would tend to defeat altogether the provisions of the sixth section, which authorise this defence to be made. For if it could not be set up after three years from the date of the patent, it would be in the power of a patentee to avoid it altogether, by forbearing to bring suits, until after the expiration of that period. And thus, although the law has carefully provided two modes for vacating a patent improvidently granted, the patentee, though not the origi-

nal inventor, and however surreptitiously he may have obtained his patent, may secure his title to the exclusive use of the invention of another, if he can for three years avoid an enquiry into the validity of that title.

Third. The last point is, that Stouffer's invention was abandoned, and consequently might be appropriated by the plaintiff. The premises may be admitted but not the conclusion. If Stouffer was the original inventor of the hopperboy and chose not to obtain a patent for it, it became public property by his abandonment. He could maintain no action against any person for using it, nor could any other person obtain a patent for it, because he would not be the original inventor. Verdict for defendant.

A writ of error was taken out by the supreme court, and the decision of that court in this case, will be found in 3 Wheat. [16 U. S.] 454.

[NOTE. For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.

[This case was taken to the supreme court on writ of error, and the judgment was there reversed, and the case remanded to the circuit court for further proceedings. In the opinion of the court Mr. Chief Justice Marshall held that the defendant, having given notice of special matter consisting in the alleged use of the improved hopperboy at various times and places prior to the alleged invention, could give evidence as to other places not specified in the notice. The court also held that the testimony offered by the plaintiff to prove that the persons whose prior use of the hopperboy had been alleged had paid the plaintiff for license, since his patent should not have been rejected, but should have been permitted to go to the jury, although it was entitled to very little weight. In relation to the construction of the patent, it was held that the patent was for the invention, discovery, and improvement in the art of manufacturing flour, and in the several machines applicable to that purpose. Evans v. Eaton, 3 Wheat. (16 U. S.) 454.]

Case No. 4,560.

EVANS v. EATON.

[3 Wash. C. C. 443;[1] 1 Robb, Pat. Cas. 193.]

Circuit Court, D. Pennsylvania. Oct. Term, 1818.[2]

PATENTS—COMPETENCY OF WITNESS INTERESTED IN SUIT — PATENTABILITY OF IMPROVEMENT IN OLD MACHINE—VALIDITY OF PATENT.

1. Where the record of a judgment in the circuit court, has been sent to the supreme court, and an appearance entered there, by the defendant in error; and a decision by the supreme court, reversing the judgment, and remanding the cause for a new trial; the defendant in error cannot object, that the judgment, in this cause, is in force, and unreversed, upon the ground, that no writ of error had been sued out.

2. A witness, who uses a machine resembling that of the plaintiff, is not an incompetent witness for the defendant; because the patent of the plaintiff may be defective, as the court cannot, in the case in which he is offered as a witness, declare the patent void, so as to benefit the witness; although in the case a verdict should be given for the defendant, on the ground that the plaintiff was not the original inventor of the machine.

[See note at end of case.]

3. If two machines be substantially the same, and operate in the same manner, to produce the same result, though they differ in form, proportions, and utility, they are the same in principle; and the one last discovered, can have no other merit, than to be an improvement of the other; but for which the inventor can obtain no patent. If the improvement be in the principle, a patent may be obtained for the improvement.

[Cited in Whitney v. Emmett, Case No. 17,585; Smith v. Pearce, Id. 13,089; Hovey v. Stevens, Id. 6,745; Crompton v. Belknap Mills, Id. 3,406; Converse v. Cannon, Id. 3,144; Willimantic Linen Co. v. Clark Thread Co., Id. 17,763.]

[See note at end of case.]

4. To the validity of a patent for an improvement, it is necessary to state, in the specification, in what the improvement consists.

[Cited in Hogg v. Emerson, 6 How. (47 U. S.) 484.]

[See note at end of case.]

[This was a suit by Oliver Evans against Eaton for the alleged infringement of a patent for an improved hopperboy granted to plaintiff under Act Cong. Jan. 21, 1808 (6 Stat. 70).]

The cause came on to be re-tried, under the mandate of the supreme court of the United States, to award a ven. fac. de novo. See 3 Wheat. 519. When the cause was called for trial, the defendant objected, that the judgment of this court, upon the former trial [Case No. 4,559], was still in force, and unreversed; as no writ of error had been sued out, to remove the record of that judgment into the supreme court; without which, that court would not take jurisdiction of the cause.

BY THE COURT. After an appearance of the defendant in error in the supreme court, and pleading, as it must be presumed he did, to entitle him to appear by counsel, and argue the cause, it is too late to take this objection. We must presume, that all formal objections, and particularly one to the want of the writ, were waived by consent of parties.

The jury being sworn, the competency of Philip Frederick, to give evidence for the defendant, was objected to by the plaintiff, on the ground that he uses a Stouffer hopperboy; and that if the defendant should obtain a verdict, upon the ground of the use of the Stouffer hopperboy by others, prior to the plaintiff's discovery, the court must declare the patent void; and thus incapacitate the plaintiff to recover against the witness.

BY THE COURT. This patent, according to the plaintiff's claim, covers eleven distinct things; and may be perfectly good for a part, though not so as to this particular machine. If, therefore, the jury should find for the defendant, on the ground that the hopperboy

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

[2] Affirmed in 7 Wheat. (20 U. S.) 356.]

was known, and in use, prior to the plaintiff's discovery, THE COURT could not declare the whole patent void, on account of the unsoundness of a part of it, in relation to a distinct machine; and we can find no authority for the judgment which has been hinted at—that is, to avoid the patent, quoad the hopperboy. It is only in this most extraordinary case, of one patent for a great number of different inventions, that this difficulty could occur. But we must say, that, on that account, it must be exempt from that provision of the 6th section [Act 1793; 1 Stat. 322], as to the judgment, where the objection goes only to the prior use of one of the patented machines.

The deposition of Michael Former was offered, and objected to, for the reasons urged against it in the case of Evans v. Hettick [Case No. 4,562]. The plaintiff's counsel examined the clerk of the court, to prove what the practice had been; who states, that rules to take depositions generally, have frequently been entered in the office; and depositions of witnesses living within the state, and above one hundred miles from Philadelphia, have been taken; that it has been rare, for twenty years past, to take depositions under the act of congress [1 Stat. 88, § 30].

THE COURT rejected the evidence, for the reason assigned in Hettick's Case.

The counsel for the plaintiff contended, that, under his patent, he was entitled to claim, 1. The entire hopperboy, which is protected by the judgment of the supreme court, in this very case (3 Wheat. [16 U. S.] 519); although it should appear that he was not the original inventor of it, which, however, they contended he was; and that the defendant's witnesses, who had testified as to the prior use of the Stouffer hopperboy, must be mistaken in their recollection of dates. 2. An improvement on a hopperboy.—That it is not necessary to the validity of such a patent, to describe in the specification, in what the improvement consists, the 3d section of the law being, in this respect, merely directory to the secretary of state, authorizing him to refuse a patent, if such a specification be not filed. But, however this may be in common cases, they insisted, that the supreme court having decided that one of the plaintiff's claims, under his patent, is to an improvement on the hopperboy (3 Wheat. [16 U. S.] 517), the requisition (page 518) that he should show the extent of his improvement, must necessarily mean, that he should show it by parol evidence; since the chief justice having noticed, in the opinion (page 515), that the specification does not distinguish the improvement from the original machine, the court would never have sent the cause to another trial, upon the plaintiff's claim to an improvement, if the specification was deemed too defective to authorize his recovery.

WASHINGTON, Circuit Justice, (charging jury). This is an action for an infringement of the plaintiff's patent, which the plaintiff alleges to be,—1. For the whole of the machine employed in the manufacture of flour, called the hopperboy. 2. For an improvement on the hopperboy. The question is, is the plaintiff entitled to recover upon either of these claims? The question is stated thus singly, because the defendant admits, that he uses the very hopperboy for which the patent is in part granted, and justifies himself by insisting,—1. That the plaintiff was not the original inventor of the hopperboy, as patented, but that the same was in use prior to the plaintiff's patent. 2. That his patent for an improvement is bad; because the nature and extent of the improvement are not stated in his specification; and if they had been, still the patent comprehends the whole machine, and is, therefore, too broad.

1. The first is a mixed question of fact and law. In order to enable you to decide the first, it will be well to attend to the description which the plaintiff has given of this machine, in his specification, of which a model is now before you. Its parts are—(1) An upright round shaft, to revolve on a pivot in the floor. (2) A leader or upper arm. (3) An arm set with small inclining boards, called flights and sweepers. (4) Cords from the leader to the arm, to turn it. (5) A weight passing over a pulley, to keep the arm light on the meal. (6) A cog at the top of the shaft, to turn it, which is operated upon by the water power of the mill. The flights are so arranged, as to track, the one between the other, and to operate like ploughs; and at every revolution of the machine, to give the meal two turns towards the centre. The sweepers are to receive the meal from the elevator, and to trail it round the circle, for the flights to gather it to the centre, and also to sweep the meal into the bolt. The use of this machine is stated to be, to spread any granulated substance over a floor;—to stir and expose it to the air, to dry and cool it, and to gather it to the bolt.

The next inquiry under this head is, when was this discovery made? Joseph Evans has sworn, that in 1783 the plaintiff informed him he was engaged in contriving an improvement in the manufactory of flour, and had completed it in his mind some time in July of that year. In 1784, he constructed a rough model of the hopperboy; but having no cords from the extremities of the leader to those of the arm, it was necessary, in making his experiments, to turn around the arm by hand. In 1785, he set up a hopperboy in his mill, resembling the model in court, and the machine described in his specification. The evidence of Mr. Anderson strongly supports this witness; and indeed, the discovery, as early as 1784, or 1785, is scarcely controverted by the defendant. The defendant insists, that a hopperboy, similar to the plaintiff's, was discovered and in use many years anterior even to the year 1783, and relies upon the testimony of the following witnesses: Daniel Stouffer, who deposes that he first saw the Stouffer hop-

perboy in his father's, Christian Stouffer's, mill, in the year 1774. In 1775 or 1776, he erected a similar one in the mill of his brother Henry, and another in Jacob Stouffer's mill in 1778 or 1779. Philip Frederick swears, that in the year 1778, he saw a Stouffer hopperboy in operation in Christian Stouffer's mill, and in the year 1783 he saw one in Jacob Stouffer's mill and another in U. Charles's mill; and that it was always called Stouffer's machine. George Roup states, that in 1784, he erected one of these hopperboys in the mill of one Brenneman, and that in 1782, Abraham Stouffer described to him a similar machine which his father used in his mill. Christopher Stouffer, the son of Christian, has sworn, that his father having enlarged his mill in the year 1780, erected a new hopperboy, of the description above mentioned, which is still in use in the same mill, now owned by Peter Stouffer. If these witnesses are believed by the jury, they establish the fact asserted by the defendant, that the Stouffer hopperboy was in use, prior to the plaintiff's discovery.

The next inquiry is into the parts, operation and use of the Stouffer hopperboy.—This consists of an upright square shaft, which passes lightly through a square mortise in an arm, underneath which are fixed slips of wood, called flights; and the arm is turned by a cog on the upper end of it, which is moved by the power which moves the mill. The arm, with the flights, operates as it turns upon the meal plated below it; and its use is, in a degree, to cool the meal, and to conduct it to the bolt. It will now be proper to compare this machine with the plaintiff's. They agree in the following particulars:—They each consist of a shaft, a cog to turn it by the power of the mill, and an arm with flights on the under side of it. They each operate on the meal, below the arm, to cool, dry, and conduct it to the bolt. In what do they differ? The plaintiff's shaft is round, and consequently could not turn the arm, into which it is loosely inserted, if it were not for the cords, which connect the extremities of the arm to that of the leader. The shaft of the S hopperboy is square, and therefore turns the arm without the aid of a leader or of cords. It has neither a weight nor pulley, nor are the flights arranged in the manner the plaintiff's are; and consequently, it does not, in the opinion of most of the witnesses, cool, or prepare the flour for packing, as well as the plaintiff's.

The question of law now arises, which is,—are the two machines, up to the point where the difference commences, the same in principle, so as to invalidate the plaintiff's claim to the hopperboy, as the original inventor of it? We take the rule to be, and so it has been settled in this and in other courts, that, if the two machines be substantially the same, and operate in the same manner, to produce the same result—though they may differ in form, proportions, and utility, they are the same in principle; and the one last discovered, has no other merit, than that of being an improved imitation of the one before discovered, and in use, for which no valid patent can be granted to any one; because he cannot be considered as the original inventor of the machine. If the alleged inventor of a machine, which differs from another, previously patented, merely in form and proportions, but not in principle, is not entitled to a patent for an improvement; (which he cannot be, by the 2d section of the law;) he certainly cannot, in a like case, claim a patent for the machine itself. The question for the jury, then, is, are the two hopperboys substantially the same in principle?—not, whether the plaintiff's hopperboy is preferable to the other? Because if that superiority amounts to an improvement, he is entitled to a patent only for an improvement, and not for the whole machine. In the latter case, the patent would be too broad; and therefore void, where the patent is single. If you are of opinion, that the plaintiff is not the original inventor of the hopperboy, he cannot obtain a verdict on that claim, unless his is an excepted case. The 1st, 3d and 6th sections of the general patent law [1 Stat. 318], conclusively support this opinion. But the judgment of the supreme court in this case (3 Wheat. [16 U. S.] 519) is relied upon by the plaintiff's counsel, to prove, that this is an excepted case; insomuch, that the plaintiff is entitled to a verdict; although you should be satisfied that he is not the original inventor of the hopperboy. That declares, "On consideration whereof, this court is of opinion, that there is error in the proceedings of the said circuit court, in this, that the said court rejected testimony which ought to have been admitted; and also in this, that in the charge delivered to the jury, the opinion is expressed, that the patent on which this suit is instituted, conveyed to Oliver Evans only an exclusive right in his improvement in manufacturing flour and meal, produced by the general combination of all his machinery; and not to his improvement in the several machines applied to that purpose; and also, that the said Oliver Evans was not entitled to recover, if the hopperboy in his declaration mentioned, had been in use previous to his discovery." But we are perfectly satisfied, that the interpretation put upon this clause, by the plaintiff's counsel, is incorrect; and this for the following reasons: (1) The question of priority of invention, was not before the supreme court, and it is therefore incredible, that any opinion, much less a judgment, would have been given upon that point. The error in the charge, which this part of the judgment was obviously intended to correct, is stated by the chief justice in the following words:—"This part of the charge seems to be founded on the opinion that if the patent is to be considered as a grant of the exclusive use of distinct improvements, it is a grant of the hopperboy itself, and not for an

improvement on the hopperboy." (2) It contradicts what is stated in p. 517, where it is said, that the plaintiff's claim is to the machines which he has invented. Now, if he did not invent the hopperboy, he has no claim to it; and if so, could the court mean to say, that he was nevertheless entitled to recover under that claim? Such a decision was certainly not called for, by the terms of "The act for the relief of Oliver Evans," but would seem to be in direct violation of it. The act directs a patent to issue to Oliver Evans, not for his hopperboy, elevator, &c., but "for his invention, discovery, and improvements in the art, &c., and on the several machines which he has discovered, invented, and improved." Now, if the hopperboy was not invented, &c., by Oliver Evans, this act, (without which Oliver Evans could not have obtained a patent,) did not authorize the secretary of state to grant him one for that machine; or if granted, it is clear that it was improvidently done. If, indeed, the supreme court had been of opinion, that the fact of Oliver Evans's prior invention was decided, and could constitutionally have been decided by congress, there might have been more difficulty in the case; but the argument of counsel, which pressed that point upon the court, was distinctly repudiated. We conceive that the meaning of that part of the opinion is, that this court erred in stating to the jury, that Oliver Evans was not entitled to recover, if the hopperboy, that is, the original hopperboy, had been in use prior to the plaintiff's alleged discovery of it; because, if the plaintiff was entitled to claim an improvement on the hopperboy, which this court had denied, and which the supreme court affirmed, this court was clearly wrong in saying to the jury, that the plaintiff could not recover for his improvement; which, in effect, was said.

Upon the whole, then, the court is of opinion, that Oliver Evans is not entitled to a verdict in his favour, as the inventor of the hopperboy, if you should be of opinion, that another hopperboy, substantially the same as his in principle, as before explained, up to the point where any alteration or improvement exist in his hopperboy, was invented, and in use prior to the plaintiff's invention and discovery, however they may differ in mere form, proportions, and utility.

2d. The plaintiff's next claim is, to an improvement on a hopperboy; which claim, we were of opinion, in another case, has received the sanction of the supreme court. His counsel contend, that his improvement is —(1) On the original method of supplying the bolt by manual labour. (2) On his own hopperboy;—and (3) On some hopperboy invented by some other person. Let this position be analyzed:—(1) It is said to be an improvement on the original method by manual labour.—But it is obvious, that if this be the invention, it is of an original machine; because, wherever the patent law speaks of an improvement, it is on some art, machine, or manufacture, &c.; and not on manual labour, which was applied to the various arts, long before the invention of machinery to supply its place. (2) An improvement on his own discovery. But where is the evidence of such invention? It is true, that Joseph Evans has stated, that the plaintiff constructed, in 1784, a rude model of a hopperboy; but it was no substitute for manual labour, because, without the cords or leading lines, the arm could not move; and it was, therefore, turned by hand. It was, in fact, in an incomplete state,—in progress to its completion, but not given out, or prepared to be given out, to the world, as a machine, before 1785, when the cords to turn the arm were added. (3) An improvement on a former machine. This is a fair subject for a patent; and the plaintiff has laid before you strong evidence, to prove that his hopperboy is a more useful machine than the one which is alleged to have been previously discovered and in use. If, then, you are satisfied of this fact, the point of law, which has been raised by the defendant's counsel, remains to be considered; which is, that the plaintiff's patent for an improvement is void, because the nature and extent of his improvement are not stated in his specification. The patent is for an improved hopperboy, as described in the specification which is referred to and made part of the patent. Now, does the specification express in what his improvement consists? It states all and each of the parts of the entire machine—its use, and mode of operating; and claims, as his invention, the machine,—the peculiar properties or principles of it, viz. the spreading, turning and gathering the meal; and the raising and lowering of its arm, by its motion, to accommodate itself to the meal under it.—But does this description designate the improvement, or in what it consists? where shall we find the original hopperboy described, either as to its construction, operation, or use; or by reference to any thing by which a knowledge of it may be obtained?—where are the improvements on such original stated? The undoubted truth is, that the specification communicates no information whatever, upon any of these points. This being so, the law, as to ordinary cases, is clear, that the plaintiff cannot recover for an improvement. The 1st section of the general patent law speaks of an improvement as an invention; and directs the patent to issue for his said invention. The 3d section requires the applicant to swear, or affirm, that he believes himself to be the true inventor of the art, machine, or improvement, for which he asks a patent; and further that he shall deliver a written description of his invention, in such full, clear, and exact terms, that any person, acquainted with the art, may know how to construct and use the

same, &c. That it is necessary to the validity of a patent, that the specification should describe in what the improvement consists, is decided by Mr. Justice Story, in the cases referred to in the appendix to 3 Wheat. [16 U. S.], and in the English cases of Boulton v. Bull [2 H. Bl. 463]; Bovill v. Moore [2 Marsh. 211]; Macfarlane v. Price [1 Starkie, 199]; Harmar v. Playne [11 East, 101, 14 Ves. 130]; and perhaps some others. What are the reasons, upon which this doctrine is founded? They are to guard the public against unintentional infringements of the patent, during its continuance, and to enable an artist to make the improvement, by a reference to some known and certain authority, to be found amongst the records in the office of the secretary of state, after the patent has run out. But it is contended, by the plaintiff's counsel, that the law would be unreasonable, to require, and, therefore, that it does not require, this to be done, unless the improvement is upon a patented machine, a description of which can be obtained by a reference to the records of the office of the secretary of state;—that it might often be impossible for the patentee to discover, and consequently to describe, the parts of a machine, in use, perhaps, only in some obscure part of the world. The answer to this is, that an improvement necessarily implies an original; and unless the patentee is acquainted with the original, which he supposes he has improved, he must talk idly, when he calls his invention an improvement. If he knows nothing of an original, then his invention is an original, or nothing; and the subsequent appearance of an original, to defeat his patent, is one of the risks which every patentee is exposed to under our law. As to the supposed distinction between an improvement on a machine patented, and one not so, there is nothing in it. In both cases, the improvement must be described; but with this difference—that, in the former case, it may be sufficient to refer to the patent, and specification, for a description of the original machine; and then to state in what the improvement on such original machine consists;—whereas, in the latter case, it would be necessary to describe the original machine, and also the improvement. The reason for this distinction is too obvious to require explanation.

If the general law upon this subject, has been correctly stated, the next question is, is this an excepted case? It is contended by the plaintiff to be so; 1st, in virtue of the act for the relief of Oliver Evans; and, 2d, by the decision of the supreme court. (1) Under the private act; that declares, that the patent is to be granted, in the manner and form prescribed by the general patent law. What constitutes the manner and form, in which a patent is granted by this law? The obvious answer is, the petition, the patent, with the signature of the president, and the seal of the United States affixed to it—the oath, or affirmation—the specification, or description of the invention, as required by the 3d section—the drawings and model, if required. Will it be contended, that a patent would be granted in the manner and form prescribed by this law, if there were no description whatever of the invention? And if it would not, which is taken for granted, where is the difference between the total absence of a specification, and one which has no reference at all to the invention for which the patent is granted? This is not the case of an imperfect, or obscure description, but of one which relates exclusively to the whole machine; whereas the invention, for which the patent is granted, is for an improvement only. (2) The opinion of the supreme court, which states, "that it will be incumbent on the plaintiff, where he claims for an improvement, to show the extent of this improvement." 3 Wheat. [16 U. S.] 518. But how is it to be shown? The court has not pointed out the manner; and we therefore think, the only fair implication is, that it must be shown as the statute of the United States, and the general principles of law require,—by the patent and specification. If it may be shown by parol evidence to the jury, as the plaintiff's counsel contend it may, then it may be fairly asked, cui bono? What sort of a showing would this be, so far as it could be productive of any useful purpose? As to this defendant, the evidence comes too late, to save him from the consequences of an error, however innocently committed. As to the public at large, with a view to caution during the continuance of the patent, and to information of the nature of the improvement, after its termination, the evidence given in this cause, must be evanescent, and totally useless. We feel perfectly convinced, that the meaning of the supreme court, as to this subject, is again misunderstood by the plaintiff's counsel; not only for the reasons above mentioned, but because the extent and construction of the plaintiff's patent, and not the validity of it, in relation to any one of the machines, were the questions before that court; and none others, (in reference to the charge,) were argued at the bar, or reasoned upon, by the chief justice, in delivering the opinion.

Upon the whole, we are of opinion, that the plaintiff is not entitled to a verdict, for the alleged infringement of his patent, for an improvement on the hopperboy.

Verdict for defendant.

[NOTE. For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.

[This decision was reviewed by the supreme court on writ of error, and the judgment was duly affirmed. In reference to the testimony of Frederick, the court held (Mr. Justice Story delivering the opinion) that it did not appear whether the hopperboy used by Ferderick was that improved by the plaintiff, but, assuming

it was, his testimony was rightfully admitted, it being perfectly clear that a person having an interest only in the question, and not in the event of the suit, is a competent witness. In respect to the question as to whether the patent covered the whole machine, or only certain improvements, the court referred to the plaintiff's specification, in which he sums up his invention without qualification, and in just such a manner as would be made use of if the whole machine was substantially new in its structure and combination. As the plaintiff could not claim a patent for more than his own invention, and as this patent was for the whole machine, it was proper for the jury to decide whether the patented machine was not in point of fact the same in principle as other machines theretofore used. The verdict of the jury negatived the right of the plaintiff as the inventor of the whole machine. Mr. Justice Story held that there was no specification of any distinct improvement set forth in the patent, as required by the patent act. Mr. Justice Livingston dissented. Evans v. Eaton, 7 Wheat. (20 U. S.) 356.]

Case No. 4,561.

EVANS v. EVANS.

[2 Cranch, C. C. 240.][1]

Circuit Court, District of Columbia. April Term, 1821.

TRIAL—ISSUE FROM ORPHANS' COURT.

When an issue is sent from the orphans' court to be tried in this court, and is accompanied by the libel and answer, they may be read in evidence, upon the trial of the issue.

[Libel by the heirs of Evans against his executors and legatees.]

This was an issue sent from the orphans' court, whether the testator was compos mentis. The respondents offered to read the libel and answer, as evidence upon the trial of the issue. The judge of the orphans' court, in ordering the issue, had directed the libel and answer to be sent to this court.

Mr. Jones and Mr. Ashton, for libellant.
Mr. Swann and Mr. Key, for respondents.

THE COURT (nem. con.) considered that circumstance as tantamount to an order by the chancellor, in an issue sent from chancery, that the bill and answer should be read in evidence, and admitted the libel and answer to be read to the jury.

EVANS (GOODYEAR v.). See Case No. 5,571.

EVANS (GRACE v.). See Case No. 5,650.

EVANS (GRIFFITH v.). See Case No. 5,822.

EVANS (HARRISON v.). See Case No. 6,135.

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

Case No. 4,562.

EVANS v. HETTICK.

[3 Wash. C. C. 408;[1] 1 Robb, Pat. Cas. 166.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1818.[2]

PATENTS—RIGHT TO A PATENT—SPECIFICATIONS—CONSTRUCTION — WHETHER FOR IMPROVEMENT OR WHOLE MACHINE — INTERESTED WITNESS — DEPOSITION.

1. Action for an infringement of the plaintiff's right to the hopperboy, described in his patent. Evidence was allowed, on the part of the plaintiff, of his declarations in a particular year, that he had discovered and constructed the machine patented, all the parts of which he described. This evidence was admitted to prove, not that the plaintiff was the discoverer, but that he then asserted such a right, and described the machine.

2. A witness who had in use such a machine as that used by the defendant, and who, with other persons sued in similar actions with the present, had contributed a common fund, to defray the expenses of their witnesses in attending to the suits, was allowed to testify on the part of the defendant in this case. Between the contributors there was no agreement to participate in paying the damages or costs, which might be recovered against either of them in the actions. A verdict in this case, would not avoid the plaintiff's patent; and therefore, the witness had no interest in this case.

3. The counsel for the plaintiff, cannot ask the witness, if Jacob Stouffer had applied to the plaintiff for a license to use his improved hopperboy, and had offered to pay for it; it not being proved that Jacob Stouffer had a hopperboy of any kind, or had ever used one.

4. The court would not allow a witness to depose what he had heard said in the family of Stouffer, as to the Stouffer hopperboy being so called; it being merely hearsay evidence.

5. A deposition of a witness residing in this state, above one hundred miles from the place of holding the court, taken under a rule entered by the plaintiff in the clerk's office, but not in conformity with the requisitions of the 30th section of the judicial act [1 Stat. 88], cannot be read in evidence.

[Cited in Allen v. Blunt, Case No. 217.]

[6. Cited in Rhoades v. Selin, Case No. 11,740. Disapproved in Patapsco Ins. Co. v. Southgate, 5 Pet. (30 U. S.) 616; approved in Allen v. Blunt, Case No. 217,—to the point that a deposition taken out of the district where the trial is had is inadmissible as evidence. Such testimony must be taken under a commission issued for the purpose.]

7. An examination of the law in relation to the taking of the depositions of witnesses, residing above one hundred miles from the place of holding the court.

8. A deposition having been read without objection, cannot be afterwards rejected and withdrawn, because the court, subsequently, refused to allow a deposition to be read, on account of an exception which would also have excluded the deposition which had been read, had it been objected to.

9. What questions cannot be put to a witness called as rebutting evidence.

10. Interest in a witness, short of that which would exclude him on the ground of incompetency, how far it should weigh.

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

[2] [Affirmed in 7 Wheat. (20 U. S.) 453.]

11. If the patent and specification do not state in what the improvement consists, in full, clear, and exact terms, where the patent has been granted for an improvement; the plaintiff cannot recover for an alleged violation of it.

12. Oliver Evans's patent for the improved hopperboy, is not an exception from the general rule, either by force of the private act, under which the patent was granted, or the decision of the supreme court, in the case of Evans v. Eaton [3 Wheat. (16 U. S.) 454].

13. Oliver Evans's patent is not for the whole hopperboy,—whether he was the original inventor of it or not; nor does the opinion of the supreme court, in Evans v. Eaton, sanction such a claim.

14. Unless Oliver Evans shows himself to be the original inventor of the hopperboy, he can claim no right in virtue of the grant made to him by the act of assembly of Pennsylvania, passed in 1787.

15. The plaintiff cannot object to the originality or priority and use of another machine, alleged to have been similar to his own, on the ground that it had gone into disuse, or was not notoriously in use; since it is essential to his case, to prove he was the original inventor of the machine for which he has a patent.

[Cited in Whitney v. Emmett, Case No. 17,585.]

Action for an infringement of the plaintiff's right to the hopperboy, described in his patent. Plea, not guilty, and notice of special matter, under the sixth section of the act of congress [of 1793 (1 Stat. 322)], relative to patents. The evidence was the same as in the case of Evans v. Eaton [Case No 4,559], save that David Aby, one of the defendant's witnesses, said the hopperboy used by the defendant was the Stouffer hopperboy.

The following exceptions were taken to the evidence:—

1. By the counsel for the defendant, who objected to those parts of the deposition of Enoch Anderson, in which he states, "what the plaintiff told him in the year 1783, relative to a discovery, which he contemplated, and was bringing to perfection, for an improvement in the manufacture of flour; in which conversation, he described the different machines for effecting that purpose, and amongst others the hopperboy."

BY THE COURT. Although the information respecting this discovery came from the plaintiff, it is nevertheless a fact, that the disclosure was made at a particular period, and the evidence to prove that fact is unexceptionable. The question is, when was the discovery made? If the plaintiff told the witness, in 1783, that he had made it, and described it, which the witness says he did; then it is clear that he made it at that time, or at least supposed he had done so. This is all that it proves. It does not prove that he was the discoverer, but that he said he was so, at that time.

2. David Aby was called as a witness by the defendant, who, it was admitted, used a hopperboy similar to that for the use of which, by the defendant, this suit was brought. Upon his examination, on his voir dire, he stated; that he, together with six other persons, defendants in suits now depending in this court for infringements of the patent on which this action was brought, agreed to contribute a fund, to defray the expenses of this witness in coming to Philadelphia, remaining here, attending to the business of these suits, and returning; and that the agreement extended no further.—That all the counsel fees had been paid; and there was no engagement to pay more; and the agreement did not extend to a contribution to damages or costs, either in the circuit court, or in the supreme court of the United States. If he should, while attending on the trial, advance money for any purpose besides his own personal expenses, the contributors were not bound by the agreement to reimburse him.

The witness was objected to, by the counsel for the plaintiff, on the ground of incompetency. 1st. Because the tendency of his testimony was to disprove the originality of the plaintiff's invention of the hopperboy, for which he has a patent; and consequently, to induce its avoidance by the judgment of the court, of which the witness could avail himself when the trial of his own case should come on. 2d. Because the witness was a contributor to a general fund, for the expenses of this, as well of his own suit; and stood in the condition of the insured, under a consolidation rule, or of a commoner.

The following cases were cited: 1 Phil. Ev. 34, 43, 44, 49, 50, 95, note, 53, 51, note, 45, 46, note, 42; 5 Johns. 258; 1 Mass. 239; 1 Caines, 378; 2 Day, 472.

WASHINGTON, Circuit Justice. The plaintiff's claim is to an improved hopperboy. If that which the defendant and the witness uses, be not that machine, there is no reason, in point of law, why the witness and the defendant may not each use the machine, which they have, without offence to the plaintiff. It is sufficient for the defendant, on the general issue, to prove that he is not guilty of using the plaintiff's improved hopperboy; although he should use some other machine called by that name, and possessing similar properties with those of the improved hopperboy; and a verdict in his favour, upon that issue, can in no respect produce the destruction of the patent; because the originality of the invention is not in issue on the plea of not guilty; consequently the witness, who owns a hopperboy similar to the defendant's, may have his wishes, but he has no interest dependent upon the event of this cause.

2. The agreement, which is the foundation of this objection, is for a contribution to a general fund to be used in defraying the expenses of this witness, as an agent to attend to the causes in which the contributors are defendants, and as a witness in these causes; but the witness has distinctly stated, that the fund is not pledged, or intended to answer for damages, or costs, in this or in

a superior court; and that the agreement in no respects binds the parties to it, to participate in any loss, which either or all of them may sustain; or in any gain, which may result from a successful termination of the suit. Where then is the interest which can disqualify him as a witness? It must be an interest in the event of the cause;—so much money has already been contributed, and placed in the witness's hands, to defray his expenses. If it should exceed his wants, he will have to refund the overplus to the other contributors, retaining his own seventh part; and if it should fall short of supplying his wants, his associates may be bound in honour, at least, to make up the deficiency; but the fund already raised, must be applied to the objects contemplated by the parties, whatever may be the event of this suit, not dependent on that event, but in virtue of the agreement. If the parties are bound by that agreement, to contribute a larger sum in order to defray the expenses of this witness, they must in like manner do so; not as a consequence of the event of this suit, one way or the other, but because the agreement has bound them to do so; and even if the witness had a power, under that agreement, to increase the fees of counsel, and to incur any other expense, on account of these suits, the legal result would be the same; because the creation of these charges upon the fund raised, or to be raised, and their discharge, would be precisely the same, whether the plaintiff or defendant should gain the cause. If the former should happen, the defendant would have to pay the plaintiff his costs; but for which, neither the fund raised, nor the other contracting parties, are bound to contribute one cent. If the latter should take place, the defendant would recover his costs of the plaintiff; in which the other parties to the contract, are not entitled, by the terms of it, to participate. So that it is plain that the witness has not a shadow of an interest dependent on the event of the suit; and he is therefore competent to give testimony.

The counsel for the plaintiff, tendered a bill of exceptions to this opinion.

3. The witness, David Aby, was asked, upon his examination in chief, by the defendant's counsel, if the hopperboy used by the defendant, was like the model of the plaintiff's hopperboy, then in court? This was objected to; but THE COURT decided that the question was proper; and the counsel for the plaintiff took an exception to the opinion of the court.

4. Philip Frederick, was examined on his voir dire; and stated that he has in his mill what is called a Stouffer, or S hopperboy, which he described. He was also asked by the defendant's counsel, where was the first hopperboy he had seen—both of these questions were objected to by the plaintiff's counsel; and the same objections to the competency of the witness were made, on a similar ground, as to Aby's; all of which objections were overruled, and the opinions of the court were excepted to.

5. Joseph Evans was asked by the plaintiff's counsel, if Peter Stouffer and Jacob Stouffer, offered to take from him licenses to use the plaintiff's hopperboy, and to pay for the same? This was objected to; and THE COURT was of opinion, that the question was improper, as it had not been proved, that Peter Stouffer and Jacob Stouffer used, or had in their mills, a hopperboy of any kind; and the opinion of the supreme court, in the case of Evans v. Eaton [3 Wheat. (16 U. S.) 454], is confined to the case of an offer made by a person having a hopperboy.

WASHINGTON, J., stated that he was not willing to go a step further than the supreme court had gone, in admitting such evidence. Upon the authority of Evans v. Eaton, we have admitted evidence of Daniel Huston's offer to purchase a license from the plaintiff; because it appears, that he uses a hopperboy, and did so when the offer was made. This being the opinion of the court, an exception was taken to it by the plaintiff's counsel.

6. Christian Markle, was asked by the plaintiff's counsel, to state what he had heard from the different members of the Stouffer family, as to the S hopperboy being called the Stouffer hopperboy.

THE COURT decided that this question was improper. The persons from whom the witness received information on this subject, ought to have been called on to give it on oath, and in a regular way. The attempt now is to introduce mere hearsay evidence, of what others told the witness as to the reputation of the name and invention of the machine.

7. Michael Former's deposition, taken under a rule entered by the plaintiff in the clerk's office, was offered by the plaintiff, and objected to, on the ground, that the place of residence of the witness is in the district, and more than one hundred miles from Philadelphia; and the requisites of the 30th section of the act of congress, passed September 24th, 1789, not having been observed, neither did the case come within the provisions of any of the rules of the court.

The counsel for the plaintiff, insisted, that the practice of the court had always been contrary to what is contended for on the other side.

WASHINGTON, Circuit Justice. What has been the practice in relation to this matter, is unknown to the court; it certainly has not received our sanction, by any one decision. If the practice be contrary to the act of congress, it ought to be, at once, put an end to. Even a positive written rule of this court, repugnant to that law, would be void.

The question is, whether, under the act

of congress, and the rules of this court consistent therewith, this deposition can be read; and this may be as fair an occasion as any that can occur, to examine and to decide this subject, that the practice of taking depositions in and without the district, may be laid down and pursued, so as to prevent future mistakes.

By the act of congress of the 24th of September, 1789 (section 30th) it is enacted, that "when the testimony of any person shall be necessary, in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken, de bene esse, before any justice or judge of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, or judge of a county court, or court of common pleas, of any of the United States, not being of counsel, or attorney to either of the parties, or interested in the event of the cause; provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if he is within one hundred miles of the place of such caption, allowing time for their attendance, after notification, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid, shall be taken before the claim be put in, the like notification as aforesaid, shall be given to the person having the agency or possession of the property libelled, at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth; and shall subscribe the testimony, by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent, in his presence. And the depositions, so taken, shall be retained by such magistrate, until he deliver the same, with his own hand, to the court for which they are taken, or shall, together with the certificate of the reasons, as aforesaid, of their being taken, and of the notice, if any given, to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court."

The rules of court applicable to the matter, were framed at different times by this court, for the purpose of regulating its practice. The first bears date on the 23d of May, 1805, and provides that a party may take depositions of witnesses, being within one hundred miles of the place of holding the court, by entering a rule in the clerk's office, giving a reasonable notice, which in no case need exceed ten days, to the adverse party, if living within one hundred miles; otherwise to him or to his attorney, of the time and place of taking such depositions; and the deposition is to be forthwith filed, and is to be considered as taken de bene esse.[3]

The next rule, relating to this subject, was made on the 13th of May, 1814; and declares, "that a rule to take depositions on notice given, shall be confined to taking them within the district, unless otherwise agreed; and if taken by agreement, out of the district, the description of judicial character, before whom it is agreed to be taken, shall be designated in the rule; and all depositions are to be considered as taken de bene esse, if the place of caption be within the reach of the process of the court.[4] The act of congress must necessarily be so construed, as to confine its operation to depositions taken within the district where the witness lives, more than one hundred miles from the place of trial; because, the process to compel the attendance of witnesses, could run to any greater distance within the district; and on that account, the deposition is to be de bene esse. But a subpoena could not, at that time, run into another district. The act which declared that such process for witnesses to attend in one district, might run into any other district, provided, that in civil cases, the witnesses do not live more than one hundred miles from the place of holding the court, did not pass into a law, until the 2d of March, 1793 [1 Stat. 335]. But this act, it is conceived, could not affect the construction of

[3] April Session, 1805, May 23d. Ordered—That a rule for a commission to any of the United States, or to foreign parts, shall be, of course, and may be, entered by either party in the clerk's office; but the interrogatories must be filed in the clerk's office at the time; a copy thereof, and written notice of the rule and of the names of the commissioners, must be served on the adverse party, at least fifteen days before the commission issues, in order that he may file cross interrogatories, or nominate commissioners on his own part, if he shall deem it eligible.

[4] April Session, 1814, May 13th. Ordered—That a rule to take depositions in any cause, or notice given, be confined to taking such depositions within the District, unless otherwise specially agreed. And if taken by agreement, out of the District, the description of the judicial character, before such depositions shall be agreed to be taken, shall be designated in such rule. All depositions to be considered as taken de bene esse, if the place of caption be within the reach of the process of this court.

that of September 1789, before mentioned; because, otherwise, this absurdity would follow, that a deposition, taken de bene esse, might be taken of a witness living in another state, at any distance from the court, or even beyond seas: because, they would live, within the words of the law, more than one hundred miles from the place of trial. Besides, it would have been something like a legal solecism in the act of 1789, to declare a deposition taken out of the district, to be de bene esse, when the party had no means to compel the attendance of the witness. The act of 1789, being confined to depositions of witnesses living within the district, but beyond one hundred miles from the place of trial, the rules above noticed, were framed in order to provide for cases not within the law; that is, where the witness lives within the distance of one hundred miles from the place of trial; and whether within or without the district, or in the words of the rule, "within the reach of the process of the court." These depositions may be taken on rules entered during the session of the court, or in the clerk's office, in vacation. But in either case, unless the rule specify that the deposition is to be taken without the district, it is to be confined to witnesses living within it; and such special rule, to extend to witnesses out of the district, must be made by agreement of the parties; and the character of the person taking it must be designated in the rule; and all such depositions are to be de bene esse.—This opinion is not to be construed to exclude cases of depositions taken differently from what the law or rules prescribe, under the agreement of the parties, or any special rule of the court, in any particular case.

Under either rule, reasonable notice of the time and place of taking the depositions, must be served on the adverse party, if living within one hundred miles; otherwise, upon him or his attorney; not only because this is reasonable and consistent with the spirit of the law, but because it is required by the rule of the 23d May, 1805. Where witnesses live out of the district, and more than one hundred miles from the place of trial, their depositions, if taken, must be under a commission, and will, of course, be absolute. Although the point now in controversy relates only to depositions taken without commissions, it may not be improper, in this place, to record two other rules of the court upon the subject, in order that the whole may be brought into one view. The rule of the 23d May, 1805, provides, that "a rule for a commission to any of the United States, or foreign parts, shall be of course, and may be entered, by either party, in the clerk's office. But the interrogatories must be filed in the office at the time; a copy thereof, and written notice of the rule, and of the names of the commissioners, to be served on the adverse party, fifteen days, at least, before the commission issues, in order that he may file cross interrogatories, and name commissioners on his part, if he pleases." The rule of the 27th April 1811, declares, "that a copy of the interrogatories, and written notice of the rule to issue a commission, and of the names of the commissioners, may be served either on the adverse party, or his attorney."

8. As soon as the opinion on the last point was delivered, the plaintiff's counsel moved the court to reject the deposition which had been read in evidence by the defendant's counsel, in the course of the trial, on the ground that this witness resided in Pennsylvania, more than one hundred miles from this city.

BY THE COURT. The deposition was read in evidence, without objection; and it is now too late to make an objection to it.—To this opinion an exception was taken, by the counsel for the plaintiff.

9. Philip Frederick, who was called by the defendant, to rebut what Joseph Evans, one of the plaintiff's witnesses, who had been examined to rebut the defendant's testimony, relative to an application, deposed by Joseph Evans to have been made to him by Frederick, to purchase a license from the plaintiff; was asked by the plaintiff's counsel, on his cross examination, "if Daniel Stouffer (one of the defendant's witnesses) was subject to fits of mental derangement?"

This was objected to and overruled by THE COURT, as improper to be asked in this stage of the cause. If allowed, the whole case might be opened to a new examination of the witnesses, to draw forth testimony which might have been obtained on the primary examination of the witnesses. The question, THE COURT observed, is not warranted by any thing which has fallen from the witnesses since the defendant closed his testimony, a part of which was Daniel Stouffer's deposition.

Ingersoll, Rawle, and C. J. Ingersoll, for plaintiff, contended,—

1. That the plaintiff's rights under his patent, are to the machine called the hopperboy, and also to his improvements on that machine; and that these rights have received the sanction of the supreme court, in the case of Evans v. Eaton, 3 Wheat. [16 U. S.] 517. Consequently, that if the jury should be of opinion that the plaintiff's improvement on the hopperboy has not been used by the defendant, still, the plaintiff is entitled to a verdict, if the jury should be of opinion, that the defendant has used the plaintiff's hopperboy, without his improvement.

2. That, upon the evidence, it does not appear, that what is called the Stouffer hopperboy, was discovered and used before the plaintiff's discovery in 1783; and that, in fact, it is only an humble imitation of the plaintiff's invention, though the same in principle; and although the jury should, upon the evidence, be of opinion, that the Stouffer hopperboy was invented, and even in use in one or two

mills, still, this would not be such a use as the law intends, not being public, and generally known to be in use, so as to charge the plaintiff with notice of it; and that this was the kind of notoriety which attended this hopperboy, is evident, from the circumstance that it was never heard of by the many witnesses produced by the plaintiff, some of whom had travelled through the state before and since 1783.

3. That the effect of the act of the assembly of Pennsylvania, granting to the plaintiff an exclusive right to his hopperboy, amounted to a grant of the hopperboy then in existence; (should the jury believe, that the Stouffer hopperboy was in existence and use prior to the plaintiff's discovery,) the same being then the property of the public; it being competent to the legislature to make such a grant.

4. That the Stouffer hopperboy, if invented and used prior to the plaintiff's discovery, fell into disuse; and if the jury should be of that opinion, then a prior discovery and use of that hopperboy, will present no objection to the plaintiff's patent, as an original discoverer.

5. That though the jury should be of opinion, that the plaintiff is not the original inventor of the hopperboy, still, the defendant would not be entitled to a verdict. The defendant's counsel relied upon the opinion of the supreme court in Evans v. Eaton, 3 Wheat. [16 U. S.] 519, which states, that there is error in the charge of this court, in saying, "that the said Oliver Evans was not entitled to recover, for the hopperboy in his declaration."

Binney, Sergeant, and Joseph R. Ingersoll, for defendant, contended:—

1. That the patent does not grant to the plaintiff, any thing more than the general result of the combined power of the different machines, and the several improved machines, or in other words, his improvements on these several machines; the supreme court having decided, that these expressions import substantially the same thing. This construction has received the sanction of the supreme court, as appears from the whole course of the reasoning of the chief justice, in the case of Evans v. Eaton [supra]. This right to the improved hopperboy, is asserted by Mr. Harper, the plaintiff's counsel in that cause; and the claim to the hopperboy itself, is distinctly disavowed by him. A patent to the same person, for an original invention, and also for an improvement on it, would be a legal absurdity, altogether inconsistent with the provisions of the patent laws. The petition and affirmation of Oliver Evans, confine his discovery and patent to his improved hopperboy; and he could not obtain a patent broader than his petition and affirmation, filed in the patent office.

2. If the rights of the plaintiff be those which his counsel contend for, still, in relation to his claim for a violation of his improved hopperboy, he cannot have a verdict; because the nature of his improvement is not stated in his specification. No evidence has been given to the jury, to prove what these improvements are, nor have the counsel pretended to point them out. But it is essential to the validity of the patent, that they should appear in the specification, as required by the 3d section of the patent law [1 Stat. 318]. The supreme court, in Evans v. Eaton, 3 Wheat. [16 U. S.] 518, confirms this doctrine. But, even if the plaintiff had shown in what his improvements consist, he cannot recover against this defendant, since it is in evidence, that he uses only the original Stouffer hopperboy.

3. The plaintiff cannot recover as an original inventor of the Stouffer hopperboy; the evidence proving, incontestably, that the Stouffer hopperboy was discovered, and in use,—in public use,—though this is not required by the law,—in many mills, long prior to the year 1783, the earliest period of the plaintiff's invention contended for even by himself.

4. There is no evidence that the Stouffer hopperboy ever sunk into disuse; but if that were proved, still it could not be patented by the plaintiff, as he could not swear that he was the first inventor.

WASHINGTON, Circuit Justice (charging jury). After stating the evidence on both sides, the facts intended to be proved by the evidence given in this cause, may be arranged under the following heads:—1. Such as respect the value of the plaintiff's hopperboy. 2. The time of its discovery. 3. The kind of machine used by the defendant. 4. The time of its discovery and use.

First. As to the first, the court has no observations to make, except that if you should find a verdict for the plaintiff, you will give the actual damages which the plaintiff has sustained, by reason of the defendant's use of his invention, which the court will treble.

Second. The evidence applicable to this head, if believed by the jury, proves, that in 1783, Oliver Evans communicated his investigation of the subject of an improvement in the manufactory of flour; and, in the summer of the same year, declared he had accomplished it. In 1784, he made a model of his hopperboy, which had no cords, weights, or pully; and, consequently, the lower arm was, for the sake of experiment, turned by the hand. In 1785, it was in operation in a mill, in as perfect a state as it now is.

Third. If the witness, who has been called to prove the kind of instrument used by the defendant, is believed by the jury—it consists of an upright square shaft, with a cog-wheel that turns it; and which is moved by the water power of the mill. This shaft is inserted into a square mortice in an arm or board, somewhat resembling an S., with strips of wood fixed on its under

side; and so arranged, as to turn the meal below it, cool, dry, and conduct it to the bolting chest. This arm slips with ease up and down the shaft, and must be raised by hand, and kept suspended, until the meal is put under it. It has no upper arm, pulley, weight, or leading lines; and the strips below the arm, are like the rake, as it is called, in the plaintiff's hopperboy. The machine has acquired the name of the S, or Stouffer hopperboy.

Fourth. The witnesses examined, to prove the originality and the use of the defendant's hopperboy, if believed by the jury, date them as early as the year 1765; and its erection and actual use, in many mills, in 1775, 1778, and progressively to later periods.

Objections have been made on each side, to the credit of some of the witnesses who have been examined on the other side; not on the ground of want of veracity, or character, but of interest short of that which can affect their competency. These objections have been pressed so far beyond their just limits, as to require from the court an explanation of their real value. Where the evidence of witnesses, opposed by other witnesses, is relied upon by either side to prove a particular fact, the jury must necessarily weigh their credit, in order to satisfy their own minds, on which side the truth is most likely to be; and, in making this inquiry, every circumstance which can affect the veracity of the witnesses, whether it concern their moral character, or arise from some interest which they may have in the question; or from feelings and wishes favourable to one or other of the parties, should be taken into the calculation. But, if the fact in controversy may exist, without a violation of probability, and the proof is by witnesses exclusively on that side; there is nothing to put into the opposite scale, against which to weigh the credit of these witnesses; and, if the objection to their credit be worth any thing, it must be to the full extent of rejecting their testimony altogether; or else it is worth nothing. The jury cannot compromise the matter, or halt between two opinions. They must decide that the fact is so, or is not so; and if the latter, because of objections to the credit of the witnesses, it would amount to a confounding of the questions of competency and credibility; for the effect would be the same, whether the court refused to permit the witness to testify, on the ground of incompetency, or the jury should reject the testimony when given on that of want of credibility. We have thought it proper to submit these general observations to the consideration of the jury.

We come now to the question of law which arises out of these facts, which is:—What are the things, in which the plaintiff alleges, and has proved, an exclusive property, which he asserts the defendant has used, and which he denies? The first claim is for an improved hopperboy, which the plaintiff insists is granted by his patent, which has received the sanction of the supreme court, and which the defendant acknowledges. This then being conceded ground, the court will proceed to examine it; and the inquiry in point of law will be, whether the plaintiff is entitled to a verdict, for an infringement of his patent, for an improved hopperboy? The objection stated by the defendant is, that the plaintiff has not set forth, in his specification, what are the improvements, of which he claims to be the inventor; so that a person skilled in the art, may comprehend distinctly in what they consist. This objection is, in point of fact, fully supported; neither the specification, nor any other document connected with the patent, states, or even alludes to any specific improvement in the hopperboy. Taking this as true, how stands the law? The 3d section of the patent law declares, "that before an inventor can receive a patent, he shall deliver a written description of his invention, in such full, clear, and exact terms, as to distinguish the same from all other things before known; and to enable a person skilled in the art, &c., of which it is a branch, to make and use the same." What then is the plaintiff's invention, as asserted by the plaintiff, conceded by the defendant, and sanctioned by the supreme court, in the case of Evans v. Eaton? The answer is, an improvement on the hopperboy, or an improved hopperboy, which that court have declared to be substantially the same. If this be so, then the section of the law, before mentioned, has declared, that he must specify this improvement, in full, clear, and exact terms. If he has not done so, he has no valid patent, on which he can recover.

The English decisions correspond with the injunctions of our law. The American decisions, so far as we have any report of them, maintain the same doctrine. Mr. Justice Story, in the case of Lowel v. Lewis [Case No. 8,568], lays it down, that "if the patent be for an improvement in an existing machine, the patentee, must in his specification distinguish the new from the old, and confine his patent to such parts only as are new; for, if both are mixed together, and a patent is taken for the whole, it is void." What is the reason for all this? In the first place, it is to enable the public to enjoy the full benefit of the discovery, when the patentee's monopoly is expired, by having it so described upon record, that any person, skilled in the art of which the invention is a branch, may be able to construct it. The next reason is, to put every citizen upon his guard, that he may not through ignorance violate the law, by infringing the rights of the patentee, and subjecting himself to the consequences of litigation. The inventor of the original machine, if he has obtained a patent for it, and all persons claiming under him, may lawfully enjoy the full benefit of that discovery, notwithstanding the improvement made upon it by a subsequent discoverer. If he has not

chosen to ask for a monopoly, but abandons it to the public, then it becomes public property, and any person has a right to use it. The inventor of the improvement may also obtain a patent for his discovery, which cannot legally be invaded by the inventor of the original machine, or by any other person. The rights of each are secured by law, and there is no incompatibility between them. But if a man, wishing to use the original invention, and honestly disposed to avoid an infraction of the improver's right, is unable to ascertain from any certain and known standard, where the original invention ends, and where the improvement commences, how is it possible for him to exercise his own acknowledged right, freed from the danger of invading that of another?—and to what acts of oppression might not this lead? Might not the patentee of his mysterious improvement, obtain from the ignorant, the timid, and even the prudent members of society, who wish to use the original discovery, the price he chooses to ask for a license to use his improvement; and in this way compel them to purchase it, rather than incur expenses and inconveniences far greater than the sum demanded would pay for or compensate? If this may happen, then the improver enjoys in a degree the benefit of a discoverer, both of the original machine, and also of the improvement. In short, the patentee of the improvement may, to a certain extent, keep all others at arm's length as to the original invention, or make them pay him for it in derogation of the rights of the inventor of the original machine. If this be the law applicable to the cases in general, is this an excepted case? The plaintiff's counsel have not directly asserted it to be so; but they have referred, with some emphasis, to what is said by the supreme court, in the case of Evans v. Eaton, 3 Wheat. [16 U. S.] 518. The expressions are, "in all cases where the plaintiff's claim is for an improvement, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject, may comprehend distinctly in what it consists." This decision does not state, in what way the extent of the plaintiff's improvement is to be proved, nor did the case require that the supreme court should be more explicit. The obvious conclusion is, that the court left that matter undecided, and meant that the extent of the plaintiff's improvement should be shown, according to the rules of law; a contrary construction would be most unfair, and unwarranted.

Is it possible to believe, that if the supreme court intended to decide contrary to the 3d section of the patent law, and to the English and American decisions, that this was a case without the influence of that law, and those decisions, such intention would have been expressed in such guarded terms? This cannot be admitted. Neither can the private act, for the relief of Oliver Evans, warrant the argument, that this case is freed from the restrictions contained in the 3d section of the patent law; because, except as to the extent of the grant it refers to; and the supreme court, in the case cited, considers it as within the provisions of that law, is it likely that the supreme court could have meant, that the plaintiff might cure the defect of his specification, by proving to the jury in what his improvements consisted? If so, then as to the present defendant, such an explanation would be unavailing, to save him from the consequences of an error, against which the sagacious wit of man could not have guarded him. He has sinned already, if he has invaded the plaintiff's right; and it is now too late to convince him of his error, if he must be a victim of it, for the want of that light which is now shed upon the act, long after his supposed transgression. But of what avail would this explanation be, after the expiration of the plaintiff's monopoly? The parol evidence given in a court of justice, is evanescent, and affords the most unsafe notice of facts, particularly when they respect matters of art, that can be supposed. What man, who wishes not to invade the plaintiff's patent, would venture to erect a hopperboy, merely from the information which he could gather from this trial? He could obtain none upon which he could safely rely; nor could any artist, after the expiration of the plaintiff's right, be enabled from such a source, to know how to construct this improvement. But, even if the extent of the improvement could be traced in this way, the plaintiff has not attempted to prove it; and what is more, his counsel, although repeatedly called on to point it out, have not attempted to do it. Can the jury, without evidence, and without the aid of the plaintiff or his counsel, say in what these improvements consist? If they had never seen another hopperboy, supposed to be the original, this would be impossible. If having seen the Stouffer hopperboy, they can do so, by comparing with it the plaintiff's improved hopperboy, then the consequence seems to be almost inevitable, that the Stouffer hopperboy is the original one, the point which, under the next head, is denied by the plaintiff. But if the specification had stated in what the plaintiff's improvement consisted, still he is not entitled to a verdict for a violation of that right, unless he has proved, to your satisfaction, that the plaintiff has infringed that right.

Upon the whole, this patent, so far as it is for an improvement, cannot be supported; and as to any claim founded on that right, the plaintiff is not entitled to your verdict.

2d. The plaintiff contends, that he is the original inventor, not only of the improved hopperboy, but of the whole machine;—that his patent grants him the exclusive right to both, and that this claim has received the sanction of the supreme court. Whether, in point of fact, he is the original inventor of

the hopperboy, will be attended to hereafter; neither shall we stop to inquire whether the plaintiff's patent grants him the right; because, if the supreme court has sanctioned the claim, that is law for this court. The part of the decision of that court, relied upon by the plaintiff's counsel, is to be found in page 517, 3 Wheat. [16 U. S.], where the chief justice says: "The opinion of the court, then, is, that Oliver Evans may claim, under his patent, the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvements on machines previously discovered." It would seem almost impossible to misunderstand this positive declaration of the court. It appears to be the result of the previous reasoning. It states that the plaintiff may claim: 1. The exclusive use of his improvements and inventions in the art of manufacturing flour. 2. In the several machines which he has invented. 3. In his improvements on machines previously discovered. As to the first, there is no dispute in this cause. The third has been already disposed of. The second is now to be examined.

It is contended, by the defendant's counsel, that this is not the correct construction of this sentence in the decision of the court, because it is inconsistent with the pretensions of the plaintiff's counsel (see Mr. Harper's argument, 3 Wheat. [16 U. S.] 499), and with the course of argument of the chief justice, throughout the opinion which led to the foregoing conclusion. This supposed inconsistency may, in the opinion of this court, be explained by the following observations:—The exceptions taken to the charge of this court, in the case of Evans v. Eaton, were—1st. He stating that the patent of Oliver Evans was only for the combined effect of all the machines mentioned in his patent; and 2d. In directing the jury to find for the defendant, if they should be of opinion, that the hopperboy was in use prior to the improvement alleged to have been made by Oliver Evans. These were the only questions presented to the view of the supreme court, upon which it was deemed proper by that court to give an opinion. The reasoning of the chief justice, therefore, is intended to prove and to correct these errors in the charge, by showing that Oliver Evans was entitled by his patent, and the accompanying documents, not only to the general result, but to an improvement on the hopperboy, one of the machines used in combination, to produce that result. If he had regard to an improvement on the hopperboy, this court was clearly wrong, in directing the jury to find a verdict for the defendant, if they should be of opinion, that the hopperboy was in use prior to the plaintiff's improvement; because, it was unimportant who was the original discoverer of the hopperboy, provided the plaintiff had a patent for an improved hopperboy, and the defendant used that improvement; and the charge precluded that inquiry. But whilst the judge aims to prove that Oliver Evans was entitled to this double claim, he does not exclude any other claim. There is one expression, relied upon by the defendant's counsel as having this appearance; but it is more likely that the word relied on is a typographical error, than that the court should both deny and affirm the plaintiff's right, as an original inventor of the hopperboy. When the court came to state, definitively, what were the plaintiff's claims, under his patent, the whole are distinctly stated. The act "for the relief of Oliver Evans," authorizes a grant to him of his improvement in the art of manufacturing flour, and in the several machines which he has invented, and in his improvements, &c. The court says, 3 Wheat. [16 U. S.] 508, that the application "is coextensive with the act." If, then, in this enumeration of the plaintiff's rights under the patent, that to the machines had been omitted, it might have been supposed, that it was not recognized by that court; and it was consequently introduced in order to prevent a conclusion against its validity, although it had not been brought into view in the previous argument, because a matter not in dispute. This course of reasoning is, we think, strongly fortified by what the court says, 3 Wheat. [16 U. S.] 518. "In all cases, where his claim is for an improvement on a machine, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject, may comprehend distinctly in what it consists." Now, if his claim was confined to an improvement, produced by the combined operation of all the machines, and to an improvement in the separate machines, why should the court have stated hypothetically what was to be proved, in case the plaintiff claimed for an improvement? This sentence, following immediately that which has been relied upon by the defendant's counsel, seems to explain it, and to fortify the construction which we have given to it.

Upon the whole, we are of opinion, that the question, who is the original inventor of the hopperboy, is left open by the supreme court, and is now to be decided by this jury. If, then, the jury should be of opinion, upon the evidence, that the hopperboy which the defendant uses, was invented and in use prior to the discovery of Oliver Evans, then your verdict ought to be for the defendant. But to this instruction, there are objections which it is proper to notice. It is contended, that the judgment of the supreme court, in Evans v. Eaton, 3 Wheat. [16 U. S.] 519, where it is said that there is error in the proceedings below, in that, in the charge the opinion is expressed that Oliver Evans is not entitled to recover, if the hopperboy in his declaration mentioned, had been in use previous to his alleged discovery, entitles the plaintiff to a verdict; although the jury should be of opinion, that he is not the original inventor of the hopperboy. That the

court did not mean this, is most obvious, from what is said in page 517, that "Oliver Evans may claim the exclusive use of the several machines, which he has invented;" could the supreme court intend to say, immediately after, that he is entitled to a verdict for a machine which he has not invented? Can it be supposed, that the court meant to ride over the third section of the patent law, and set up a different rule to govern this case, without having stated the reasons for so extraordinary a distinction? This is altogether inadmissible.

Another reason may be urged against the conclusion drawn by the plaintiff's counsel, from the judgment, which is this:—The error to be corrected by that part of the judgment relied on, that "the court instructed the jury to find for the defendant, if they should be of opinion, that the hopperboy was in use prior to the invention of Oliver Evans's improvement." Now, the words "in the declaration mentioned," are not in the charge of the circuit court, as stated by the chief justice, which the supreme court proposes to condemn; and it is the insertion of these words into the judgment, which produces all the difficulty. Leave them out, and then the judgment is consistent with the whole reasoning of the chief justice, which condemned the charge of the circuit court; because it precluded Oliver Evans from obtaining a verdict for his improvement, if he was not the inventor of the elementary parts of the machine. Retain them, and it follows, that if Oliver Evans was proved not to be the inventor of the hopperboy, in his declaration mentioned, still, the defendant was not entitled to a verdict. This would be in such direct opposition to the 6th section of the patent law, that we cannot suppose this was the meaning of the supreme court.

2. The next objection to this instruction is, that the act of the legislature of Pennsylvania, conveyed to Oliver Evans the original hopperboy; and consequently, its existence and use, at a period prior to the plaintiff's discovery, cannot now be urged to invalidate his patent. There are two conclusive answers to this argument—(1) That it is by no means to be admitted, that the act operates to make such a transfer; but (2) if it did, still, the plaintiff cannot recover, if he appears not to be the first, or original inventor of the hopperboy. This claim in this action is not derived either from the state, or from an individual. His suit is founded on his patent, and unless he was himself the original inventor of the hopperboy, he cannot recover.

3. Another objection stated by the plaintiff's counsel, is, that the Stouffer hopperboy, although the jury should believe that it was in use, in many mills, before the plaintiff's discovery, had fallen into disuse; and, therefore, it cannot be used to invalidate the plaintiff's right to recover. The answer to this is, that whether it fell into disuse, or not, if it was used before the plaintiff's discovery, the plaintiff could not obtain a patent for it, so as to exclude the defendant from using it, if he chose to do so.

4. The last objection is, that the use of the Stouffer machine, cannot affect the plaintiff's patent, unless it was public, so as to affect the plaintiff, or other inventors, with notice. Whether that hopperboy was in public use, or not, the jury will judge, from the testimony of the witnesses. It was erected, and used in four or five mills; if the witnesses are believed, who have testified for the defendant, on that point. But this argument has no foundation in the act of congress, which does not speak of public use, of the nature represented by the counsel. It is immaterial, whether the patentee had notice of the prior invention, or not. If it was in use, in any part of the world, however unlikely or impossible that the fact should come to the knowledge of the patentee, his patent for the same machine cannot be supported.

Verdict for the defendant.

[NOTE. This judgment was affirmed by the supreme court in Evans v. Hettich, 7 Wheat. (20 U. S.) 453, Mr. Justice Story delivering the opinion. The affirmance rested chiefly upon the grounds set forth in Evans v. Eaton, 7 Wheat. (20 U. S.) 356. See note to Id., Case No. 4,560.

[Patent was granted to O. Evans, December 18, 1790. For other cases involving this patent, see Evans v. Eaton, Case No. 4,560; Id., 3 Wheat. (16 U. S.) 455, 7 Wheat. (20 U. S.) 356; Evans v. Robinson, Case No. 4,571; Dox v. Postmaster General of the United States, 1 Pet. (26 U. S.) 322; Evans v. Chambers, Case No. 4,555; Evans v. Jordan, Id. 4,564; Id., 9 Cranch (13 U. S.) 199; Evans v. Weiss, Id. 4,572; Evans v. Kremer, Case No. 4,565; Evans v. Hettich, 7 Wheat. (20 U. S.) 453.]

Case No. 4,563.

EVANS v. The JOHN F. WARNER.

[4 West. Law Month. 193.]

District Court, N. D. New York. March Term, 1862.

COLLISION—SCHOONER ENTERING CREEK.

[A schooner entering the mouth of Buffalo creek, from the lake, in a gale, with wet and swollen rigging, *held* free from fault in colliding with a canal boat which projected too far into the channel; it appearing that the schooner, while crossing a spit which had been raised by a recent freshet, took a rank sheer to port, and struck the canal boat before her sails could be taken in, or the sheer stopped by the starboard anchor, which was promptly let go.]

[This was a libel by Alonzo Evans against the schooner John F. Warner (Thomas P. Handy, claimant) to recover damages for a collision.]

HALL, District Judge. This is a case of collision. The libellant is the owner of the canal boat Mygatt, which was run into and sunk on the 11th November, 1861, whilst endeavoring to turn in Buffalo creek, outside of

the propeller Euphrates, which then lay at the dock near the foot of Commercial street. The Warner was coming into port, with the wind blowing a gale directly up the stream. At a slight bend in the creek, a few rods below the Mygatt, she took a rank sheer to port, and ran against and carried away the stern of that boat before she could be brought up by her starboard anchor, which was cast as soon as possible after the sheer commenced. After a careful review of the testimony, I retain the impression made by the evidence at the hearing, and I shall therefore dismiss the libel with costs. Considering the necessity of carrying all the sail the Warner had up, in order to cross the bar at the mouth of the harbor; the season of the year; the violence of the gale; the wet and swollen condition of the rigging, and the consequent difficulty in taking in sail, the evidence which was given to show that the master of the Warner took in sail as rapidly as possible, is entirely satisfactory; and the preparations which he made before entering the harbor, and the whole conduct of the master, were of the most satisfactory character, evincing superior skill and more than ordinary prudence and forecast. No fault can be attributed to those in charge of the Warner; on the contrary, the evidence shows that her master was skillful, careful and energetic, and that he did all that could be reasonably required of him in order to prevent a collision. That his vessel took a sudden sheer, when she "smelt ground" on the spit referred to by the witnesses, was no fault of his; and when the sheer occurred, he did all that could be done to prevent the injury which ensued. In view of the possibility of being required to anchor in a sudden emergency, he had cleared away his anchors and stationed a man forward at the starboard anchor, ready to let it go, "stock and fluke;" and when the sheer to port occurred, the orders to put the helm hard-a-port and let go the starboard anchor, followed in rapid succession. There was, however, not sufficient space between the Warner and the Mygatt to allow the former to be brought up by her anchor before the collision occurred, and the stem of the canal boat was crushed betwen the Warner and a schooner lying above the Euphrates and the Mygatt; a schooner which lay outside of two canal boats and two other schooners, lying side by side, and extended far out towards the center of the channel of the creek.

It is probable from the evidence that the unusual accumulation on the spit at the point where the sheer occurred, was produced by the extraordinary freshet which had a few weeks before brought down mud, sand, and other deposits in the creek; and it may have been increased by the current which the gale then in progress had sent up the creek. At all events, it could not have been anticipated by the master of the Warner, that with the water of the creek at least two feet above its ordinary height, there could be any danger in passing that point with his schooner; and as he endeavored to avoid the spit as far as practicable by going as near the opposite side of the creek as the opening in the channel would allow, the Warner must be held entirely free from fault. The management of the master of the canal boat in extending the stem of his boat so far out into the channel, after being warned that a vessel was coming in, was extremely careless. After he knew the Warner was approaching, there was abundant time for him to haul his boat so far from the space left open by the unusual crowd of vessels in port as to be entirely out of danger, but he imprudently, if not recklessly, crowded the stem of his boat into this open space, which, in consequence of the very extraordinary crowd of vessels in the creek, had been already narrowed to less than half the width of the channel, and thus brought on his boat the consequences of this collision. The master of the canal boat was bound to exercise extraordinary vigilance, as well as to act with great prudence and caution, in attempting to change the position of his boat under the circumstances of the case. The harbor was crowded to excess with vessels lying three, four, and five abreast, in violation of the city ordinances, and narrowing the channel in many places—and particularly at that point where the Mygatt attempted to turn—to such an extent as to require the utmost care and skill on the part of those in charge of vessels coming into port; vessels were frequently coming in and passing up this narrow channel; the wind was blowing a gale up the creek; the weather had been wet and cold, and the sails and rigging of vessels were difficult of management; anchoring in the creek was dangerous to a vessel under way; and it was hardly possible that a vessel could be stopped by any other means below the point where the Mygatt lay; which was just above a slight bend in the creek, and just above the spit which caused the sheer of the Warner. The Mygatt was a canal boat, and therefore too frail to bear even a glancing blow from the heavier and stronger vessels coming in from the lake; her master was warned that a vessel was approaching, and of the danger of going out into the open channel; and yet he proceeded heedlessly and carelessly to place the stem of his boat a considerable distance outside of the vessels lying above and below him; and in such a position as to be crushed between the approaching vessel and the outer vessel of those lying above him. To hold the master and crew of a sail vessel coming into port on a raw, chilly day, near the middle of November, after the wearisome and exhausting labors of a stormy and tempestuous night, and with the wind still blowing a gale, in any degree responsible for a collision occurring under the circumstances of this case—a collision which very little exertion and less

than ordinary precaution on the part of those in charge of the canal boat would have rendered impossible—would, in my opinion, be gross injustice. The libel in this case is dismissed with costs.

Case No. 4,564.

EVANS v. JORDAN et al.

[1 Brock. 248;[1] 1 Robb, Pat. Cas. 20.]

Circuit Court, D. Virginia. May Term, 1813.[2]

PATENTS—EXPIRATION OF GRANT—UNAUTHORIZED USE OF MACHINE CONTINUED AFTER RENEWAL OF PATENT.

An old patent, securing to the inventor of improved machinery for the manufacture of flour and meal, the exclusive use of his invention for fourteen years, having expired, J. & M. erected machinery, adopting the improvements of the patentee, and subsequently, a special act of congress was passed, authorizing the secretary of state to issue a second patent for the same invention, for an additional term of fourteen years, which act contained the proviso, "that no person who shall have used the said improvements, or have erected the same for use before the issuing of the said (second) patent, shall be liable to damages therefor." *Held*, that this proviso did not authorize the use of this improved machinery by J. & M. subsequent to the date of the second patent, and for such subsequent use, they were liable to damages to the patentee.

[See note at end of case.]

This was an action for damages brought by the paintiff, against the defendants, for an alleged violation of a patent issued to him for certain improvements made by him in the art of manufacturing flour and meal. In the year 1790, Oliver Evans obtained a patent, granting to him, for the term of fourteen years, the exclusive right of making, constructing, using, and vending, his invention in the structure of machinery, to be employed in the art of manufacturing flour and meal. After the expiration of the term for which this patent-right was secured, Jordan & Morehead, the defendants in this suit, constructed and used the improved machinery, invented by Oliver Evans. On the 21st of January, 1808, congress passed a special act,[3] authorizing the secretary of state, on application in writing, by Oliver Evans, to cause letters-patent to be made out in the manner and form prescribed by the general patent law, granting to him, for a term not exceeding fourteen years, "the full and exclusive right and liberty of making, &c., his invention, &c., in the art of manufacturing flour and meal, and in the several machines which he has discovered, invented, improved, and applied to that purpose: provided, that no person who may have heretofore paid the said Oliver Evans for license to use his said improvements, shall be obliged to renew said license, or be subject to damages for not renewing the same: and provided also, that no person who shall have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages therefor." The second patent was issued on the 22d of January, 1808, and this suit was brought in 1810. The defendants pleaded specially, that they had constructed and used the improved machinery of Oliver Evans, subsequently to the expiration of the first patent, and before the date of the second, and had continued to use the same ever since, as it was lawful for them to do, and to this plea the paintiff demurred. The same question was also presented in other causes depending in this court, in which the said Oliver Evans was plaintiff.

Before MARSHALL, Circuit Justice, and TUCKER, District Judge.

MARSHALL, Circuit Justice. These cases came on to be heard on demurrers to several pleas in bar which have been filed by the defendants. It is intended to present two questions for the consideration of the court. 1st. Is Oliver Evans entitled to maintain this action against a person who has used his machinery subsequent to the date of his patent, but had constructed it previous to the passage of the act by which his patent was authorized? 2d. Is the case affected by the circumstance, that Oliver Evans had obtained a previous patent for the same discovery, which previous patent had expired before the construction of the machine, for the use of which the present suit is instituted?

This being one of those subjects which is, by the constitution of the United States, delegated entirely to the government of the Union, the question which has been made must depend on the acts of congress. The act of 1793 authorizes the secretary of state to issue a patent to the inventor of any new and useful art, securing to him "for a term, not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery."[4] This right could not be full and exclusive, if any other person should have a right to make, construct, use, or vend the invention which was the subject of the patent. The 5th section of the same act subjects to a specific penalty "any person who shall make, devise, and use, or sell the thing so invented." The terms "devise and use" being coupled together, it might well be questioned whether, under this law, any person would be subject to the penalty for using a machine which he had not also made or devised. But this doubt is removed by the act of 1800.[5] The 3d sec-

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

[2] [Affirmed in 9 Cranch (13 U. S.) 199.]

[3] "An act for the relief of Oliver Evans,"—Act Jan. 21, 1808 [6 Stat. 70].

[4] Act to promote the progress of the useful arts, Feb. 21, 1793,—1 Story's Laws, c. 55, p. 300 [1 Stat. 318].

[5] Act April 17, 1800; 1 Story's Laws, c. 25, p. 752 [2 Stat. 37].

tion of that act repeals the 5th section of the act of 1793, and subjects to the damages therein prescribed "any person who shall make, devise, use, or sell," the invention of any other, which that other has secured by a patent. This clause cannot be expressed in terms which would show more conclusively the intention of the legislature to subject each act contained in the enumeration to the penalty of the law, than those which are employed. It has, therefore, been deemed necessary, by the counsel for the defendants, to insist that the obvious construction ought to be overruled, either because it is unconstitutional, or because it is a manifest injustice, which ought not to be ascribed to the legislature.

To subject any person to a penalty for using a machine, the invention of another, which had been constructed anterior to the patent, has been pronounced an ex post facto law, and, consequently, void. But an act which prescribes conditions, under which alone a thing may be used in future, cannot be ex post facto. It attaches neither guilt nor punishment to a past act, but looks forward to future acts, and prohibits the future use of the machine invented by another, without compensating that other for his invention. But it is contended that the injustice of exposing an individual to pay for the use of a machine, a sum which he may deem above its value, or to lose one which has been constructed at considerable expense, when he believed it might be lawfully constructed and freely used, is so glaring, that such a construction ought never, if it can be avoided, to be placed on an act of the legislature. That an act ought so to be construed as to avoid gross injustice, if such construction be compatible with the words of the law, will not be controverted; but this principle is never to be carried so far as to thwart that scheme of policy which the legislature has the power to adopt. To that department is confided, without revision, the power of deciding on the justice as well as wisdom of measures relative to subjects on which they have the constitutional power to act. Wherever, then, their language admits of no doubt, their plain and obvious intent must prevail. In cases of patents, although some injustice may ensue from imposing a price to be paid to the inventor, on the future use of a machine which was constructed before the patent was obtained, yet the great fundamental principles of right, and of property, do not appear to be so vitally wounded as to induce the court to resist and struggle against the obvious meaning of words.

The constitution gives to the legislature a power "to promote the progress of useful arts, by securing, for limited times, to inventors, the exclusive right to their respective discoveries." In the exercise of this constitutional power, the legislature has passed an act, prescribing the mode by which a patent to any invention may be obtained, and giving to the patentee the exclusive right to make, devise, use, or sell it, for fourteen years from the date of the patent. The constitution and law, taken together, give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent. This inchoate right is exclusive. It can be invaded or impaired by no person. No person can, without the consent of the inventor, acquire a property in the invention. Whenever, then, previous to a patent, any person constructs a machine discovered by another, he constructs it subject to the right of that other. His right to use it is qualified by the paramount right of the inventor to prescribe the conditions on which he shall use it. Were it otherwise, the exclusive right in the discovery which the constitution authorizes congress to secure to the inventor, and the exclusive right to use it after the date of the patent, which the act of congress confers, would not be exclusive, but would be participated with every person who had constructed the machine previous to the emanation of the patent. If gentlemen will recollect, that this inchoate and indefeasible property in the thing discovered commences with the discovery itself, and is only perfected by the patent subjecting the future use of the machine constructed previous to a patent, to that price which the inventor demands from others for the use of it, his discovery will not appear to be one of those violent invasions of the sacred rights of property, which would justify a court in disregarding the plain meaning of words.

In deciding this first question, it still remains to inquire, whether, from the particular act under which Oliver Evans has obtained his patent, he derives rights as extensive as would have been conferred by the general law. In the enacting part of the law, reference is made to the general act, and it is declared that his patent grants, "for a term, not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to be used, his invention," &c. In the enacting clause, there is found no difference between this particular law and the general law. A patent issued under the one, or the other, confers equal rights. Is this construction varied by the proviso? The first proviso is, "That no person who may have heretofore paid the said Oliver Evans for a license to use his said improvements, shall be obliged to renew the said license, or be subject to damages for not renewing the same." The second is, "That no person who shall have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages therefor." The second proviso has been supposed to comprehend the case at bar. But, surely, this would be extending the proviso far beyond the meaning of the words. Their obvious import is, that no person who shall

have used the said improvements, or have erected the same for use, before the issuing of the said patent, shall be liable to damages for such previous use, or for such previous erection; but this no more excepts the future use of a machine previously erected, from the operation of the enacting clause, than it excepts from that operation a machine to be in future erected. The legislature, knowing that an inchoate right to the exclusive use of his discovery was vested in the inventor, from the moment of discovery, and only perfected by the patent, might deem it necessary to guard against a continuation, which would make this patent relate back to antecedent transactions. This may have been a superfluous caution, but such caution is often found in legislative proceedings. This construction derives additional force from the first proviso. This does away the necessity of renewing licenses purchased under the former patent. The words of the proviso, certainly, apply to all former licenses, for which payment had been made, not to those for which no payment had been made, and shows that the legislature supposed it possible that the effect of the patent would be extended to such licenses. An attempt has been made to impair the influence of this proviso, by its application to cases in which a license had been obtained and paid for, but the machine had not been constructed. There is nothing in the words to justify the idea that the legislature designed to limit their operation to such particular cases; and to suppose their existence requires no inconsiderable effort of the imagination. It is difficult to assign a motive for purchasing, just before the expiration of a patent, a license to use a discovery, which the purchaser did not purpose to erect until the patent should expire.

It is, then, the opinion of the court, that the act for the relief of Oliver Evans, considered independent of any former patent, would authorize him to sustain an action for the use of his invention, after the date of his patent, although the machinery itself had been constructed before its date. Does the existence of a former patent affect the question of law? The court can perceive no ground upon which to rest an affirmative answer to this question. That construction of the constitution which admits the renewal of a patent, is not controverted. A renewed patent, then, has the same obligation, and confers the same rights, with an original patent. The inchoate property which vested by the discovery, is prolonged by the renewed patent, as well as by the original patent. There may be powerful reasons with the legislature for guarding a renewed patent, by restrictions and regulations, not to be imposed on original patents; but these reasons address themselves to the legislature only. If they have been overlooked or disregarded in the hall of congress, it is not for this court to set them up.

NOTE. The court being divided in opinion, pro forma, on the question raised by the demurrer in this cause, the following order was made: "On the trial of this cause, it occurred, as a question, whether, after the expiration of the original patent granted to Oliver Evans, a general right to use his discovery was not so vested in the public, as to require and justify such a construction of the act passed in January, 1808, entitled, 'An act for the relief of Oliver Evans,' as would exempt from either treble or single damages, the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent, and previous to the passage of the act, entitled 'An act for the relief of Oliver Evans.' Upon this question, the court was divided in opinion, and it is, therefore, ordered to be certified to the supreme court for their decision and direction thereon." The supreme court of the United States unanimously sustained the above opinion of the chief justice. See [Evans v. Jordan] 9 Cranch [13 U. S.] 199; 3 Pet. Cond. Rep. 358. The decisions of the United States court, on cases arising under the patent act, are collated by Mr. Peters, in a note at the end of the case.

[NOTE. It was the unanimous opinion of the supreme court that the act passed in January, 1808, entitled "An act for the relief of Oliver Evans," ought not to be so construed as to exempt from either treble or single damages the use, subsequent to the passage of the said act, of the machinery therein mentioned, which was erected subsequent to the expiration of the original patent, and previous to the passage of the said act.

[For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.]

Case No. 4,565.

EVANS v. KREMER.

[Pet. C. C. 215;[1] 1 Robb, Pat. Cas. 66.]

Circuit Court, D. Pennsylvania. April Term, 1816.

PATENTS—INFRINGEMENT—DEFENCE OF PRIOR USE—EVIDENCE.

If to an action for a violation of a patent right, the defendant plead the general issue; it is sufficient in the notice of special matter to state, that the plaintiff is not the original inventor of the machine, for which the patent has been obtained, if the defence is founded on such an allegation; and it is not necessary to state in the notice, who was the inventor, or who had previously used the machine. If the notice specifies some persons who used the machine, the use thereof by others may be given in evidence.

This was an action, for the violation of the plaintiff's patent right to the hopper-boy, part of his machinery for manufacturing flour. Upon the general issue, the defendant gave the plaintiff notice in writing, that at the trial, he should contend, that the plaintiff was not the original inventor of the hopper-boy, but, that the same had been used long before the plaintiff's discovery, in certain mills, which were mentioned by name in the notice. The defendant at the trial proved, that a hopper-boy had been used in the mills so specified in the notice, some years before the date of the plaintiff's first

[1] [Reported by Richard Peters, Jr., Esq.]

patent; and was proceeding to prove the use of it in other mills, not specified in the notice. This was objected to.

Ingersoll, Rawle and C. J. Ingersoll, for plaintiff.

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

WASHINGTON, Circuit Justice. That the plaintiff was not the original inventor, is a plea in bar, and if this be the ground of defence, the plaintiff must come prepared to prove that he was. Had the defendant filed a special plea on this point, he need not have set out in his plea, the particular facts on which the plea was grounded, or specified the mills, where the hopper-boy had been used. Neither was it necessary for him to make such specification in his notice, when he chose to avail himself of the permission, granted by the act of congress [1 Stat. 322], of pleading the general issue, and giving the special matter in evidence. The special matter of the defence is, that the plaintiff is not the original inventor, for that the machine was known and used before the time when he claimed to be the inventor; and notice of this was sufficient, without being more specific. This was sufficient to prevent surprise, and to warn the plaintiff to be prepared to maintain his title, in relation to the question of original discovery. To go further, might lead, step by step, to introduce a degree of nicety and precision in these notices, which would be productive of great inconvenience, and would render the privilege of pleading the general issue, rather disadvantageous to the defendant, than a benefit. The evidence was admitted.[2]

Before the opening was concluded, the plaintiff's counsel, because of the absence of their client, suffered a nonsuit.

NOTE [from 1 Robb, Pat. Cas. 66]. The act of July 4, 1836 [5 Stat. 117], provides that whenever the defendant relies upon the fact of a previous invention, knowledge, or use of the thing patented, he shall state in his notice of special matter the names and places of residence of those who he intends to prove possessed such prior knowledge of the thing, and where the same had been used.

[NOTE. For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.]

EVANS (MILLER v.). See Case No. 9,569.

EVANS (MORGAN v.). See Case No. 9,800.

[2] In the case of Evans v. Eaton [Case No. 4,559], the circuit court of Pennsylvania having admitted testimony similar to that which was allowed to be given in this case, upon the same notice; an exception was taken to the opinion of the court, and the principles laid down by the circuit court, in the case of Evans v. Kremer, were recognized and affirmed, by the supreme court of the United States. [Evans v. Eaton] 3 Wheat. [16 U. S.] 503.

Case No. 4,566.

EVANS v. PACK.

[2 Flip. 267; 7 Cent. Law J. 409; 7 Reporter, 70; 2 Tex. Law J. 356; 13 Am. Law Rev. 375.][1]

Circuit Court, E. D. Michigan. Oct. 14, 1878.

TRESPASS—STATE COURT—JURISDICTION.

The prosecution of an action of trespass, brought in the state court against the marshal for seizing goods of another party under execution, cannot be enjoined by the circuit court of the United States. It has no such power. The injunction in such case, when issued, is wholly void for want of jurisdiction.

[Cited in Hudson v. Schwab, Case No. 6,835.]

Two motions, one to commit Pack and his attorney, J. D. Turnbull, for violating an order of this court, from further proceeding, etc.; the other to set aside such order. The bill set forth that Evans, the complainant, recovered a judgment on the law side of this court against Cunningham, Haines & Co. [in the sum of $10,244.46];[2] that execution thereon came to the marshal's hands, who by his deputy, also a complainant, levied upon and sold a quantity of personalty on the premises of the defendants in such execution. Further that this property belonged to said defendants, but that Pack and the other defendants to this suit claiming to be the owners thereof, brought suit in trespass in the circuit court of Alpena county against the marshal and Evans to recover the value of the property. It was alleged that the defendants claimed title to said property, through conveyances from Cunningham, Haines & Co., which came through two intermediate parties; that such conveyances were fraudulent, void, and without consideration; and bill prayed to have these set aside and for injunction to stop further proceedings. An order restraining the parties named from proceeding was issued; and on the hearing of these motions affidavits were read to the effect that after the service of the order defendants proceeded and obtained judgment against complainant and the deputy for $5,633.48, damages for taking the property.

Henry M. Duffield and George V. N. Lothrop, for complainants.

Alfred Russell, for defendants.

BROWN, District Judge. This case involves the important question whether this court has jurisdiction to enjoin the prosecution of an action in a state court, against the marshal of this court, for taking the goods of one person upon execution against another. That the possession of the marshal of goods seized under an execution, cannot lawfully be disturbed by an officer of the state court acting under a writ of replevin or other analogous process, was settled in Freeman v. Howe, 24 How. [65 U. S.] 450—a decision since repeated—

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 7 Reporter, 70, contains only a condensed report.]

[2] [From 7 Cent. Law J. 409.]

ly affirmed by the supreme court, and universally acquiesced in by the state courts. It is equally well settled that the state courts may entertain jurisdiction of an action of trover or trespass against a marshal, for taking the goods of a third party upon a writ of execution. Buck v. Colbath, 3 Wall. [70 U. S.] 334. The substance of these decisions is that, while the possession of the marshal cannot be disturbed, he enjoys no immunity from prosecution in an action for the value of the goods taken.

It is admitted that under the Revised Statutes (section 720) the judicial power of the federal courts does not extend to the staying of proceedings in a state court, except in cases arising under the bankrupt act. It is claimed, however, that this section has no application to injunction bills which are merely ancillary to suits at law; that every court is bound to protect its officers in the execution of its process; that having first obtained jurisdiction of the case, this court has the right to decide every question arising therein; that the defendants whose property the marshal is alleged to have unlawfully seized, might have applied to this court for a release of the same and obtained full protection of their rights; that having elected to sue in the state court, which is admitted to have jurisdiction of such suit, the option still remains with this court to allow the suit to proceed or interfere by injunction and withdraw it from the cognizance of the state court. Certain expressions in the case of Freeman v. Howe [supra] seem to support this contention, but these remarks were thrown out by way of dictum, and were subsequently criticised in Buck v. Colbath, 3 Wall. [70 U. S.] 334, 344. All that was decided in Freeman v. Howe, was, that property which had been seized by the marshal on an execution from the federal court, could not be replevied by a mortgagee or other claimant through the instrumentality of a state court. In other words, that the marshal was entitled to be protected in his possession of the property. The contest related solely to the possession of the goods seized, and there was no necessity of examining into the question how far another court might go in passing upon the title. The court did not even decide that the state court or the plaintiff therein might be enjoined from prosecuting the suit in replevin, as the case arose upon a writ of error to the supreme court of Massachusetts. It is left to inference, however, that the marshal might lawfully resist by force the execution of any process which was designed to wrest from him the possession of the property.

That nothing more was intended by this decision is evident from the subsequent case of Buck v. Colbath, 3 Wall. [70 U. S.] 334, which was also a writ of error to the supreme court of Minnesota. Colbath sued Buck in one of the courts of Minnesota in an action of trespass for taking goods. Buck pleaded in defense that he was a marshal of the United States, and that, having in his hands a writ of attachment against certain parties, he levied the same upon the goods for the taking of which he was now sued. The court held the action was properly brought. It is true that the marshal in his plea did not aver that the goods belonged to the defendants in the writ of attachment and relied solely upon the fact that he was marshal, and held the goods under the writ. But the case does not seem to have turned upon Buck's failure to plead that the goods seized in fact belonged to the defendants in the execution. Indeed the court remarks that the case was like that of Freeman v. Howe, in every particular, with the single exception that, in the earlier case, when the marshal had levied the writ of attachment on certain property, a writ of replevin was issued against him in the state court and the property taken out of his possession, while in the case then under consideration the officer was sued in trespass for the wrongful seizure. The distinction was clearly drawn in the case between actions which involved the possession of the property, and those which simply sound in damages: "Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." Again: "It is only while property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect the possession from the process of other courts. * * * It is obvious that the action of trespass against the marshal in the case before us does not interfere with the principles thus laid down and limited." Speaking of the liabilities of the marshal under a writ of execution the court further remarks: "He is so liable to the plaintiff, to defendant or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he shall exercise that discretion which the law reposes in him, and in no one else."

While the intimation in both these cases is, that the person whose property is wrongfully seized may have redress by petition or bill in equity in this court, it is equally clear he may sue the officer in trespass or trover in the state court, and that such court may lawfully entertain jurisdiction of the suit; and if the state court may take jurisdiction, I know of no authority except in cases arising under the bankrupt act which will justify us in interfering with it. This bill clearly falls within the language of section 720, and unless there is something peculiar in the

nature of this case which exempts it from the operation of this provision, it must be held conclusive. It is said that the bill is ancillary to the jurisdiction of the federal court in the original suit. Perhaps a bill to set aside these conveyances might have been entertained, if filed before the suit was commenced in the state court; but that court having first obtained jurisdiction of the subject matter, viz.: of the alleged fraudulent transfers, with which the original suit in this court had nothing to do, that jurisdiction is exclusive. I have made diligent search for precedents to sustain injunctions against parties proceeding in state courts, but have found none except in cases arising under the bankrupt act, and the courts have seemed to assume that no other exception existed. Diggs v. Wolcott, 4 Cranch [8 U. S.] 179; Dial v. Reynolds, 96 U. S. 340. Had such jurisdiction been supposed to exist, it would certainly have been often invoked.

The restraining order in this case was issued upon the authority of Kellogg v. Russell [Case No. 7,666]. In this cause the marshal seized certain property upon a warrant in bankruptcy supposed to belong to the bankrupt, and transferred it to the assignee. A suit having been brought in the state, court against the marshal for such seizure by a party who claimed the property, Judge Woodruff entertained a bill against the claimant and the bankrupt, to set aside the transfer as fraudulent, and granted an injunction to restrain the further prosecution of the suit commenced in the state court. It is true the learned judge does not base his allowance of the injunction on the ground that the suit was in aid of the bankrupt proceedings, and that it was necessary for the bankrupt court in winding up the estate to have entire control of the assets and the power to determine all collateral questions and controversies arising in connection with the estate, but upon a careful examination of the authorities, I am satisfied that this is the only ground upon which the injunction could be sustained. I cannot accept the case as authority for the general proposition that this court may enjoin the prosecution of an action of trespass against the marshal in all classes of cases.

But it is urged that, although this restraining order may have been improperly issued, it was still a mere irregularity, that the court had jurisdiction of the case, and that the defendants were bound to obey it until it had been regularly set aside. Had, then, the court jurisdiction of the case? Had it power to take cognizance of, and decide the case according to the law, and carry its sentence into execution? It is not always easy to determine whether the defect in a bill is a jurisdictional one or not, and the authorities are not altogether in harmony. Generally speaking, I should say that, if the complainant states such facts as preclude the possibility of granting the relief sought against the defendant, the court has no jurisdiction of the case; but if the facts stated tend to make a case the court may lawfully proceed to hear and determine it. The distinction is clearly stated in the case of Erie Ry. Co. v. Ramsay, 45 N. Y. 637, 644: "Did the learned judge who granted that order have jurisdiction? Had he the power to sit in judgment upon the facts presented to him by the verified complaint in this action, and the affidavits accompanying it, and to judge whether they brought before him a case demanding the interposition of the provisional remedy of an injunction order? It must be borne in mind that it matters not whether he judged erroneously as to the necessity or propriety of its interposition, or whether the facts were weak or insufficient. If the allegations contained in the papers before him tended to make a case which, existing, he had the power to enjoin, then he had the power to sit in judgment upon them, and to judge and determine as to their strength or weakness." The statute quoted in this case expressly provides that the court shall not grant an injunction to stay proceedings in a state court. In other words, on no state of facts which the complainant could present would he be entitled to the relief prayed. What, then, can the court be called upon to hear and determine? In the New York case above cited the court held that there was power of injunction to restrain proceedings in another equitable action in the same court, and, therefore, that the justice had the right to judge between the parties and pass upon the subject; in other words, had jurisdiction of the case, and that Ramsay having disobeyed it was guilty at least of a technical contempt. Applying, however, these general principles to the facts in this case, I feel clear that the restraining order was not merely irregularly or improvidently granted, but that it fell within the statute and was, therefore, void. In several cases where the question of enjoining the action of the state courts has arisen, the court has used language indicating that it had no jurisdiction of the case. Diggs v. Wolcott, 4 Cranch [8 U. S.] 179; Peck v. Genness, 7 How. [48 U. S.] 612; Dial v. Reynolds, 96 U. S. 340. The motion made to commit for contempt must be denied and the restraining order vacated.

EVANS (PATERSON v.). See Case No. 10,796.

EVANS (PENDLETON v.). See Cases Nos. 10,920 and 10,921.

Case No. 4,567.

EVANS v. PITTSBURG.

[19 Leg. Int. 4; 4 Leg. & Ins. Rep. 3.]

Circuit Court, W. D. Pennsylvania. Jan. 3, 1862.

MANDAMUS TO ENFORCE JUDGMENT AGAINST CITY —JURISDICTION OF CIRCUIT COURTS.

[1. Mandamus to enforce a judgment against a city may issue under the authority given by the Pennsylvania statute of April 15, 1834 (Laws, 1833-34, p. 509); for, although counties and townships only are mentioned in the act, yet cities are clearly within the spirit thereof. Following Monaghan v. City of Philadelphia, 28 Pa. St., 209.]

[2. The federal circuit courts have power to issue writs of mandamus to enforce judgments against public corporations. Following Knox Co. v. Aspinwall, 24 How. (65 U. S.) 383.]

Application for a mandamus execution against the city of Pittsburg. The case was thus: One section of a statute of Pennsylvania (Act April 15, 1834, § 6) enacts that when any person has obtained a judgment against a county, he may have execution thereof as follows, and not otherwise—that is to say: "The court in which the judgment is, may issue a writ commanding the commissioners of the county to cause the amount thereof, with interest and costs, to be paid out of any moneys unappropriated of such county, or if there be no such moneys, out of the first moneys that shall be received for the use of such county." Another section of the same law (section 7) enacts that if judgment be obtained against a township, the like proceeding may be had. The act is entitled, "An act relating to counties and townships, and county and township officers." It is a very long act, comprising one hundred and seventeen sections, and makes, in fact, a whole corpus of statute law relating to counties and townships and to county and township officers, but does not touch upon cities, further than to say, in one section (section 2), that every city shall be deemed and taken to form part of the county in which it is, saving, however, to such city, the rights, privileges, immunities, &c., granted by its charter and the laws. Evans, the plaintiff, had obtained judgment for a large sum against the city of Pittsburg, which occupies a small portion of Allegheny county; the county having its county and township officers, such as the act prescribes, and the city having its officers, according to its charter, &c.; but not after the county names or models, or in any such form as the act above mentioned contemplates for counties and townships.

The question now before the court was, whether Evans was entitled to a mandamus or order upon the controller of the city, to deliver to him an order on the treasurer (these, and not "commissioners," being its fiscal officers), for the amount of his judgment, to be paid out of the first moneys which should come into his, the treasurer's, hands; in other words, to have a mandamus execution.

It is necessary here to state, that in Pennsylvania there is "An act relating to executions" (Act June 16, 1836 [Laws 1835-36, p. 755]), the said act being part of what is known as the "Revised Code," and the act itself having been generally considered to regulate the whole subject of ordinary executions. One of its heads (xi.) is "Of Executions against Corporations." It proceeds to order and regulate, by detailed provisions, the whole subject of executions against corporations generally; but it excepts from these provisions "any corporation being a county, township or other public corporate body." The legislature seemed to have considered that execution by fi. fa., attachment of debt, or other like process, was hardly to be given against municipal corporations, as if so allowed, the wheels of government might be stopped and the whole municipality thrown into complete disorder. The creditor who dealt with a city was perhaps expected to trust largely to public faith; in those times not shamelessly violated by cities as in ours. However, in 1857, the circuit court of the 3rd circuit, at Pittsburg, McCandless, J., constituting it, (Grier, J. being absent,) had allowed a levy by fi. fa. upon stock owned by the city in a gas company; this being done under the authority of an old act of assembly, (March 29, 1819,) enacting "that the stock of any body corporate owned by any individual or individuals, body or bodies politic or corporate in his, her, its or their own name or names, shall be liable to be taken in execution and sold in the same manner that goods and chattels are." This act, Judge McCandless, differing, perhaps, from the common opinion, had considered was not impliedly repealed by the reviser's act relating to executions generally. See Oelrichs v. Pittsburgh, [Case No. 10,444]. But the city of Pittsburg now had nothing which fi. fa. attachment, &c., could reach; and unless it was subject to execution of mandamus, could completely defy this creditor.

The City Solicitor, for the city, relied—

1. On the plain general scope and object of the act, of which counties and townships alone, and as distinguished from cities, from the beginning of the act to its distant end, were the subject of the legislation. A mode is provided for getting satisfaction when the defendant is a county; then, by a separate section, a mode is prescribed when the defendant is a township: but no mode is prescribed when the defendant is a borough, nor when it is a city. The inference is plain that process against cities was not meant to be regulated by this act. In fact, the matter of execution against counties and against townships is given only as a part of a general code regulating the whole matter of these divisions of government. It will not do to look at the single section about executions, as we find it in the Digest. Looking at a

single section, you might say, the object is to get satisfaction of debts in general against municipal bodies. But this is not so, as will appear by looking at the statutes at large; where it will be seen that counties and townships absorb all the idea of the legislature; the general and particular constitution and regulation of counties and townships, and not the matter of executions, except as one item of the main subject, being the object of the enactment. Cities are mentioned in the act only once; and on this occasion rather to except and protect them; they are mentioned just enough to show that the distinction between them and counties and townships was noticed and meant to be observed, and at the same time to show that the act, in its various provisions and complete system, did not mean to embrace them.

2. On authority. In Oelrichs v. Pittsburgh [supra], a creditor had levied on some gas stock owned by the city, and the execution was sought to be set aside on the ground that the true way was by application for mandamus under the act of 15th April, 1834. This court said, "no." That act does not apply to cities. You can issue a common law execution against them, at least to the extent remaining under the act of 29th March, 1819; though you can't against counties. Here is the language of the court; McCandless, J., who alone on that occasion constituted the court, delivering it: "It is contended," said he, "that the act of 15th April, 1834, is applicable to cities and boroughs. We think not. Cites are nowhere mentioned except when embraced within a county. They were independent bodies politic. .. . . They were not merged in the counties; and being already corporate bodies, having all the immunities, and subject to all liabilities as such, there was no legal necessity for the application of the law to them. Counties, on the contrary, were nondescript bodies, called by the courts, before the passage of the act, quasi corporations, against which the creditor had but an imperfect remedy. It was to remedy this defect that the law was passed. It would be manifestly impracticable to execute the act of 1834 as to cities. Upon whom would you serve the writ which commands the commissioner to pay the judgment out of any unappropriated money, &c.? Upon the mayor, who represents the general police of the municipality? Upon the controller, treasurer or finance committee, who may have the custody of the public funds, or upon the select and common councils, the legislature of the city? The act is silent as to cities."

GRIER, Circuit Justice. In that case you argued that this act did apply to cities.

It is unimportant what we argued; though it is very important what the court decided. The language above quoted is the language of this very court: and it was not dicta. It was the point decided. The court allowed a fi. fa. to go against personal property of the city because the act about mandamus executions, while applying to counties and townships, did not apply to cities at all. It will not do for one member of the court to overrule what his brother, who has exactly the same power to constitute the court as he, has solemnly decided in his absence. There will be no end to difficulty if the judges act respectively on that principle. We must treat each as the court; as each in fact and in law is.

The case of Monaghan v. City of Philadelphia, 28 Pa. St. 209, which might appear to regulate this case, is not in point. There, a mandamus did issue nominally against a city, but really against the county; the county there being incorporated under the name of a city. In the city of Philadelphia, as constituted at the time of that decision, no less than twenty-nine bodies, st, a city proper, and twenty-eight townships and boroughs, many of them absolutely rural, were consolidated. The so-called city occupies more than one hundred and twenty-nine square miles. More than one hundred and twenty miles are country, and have no streets nor alleys, but roads only. Enough land remains to make, supposing the new ones to be laid out as the old ones are, nine thousand miles of additional streets, &c. See bill filed in Girard v. Philadelphia, Oct. Sess., 1859, No. 3. The old county of Philadelphia, and all the municipal corporations, were consolidated in 1854, under the name of a city; rights and remedies being no further interfered with than necessary. In Monaghan v. City of Philadelphia, the debt was originally due by the district of Richmond, which we suppose was in fact a sort of township. On the consolidation of all the districts, townships, boroughs, &c., of the old city, the new city of Philadelphia was substituted. A fi. fa. having issued against the city on a judgment obtained, and a motion being made to set it aside, Knox, J., delivering the court's opinion, does indeed say,—"Although cities are not expressly named, yet they are clearly within the spirit of the act:" but he goes right on to say, "besides which, by the consolidation act, the municipality is to be considered both a city and a county." And he goes on to argue in a way that shows that this was as much the ground of the judgment as any other thing: in fact, that it was the principal ground.

The act of the Pennsylvania legislature of June 16, 1836, which will be relied on, has no pertinence. Its language is—"It shall be the duty of the supreme court, at their sessions in banc, from time to time, to devise and establish, by rule of court, such new writs and forms of proceedings, as in their opinion shall be necessary or convenient to the full, direct and uniform execution of the powers and jurisdiction possessed by the said court, or by the courts of common pleas, district courts, orphans' courts or registers' courts."

Conceding that a decision when the case

arises, is "devising and establishing by rule of court, and from time to time—such new writs and forms of proceedings as this statute provided for"—which plainly it is not—yet the act does not mean to give the supreme court power to authorise the issuing of old writs in cases where, by law, they could not issue them before the statute was passed. In issuing a mandamus to a city, the supreme court does not either "devise or establish" any "new writ or form of proceeding." It simply applies an old writ devised and established in England generations ago, to a new purpose; and the question will be after the statute as before—is it rightly applied, either independently of the act of 15th April, 1834, § 6, "relating to counties and townships and county and township officers," or under it? What the act of June 16, 1836, § 3, "relative to the jurisdiction and powers of courts" means, is this—that where a "power and jurisdiction" is already "possessed" by the supreme court, by itself or in connection with other courts of the commonwealth, and there is no "writ or form of proceeding" which gives "full, direct and uniform execution of such (admitted) power and jurisdiction," then the supreme court may, "at their sessions in banc, from time to time, devise and establish, by rule of court, such new writs and forms of proceedings as shall be necessary or convenient to the full, direct and uniform execution of the powers and jurisdiction possessed." Thus exemp. grat., when the act of 15th April, 1834 gave the courts power to issue an order or mandamus to the commissioners of a county, commanding them to cause the amount of a debt due, to be paid out of any money unappropriated of such county, no writ of mandamus ad hoc, or form of proceeding had ever been devised, established or in use. The act of June 16, 1836, § 3, made it the duty of the supreme court to devise and establish a form. So in other cases, where new powers were given to the court. But the court was not to apply remedies hitherto applicable to one class of cases to a wholly new class, to which they had never been applied: they were not to usurp remedies when the statute gave none. The construction contended for turns the supreme court into the legislature at once.

On the other side, reliance was placed on Knox Co. v. Aspinwall, 24 How. [65 U. S.] 385. There under the judiciary act of 1789 (section 14), the supreme court held that a mandamus could issue to the commissioners of Knox county, Illinois, ordering them to levy a tax, which by statute they were bound to levy; yet the words of section 14 of the judiciary act [1 Stat. 73] were much like those of the Pennsylvania statute of June 16, 1836, (section 3). They are "that courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, agreeable to the principles of the common law." Grier, J. delivering the opinion, said: "Now the jurisdiction is not disputed, and it is necessary to an efficient exercise of this jurisdiction, that the court have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's remedy can be effected. . . . They refuse to perform a plain duty. There is no other writ that can afford the party a remedy—which the court is bound to afford if within its constitutional powers—except that afforded by this writ of mandamus. It is 'agreeable to the principles of the common law,' and consequently within the category as defined by the statute." This decision would authorize the issuing of a mandamus independently of any act of assembly.

Without inquiring whether the decision in Oelrichs v. Pittsburgh was or was not right, upon the facts of that case, it is enough to say here that the city has now no property which under it can be levied on. "There is no other writ which can afford the party a remedy." Then the decision in Monaghan v. City of Philadelphia decides that the act does apply to cities, and being the construction by the state court of a state law, binds this court. The corporation called "The City of Philadelphia," is a city, purely and simply. The fact that it covers what was once or even now is a whole rural district, is unimportant. The county is organized as a city; with a charter, and with city officers, and with a city system. Unlike other similar extent of territory known as counties, none of its functions are performed under the act of 15th April, 1834, "relating to counties and townships," but under a system of city government alone. Monaghan v. City of Philadelphia, therefore, did decide that a mandamus execution could issue against a city.

GRIER, Circuit Justice. The writ of mandamus, though originally treated as a prerogative writ, has in modern times been used as a remedial process, and has been liberally interposed for the benefit of the citizen and the advancement of justice. Whenever a party had a legal right, and no other specific legal remedy, this will not be denied—nor will it be a ground of refusal that the party might have a remedy in equity, or even that there may be another remedy, if such remedy be obsolete. The great multiplication of corporations, both municipal and private, of modern times; the readiness of legislatures in conferring on them most extensive and dangerous powers, demand of the courts the most liberal application of this remedy to prevent a failure of justice.

The act of assembly of this state, passed on the 15th of April, 1834, relating to counties and townships, presents a method by which those having judgments against these quasi corporations may have a remedy by

means of the remedial writ of mandamus; and as these corporations have no property which could be properly made subject to levy and sale, it restrains the use of other process. It is but the legislative extension of the common law remedy of mandamus, and a modification of the process to suit the peculiar functions and officers of these anomalous corporations, and make it more simple in practice; as it issues only where a court of justice has given a judgment, which makes it the duty of the officers of the corporation to pay a certain sum of money, it dispenses with the form of an alternative mandamus. It assumes that the officers whose duty it was to lay and collect taxes sufficient to pay all just demands against the corporations have done so, and gives the party aggrieved a right to satisfaction out of the moneys in the treasury unappropriated; and if there be no such moneys, then out of the first moneys that shall be received. Now it is true, that the peculiar form of process is presented in an act relating to these quasi corporations, and in its letter refers only to counties and their peculiar officers called "commissioners;" and that cities, which are public chartered corporations, having much more enlarged powers, privileges and duties, are not specifically named. Cities often are possessed of stocks and other property not devoted to special public use, which might well be levied on to satisfy a judgment against it. But where a city has no such property, (as in this case,) and its officers obstinately refuse to satisfy a claim which courts of justice have pronounced to be legal and just, there will be an entire failure of justice unless this remedial writ of mandamus be issued and enforced by the court whose judgment is publicly set at defiance. States claiming sovereign, or quasi sovereign powers, may repudiate their contracts if they are content to abide the scorn of the civilized world, because there is no superior with power to compel obedience. But this sovereign right to defraud makes no part of the privileges or immunities granted by the charters of city corporations. They are subject to the laws as much as private corporations or individuals, and where the court has adjudged that they shall pay a sum of money due on their contracts, it is bound to find a remedy for the party aggrieved by their refusal. This modification of the mandamus process by the legislature, has the merit of simplicity in form, while it is effective for the purposes intended, and accordingly the supreme court of the state, in the case of Monaghan v. City of Philadelphia, have unanimously decided, that "although cities are not expressly named, yet they are clearly within the spirit of the act." Besides, by the act of 16th June, 1836, (section 3), "relative to the jurisdiction and power of courts," it is made the duty of the supreme court, to devise and establish such new writs and forms of proceedings as in their opinion shall be necessary and convenient, &c. That court, had, therefore, full power and authority to adopt this remedial writ, devised by the legislature, in the act regulating counties, and apply it to the case of cities—and by this decision they have done so, sic volo sic jubeo would have been a sufficient reason. The suggestion that the city of Philadelphia embraces the whole counties, like many other cumulative reasons, adds nothing to the heap. This court has by rules adopted the form of state process as construed and confirmed by the supreme court. In a former case in this court, decided by my Brother McCandless, the motion was to set aside an execution levied on stocks belonging to the city. The counsel for the city then contended that the only remedy which the court had an authority to give was this writ of mandamus. But the court refused to set aside the execution and levy, because the prohibition of other process in the act would only apply to the case of a county, and was very properly intended to prohibit the levy and sale of the court-house, jail and other property held for the public use—and that the process of mandamus adopted by the court, need not be resorted to in this court where the plaintiff had another sufficient remedy by levy and sale of stocks and other property not so used.

The question as to the power of this court to issue a mandamus in such case, is decided in the case of Knox Co. v. Aspinwall, 24 How. [65 U. S.] 383. Mandamus issued.

[NOTE. Subsequently, on a motion for an attachment (Case No. 4,568), this writ was set aside as irregular and void.]

Case No. 4,568.

EVANS et al. v. PITTSBURGH.

[2 Pittsb. Rep. 405; 10 Pittsb. Leg. J. 233.]

Circuit Court, W. D. Pennsylvania. 1863.

ENFORCEMENT OF JUDGMENTS AGAINST MUNICIPAL CORPORATIONS—ACT PA. APRIL 15, 1834—CONSTRUCTION BY STATE COURT — APPROPRIATION FOR PAYMENT OF DEBTS—CONTEMPT BY MUNICIPAL OFFICERS.

1. In conformity with the decision of the supreme court of Pennsylvania, the act of assembly of Pennsylvania of 15th April, 1834 [Laws, 1833-34, p. 509], which provides a mode for enforcing the payment of judgments against counties and townships, will, in this court, be applied to cities also. The construction by the state supreme court of their own peculiar statutes is conclusive in this court.

2. The annual estimate by county commissioners as to the funds needed for the coming year, whether right or wrong, is not an "appropriation" of them to pay any particular debt due by the county; consequently the judgment of the court is the first appropriation and should have precedence. Pollock v. Lawrence Co. [Case No. 11,255] re-affirmed.

3. To enforce execution against the city, if there be no unappropriated funds in the treasury or none appropriated to the payment of the judgment in the case, the mandatory process should issue to the city councils, as the legislative power, and the mayor and controller, the proper executive officers, whose duty it is

to "cause the money to be paid," and who only have the power.

4. If after a due performance of their several duties the treasurer, who is their officer or servant, should refuse to perform any duty imposed on him, or attempt, by ingenious devices, to evade the performance of it, he may be treated as for a contempt by serving the proper process upon him for the purpose.

Motion for attachments against the controller and treasurer of said city.

Hamilton & Acheson, for plaintiffs.
Veech & White, for the city officers.

GRIER, Circuit Justice. The plaintiffs obtained their several judgments against the city of Pittsburg, at May term, 1861, for interest due in 1852 and 1853, on coupons on railroad bonds. At November term, 1861, [Case No. 4,567], the plaintiffs' attorneys applied to the court by petition, to direct "that a mandatory writ be issued directly to the controller and treasurer of the city, commanding the said controller to prepare and deliver to the said plaintiff or his attorney, a warrant on the treasury for the amount of the judgment, payable out of any money in the treasury, or if there be no money in the treasury, then out of the first money that shall come into the treasury," etc. The court made the order requested, no question having been made as to whether it was directed to the proper persons or not. It was entirely ex parte, and without notice to the defendants' attorneys. They have therefore a right to meet the rule in this case for an attachment, by an allegation that the mandamus writs which have been served on those officers have been improvidently issued, and that the process should have issued to the mayor and city councils; and consequently that the court, instead of enforcing obedience to the mandatory process, should set it aside as irregular and void.

The supreme court of Pennsylvania has decided that the act of 15th of April, 1834, which provides a mode for enforcing the payment of judgments against counties and townships, should be applied to cities also. In conformity with which decision this court decided in the case of Evans v. Pittsburg [Case No. 4,567], that such process might issue from this court to enforce the payment of judgments obtained in the circuit court of the United States. To what officers of the corporation should this mandatory process issue? The law requires it to issue to the commissioners who have the taxing power. "The only means that a municipal corporation has for the payment of its liabilities is the power of taxation." 4 Casey [28 Pa. St.] 210. Its property necessary for public purposes cannot be levied or sold. The command of the mandatory writ authorized by the statute is, "to cause the amount of the judgment, with interest and costs, to be paid, etc., out of any moneys unappropriated of such county, or if there be no such moneys, out of the first moneys that shall be received for the use of said county." The proper party, therefore, to such process should be those who have the power of taxation, who have the executive and legislative powers of the corporation, and can "cause the money to be paid." The treasurer is but the servant of this power; he is merely the collector of the city taxes and the custodian of its funds, bound to receive and keep them as city councils may direct, and to pay them out only upon the warrants of the mayor, countersigned by the controller, and drawn upon specific appropriations made by the councils according to law.

The answer of the treasurer to the interrogatories sets forth clearly and correctly his position in this matter, and contains the statement of facts which we must assume to be correct for the purposes of the present motion. In answer to the 7th interrogatory he states that "the judgments of the plaintiffs had not been paid either in whole or in part, because there was no money in the treasury which could be legally appropriated to such payment. All the moneys that have been received in the treasury, and all the moneys now in the treasury, have been and are specifically appropriated by ordinances of the city councils, under acts of assembly, authorizing and directing the same to be done. The act of 6th April, 1850, directed that the councils should each year, previous to the annual levy, assign and appropriate the revenue of said city derivable from all sources, and prescribed the order in which it should be applied, to wit: 1st, for the payment of interest for the funded debt; 2d, the payment of salaries of city officers; 3d, for the payment of the ordinary current expenses of the city; and, 4th, for extraordinary improvements, erections, and purchases; and if there be any surplus it is to be paid into the sinking fund created by the said act. The act of 10th of May, 1857, directed that the moneys arising from the assessments for grading and paving should be paid into the sinking fund, and should be applied to the same purposes. and held under the same restrictions, as the other moneys of that fund. In pursuance of said acts the city councils did, in the month of January in each of the years 1861 and 1862, 'assign and appropriate' all the revenue of those years, respectively, to and for the purposes authorized and directed by said act. There has not, therefore, any money come into the hands of the city treasurer, and there is now none in his hands which, as he has been advised, he could have legally applied, or which he can now legally apply to the payment of the plaintiffs' judgments." The funded debt here mentioned in the act is the old debt incurred for the cost of erection of the water works, etc. These bonds of the city, for railroad purposes have all been issued since the passage of the act above referred to. It was the duty of the city councils to assess a tax sufficient to liquidate the interest of the bonds as it became due. In-

stead of an honest endeavor to meet their liabilities, and support the credit and honor of the city, the councils have chosen to litigate and repudiate their obligations, to obstinately resist every process of the courts and evade the performance of their official duties. "Pudet haec opprobria dici et non potuisse repelli." From the public legal history of the courts, we see that the supreme court have by mandamus endeavored to compel a faithful execution of these duties; but it does not appear from the facts in evidence that one dollar has ever been raised for the purpose of paying off these judgments.

It is no fault of the treasurer that he has no moneys of the city "unappropriated" in his hands. He has acted in this matter with integrity and honor. We cannot give two different definitions to the terms "assign and appropriate," as used in the act of 1850, and the negative "unappropriated," in the act of 1834. It was the duty of the councils to increase their assessments to a sum sufficient to cover the payment of these interest coupons, and "assign and appropriate" a sufficient portion of the money in the same order as directed by that act for the payment of the interest of precedent debts. The honor, credit and character of the city and its citizens are as much bound to see the interest paid on their late debts as on their earlier ones. The fact that the money first borrowed was judiciously expended, and the latter not, can make no difference to the grade of the obligation. A conscience, it is said, cannot be imputed to a corporation; but the corporators and citizens, who enjoy its franchises, will be held as morally, if not legally, responsible before the world.

The case of Monaghan v. City of Philadelphia, 4 Casey [28 Pa. St.] 207, is cited as having definitely settled the question. If a case presenting the points raised in this case, and on the same state of facts, had been decided by the supreme court of the state, it would have relieved my mind very much in the decision of this case. Their construction of their own peculiar statutes is conclusive, and I would not question its correctness. But in that case no question was raised as to "appropriation" of the funds of the city. Monaghan's judgment was for some services rendered to the city, or on some contract, payable, as all other of the current expenses of the city, out of its general funds in the hands of the treasurer. The money in the treasurer's hands was appropriated to pay just such demands. Monaghan's bill was disputed, and he could not get an order for the amount of his claim. He is compelled to bring suit; he recovers a judgment, and the court decides that the judgment of the court is the highest evidence of the justice of the claim, and that it was the duty of the treasurer to pay the judgment without an order from the mayor or controller. There was no pretense that the treasurer had not sufficient funds of the city in his hands unappropriated to any other special purpose. In fact, so far as any "appropriation" existed, it was to pay just such demands as that sued for; and the judgment of the court was justly considered to be the first appropriation of so much of the general fund as was necessary to satisfy the demand; consequently, it was entitled to be paid out of any money in the treasury, and the first that should be received in it, without any further order of the officers of the corporation. An answer of the treasurer that such money was necessary for more important purposes, and to support the government of the city in the exercise of its functions, could be no objection to the appropriation made by the judgment of the court. By the theory of that case, the treasurer had sufficient funds in his hands to pay all the demands, and the only question was whether the judgment of the court was not itself a specific appropriation of that amount to that purpose. There was no default in the city councils; they had furnished means; the only difficulty was in the treasurer's refusal to pay.

The case before us has no resemblance to that of Monaghan. Here the treasurer has no "unappropriated funds" in his hands, nor any appropriated to the payment of these demands. The judgment of the court is not an appropriation of that which was appropriated beforehand, by virtue of the statute, or acts of councils. It is clear that the special funds ordered by statutes to be paid into the sinking fund were "appropriated," and could not by any act of the court be "assigned and appropriated" to a different purpose. Nor can I make any definition of those terms which would not also apply to the appropriations made for other purposes. The writ authorized by the statute does not make a new appropriation of funds, in the hands of the treasurer, at the expense of others, but affects only such as are unappropriated to other special purposes. It was properly decided, in the case of Pollock v. Lawrence Co. [Case No. 11,255], that the estimate of the commissioners, as to the funds needed for the coming year, whether right or wrong, was not an "appropriation" of them to pay any particular debt due by the county; consequently the judgment of the court was the first appropriation, and should have precedence. The definition there given of the term "appropriation," "to set apart or vote a particular sum of money for a particular purpose," as given by the learned judge, is undoubtedly correct, and according to it the answer of the treasurer is true, not only in its assertion of facts, but in its inference of the law. The funds committed to his care were appropriated and set apart for certain special objects, and consequently he had no unappropriated funds with which to

satisfy the exigency of the process served on him, nor could he, under existing circumstances, have any. If the assessments are increased by order of the councils to an amount sufficient to pay their debts, being of the same order as the old debts, and the treasurer should have funds from taxes in his hands, and would not apply them to the judgments, the writ might then interfere to compel him to appropriate the money as it came to his hands, to their payment. If the town councils, in pretended obedience to the orders either of their own supreme court or of this court, pursue the plan of the commissioners to baffle the collection of those claims by the ingenious contrivance of two separate assessments, one to be paid and one not to be paid, or by anticipating the funds before they reach the treasury by orders or posterior appropriations, such conduct may be treated as a contempt of court, and the treasurer possibly made a party. But as the case stands at present, the treasurer is not in contempt, because the writs issued by this court have been improvidently issued and must be set aside. Under the circumstances disclosed in this case it is clear that the process should have issued to the city councils, as the legislative power, and the mayor and controller, the proper executive officers, whose duty it was to "cause the money to be paid," and who only had the power. If after a due performance of their several duties, the treasurer, who is their officer or servant, should refuse to perform any duty imposed on him, or attempt, by ingenious devices, to evade the performance of it, he may be treated as for a contempt by serving the proper process upon him for that purpose. Let the rule be discharged, and the several writs set aside.

Case No. 4,569.

EVANS v. POTTER.

[2 Gall. 12.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1813.

FACTORS—GOOD FAITH — PLEDGE OF PRINCIPAL'S PROPERTY.

A factor is bound to good faith and reasonable diligence. He cannot pledge the property of his principal for his own debts; but he may for the payment of the duties accruing on the specific goods. See Story, Bailm. §§ 455, 456; Story, Ag. §§ 113, 198, and cases cited.

[Cited in Marfield v. Goodhue, 3 N. Y. 68.]

Assumpsit for breach of orders, against the defendant, who was master and also consignee of an adventure of the plaintiff put on board the ship Robinson Potter, on a voyage from Philadelphia to Archangel and back to the United States. The controversy, at the trial, turned principally on matters of fact, as to the correctness of the conduct of the defendant, under all the circumstances.

[1] [Reported by John Gallison, Esq.]

Mr. Searle and Trist. Burgess, for plaintiff.

Burrill and Dexter, for defendant.

Before STORY, Circuit Justice, and HOWELL, District Judge.

STORY, Circuit Justice (summing up to the jury). A factor is bound to ordinary diligence in relation to the property confided to him. Where his orders leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct. He may lawfully do whatever the course and usage of the trade requires; and, indeed, unless his orders restrict him, he is bound to conform to this course of the trade. In no case can he wantonly sacrifice the property without being responsible to the shipper. If he can advantageously sell the property, and neglects so to do, he must answer in damages. But if the markets be low, or unusually crowded, if new and unexpected difficulties arise, he is not obliged to sell at all events and under every disadvantage. Neither the interests of commerce, nor the good faith due to his employer, would countenance such a proceeding. Neither can a factor lawfully pledge the property of his principal for his own private debts; but he may lawfully pledge it for the duties accruing thereon; or for any other purposes, which the usage of trade sanctions and approves.

Verdict for the defendant.

Case No. 4,570.

EVANS et al. v. RICHMOND.

[Chase, 551; 2 Am. Law T. Rep. U. S. Cts. 101; 2 Balt. Law Trans. 610; 3 Am. Law Rev. 784.][1]

Circuit Court, E. D. Virginia. Nov. Term, 1869.

WAR — GOVERNMENT OF INSURGENT STATES—VALIDITY OF REGULATIONS PUBLIC AND PRIVATE — ISSUANCE OF CURRENCY BY MUNICIPALITY.

1. No city within the commonwealth of Virginia has power and authority to issue notes for circulation as money, of any denomination whatever.

2. The insurgent government of Virginia during the war was a de facto government.

[Cited in Ford v. Surget, 97 U. S. 622.]

3. As to regulations concerning marriage descents, conveyances of property, every thing, in short, which belongs to ordinary business, and the common transactions of life, its acts may be upheld as valid.

4. But, on the other hand, those acts of any body corporate, or otherwise, which were intended to subvert the authority of the United States, can not be so upheld.

5. Query, can the legislature of the insurgent government be recognized by the government as valid?

6. Query, could that legislature authorize cities to issue notes for circulation as currency?

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission. 3 Am. Law Rev. 784, contains only a partial report.]

7. The insurgent government of Virginia, especially, must be denied any larger recognition than is authorized by the case of Texas v. Chiles [10 Wall. (77 U. S.) 127], since there existed at this very time another government within the limits recognized by the government of the United States as the true and lawful government of the state.

8. The city of Richmond issued certain notes in 1861, and others in 1862. The first were issued without authority of law. Subsequently an act of assembly undertook to legalize the former, and to authorize the latter. The court being satisfied from the evidence that they were issued to give aid and support to the war against the United States, they are void.

[See Bailey v. Milner, Case No. 740.]

This was a suit brought by the plaintiffs [Evans & Evans], citizens of Maryland, against the city of Richmond to recover the amount of certain small notes (notes under the denomination of five dollars), issued by the city during the year 1861, and after April 19, of that year. It was submitted to the court without a jury. On the trial it appeared that by the laws of Virginia in force before the war, the issue of notes of circulation under the denomination of five dollars was absolutely prohibited to all municipal corporations and other persons. But the banks of Virginia suspended specie payments early in 1861, before the beginning of the war, and the scarcity of change was an inconvenience seriously felt in the whole community. The city of Richmond, immediately on the secession of Virginia, voted large supplies to the volunteer troops raised by her, and to a large extent equipped and clothed them by her credit and means. While she was doing this, her authorities issued, by virtue of ordinances of the city government, small notes to an amount of about three hundred thousand dollars. It was in evidence that these notes were paid out in change, and exchanged with the banks for their issues, which, with the city notes, were used indiscriminately in paying the expenses of the city, its salaries, disbursements for troops and pay of its employes, as well as interest on its debts created long before the war. In 1862, the city presented a memorial to the legislature of Virginia, stating that it had thus issued these notes in violation of the law; that they had been issued under urgent necessity, to be used as small change by the community, then totally without it, because of the disappearance of gold and silver from circulation, and because it was necessary to purchase supplies for the volunteers from Richmond in the Confederate army, and praying the passage of an act legalizing this action, and authorizing further issues. Such an act was accordingly passed. The city notes circulated as currency, and were recognized as legal and binding on the city until the overthrow of the de facto government of Virginia in April, 1865, and the establishment of the Alexandria government over the whole territory. After that period the city authorities, the mayor, common council, and other officers, were appointed by the military authority governing Virginia, and these authorities refused to recognize these issues as binding on the city. Wherefore this suit was brought.

J. A. Jones and W. T. Joynes, for plaintiffs.
R. T. Daniel and Mr. Steger, for defendant.

CHASE, Circuit Justice. We have not been able to give to this case so full and thorough an examination as we should desire to give it, but it is not probable that our opinion will undergo any change, so we shall proceed to state it briefly.

This is a suit against the city of Richmond upon small notes issued under the orders of the council. These notes were issued in 1861. At that time they were, in the judgment of the court, void notes. We are not able to agree with the counsel who think that, upon a fair construction of the statutes of Virginia, any city within the commonwealth could issue, for circulation as money, notes of any denomination whatever. To hold that, would be, it seems to us, to disregard the whole policy of the state with regard to the issue of unauthorized paper. It would require very strong argument to convince us that any city could issue paper for circulation, in the similitude of bank notes, in contravention of the positive enactments, and of the general policy of the state. These notes, then, as we think, were void at the time they were issued.

Subsequently, and during the war, the legislature of the insurgent state of Virginia, having control of much the larger portion of the territory, passed an act authorizing the issue of these or similar notes. Whether this action can be regarded as valid, having been taken by the legislature of the state under such circumstances that it could not be recognized by the government of the United States as the lawful government; whether, indeed, this legislature itself can be regarded as valid, admits of very serious question.

In the case of Texas v. Chiles [10 Wall. (77 U. S.) 127] the supreme court held that the acts of a body exercising authority in an insurgent state as a legislature must be regarded by the United States as either valid or not, according to the subject-matter of legislation. That the governor, legislature, and judges of Virginia during the war constituted a de facto government, nobody will question. They exercised complete control over the greater part of the state, proceeding in all the forms of regular organized government, and occupying the capital of the state. It was a de facto government. But then it was a government at war with the United States. and in rebellion against its constitutional authority, and could not be recognized in the national courts as the lawful government; nor could its acts be recognized as lawful acts, so far as these acts had the effect, or were intended to have the effect,

of overcoming the authority of the United States within the limits of Virginia, or of excluding that authority from those limits.

As to regulations concerning marriage descents, conveyance of property, everything, in short, which belongs to ordinary business and the common transactions of life, its acts may be upheld as valid. But, on the other hand, those acts of any body, corporate or otherwise, which were intended to subvert the authority of the United States, can not be so upheld. This is the distinction laid down by the supreme court in the case of Texas v. Chiles [supra], and if we were disposed to depart from it, we should not be at liberty to do so.

The insurgent government of Virginia especially, must be denied any larger recognition, since there existed at this very time another government within its limits, recognized by the government of the United States as the true and lawful government of the state. If there had been no rebellion, and Virginia had seen fit to change her policy with respect to the issue of small notes, as, for example, if there had been a general suspension of specie payments, and the state, not choosing to relieve the banks from incapacity to issue small notes, had preferred to give that authority to municipal corporations, the right of the state so to act could not be questioned. There would be no doubt on that point; and if, before the adoption of this policy, any particular municipality, as, in this instance, the city of Richmond, had illegally issued notes of this character, it seems impossible to deny that subsequent legislation giving to the city the same authority to issue small notes, which was actually conferred in 1862, must have been held as legalizing the whole issue. Certainly, as it seems to us, suits upon notes of the earlier issues might be maintained against the city with the same legal results as upon those of the later emission. There could be no policy which would invalidate the first notes more than the last. So that if there were no questions in this case other than those arising upon the acts of the legislature and internal state policy, it would be very difficult to avoid the conclusion that the city of Richmond is liable for these notes, and must provide for the payment of them equally with the notes subsequently issued.

The acts of 1862 were intended, as we think, to sanction all the small notes of the cities, within the limits defined by them, without regard to the time of emission.

But all this does not touch the controlling question in this case. That question is: For what purpose were these notes issued? Were they or were they not issued for the purpose of aiding the rebellion against the government of the United States?

The circumstances under which they were put into circulation have been fully detailed by the witnesses. There was a suspension of specie payments, and doubtless one of the objects of the emission was to provide a convenient and safe circulation of notes under five dollars, and for parts of a dollar. And this certainly might be legalized. But another, and as the evidence shows, a very leading object, was to give aid and support to the rebellion. The memorial of the city council of Richmond to the legislature excludes all doubt on this point. The case is brought, therefore, directly within the principles of the decision in the case of Texas v. Chiles, and the court is obliged to hold that no recovery can be had upon the notes. Judgment may be entered for the defendant.

Case No. 4,571.

EVANS v. ROBINSON.

[Brunner, Col. Cas. 400;[1] 1 Car. Law Repos. 209.]

Circuit Court, D. Maryland. 1813.

PATENTABILITY OF INVENTIONS — EXTENSION OF PATENTS—POWER OF CONGRESS—EX POST FACTO LAWS.

1. An inventor of a new and useful improvement on an old principle, whereby it is applied to a new and useful purpose, is entitled to a patent thereon.

2. Congress has the exclusive power to grant patents, and to renew or prolong the time for the continuance of the same.

3. Ex post facto laws are laws which affect solely crimes and criminal cases. The term is not used with reference to laws affecting civil cases.

The following brief statement was furnished to Mr. Oliver Evans by his counsel, for the purpose of exhibiting to the committee of congress appointed on the subject of his patent right. The Hon. Judge Duval in his testimony before the committee of the senate of the United States confirmed it; and has observed that he did not consider the representation so full in favor of Mr. Evans as the evidence warranted.

"At the last (November) term of the circuit court of the United States, Baltimore, several actions came to trial which had been brought by Oliver Evans against different persons for infringing his patent right, by using his mill machine without his permission. The millers near Baltimore, with the Ellicotts and Tysons at their head, made a common cause with the defendants. The defense set up was that Evans was not the original inventor of the machines for which he had obtained the patent. To support this defense witnesses were summoned from various and distant places, particularly from the neighborhood of Christiana, in the state of Delaware, where Evans resided at the time when, as he alleges, the invention took place. The causes were twice continued, on the application of the defendants to give them an opportunity of procuring the attendance of all their witnesses. All did attend at the

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

trial. The machines in question were the conveyor, the elevator, and the hopperboy. Evans' patent included others, but they are not in general use by the defendants. As to the conveyor, the proof was that Johnathan Ellicott, previous to the invention of Oliver Evans, had invented and used a machine something like the conveyor of Evans; but it was proved on the part of Evans that his conveyor differed essentially from that of Ellicott, was an improvement on it, and was much better adapted to the purpose to which Evans applied it. It was also proved that Ellicott had never applied his machine to that purpose until the application was made and practiced by Evans, who, consequently, not only improved the machine in a new and useful manner, but invented a new and useful application of it when so improved, making, thereby, a new and useful improvement in the art of manufacturing flour. The elevator came next in question. Here the defendant gave evidence of various hydraulic machines, something resembling an elevator, that had formerly been used in Europe (or proposed to be) for raising water; but it appeared that none of those machines had ever been applied to the raising of meal or grain, or were fit for that purpose. The elevator of Mr. Evans was essentially different and a great improvement, which not only applied for this new purpose in the manufacture of flour, but was extremely useful for that purpose. They then produced a miller from the state of Delaware, of the name of Stroud, who, after Evans told him grain and flour might be raised by a machine, did in fact make an elevator similar to that of Evans, though not complete. But Stroud declares he never should have thought of it but for the information he received from Evans; and it was proved on the part of Evans that he invented his elevator and made a complete model of it before Stroud's was made. On this head Stroud was so well satisfied that he purchased a license from Evans to use his elevator, together with his other improvements. As to the hopperboy, the defendant gave evidence that some millers in Delaware of the name of Marshall, having heard of Evans' discoveries, which were kept concealed, invented and attempted to use a very imperfect machine for the purpose to which Evans applied his hopperboy. But the Marshalls, who were produced as witnesses, proved that their machine did not answer the purpose on account of several essential defects in its principle and construction, and that as soon as that of Evans, which was very different and very complete, made its appearance, they adopted it by license from him, and threw aside their own. All these machines were admirably combined in an original and useful manner by the patentee.

"The defendants thus defeated on the evidence next attacked the case on the construction, and even the constitutionality of the act of congress [act for the relief of Oliver Evans (6 Stat. 70)]; but the court, composed of Mr. Duval, a judge of the supreme court, and Mr. Houston, the district judge, decided against them on every point. They then gave up the defense, and confined all their evidence to the mitigation of damages. The jury found a verdict of one thousand eight hundred and fifty dollars for the plaintiff in the first case, who declined demanding the treble damages allowed by law. The defendants in all the subsequent cases which came to trial, to the number of four, confined themselves entirely to excuses in mitigation of damages. In all the cases there were verdicts for the plaintiff, with ample damages, which gave universal satisfaction. The special act of congress, it will be observed, under which the patent in controversy was granted, gives a right of action against such only as have used, since its passage, or may hereafter use the machines, without having purchased license therefor. All who paid under the former defective patent are expressly protected; nor can there be any recovery for using the machines prior to the present patent, even without having paid for them. The special act is not retrospective in its operation, or in the construction put upon it by the patentee and his counsel.

"Evans, to show the utility as well as the originality of his improvements, produced at the trial many respectable witnesses, and read the following certificate from Messrs. Ellicotts, near Baltimore, the most skillful millwrights and experienced millers in this or any other part of the United States: 'We do certify that we have erected Mr. Evans' new invented mode of elevating, conveying, and cooling meal, etc. As far as we have experienced we have found them to answer every valuable purpose, well worthy the attention of any person, concerned in merchant, or even extensive country mills, who wishes to lessen the labor and expense of manufacturing wheat into flour. John Ellicott. Johnathan Ellicott. George Ellicott. Nath. Ellicott. Ellicott's Mills, Baltimore County, Md., August 4, 1790.'

"Respecting the utility of these machines and improvements, it was fully proved that in a mill which can manufacture twenty barrels of flour in a day they save at least three hundred dollars a year in labor alone; that the operation is more perfectly performed, and with less waste; that more work can be done by the same mill, and a larger proportion of superfine flour produced from a given quantity of wheat, equal to at least fifty cents gain to the miller on each barrel; that the saving on the whole in such a mill, upon the most moderate computation, amounts to one thousand two hundred dollars a year, probably much more; and that no mill without these improvements can be employed in competition with such as have them.

"We were counsel for Mr. Oliver Evans in these cases, and have given this statement

at his request. We certify it to be true, and have no doubt that the judges who heard the cause, if applied to, will confirm it.

"Robert G. Harper,
"Nathaniel Williams.

"Baltimore, January 6, 1813."

The following is a copy of a note addressed by William Pinkney, Esq., attorney-general of the United States, one of Mr. Evans' counsel, to Mr. Williams: "Baltimore, January 12, 1813. Dear Sir—I find the statement signed by you and Mr. Harper relating to the trials at the last session of the circuit court of Maryland, of Mr. Oliver Evans' cases, to be perfectly correct; and you are at liberty to use this note as a proof of my entire concurrence in that statement. I am, dear sir, etc., William Pinkney."

In the progress of this cause the defendant's counsel contended before the court that the letters patent granted in this case were not conformable with the act of congress passed for the plaintiff's relief; that the declaration did not correspond with the proof, as in the construction of the defendant's counsel the breach was alleged to consist in the use of machines, whereas the patent comprehended the discovery of principles as well as machines; that the plaintiff was not entitled to a patent for the conveyor, inasmuch as J. Ellicott had previously invented a screw to mix flour, although the plaintiff's conveyor was differently constructed from Ellicott's and applied to different purposes; that the defendant was not liable to pay for using the machine in question, it having been erected before the passage of the special act, or the grant of letters patent to the plaintiff, and after the expiration of the former letters patent, when it was not unlawful to erect or use the same; and lastly, that the act for Oliver Evans' relief was ex post facto; that it impaired the obligation of contracts, and was therefore unconstitutional, he having obtained letters patent in 1790 for the same improvements which had expired before the act aforesaid was passed, it not altering the case that the first patent was declared judicially to be null and void for defect of form.

THE COURT (DUVAL, Circuit Justice, and HOUSTON, District Judge) declared that the letters patent in controversy were issued conformably to law; that the declaration was good and sufficient to maintain the plaintiff's case established in proof, some of the counts alleging that the defendant used the patented improvements generally, and others part of the improvements; that the plaintiff's conveyor, being a new and useful improvement on the continued spiral screw, and applied to a new and useful purpose, entitled him to patent for his improved conveyor; that the second proviso in the act for Evans' relief, passed January 21, 1808 [6 Stat. 70], protected the defendant from any liability to pay damages for using the machinery without a license previously to the granting of the license, but not for any subsequent use; and that in the opinion of the court the act referred to is not an ex post facto law, for that relates to criminal cases only; that it does not impair the obligation of contracts, or interfere with any rights previously acquired by the community; that on the contrary, the legislature has evinced its attention to individual rights by exempting, in a special proviso, all persons from the obligation to renew a license purchased under the former patent; that congress have the exclusive right by the constitution to limit the times for which a patent right shall be granted, and are not restrained from renewing a patent or prolonging the time of its continuance; more especially in the present case, where the patent granted in the first instance had been decided by judicial authority to be null and void on account of some defect in the patent.

[NOTE. For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.]

EVANS (SAMUELS v.). See Case No. 12,289.

EVANS (SCOTT v.). See Case No. 12,529.

EVANS (SICKLES v.). See Case No. 12,839.

EVANS (SPAULDING v.). See Case No. 13,216.

EVANS (SUSQUEHANNA BRIDGE & BANK CO. v.). See Case No. 13,635.

EVANS (UNITED STATES v.). See Cases Nos. 15,061–15,065.

EVANS (VIRGINIA v.). See Case No. 16,969.

Case No. 4,572.

EVANS v. WEISS.

[2 Wash. C. C. 342;[1] 3 Hall, Law J. 180; 1 Robb, Pat. Cas. 10.]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

PATENTS — CONSTRUCTION OF SPECIAL GRANTS — ACT OF JANUARY 21, 1808—RIGHT TO A PATENT —FIRST INVENTOR.

1. Construction of the act of congress, passed the 21st of January, 1808 [6 Stat. 70], entitled "An act for the relief of Oliver Evans."

2. The general law of patents declares, that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and, therefore, any person, who, knowing that another is the first inventor, yet doubting whether he will apply for a patent, constructs a machine invented by another, acts at his peril, and a subsequent patent will prevent his use of the machine thus erected.

[Cited in Treadwell v. Bladen, Case No. 14,154; Whitney v. Emmett, Id. 17,585; Rein v. Clayton, 37 Fed. 355.]

This was an action on the case, for a violation of the plaintiff's patent right, and comes

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

on upon the following case agreed: The plaintiff [Oliver Evans] being the inventor of the improvements in the manufacture of flour, hereafter mentioned, and the patent right for the same by him heretofore obtained, having been declared by this court void, in the action of the said Evans against Chambers [Case No. 4,555], and the time for which the said patent was granted, having also run out, an act of congress, entitled, "An act for the relief of Oliver Evans," was passed on the 21st of January, 1808, in consequence of which, the said Evans duly obtained letters patent, bearing date the 22nd of January, 1808, notice whereof was given to the defendant [John Weiss], in February last. On the 7th of May, 1802, during the continuance of the former patent, the defendant purchased of the plaintiff, a right to use the said improvements at his mill on Wissihicon creek, in Philadelphia county, in this district, for one wheel and pair of stones; but prior to the passing of said act of congress, he had applied and used, and still continues to apply and use the same improvements for two wheels and two pair of stones in the same mill. The question submitted is, whether the defendant is liable for damages for the use of said improvements, in their application to this second wheel and pair of stones, since the act of the 21st of January last; and whether, if so, he is liable before notice from the plaintiff. If the opinion be in favour of the plaintiff, judgment to be entered generally, and the amount to be afterwards adjusted by the attorneys.

WASHINGTON, Circuit Justice. It is contended by the plaintiff, that the defendant is liable for using the plaintiff's improvement, in application to the second wheel and pair of stones, since the 22d of January, 1808; or, at all events, since the time when the defendant received notice of the plaintiff's patent; because the proviso in the act, passed on the 21st of January, 1808, "for the relief of Oliver Evans," extends only to cases of improvements erected for use, or used prior to the passage of that law, and does not protect the defendant from damages for using, after the issuing of the patent under this law, an improvement erected prior thereto. On the other side, it is insisted that such a construction would render this an ex post facto law, and consequently repugnant to the constitution. To avoid which, it should be so construed, as to connect with the use of the improvement, the erection of it subsequent to the grant of the patent.

Although the court at the last term, and upon the first argument, felt strongly inclined to give it the construction contended for by the defendant, yet, upon further reflection, we are satisfied that we should do a violence to the words, which no rule of construction would warrant. The words of the proviso are, "Provided that no person, who shall have used the said improvements, or have erected the same for use, before issuing said patent, shall be liable therefor:" that is, shall be liable for having erected, or for having used the improvement at any time prior to the patent. But with respect to the use of it after the issuing of the patent, no protection whatever is afforded against the claim for damages under this law.

The next inquiry is, does the general law give to the plaintiff a right of recovery, against a person who erected a machine, prior to the isuing of a patent to the first inventor of it, and who afterwards made use of the same? The act of congress of the 17th of April, 1800 [2 Stat. 37], which, as to this point, is the only law in force, declares that if any person, without permission from the inventor, shall make, devise, use, or sell the thing, whereof the exclusive right is secured to the patentee, he shall pay three times the damages sustained by the patentee, to be ascertained by a jury. Now, whatever doubt might have existed as to the meaning of the words "devise and use," in the fifth section of the act of the 21st of February, 1793 [1 Stat. 318], thus connecting the using, with the devising of the improvement; there can be none under the third section of the act of 1800, which repeals the whole of the fifth section of the old law. It is plain, that the using of an improvement invented by another, and secured by patent, is of itself an offence, no matter at what time such improvement was devised or made. Whether the word "devise," which has been a good deal criticised, is synonymous with "make," as Mr. Rawle seemed to think it is, or means to invent, a mere act of the mind, which we deem very unreasonable. or to contrive, plan, form, or design, it is unnecessary in this case to decide, because the charge against the defendant, is the using of the plaintiff's improvement, unconnected with the making or devising it.

But it is objected to this construction, that it would render the law ex post facto in its operation, in respect to one who has erected this improvement, prior to the grant of the patent to the plaintiff. It must be admitted, that cases of great hardship may occur if, after a man shall have gone to the expense of erecting a machine, for which the inventor has not then, and never may obtain a patent, he shall be prevented from using it by the grant of a subsequent patent, and its relation back to the patentee's prior invention. But the law in this case, cannot be termed ex post facto, or even retrospective in its operation; because the general law declares, beforehand, that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and, therefore, any person, who, knowing that another is the first inventor, yet doubting whether that other will ever apply for a patent, proceeds to construct a machine, of which it may afterwards appear he is not the first inventor, acts at his peril, and with a full knowledge of the law, that, by relation back to the first invention, a subsequent patent may cut him out of the use

of the machine thus erected. Not only may individuals be injured by a literal construction of the words of the law, but the public may suffer, if an obstinate or negligent inventor should decline obtaining a patent, and at the same time keep others at arm's length, so as to prevent them from profiting by the invention for a length of time, during which the fourteen years is not running on. But all these hardships must rest with congress to correct. It is beyond our power to apply a remedy. No such hardship exists in this case, where the defendant erected this improvement, with a knowledge not only that the plaintiff was the first inventor, but that he had absolutely obtained a patent, although it was afterwards declared invalid. Upon the point of notice, we think, that the act of 1808, being a private one, the defendant is liable only from the time he received notice of the law. Judgment for plaintiff.

NOTE. In the case of Evans v. Jordan, February term, 1815, the supreme court unanimously affirmed the construction given, in the above opinion, to the act of January, 1808. The question of notice did not come up. 9 Cranch [13 U. S.] 199.

[NOTE. For other cases involving this patent, see note to Evans v. Hettick, Case No. 4,562.]

Case No. 4,572a.

EVANS v. WHITE et al.

[Hempst. 296.] [1]

Superior Court, Territory of Arkansas. Feb., 1833.

JUDGMENTS—INTEREST—MERGER OF THE CONTRACT—LEX LOCI CONTRACTUS—RATE OF INTEREST—EFFECT OF NONSUIT.

1. Judgments, under the statute (Ter. Dig. 310), bear six per cent. interest per annum from rendition, and can bear no greater rates, whatever may be the rate in the original contract; and a judgment for prospective and accruing interest at a greater rate is erroneous and reversible.

2. The judgment merges the contract, and accruing interest flows from the judgment, under the sanction of the statute.

3. The lex loci contractus must prevail, in the computation of interest, up to the time of judgment.

4. A judgment of nonsuit never operates as a bar to a subsequent action for the same case.

5. The case of Byrd v. Gasquet [Case No. 2,268a] cited and approved.

Error to Conway circuit court.

[This was a suit at law by James White and John Reed against Elizabeth Evans, as administratrix of Thomas Evans, deceased.]

Before YELL and CROSS, Judges.

CROSS, J. This case comes up on a writ of error to the Conway circuit court. An inspection of the record shows that the defendants in error commenced an action of debt against the plaintiff for the amount of a judgment rendered by the superior court of Limestone county, in the state of Alabama. The defendant below, at the proper time, interposed the pleas: First, nul tiel record; second, former recovery; third, that plaintiff's intestate had no notice, and was never served with process in the original suit; and, fourth, nil debet; the three last of which were demurred to, and the demurrer sustained. Issue was taken on the first, and the cause submitted for trial. To the reading in evidence of the transcript of the record from Alabama, the plaintiff in error objected, which objection was overruled, and the same permitted to be read. A bill of exceptions was thereupon filed to the decision of the court allowing the transcript to be read, and judgment was given in favor of the defendant in error, for the sum of one hundred sixty-four dollars and seventy-eight cents, with interest on the same, at the rate of eight per cent. per annum, until paid. It also appears that by the laws of Alabama the legal rate of interest is fixed at eight per cent. per annum, and was at the time of the rendition of the original judgment by the superior court of Limestone county. Various errors have been assigned, the first of which is, that the transcript read in evidence was not authenticated in accordance with the laws of the United States on that subject; second, that the judgment gives prospective interest at a higher rate than is authorized by the laws of Arkansas; and, third, that the demurrer to the plea of former recovery was improperly overruled. These are the only errors urged in argument, and although there are others assigned, we deem it unnecessary to notice them.

In examining the authentication of the record from Alabama we concur in believing that the circuit court very properly allowed it to be read in evidence on the trial, as it is substantially in compliance with the provisions of the act of congress.

The second error assigned, involves a question that has been more than once decided by this court. In the case of Byrd v. Gasquet [Case No. 2,268a], after a careful and tedious investigation of the subject, the court held, that notwithstanding parties in controversy might stipulate for the payment of interest at the rate of ten per cent. per annum, yet on rendering judgment upon such contract, it would be error to allow prospective and accruing interest at the same rate after its rendition, and that by our statutory provisions on the subject, no greater or other rate of interest could be allowed on any judgment, than six per cent. per annum, whatever might have been the rate agreed upon in the original contract. This court, in the case alluded to, expressed the opinion that the judgment merges the contract so far as the question of interest is concerned, and that whatever accrues afterwards flows from it, under the sanction of the statute which fixes the rate on all judgments at six per cent. On the subject of interest, see Ter. Dig. 310.

[1] [Reported by Samuel H. Hempstead, Esq.]

In the case before us, a judgment having been obtained in the state of Alabama, where the rate of interest, in all cases, is fixed at eight per cent., the lex loci ought to pervail in computing interest up to the time of rendering judgment here; after which the character of the claim being changed, our own statute applies. The allowance of interest, therefore, at the rate of eight per cent. after the rendition of judgment, was, we think, unauthorized and obviously at variance with the statute referred to.

The third and last error we shall notice, depends on the consequence given to the proceedings in the county court. We think it amounts to nothing more than a judgment of nonsuit, which never operates as a bar to a subsequent action for the same cause.

On the ground that the court below has allowed interest at the rate of eight per cent. per annum prospectively, the judgment must be reversed and the cause remanded. Judgment reversed.

EVANSVILLE, ETC., STEAM PACKET CO. (HARVEY v.). See Case No. 6,179.

Case No. 4,573.

EVANSVILLE NAT. BANK v. METROPOLITAN NAT. BANK.

[2 Biss. 527; 10 Am. Law Reg. (N. S.) 774; 1 Thomp. Nat. Bank Cas. 189; 6 Am. Law Rev. 574.] [1]

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

BANK'S LIEN ON STOCK.

1. A transfer of stock in a banking corporation organized under the act of June 3, 1864 [13 Stat. 90], to a bona fide holder is valid, though the seller, or pledgor, be at the time indebted to the bank, and a by-law of the bank declared that no transfer of the stock by any share-holder indebted to the bank should be made, without the consent of the board of directors.

[See note at end of case.]

2. Such a by-law in effect attempts to create a lien upon stock for debts of the holder, and the result is the same as if a loan were made upon the security of the stock—a transaction forbidden by the 35th section of the act.

3. The principle announced in the case of First Nat. Bank of South Bend v. Lanier [11 Wall. (78 U. S.) 369] is decisive of this case.

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

This was an action by the Evansville National Bank, of Evansville, Indiana, to recover two hundred shares of its capital stock, pledged to the Metropolitan National Bank of New York City. The Evansville National Bank was organized in January, 1865, under the act of congress of June 3, 1864 (13 Stat. 99). One of the articles of association provided that the directors might prohibit the transfer of stock without their consent. Accordingly a by-law declared that no tranfer of the stock should be made, without the consent of the board of directors, by any share-holder who was indebted to the bank—and certificates of stock were to contain this provision. After the adoption of this by-law, Watts, Crane & Co., became the owners of one hundred and fifty shares of stock, and Crane, one of the firm, of fifty shares. Certificates were issued for these shares, in conformity with the above by-law. Watts, Crane & Co., did business with the Evansville National Bank, and they were indebted to the bank from the time they became holders of the stock, for money loaned upon bills drawn, indorsed, or accepted by them in the usual course of dealing. On the 15th of September, 1866, they borrowed $30,000 of the Metropolitan National Bank, of New York, and they and Crane delivered their certificates of stock as a pledge to secure the money so borrowed, attaching to the certificates bills of sale with power of attorney for the transfer of the stock. On the 15th of April, 1867, Watts, Crane & Co., became indebted to the Evansville National Bank, on an acceptance for $25,000. At this time, the Evansville Bank had no notice of the pledge previously made to the Metropolitan Bank. The members of the firm of Watts, Crane & Co., were declared bankrupts by the district court of Indiana, March 3, 1868. The district court [case unreported] held that the pledge to the Metropolitan Bank was binding, notwithstanding the by-laws under which the Evansville Bank claimed a lien upon the stock.

Asa Iglehart, for plaintiff.

Hendricks, Hord & Hendricks, for defendant.

DRUMMOND, Circuit Judge. The only question in the case is, whether this by-law was valid under the law of June 3d, 1864. The 8th section of that act authorizes the board of directors to make by-laws, but declares they must not be inconsistent with its provisions. The 35th section declares that no association shall make any loans, or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless to prevent loss on a debt previously contracted in good faith.

The counsel for the plaintiff, in the able argument he has presented, claims that the operation of the by-law upon the shares of stock, because of the indebtedness of Watts, Crane & Co., and their transfer to the Metropolitan Bank, without the consent of the board of directors, was not a loan or discount made on the security of the shares, that there must be a distinct assignment or hypothecation of the stock as security for a loan or discount made, and some authorities have been cited which seem to sustain that principle. But if a by-law declares in sub-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Am. Law Rev. 574, contains only a partial report.]

stance and effect, that for all loans or discounts made to the share-holder, a lien shall exist against his stock, the result would be the same as if there were a separate transaction and security given in each case. The share-holder always has the credit on the security of his stock, and thus the very object is accomplished which the 35th section sought to prevent, the absorption of the shares into the assets of the bank. And it will be observed that the law only allows the stock to be taken by the bank as security, or purchased or held to avoid loss on a debt previously contracted in good faith, and even then the stock is to be retained by the bank only a limited time.

An extended examination of the authorities cited by counsel is unnecessary, because in the case of the First Nat. Bank of South Bend v. Lanier (recently decided by the supreme court of the United States) 11 Wall. [78 U. S.] 369, the question involved here is discussed by that court, and a principle established that is decisive of this case. In that case the bank had made a by-law, declaring that the stock of the bank should be transferable only on its books, subject to the provisions of the 36th section of the act of 1863 (12 Stat. 675), by which a shareholder was prevented from transferring his stock when he owed the bank. The bank sought to avail itself of this by-law, notwithstanding the repeal of the 36th section, by the act of 1864, and the court held that that could not be done. This was in effect, deciding that no such by-law could be in force under the provisions of the act of 1864. The language of the court is: "Congress evidently intended, by leaving out of the law of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified, that thereafter they must deal with their share-holders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them." The decree of the district court is affirmed.

This case was appealed to the supreme court, and affirmed by a divided court, and consequently no opinion was given.

NOTE. A corporation has no lien at common law upon stock for a claim against the stockholder. Steamship Dock Co. v. Heron, 52 Pa. St. 280; Massachusetts Iron Co. v. Hooper, 7 Cush. 183. Nor any implied lien; and is bound to enter on its books a transfer of the stock made by the holder. Heart v. State Bank, 2 Dev. Eq. 111. Contra, Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Arnold v. Suffolk Bank, 27 Barb. 424. Lien may be sustained by proper clause in certificate of stock. Vansands v. Middlesex County Bank, 26 Conn. 144; Fitzhugh v. Bank of Shepherdsville, 3 T. B. Mon. 126. Or by provision in charter. St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Cunningham v. Alabama Life Ins. & T. Co., 4 Ala. 652; Stebbins v. Phoenix Fire Ins. Co., 3 Paige, 350; Union Bank v. Laird, 2 Wheat. [15 U. S.] 390; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513. See, also, McCready v. Ramsey, 6 Duer, 574; Merrill v. Call, 15 Me. 428. Where a bank has notice of an equitable transfer, not completed on its books, it is bound to respect it. Conant v. Reed, 1 Ohio St. 298; Nesmith v. Washington County Bank, 6 Pick. 324. Lien given by charter cannot overreach a prior assignment so as to prevent its transfer. Neale v. Janney [Case No. 10,069]. Bank may hold the whole of its debtor's stock. Sewall v. Lancaster Bank, 17 Serg. & R. 285. And dividends on such stock. Hague v. Dandeson, 2 Exch. 741. Assignee takes subject to the rights of the corporation under its charter, of which he is bound to take notice. Reese v. Bank of Commerce, 14 Md. 272; Brent v. Bank of Washington, 10 Pet. [35 U. S.] 610; Union Bank of Georgetown v. Laird, 2 Wheat. [15 U. S.] 390. Lien is good as against purchaser at sheriff's sale, with notice. Tuttle v. Walton, 1 Ga. 43. The supreme court of New York hold that under these acts of congress a bank cannot by a by-law create a lien upon stock for the security of debts due from the stockholder to the bank. Rosenback v. Salt Springs Nat. Bank, 53 Barb. 495; followed at a subsequent term in Conklin v. Second Nat. Bank, Id. 512, note. Contra: In one of the earliest cases under the bankrupt law, Blatchford, J., ruled that a bank could maintain a lien on its shares of stock, as against the assignee in bankruptcy of the stockholder, to protect itself against loss. In re Bigelow [Case No. 1,395]. Though a certificate of stock contains a provision that the stock was not transferable until all the liabilities of the stockholders were paid, such a provision gives the bank no lien upon the stock for subsequent indebtedness, and is void under the act of congress of June 3, 1864. Conklin v. Second Nat. Bank, 45 N. Y. 655.

Case No. 4,574.

EVARTS et al. v. FORD.

[6 Fish. Pat. Cas. 587;[1] 5 O. G. 58.]

Circuit Court, N. D. Illinois. Nov. 26, 1873.

PATENTS—CONSTRUCTION OF CLAIMS—RESULT EFFECTED—INFRINGEMENT—ABANDONMENT—OPINION OF COMMISSIONER OF PATENTS ON QUESTION OF NOVELTY.

1. The third claim of the patent granted H. H. Evarts, October 1, 1854, for "improvement in shingle-machines," which is, "presenting the sides of the fibers of the wood to the action of the saws in the sawing of shingles, or equivalent articles, for the purpose of giving them smoother surfaces than can be produced by the usual mode of sawing," if construed literally, asserts a right to a result, and can not be sustained.

2. Construed as a claim for the mechanism by which the result is effected, it may be sustained.

3. A patent for a machine in which a shingle-bolt is fastened automatically by dogged teeth upon a rotating carriage, which presents it sidewise to the saw, is not infringed by a machine in which the bolt is by hand fastened to a reciprocating carriage, and by hand shoved to the saw and withdrawn.

4. Evarts having failed to patent his hand-machine, made while experimenting and before taking out his patent on his perfected machine, and having failed to mention or describe it in the specification of the patent he did take out, is held to have abandoned it to the public.

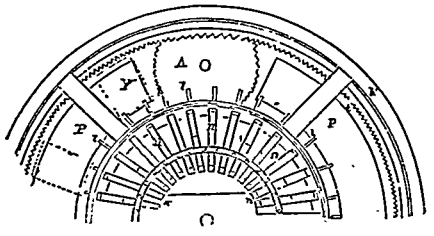
[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

5. The opinion of the commissioner of patents, granting an extension, is entitled to great weight on the question of novelty.

In equity. Final hearing on pleadings and proofs.

Suit brought [by Harry H. Evarts and others against David M. Ford] on letters patent [No. 11,858] granted H. H. Evarts, October 1, 1854, for "improvement in shingle-machines," and extended for seven years from October 1, 1868.

The engraving shows a plan view of the machine, as described in his patent, and represents one-half only, the other half being exactly the same.



It is an ingenious and complete machine for sawing shingles from the block. A block, Y (in the engraving represented in broken lines), is placed on each table, P, P'; is seized by dogs, actuated by H, and teeth t', and carried by the saws A, as the cogged rim F revolves. The tables P, P' are so inclined in respect to saws as to give the required taper to the shingle. The lever cams H are rocked on fulcrums in the rim D, by cams n', n', so that two at a time of the dogs i shall pierce the block as it arrives near the saw, or at Y, by which time the other two dogs i, which hold the block thus far, are withdrawn; thus but two dogs, together with the teeth t', carry a block around. It must be observed that, to give the proper taper, the beds P, P' slope inward and downward from the saws the angle required. As the block always bears against this bed as it meets the saws, the taper necessarily results. The block is sawed alternately from end to end, giving the thin and thick ends of shingles, alternately from each end of the block. As soon as one shingle is cleared, it drops, and the dogs i, now holding the block, are withdrawn (by cams n', n'), and the block drops a distance equal to the thickness of the shingle just formed on the bed H, and is in the exact position to meet the next saw, just before clearing which, two dogs, i, quickly clamp it, and hold it until past this saw.

Thus it may be seen that a block placed on one of the tables, and the machinery being in motion, the machine will convert it into shingles without further manual assistance.

The claims of the patent are—

"1. Placing the blocks to be sawed into shingles in a rotating carriage, which is combined with the inclined tables p, p (or a single table), with saws O, O (or a single saw), in such a manner that the blocks will be carried continuously forward, and be automatically operated upon to convert them into shingles, substantially as herein set forth.

"2. I also claim the arrangement of the weighted levers H, H, the fastening teeth i, i, and the inclined planes l, l, with each other and with the inclined tables p, p, and the outer series of teeth in the ledge r, substantially as herein set forth.

"3. I also claim presenting the sides of the fibers of the wood to the action of the saws in the sawing of shingles or equivalent articles, for the purpose of giving them smoother surfaces than can be produced by the usual mode of sawing, substantially as herein set forth."

It seems that, while experimenting on his machinery for sawing shingles, Evarts invented and put into use a machine known as his "hand-machine," which accomplished the results described in his patent which he afterwards obtained on his automatic machine, but which did not contain the devices just as claimed in the patent, though undoubtedly the invention of the patentee. This hand-machine the defendants were using. They contended that it did not infringe complainants' patent, and that it was abandoned to the public.

L. L. Coburn, for complainants.

West & Bond, for defendant.

BLODGETT, District Judge. This suit is brought to recover damages for an alleged infringement of a patent for an improvement in shingle-machines, issued to H. H. Evarts, dated October 1, 1854, and extended for a term of seven years from October 1, 1868.

The title to the patent is admitted to be in the complainants; and it is admitted that the defendant has manufactured shingle-machines since the extension of the patent, which complainants claim infringe their patent. With these admissions, the only questions made upon the argument of the case are: First. Is the complainants' patent void for want of novelty? Second. Is the machine made by the defendant substantially embraced in the patent (issued to the complainant Evarts)?

The claims in the patent are as follows:

"1. Placing the blocks to be sawed into shingles in a rotating carriage, which is combined with the inclined tables p, p (or a single table), with saws O, O (or a single saw), in such a manner that the blocks will be carried continuously forward and be automatically operated upon to convert them into shingles, substantially as herein set forth."

This claim includes and covers, then, this rotating carriage, with the saws which are shown, and the inclined tables, the function of which is to give the slant or pitch to the blocks, so as to saw alternately butts and points.

The second claim is:

"2. I also claim the arrangement of the weighted levers H, H, the fastening teeth i, i, and the inclined planes l, l, with each other, and with the inclined tables p, p, and the outer series of teeth in the ledge r, substantially as herein set forth."

These two claims refer, it would seem, clearly to the elements contained in the rotating carriage, and to nothing else.

"3. I also claim presenting the sides of the fibers of the wood to the action of the saws in the sawing of shingles or equivalent articles, for the purpose of giving them smoother surfaces than can be produced by the usual mode of sawing, substantially as herein set forth."

It would seem, from the evidence in the case, that up to the time that the patentee commenced his experiments, nearly or quite all the shingles used in this country were made by the process of riving and shaving; and although several inventors had devised machines for sawing shingles, none of them had been able to produce sawed shingles which were acceptable in the market, or which could be made to supersede the shaved shingles in use. The leading characteristic of the complainants' machine consists in presenting the side of the fiber of the block to be cut into shingles to the saw, instead of the end.

After a series of experiments involving this principle, Mr. Evarts made and put in use a machine substantially like that now made by the defendant, and which is popularly known to the trade as the "Evarts Hand-Machine," of which Exhibit C is a model. Upon this machine he took out no patent, unless it be, as it is now contended, covered by his patent of October 1, 1854.

After making this machine and introducing it to the public, and also introducing its products into the market to a considerable extent, Mr. Evarts made what he deemed his perfected machine, upon which he obtained the patent set forth in the bill.

It is evident from his conduct, and the specification of his patent and the claims, that Mr. Evarts considered all he had accomplished up to this point as mere experiments.

He says in his specification:

"The first general feature of my invention consists in a rotating carriage, arranged in connection with tables inclined in opposite directions, and with circular saws, in such a manner that the bolts of wood placed in said carriage will, one after the other, be continually operated upon, cutting the thick end of the shingle first from one end of a bolt, and the thick end of the next in succession from the opposite end of said bolt, and thus alternate until the bolt is sawed down as thin as it can be safely operated upon.

"The second feature of my invention consists in presenting the side of a bolt of wood to the saws, instead of the end thereof, for the purpose of producing thereby shingles with much smoother surfaces than can be produced by advancing the end of the bolt to the saw in the usual manner."

In his experiments, Mr. Evarts first fastened the shingle-bolt to a long lever or beam, vibrating upon its center like a walking beam, so that the bolt could be brought down in contact with a vertical circular saw, so as to present the side of the bolt to a saw. By this experiment, he satisfied himself that he could produce smooth-sawed shingles by that method of sawing. He then produced the hand-machine. He also met with serious difficulty by the kinking, buckling, or sagging of his saw, and to overcome these difficulties he improved the saw, so that its center was strengthened by a reinforcing plate, and the saw-plate beveled toward the outer edge, whereby it was made stronger, and its buckling, kinking, and sagging prevented.

He finally produced the rotating machine, which he patented, evidently deeming that the crowning embodiment of his invention.

The evidence shows that, while making these experiments, Mr. Evarts was embarrassed by want of means, and that he was in fact obliged to dispose of a large interest in his patent to get the means with which to construct his first machine, and demonstrate its utility, by the manufacture of shingles, and placing them upon the market in competition with shaved shingles.

After obtaining his patent, Mr. Evarts continued to manufacture machines and shingles until side-sawn shingles have nearly or quite superseded the shaved shingles in the market; but what seems remarkable in the history of the invention is the fact, well established by the evidence in this case, that the hand-machine—the second step apparently of the inventor toward his perfected and patented machine—is the machine which is most in use, and probably of the most practical utility at this time in the manufacture of shingles.

This machine the defendant makes and sells; and while he, in effect, admits that Mr. Evarts was the inventor, he denies that he has so secured his invention by his letters patent as to have the exclusive right of manufacture. And the question to be decided in this case is, whether this hand-machine is covered by the patent; in other words, after constructing the machine, in which he fastened the shingle-block vertically to the end of a lever, and brought it down in contact with a circular saw, which revolved vertically, and became satisfied that the side-cut with a circular saw would produce a shingle nearly, if not quite, as smooth as a shaved shingle, Mr. Evarts then set about devising a more compact and easily-managed machine for the purpose of applying the principle of side-cutting; and his first effort in that direction was this machine, which is now manufactured by the defendant, and upon which, as a specific machine, he never obtained a patent.

The first and second claims of the patent

have special reference to the rotating machine, and if the defendant's machine is found at all in the patent, it must be in the third claim, which is as follows:

"I also claim presenting the sides of the fibers of the wood to the action of the saws, in the sawing of shingles or equivalent articles, for the purpose of giving them smoother surfaces than can be produced by the usual mode of sawing, substantially as herein set forth."

This claim, if literally construed, calls for a result which can not be allowed under the patent law; but I think a fair and liberal interpretation should be given, and I construe this as a claim for the mechanism by which the result is attained; or, in other words, the mechanism by which the sides of the fibers of the block are presented to the saw, as set forth in the specifications. I say this, because the idea of sawing shingles lengthwise of the grain or fiber, in order to make a smoother cut, was not new or original with Mr. Evarts. He may have made the first and best machine for making sawed shingles, by cutting them with the fiber; but he was not the first to put forward the idea of side-sawing. His machine seems to have depended for its success upon other elements than the side-cutting alone.

Simon Wood, in 1829; William Bell, in 1838, and Manasseh Andrews, in 1839, had already made machines which cut lengthwise of the grain, and were applied to the sawing of shingles, or of staves, or kindred articles; and a machine was also constructed in Maine, which is testified to by the witness William Smith, but the form of which is not exhibited, showing that the same idea was applied in the mechanism for a shingle-machine used in Maine, in 1834. So that producing a smooth surface by a side-cut was not a new idea, upon which, as a result, Mr. Evarts could have obtained a patent.

The important question, then, is: Do we find in the hand-machine the particular mechanism, or device, by which this side presentation is accomplished, as "set forth" in the patent? In the patent, this result is accomplished by placing the blocks in the rotating carriage, where they are automatically gripped or dogged, and carried forward by the motion of the carriage to the saw. The mechanism which does this work, is the rotating carriage and the dogging-teeth r and i. In the hand-machine, the side presentation is accomplished by means of a reciprocating carriage, into which the block is fastened, and the carriage is then shoved, or pushed forward, by the hand of the operator, along a tramway, so as to bring the side of the block in contact with the saw. The dogging or fastening of the blocks in the carriage or frame is done by the operator, and not automatically by the machine itself, and the movement of the block against the saw is here made by the hand of the operator.

These two mechanisms, to my mind, have nothing in common, except it be the result, which can not be patented. The two devices seem to me to be radically different. In the patent the block travels on the radius of a circle and approaches the saw, and is operated upon it, not exactly sidewise, but by a partial end and partial side presentation—a sort of diagonal or quartering cut. This is a necessary incident of the rotating machine, and the degree of quartering or end cut in the rotating machine, which must be given to the block, depends, of course, upon the length of the radius. The rotating carriage differs from the reciprocating carriage as essentially as the rotating or circular saw differs from the reciprocating saw.

When a shingle has been cut in the hand-machine, the carriage must be brought back over the saw and the block dropped upon the tilting table; the table tilted to give a slant to the next shingle and the block redogged, then it is ready to cut another shingle. All this is avoided in the rotating machine.

My conclusion, then, is that the two devices are essentially different in their mode of operation. I have, I must be permitted to say, reluctantly come to the conclusion that the third claim of the patent does not, by any fair construction or interpretation, include the mechanism made by the defendant. I say I come reluctantly to this conclusion, because the evidence before me shows to my satisfaction that this hand-machine is of great practical value—that it was the actual invention of Mr. Evarts, and that it has worked a revolution in the manufacture of shingles; but he can take no more by his patent than he has claimed, and as it is not claimed or described by apt words in the patent, he must be held to have abandoned it to the public.

As I stated just now, I have no doubt from the proofs that Mr. Evarts made what was really the first practical machine for making smooth-sawed shingles, which could and did compete successfully in the market with the shaved article; but I think his success largely attributable to other elements of his machine, as well as to the side-cutting. Others had cut with the grain, but their machines were not generally acceptable to the public. To my mind his improved saw and his simple device of the tilting and inclined tables had much to do with his success, and made his machine, as a whole, practicable, and enabled him to make cheap and valuable shingles. Yet the saw, in its improved form, is not noticed in his specification, either as an original invention or as an improvement, in combination with the other parts of the machine. If he can now claim the hand-machine, as covered by his patent, why may he not also come back hereafter and claim the beveled saw? or, if some person shall see fit to saw shingles by the old walking-beam or tilting lever, why may he not also claim that his patent covers the use of that, as it is one of the steps by which he accom-

plished his result in the rotating machine. I mention this only by way of illustration. Mr. Evarts used all these in his experiments, but abandoned them, or at least must be held to have abandoned them, when he had devised what he deemed to be his fully matured machine. If he had wished to cover his initial steps by patents, he could have done so after the example of many other inventors; but not having done so, these must be deemed to have been surrendered to the public, although probably more valuable now than the elaborate machine which he patented. The bill is therefore dismissed.

I should say, in addition, gentlemen, that this case was heard mainly upon the evidence on the application for the extension of the patent before the commissioner; and much stress is laid upon the opinion of Judge Foote, who granted the extension. I have not considered that opinion as binding, because there it was not a question of infringement; but the question was, whether this was a patentable device under the state of the art as it then stood. Of course, the opinion of the commissioner is entitled to great weight upon that question as it was presented; but upon the question of infringement I do not consider that it should have any special weight, because the point of infringement was not before the commissioner.

EVE (McCALL v.). See Case No. 8,670.

EVELINE, The MARY. See Cases Nos. 9,210-9,212.

Case No. 4,575.

The EVENING STAR.

[Blatchf. Pr. Cas. 582.] [1]

District Court, S. D. New York. Dec., 1863.

PRIZE—VIOLATION OF BLOCKADE—CONDEMNATION REFUSED.

The vessel and cargo were owned by unnaturalized foreigners, residing in the enemy's country, who came in here out of a blockaded port of the enemy, with the sole purpose of escaping with their property from the enemy, and delivering that and themselves to the blockading squadron and to the authority of the United States. Vessel and cargo restored, but without costs, there being probable cause for the seizure and the suit.

In admiralty.

BETTS, District Judge. The above vessel and cargo were seized as prize of war May 29, 1863, in Warsaw sound, near the shore of the state of Georgia, by the United States gun boat Cimerone. The vessel, being found unseaworthy, was appraised, by a board of naval survey, at $10, and left at Port Royal, and her cargo was transported to New York for adjudication. A libel by the United States was filed in this court against the said prize August 19, 1863, returnable September 8th thereafter. A warrant and monition were issued thereupon, and were duly returned by the marshal, that the vessel had been taken by the government, and that the cargo was attached under the said process. On the same day Frank Schwiren intervened, and filed a claim, under his own oath, as part owner of the vessel and cargo, "and for Frederick W. Rose, the other owner," asserting therein that those owners were in possession of the sloop and cargo at the time of their seizure, and were the true and bona fide owners of the same. The naval survey reported the valuation of the vessel and tackle, on her arrest, to be ten dollars, and the prize commissioners, on an appraisal of her cargo, made under the order of the court September 30, 1863, reported the same to amount to $3,892.50.

The case was brought to hearing December 9, 1863, on the part of the government, when the claimants, by the assent of the district attorney, moved for and obtained the order of the court that "they have twenty days from that date to take and introduce further proofs" in the cause. Such further proofs were taken before one of the prize commissioners, on the attendance of the United States attorney and the proctor for the claimants, and were reduced to writing by the commissioner on the 29th of December, and were filed in court the next day by him. All the papers, with the briefs of the counsel for the respective parties, were submitted to the court for consideration December 31, 1863.

It appears, from the papers produced from on board the vessel by the prize-master, the certificate of ownership, the manifest, and the clearance given at Savannah, Georgia, April 22, 1863, and from the preparatory proofs, that the vessel was dispatched from Savannah in the latter part of May last, on a voyage from that port to Nassau, N. P.; that the vessel was a sloop of about nine tons' burden, old, and of small value, being worth about ten dollars; that she was laden with a cargo of cotton, both vessel and cargo being owned by the claimants in the cause, who were residents in Georgia, but Prussians by birth, not naturalized; that one of them was unmarried, and that the other was married, his wife residing in one of the Confederate States. The vessel sailed from Savannah under the rebel flag, and a rebel pass furnished her at that port.

The testimony of the two owners is positive and direct, on the preparatory examination and the subsequent one given under the allowance of further proof, that their actual and sole purpose in coming out of Savannah was to escape, with their property, from the Confederate authority, and deliver the vessel and cargo and themselves to the protection of the blockading squadron, and to the authority of the United States, as loyal citizens thereof. The collateral evidence of the intention of the claimants, manifested

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

by declarations of theirs to friends before the dispatch of the vessel, and by efforts and preparations set on foot by them, indicates a fixed purpose and anxiety on their part to separate themselves personally and their effects from all connexion with the insurrectionists, and to become wholly detached in interests and residence permanently from them.

I perceive no ground to doubt the fairness and reliability of the representations given in evidence in this cause, and am of opinion that it satisfactorily brings the present case within the principle declared by the circuit court in the case of The General C. C. Pinckney [Case No. 5,308], and that the withdrawal of the property in question from an enemy and blockaded port does not subject it to capture as prize of war. A decree will be entered that the libel be dismissed, but without costs, there being sufficient probable cause for the seizure and the suit.

EVERDING (BACHMAN v.). See Case No. 708.

Case No. 4,576.

EVERETT et al. v. DERBY.

[5 Law Rep. 225.]

District Court, D. Maine. Aug., 1842.

BANKRUPTCY—ACT OF 1841 — EFFECT OF SUIT AT LAW UPON PETITION IN BANKRUPTCY SUBSEQUENTLY FILED BY SAME CREDITOR AGAINST SAME DEBTOR.

1. The pendency of a suit at law is not a bar to a petition by the creditor, proceeding in invitum, on a distinct and independent demand.

2. Thus, where certain creditors sued out writs of attachment against a debtor, and afterwards petitioned that he be decreed a bankrupt, it was *held*, that it was not necessary for the suits at law to be withdrawn, until it was determined whether the petition could be sustained.

3. It seems, that a trader who has withdrawn from business, may be proceeded against in invitum, as a bankrupt, upon debts which were contracted while he was actually in trade.

In bankruptcy.

WARE, District Judge. This is a petition on the part of creditors against Mr. Derby, to have him decreed a bankrupt. He has appeared and filed objections to the decree. The first objection relied on is, that the petitioners are proceeding against him in an action at law. The facts, which are not in dispute, are that the petitioners sued out writs of attachment against the supposed bankrupt on the 19th of March, and caused his property to be attached and held to answer the judgment, which suits were duly entered in court on third Tuesday of June, being the 21st day of the month, and which were, with the consent of the defendant's attorney, continued to the next term of the court, and no further proceedings had upon them. On the 11th of May, they filed their petition in this court, praying to have him declared a bankrupt. The second objection relied upon is, that the respondent was not, at the time of the alleged acts of bankruptcy, nor at the time of the jurat and the filing of the petition, a merchant, and actually using the trade of merchandise, nor a retailer of merchandise, and so not liable to compulsory process in bankruptcy on the part of his creditors. The petitioners have put in replication insisting on the right to proceed in their petition to have the respondent decreed a bankrupt, notwithstanding the pendency of their suits, and alleging that the debts, on which the petition is founded, are not the same demands that are in suit, but distinct and different debts; and tendering an issue of facts on the other objection that the respondent was not a merchant and actually using the trade of merchandise.

The second objection presents the question of fact which, the parties not being prepared with their evidence, will be passed with a single remark. It is doubtful, to say the least, whether, in the terms in which it is expressed, it is broad enough to protect the respondent from this proceeding, admitting the fact to be as alleged. A debt which has been contracted after the debtor has retired from trade, will not support a petition on the part of creditors, proceeding in invitum. Eden, Bankr. Law, 46. But where the debt was contracted while the debtor was in trade, and then subject to the bankrupt law, Lord Eldon held it to be clear of any doubt that a commission could be supported by an act of bankruptcy committed after he had ceased to be a trader. It may, therefore, be necessary for the respondent to amend his answer to the petition in this part.

With respect to the other objection, the facts alleged by the respondent are admitted in the replication, and the question to the court is, whether the pendency of the suits mentioned in the objection is a bar to the parties proceeding under this petition. There does, it must be admitted, seem to be some incongruity in proceeding in law against a debtor who is in bankruptcy. As the whole of his property passes and vests in the assignee, by operation of law, from the time of the decree, and by relation from the filing of the petition, the remedy at law is reduced to the naked right of process against the person. And as the person must be discharged by the certificate, if the bankrupt is legally entitled to it, it would seem that the only benefit that can be derived from a suit at law is to try the validity of the discharge. But it is quite certain that the existence of a commission under the English bankruptcy system does not preclude creditors from pursuing the ordinary remedial processes of the law, and such also was the case under the former bankrupt law in this country. The present act contains no clause prohibiting them generally from proceeding at law if they prefer this remedy. The clause of the

law applicable to the question raised by this objection, is found in the 5th section of the act of 1841 [5 Stat. 444], and is in these words: "No creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." This clause meets and provides for two distinct cases: First, for that where the creditor has proved his debt before a suit is commenced. The proving the debt alone, is a bar to any suit at law or in equity, for the recovery of the debt so proved. The second case is where the suit has been commenced before the proof of the debt in bankruptcy; and in this case the proving the debt operates as a surrender ipso jure of the action, and is a bar to any further proceedings in the suit.

The present case falls under the second branch of the clause in question. The action was commenced before the filing of the petition. Now it is very clear that the naked fact of the action having been commenced is no bar to filing and proceeding upon the petition, for the law contemplates and provides for this precise case, and declares, not that the proceeding in bankruptcy is barred by that fact, but that the proceeding in bankruptcy shall operate as a surrender of the suit. But what proceeding is it that has this effect? It is proving the debt. The proof of the debt is an election to proceed in bankruptcy, and is a conclusive bar to any further proceeding in a suit at law or in equity for the recovery of the same debt. I say for the recovery of the same debt, for it has been decided in England by the courts of law, under the act of 49 Geo. III. c. 121, § 14, from which this clause in our law seems to have been borrowed, that where a creditor has several distinct and independent debts due to him from the bankrupt, he may prove one in bankruptcy and maintain a suit at law on another, it being held that the election is confined to the particular debt proved. Harley v. Greenwood, 5 Barn. & Ald. 95. Whether this principle adopted by the common law courts is reconcilable with the decisions of the chancellor in bankruptcy, it is not necessary here to consider. Ex parte Dickson, 1 Rose, 98; Ex parte Hardenbergh, Id., 204, quoted in Eden, Bankr. Law, 112.

It has always been held under the English bankrupt law, that the petitioning creditor makes his election by presenting his petition, and, however it may be with other creditors, he cannot proceed at law for a distinct demand, if the petition is capable of prosecution. Id. 116. The presenting of a petition is an election to proceed in bankruptcy, not only for the debt, on which it is founded, but for all other claims which he has against the bankrupt, and if he proceeds at law, the commission will be superseded, or the suit at law be enjoined. Id. 50; Cooke, Bankr. Law, c. 2, § 3. But if a suit is already commenced, he need not relinquish it before presenting his petition. If indeed he has the debtor in execution, this is fatal to the petition; for this is a satisfaction of the debt. Burnaby's Case, 1 Strange, 653. But proceeding in a pending suit, not against the person, has been held not to be an objection to suing out a commission. Miles v. Rawlyns, 4 Esp. 194.

It would seem, then, from the analogy of the English decisions, that the pendency of a suit in the courts of law, on a distinct and independent demand, is not a bar to proceeding on this petition. The suit may remain at present notwithstanding, for that is declared to be surrendered, not by the filing a petition against the bankrupt, but by proving the debt. But as the debt must be proved to support the petition and obtain a decree, this, it seems to me, will constitute such a proof in bankruptcy as will, from the time of the decree, operate ipso jure as a surrender of the suit at law. My opinion is that the petitioners may proceed to a decree while their suits are pending, but that the suits will be annulled and surrendered by the passing of a decree. It is undoubtedly true, that the petitioning creditors cannot carry on the two proceedings at the same time,—at law for one part of their demands, and in bankruptcy for another; but I can see no reason, in principle or on grounds of expediency, why they should be required to abandon their suits at law commenced before filing this petition, until it is determined whether the petition can be sustained. If, as is contended by the debtor, he is not subject to the bankrupt law, then the petitioners have an undoubted right to pursue their remedy at law.

EVERETT (MEADOR v.). See Case No. 9,376.

Case No. 4,577.

EVERETT v. STONE et al.

[3 Story, 446.] [1]

Circuit Court, D. Maine. Sept. Term, 1844.

BANKRUPTCY — ACT OF 1841 — PREFERENCES IN "CONTEMPLATION OF BANKRUPTCY"—FOLLOWING ASSETS—RIGHTS OF JUDGMENT CREDITORS.

1. Where A. and B., being partners in trade, and apprehending embarrassment in their business, conveyed all of their stock, and real estate, and certain notes, to certain of their creditors, to secure them against certain debts and liabilities, as sureties, and endorsers on the notes of A. and B.; and afterwards, suits were commenced upon certain of the debts so secured, on which judgment was rendered, and execution was levied, but before judgment was rendered, A. and B. became bankrupts under the act; and the per-

[1] [Reported by William W. Story, Esq.]

sonal chattels so assigned were, previous to the bankruptcy, sold, and the proceeds applied to the payment of the said debts; it was *held*, that the assignment was an act "in contemplation of bankruptcy," and in preference of certain creditors, and was therefore void; that the said judgments were not valid liens within the saving of the last proviso of the second section of the bankrupt act [of 1841 (5 Stat. 442)]; that the proceeds of the personal chattels, sold and applied to the payment of the debts, could be followed by the assignee, and made assets in bankruptcy; and that the said fraudulent conveyance was a bar to the bankrupt's discharge.

[Cited in Rison v. Knapp, Case No. 11,861; Reed v. McIntyre, 98 U. S. 513; Re Walker, Case No. 17,063.]

2. The phrase "contemplation of bankruptcy," means a contemplation of insolvency, and not of voluntary or involuntary proceedings under the bankrupt act.

[Cited in Re Wolfskill, Case No. 17,930; Re Smith, 9 Fed. 593.]

[See Ashby v. Steere, Case No. 576.]

3. Where an attachment is made by creditors, and afterwards, before judgment in the suit, the debtor files his petition in bankruptcy, if the creditor, with knowledge thereof, take judgment and levy execution, and the debtor be afterwards declared a bankrupt, the levy and execution are a fraud upon the bankrupt act, and are void.

[Approved in Re Beisenthal, Case No. 1,236.]

4. A judgment creditor differs from a bona fide purchaser, for a valuable consideration, without notice, in that the former is entitled to take on execution only, what belonged to his creditor, while the title of the latter does not depend upon that of the seller.

[Cited in Amory v. Lawrence, Case No. 336.]

5. Creditors, taking under a conveyance, fraudulent under the bankrupt act, are not to be treated as purchasers, but as creditors claiming under a defective title.

[Cited in White v. Denman, 1 Ohio St. 112.]

This case was adjourned into this court, from the district court [of the United States for the district] of Maine [case unreported], upon the following statement of facts, and questions, certified by the district court under the bankrupt act of 1841 (chapter 9, § 6):

This was a bill in equity, brought by the plaintiff [Ebenezer Everett], as assignee of Ebenezer Swett and James Green, to recover certain property of the bankrupts, conveyed to the defendants [Alfred J. Stone and others], as is alleged, to defraud their creditors, and in violation of the bankrupt law. The bankrupts were partners in trade under the name of Swett and Green, and were also members of another firm, under the name of Oliver Stoddard & Co., composed of Swett and Green with Oliver Stoddard, and, as traders owing more than $2,000, were liable to be proceeded against as bankrupts, by their creditors. Swett filed his petition to be declared a bankrupt on January 22d, and Green on February the 7th, 1843, and they were declared bankrupts by a decree of the court, on June 6th, 1843. On the 14th of March, 1842, having heard of the failure of their consignee in Boston, and apprehending, in consequence of it, embarrassment in their business, they made an assignment and transfer, by deed, of all their stock in trade, to the defendants, for the nominal consideration of $6,720, but, in fact, to secure to the defendants certain debts due from the bankrupts to the said defendants, and to indemnify the defendants against certain liabilities, as endorsers and sureties for the bankrupts. On the same day, they also conveyed by deed of mortgage to the defendants all the real estate, which they held as partners, and also all which they owned as partners with Oliver Stoddard & Co., to secure the payment of $2,250. These conveyances were both made and recorded before either of the defendants had any knowledge of them. On the same 14th of March, Swett and Green assigned a note for $2,440.10 of Oliver Stoddard & Co., due to them, to John F. Titcomb, without any consideration, he paying nothing therefor, and not being a creditor or endorser for them, and Stoddard; on the 19th of March, by the request of Swett and Green, they conveyed to Titcomb all the said Stoddard's right in and to the hides, leather, and skins in the tan-yard of O. Stoddard & Co., for the nominal consideration of $2,440.10, but no consideration was paid. These conveyances embraced, with trifling exceptions, all the real estate owned by Swett and Green, as partners with each other, and as partners with O. Stoddard & Co., and all their personal property, which was exposed and liable to be taken by legal process, and they are set forth in the complaint as acts of bankruptcy. On the 21st of March, for the purpose of carrying into effect the conveyance of the 14th, more fully, a tripartite indenture was made between Swett and Green of the first part, the defendants of the second part, and Alfred J. Stone, one of the defendants of the third part, by which the same personal chattels were again conveyed to the defendants, and Stone was made the special agent of the parties, to sell and dispose of the goods, and apply the proceeds to the payment of certain debts of Swett and Green, and of O. Stoddard & Co., enumerated in the deed, on which the defendants were sureties or endorsers; and Stone took possession of the property on the 23d. On the 22d, the note of O. Stoddard & Co. of $2,440.10 to Swett and Green, and by them assigned to Titcomb in trust, and the mortgage of O. Stoddard & Co. to Titcomb were, by the request of Swett and Green, transferred to Stone and Thompson, two of the defendants, in further security to Thompson and Stone. Afterwards, suits were commenced on certain of the debts, purporting to be secured by said conveyances, viz. by the Brunswick Bank, on the note of O. Stoddard, against Swett and Green, or their sureties, viz. J. Harmon, D. Chase, J. Higgins, and C. Harmon, which were entered at the June term, and judgment was obtained, and execution; on which execution, Swett and Green, and the other defendants, were arrested on the 5th of November. Suits were also commenced by S. Stover, E. Ryanson, J. McLellan,

and I. L. McLellan, against Swett and Green, and on these suits all the real estate of Swett and Green in the county of Cumberland was attached; which actions were entered at the October term of the court, and continued to the March term, when judgment was rendered; the plaintiffs in said action knowing, that the said Swett and Green had before that time filed their petitions to be declared bankrupts, and that said petitions were then pending and not acted upon; and afterwards, within thirty days from the rendition of judgment, executions were taken out and levied upon the lands of Swett and Green, which had been attached, and which had been conveyed to the defendants by said Swett and Green before, to wit;—on the 14th of March, 1842. The personal chattels assigned by the tripartite indenture were sold by Stone, and the proceeds were applied, according to the terms of the deed, towards the payment of the notes intended to be secured, before the bankrupts filed their petitions to be declared bankrupts.

On these facts the following questions arose, which were adjourned to the circuit court for a final decision:

1. Whether the conveyance of March 14th, with that of March 21st, 1842, was an act of bankruptcy in both Swett and Green, it being a conveyance of the whole of their visible property, both real and personal, with inconsiderable exceptions.

2. The conveyance having been made by the bankrupts, about ten months before the filing of their petitions in bankruptcy, and the grantees having had, at the time of the conveyance, no knowledge of their insolvency, or of an intention on their part to petition for the benefit of the bankrupt act, neither of them having, in fact, had any such intention at that time, does the conveyance come within the saving of the proviso of the second section of the bankrupt act, of all dealings and transactions made bona fide, and entered into more than two months before the filing of the petition by and against them?

3. The attachments, having been made before the bankrupts filed their petitions in bankruptcy, and judgment having been obtained, and levied on the lands of the bankrupts, within thirty days after the rendition of judgment, but after their petitions were filed to take the benefit of the act, but before a decree declaring them bankrupts; were the inchoate and imperfect liens or securities acquired by the attachments rendered perfect and valid liens within the saving of the last proviso of the second section of the law?

4. Whether the proceeds of the personal chattels, which were assigned by the tripartite indenture, for the benefit of certain creditors, and were sold in pursuance of the assignment, and applied to the payment of the demands before the bankrupts filed their petitions for the benefit of the bankrupt law, can be followed by the assignee in bankruptcy, in the hands of the creditors to whom they have been paid, and be brought back for an equal distribution in bankruptcy among all the creditors?

5. Whether the said conveyance of the 14th of March, with that of the 21st, if made in contemplation of bankruptcy, and for the purpose of giving a preference to a part over their other creditors, is a bar to their discharge, and a certificate thereof?

6. Whether the court should proceed now to decide on the matters in controversy, or wait until after a discharge is either allowed or refused, before deciding?

STORY, Circuit Justice. As to the first question, I entertain no doubt, that the conveyances referred to in that question are fraudulent conveyances, within the sense of the bankrupt act of 1841 (chapter 9), upon which a proceeding might have been had by the creditors of the bankrupts in invitum, under the first section of the act. They were obviously designed to give certain creditors a priority and preference over the other creditors of the bankrupt, and containing, as they did, the bulk of all their property, it must be perceived, that they contemplated exactly what was the natural result of the acts, and what the acts purported to produce, an actual insolvency, and inability to pay all their creditors, and that the conveyances were, therefore, made in contemplation of bankruptcy, and for the purpose of giving the enumerated creditors a preference or priority over the other creditors, in the sense of the second section of the bankrupt act. This question does not seem material to be decided, otherwise, than in a general form, as a contemplated act of bankruptcy, since, in the case before the court, there was no proceeding in invitum by the creditors; but the bankrupts are volunteers in bankruptcy.

As to the second question, it does not strike me, that the case falls within the saving of the section of the bankrupt act, which provides "that all dealings, and transactions, by and with any bankrupt, bona fide made, and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act, provided that the other party to any such dealings or transactions, had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act." It does not appear to me, that this proviso has any application whatsoever, except to the ordinary dealings and transactions, in the common course of business, where payments, securities, conveyances, and transfers are made between the parties. These conveyances are in no just sense such conveyances. They were notoriously made with the intent to give a preference to certain creditors. They were voluntarily made, —the first, without any knowledge, or co-operation of the defendants; the second convey-

ance to the defendants, with their knowledge and consent, in furtherance of the first, and resting upon the same foundation. The conveyances to Titcomb were plainly voluntary, and without any consideration, and were also transferred to two of the defendants. We must treat all these conveyances, therefore, as nearly contemporaneous, and known to the defendants to contain a transfer of all the property of the bankrupts, with some trifling exceptions, and to be intended to give certain creditors a preference in contemplation of a breaking up of their business, and their immediate insolvency. What is this, but a case of conveyances made, giving a preference, in contemplation of bankruptcy, in the sense of the second section of the act? The defendants must be presumed to know the law, and cannot set up their ignorance as a justification. They must be presumed to know the natural, nay, the necessary results of these conveyances to be, that they were acts of bankruptcy, within the meaning of the first section of the bankrupt act, for which a proceeding might be had by the creditors of the bankrupt in invitum. The very facts put them upon inquiry, and diligent inquiry, to know, whether the bankrupts must not thereby contemplate a state of immediate insolvency, and a direct preference of a few, over the other creditors, which would be unlawful. Nay, the facts were so awakening, and striking, that no persons not choosing voluntarily to shut their eyes, could doubt, that the bankrupts were ruined in business, and unable to proceed farther; and that if they did not then intend to seek, as volunteers, the benefit of the bankrupt act, their creditors had a right to proceed against them in invitum, for the unlawful preference. "Contemplation of bankruptcy," in the sense of the bankrupt act, is not limited or confined to those cases only, where the bankrupts contemplate, and intend to be volunteers in bankruptcy, nor even where they contemplate future proceedings by their creditors against themselves, in invitum, under the act; but it extends also to cases where the bankrupts contemplate a complete and total stoppage of their business, and trade,—and mean, under such circumstances, to provide for preferences to particular creditors, injurious to the interests of their other general creditors, whether any proceedings are, or shall be in futuro, instituted by or against them, under the bankrupt act, or not. In short, "contemplation of bankruptcy," means a contemplation of becoming a broken up and ruined trader, according to the original signification of the term; a person whose table or counter of business is broken up, bancus ruptus. In such a case, if the bankrupt makes a conveyance, giving a preference to certain creditors, that is the very act which the bankrupt act denounces, and declares a fraud, and consequently avoids it, if proper proceedings in bankruptcy are afterwards instituted, and the parties are declared bankrupts under the act. This is no new doctrine in this court. It was fully considered and stated in Hutchins v. Taylor [Case No. 6,953], and in Arnold v. Maynard [Id. 561], and has since been repeatedly acted upon in this court. Without going at large into the authorities upon the subject, spread through the English reports, I would merely refer to the case of Pulling v. Tucker, 4 Barn. & Ald. 382, as being of itself almost decisive of the question. See, also, Morse v. Godfrey [Case No. 9,856], and Gibson v. Muskett, 4 Man. & G. 160, 164.

As to the third question, it is, in my judgment, completely covered by the reasoning in the case Ex parte Foster [Case No. 4,960], although the point was not necessary to be decided in that case. The argument, however, presented it fully for the consideration of the court, and it was not, therefore, an obiter dictum, but was relied on by the court, as a part of the reasoning, which conducted it to the conclusion at which it arrived. The result of that reasoning is, that if an attachment is made by any creditors, and afterwards, and before judgment in the suits, the debtor files his petition in bankruptcy, and before the debtor can regularly be declared a bankrupt, the creditors, knowing all the facts, take judgment, and levy their execution upon the property attached, and the debtor is afterwards declared a bankrupt upon his petition, the judgment and levy are to be treated as a fraud upon the bankrupt act, designed to produce an undue preference, against the policy of that act. But in the present case, there is a still stronger ground, on which to rest the decision on this point. The judgment creditors by their judgments could acquire and hold no other title, than that which the bankrupt himself had, and held at the time of the levy, with all its infirmities and defects. Now, it is plain, that the conveyances made by the bankrupts (already referred to), were good and operative against the bankrupts themselves. See 1 Story, Eq. Jur. § 371, and authorities there cited. They are also good, at the common law, against all creditors generally, (although they gave preferences to certain creditors over the rest,) so far as respected all the creditors assenting thereto, unless they were not bona fide conveyances, but made with design to defraud creditors. Now, there is no ground to say, at least, upon any of the facts at present apparent on the face of this case, that these conveyances, as to the real estate in controversy, were not made bona fide, as mortgages or securities, or assignments, for the benefit of the defendants, and other creditors named therein. If they are to be treated as fraudulent at all, they are so only under the bankrupt act; and the judgment creditors cannot protect themselves, by attempting to avail themselves of such a fraud, under the bankrupt act, to defeat the very policy of the act itself. But this is not the whole ground of the objection.

From what has been already suggested in answer to the first question, these very conveyances were not only a fraud upon the bankrupt act, but they were actually acts of bankruptcy, for which proceedings might be had under the bankrupt act in invitum; and as acts of bankruptcy, the title of the bankrupts became thereby subject to the operation of the bankrupt act, and was divested eo instanti, by relation, when, and as soon as the debtors were declared bankrupts, and an assignee was appointed. In other words, being acts of bankruptcy, and void, and fraudulent under the bankrupt act, the assignee, as soon as he was appointed, became entitled to the property, for the benefit of the creditors generally, by relation, from the time when these conveyances were executed; so that his title would overreach that of any subsequent attaching creditors, who should consummate their attachments by a judgment and levy, since they could attach and levy only upon the right and title which the debtors possessed, at the time of their attachments.

It is very clear, that a judgment creditor does not stand, under a levy, in the same situation as a bona fide purchaser for a valuable consideration without notice. A judgment creditor is entitled to take in execution, under his judgment, all that then rightfully belongs to his debtor, and nothing more, inasmuch as he stands merely in the place of the debtor. This was expressly so held by Lord Cottenham, in Newlands v. Paynter, 4 Mylne & C. 408, which is a very strong case, and by Mr. Vice Chancellor Wigram, in Langton v. Horton, 1 Hare, 549, and Whitworth v. Gaugain, Eng. Jur. May 4, 1844, vol. 8, pp. 374, 376. A like doctrine was in effect held in Priest v. Rice, 1 Pick. 164, and Briggs v. French [Case No. 1,871]. The judgment creditors, then, in the present case could by their levy take no other or better title than that, which then belonged to the debtors, and that, as we have seen, was subject to be devested, and was subsequently devested in favor of the assignee under the bankruptcy. And besides; the judgment creditors made their levy with a full knowledge of the nature and character of these conveyances, and must be deemed to have notice of all the legal infirmities and consequences attached thereto. The case of Doe v. Britain, 2 Barn. & Ald. 93, is strongly in point to show that, after an act of bankruptcy, the title of the assignee takes effect from that act, so as to devest any subsequent disposition of the property made by the bankrupt. See, also, Doe v. Ball, 11 Mees. & W. 531, 533.

As to the fourth point, it is completely disposed of by the suggestions already made. Creditors taking under a conveyance, fraudulent under the bankrupt act, can be in no better predicament than the grantees, under the assignment made for their benefit. They must be taken to be perfectly conusant of the nature and legal operation of the title, under which they claim, and to have full notice of the facts, and of the law bearing on their title. They are, in no sense, to be treated as purchasers, but simply as creditors claiming under a defective title,—a title which must yield to that of the assignee in bankruptcy, who represents the rights and interests of all the creditors.

As to the fifth question, since the bankrupt is not before the court, I should feel a difficulty in deciding it, if the language of the second section of the bankrupt act did not seem to be peremptory upon the point. That section declares that "the person making such undue preferences shall receive no discharge under the provisions of the act." It has been already decided in answer to the preceding questions, that these conveyances did make an undue preference in fraud of the bankrupt act.

As to the sixth question, it seems to me, that the district court may, and should proceed to decide the four first questions, without waiting for the decision upon the right of the bankrupt to his discharge, if he applies for it. The other questions are properly before the court upon the present petition of the assignee.

I shall direct a certificate to be sent upon all the adjourned questions, according to the opinions herein expressed. The answers to all are in the affirmative.

Case No. 4,578.

EVERETT v. THATCHER et al.

[2 Flip. 234; 3 Ban. & A. 435; 16 O. G. 1046; Merw. Pat. Inv. 254; 7 Am. Law Rec. 197.] [1]

Circuit Court, N. D. Ohio. Sept. Term, 1878.

PATENTS—PATENTABILITY OF INVENTION—INSPECTION OF MODEL BY COURT — EFFECT OF DECREE TAKEN PRO CONFESSO.

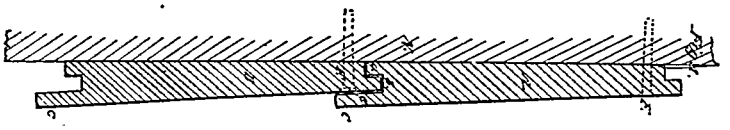
1. It is competent for the court to inspect a model exhibited in evidence, and, from such inspection, to decide as to the patentability of the alleged invention.

2. A decree of a circuit court taken pro confesso will not preclude full inquiry and investigation by another court.

In equity. Everett filed a bill in January, 1872, alleging the issue [on May 16, 1854] of a patent to William Baker for a new and improved clapboard joint; that in July, 1869, he acquired the exclusive right to make, use and sell the patent in Logan county; that since that time the defendants have made the patent joint and siding for houses, and that this patent was adjudged valid in the circuit court of the United States for the western district of Pennsylvania in November, 1870, in the case of Anderson v. Schmidt [unreported]. There was a prayer for in-

[1] [Reported by William Searcy Flippin, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. Syllabus from 3 Ban. & A. 435; statement and opinion, except as otherwise noted, from 2 Flip. 234.]

junction and account. The defendants filed an answer, denying that Baker was the first and original inventor; alleging that before May, 1854, the invention was known and used by John Rowze and E. L. Small and by others, and that the re-issued patent of [January 19] 1869 was void because it was enlarged so as to cover matters not embraced in the first issue, and which were previously known and used. Further, the allegation was made that the siding made by defendants was, since 1844, in common use. There was a replication to the answer. The original patent No. 10,903 is to be found in Patent Office Report for 1854, vol. 1, p. 368; and the figure of the patent joint is in volume 11, at p. 43. The re-issue No. 3,268, is set out in volume 11, p. 805, of the Patent Office Report for 1869.



[Drawing published from the records of the United States patent office.]

The claim in this is as follows: "(1) The construction of the joint of clapboards, or jointed siding, for houses and other buildings, in such manner, that the boards when laid on the frame, shall lie flat and solid for their whole width against the frame of the building, and at the same time shall preserve the appearance and advantage of clapboarding in front by the outer lip of the upper board, at each joint, overlapping outside the board next below it, for shedding the water as described. (2) The combination of the lock a, in the rear of the joint for holding the board to the frame at the lower edge as described with the extended lip C, Fig. 1, in front for covering the head of the nail, as described, the whole being constructed, combined, and arranged substantially in the manner and for the purposes herein set forth." In the schedule Baker claimed that he had "invented a new and useful improvement in the preparation and joining of clapboards, and the siding of houses and other buildings." He further claimed that the siding would "lie flat and solid against the posts and studs of the frame instead of touching the frame at their corners only, as is the case of ordinary clapboarding. At the same time they shall preserve outside the appearance and advantage of clapboarding by the outer lip on the lower edge of each board overlapping the full thickness of the upper edge of the board immediately below it for shedding the water. And second, by extending the outer lip of the upper board sufficiently for that purpose, may also cover the heads of the nails by which the boards are fastened to the frame, these being driven near the upper edge of the boards, where a small nail is sufficient, as the boards are thin at this point." The figure intended to illustrate the invention is then described. A number of depositions were taken by defendants which tended to show that ordinary tongued and grooved flooring had been used for weatherboarding houses before the patent; that siding, though not exactly the same, yet similar, had been used by different persons, and specimens were annexed to some of the depositions. A witness testified that he had built a house in 1844 in Hudson, Ohio, with siding like a specimen produced, the only difference between that and the patented article being in the bevel. The plaintiff read depositions, which tended to show that the specimens produced were different in principle from the patented article.

At the March term, 1878, the case was in part heard, and a portion of the evidence read, when the court intimated an opinion on inspection of a specimen of the siding described in the patent, without reference to other evidence, that it was not patentable; but continued the case with leave to file briefs.

Wm. Lawrence and Willey, Sherman & Hoyt, for complainant.

A. T. Brewer and Mr. Kaiser, for defendants.

[2][These made the following points:

[Wm. Lawrence, for complainant.

[I. The court cannot, on inspection, declare the siding or clapboard joint not patentable.

[1. The letters patent make it prima facie evidence that it is patentable. a. This is the effect of the patent law. Act July 4, 1836, § 15 [5 Stat. 123]; Act July 8, 1870, § 61 [16 Stat. 208], etc.; Union Paper Bag Co. v. Newell [Case No. 14,390]. b. It is on general principles. The law gives the commissioner of patents power to examine applications for issue patents. It presumes he has done his duty. "Omnia praesumuntur rite et solemniter esse acta," etc., is the maxim. It would violate all comity for the court to declare this patent void without evidence. c. It is decided by the courts. Reckendorfer v. Faber [92 U. S. 347]; American Nicholson Pavement Co. v. Elizabeth City [Case No. 311]; Stimpson v. Woodman, 10 Wall. [77 U. S.] 117; Westlake v. Cartter [Case No. 17,451]; Herring v. Nelson [Id. 6,424]. In this case the court say the patent is presumed valid, and can only be overthrown by "clear and satisfactory proof." The court can compare "patent papers," but can "not compare the patents" in conflicts. Westlake v. Cart-

[2] [From 7 Am. Law Rec. 197.]

ter [Case No. 17,451]. At most can only "examine models" to understand evidence. Birdsell v. Hagerstown Agricultural Implement Manuf'g Co. [Case No. 1,436]. The decision in Anderson v. Schmidt referred to in the plaintiff's bill, though the decree was on default, is a respectable authority. This patent was also litigated in the southern district of Ohio, and no question made as to patentability.

[2. There is neither pleading nor evidence directed to a denial of patentability. The answer practically admits the patentability.

[3. The court has a limited range of judicial knowledge. But this cannot extend to questions of non-patentability on inspection. 1 Best, Ev. (Morgen's Notes) 1 Am. Ed., from 6 London Ed., § 688; 1 Starkie, Ev. (3d Ed.) 524; Id. (4th Ed.) 816. In Manley v. Shaw, Car. & M. 361, a juror who knew a stamp on a bill to be a forgery was not permitted to act on his knowledge, and gave a verdict against his knowledge. It would be hazardous for the court to act on their own knowledge of the art in 1854, when the patent was granted. To do so would deprive parties of the benefit of a cross examination or the right to show the court mistaken.

[II. This siding is patentable. There is no evidence to deny its utility. There is none to disprove its patentability. The evidence all assumes its utility. The authorities show that a new combination of old and long known and used elements is patentable, if it has utility, however slight. Act July 4, 1836 (5 Stat. 118, § 6); Roberts v. Dickey [Case No. 11,899]; Woodman v. Stimpson [Id. 17,979]; Forbush v. Cook [Id. 4,931]; Clark's Steam & Fire Regulator Co. v. Copeland [Id. 2,866]; Sanford v. Merrimac Hat Co. [Id. 12,313]; Hailes v. Van Wormer, 20 Wall. [87 U. S.] 353; Reckendorfer v. Faber [supra]; Gilbert & B. Manuf'g Co. v. Walworth Manuf'g Co. [Case No. 5,418]; Heide v. Wirtz, 8 O. G. 817. Westlake v. Cartter [supra] holds patent valid, if "in any measure, however slight," it has utility. Lynch v. Dryden, 3 O. G. 407.

[III. The evidence shows the novelty and utility. It has been extensively used all over the country. This proves its utility. The want of novelty is not shown by the evidence that "similar" siding was used before this patent. Similarity is not identity. A bad plow is similar to a good one. The slightest variation in the combination of its parts may give it great utility. Even in a plea of misnomer, in criminal proceedings, the rule is "Similiter sonans non est idem sonans."

[The Summit county deposition is incompetent: 1. Because the knowledge and use referred to therein are not set up in the answer. [Seymour v. Osborne] 11 Wall. [78 U. S.] 517; [Ex parte McCardle] 7 Wall. [74 U. S.] 506; Russell & Erwin Manuf'g Co. v. Mallory [Case No. 12,166]. 2. Because a specimen of the boards or siding alleged to have been used is not produced. It is better original evidence than the opinion of the witness. It must be produced so other witnesses can give opinion as to it, and so the court can compare and judge, just as specimens of handwriting must be produced by experts. The witness only testifies to a conclusion, not to a fact or expert opinion.

[Willey, Sherman & Hoyt, for plaintiff.

[1. The adjudication in Pennsylvania should be conclusive of the validity of the patent, unless impeached, as it is not.

[2. The patent is prima facie evidence of novelty, and this can only be impeached by proof of prior use. The statute contemplates this by requiring notice as to the places where, and witnesses by whom, prior knowledge and use are to be proved. How can the court do what the parties cannot be allowed to do?

[3. Slight invention will sustain a patent. Whether there be invention or not is to be ascertained on proof. To decide on view would imperil inventions of great value where the differences were, perhaps, apparently but slight, or even not perceivable by a hasty glance.

[4. As to utility, the test is whether the thing to be made is useful; of that there can be no question here.

[A. T. Brewer, for defendant.

[I. The patent is void because it claims too much in (1) claiming the feature of laying flat and solid; (2) in claiming the lock a, for holding the boards on the frame, which is as old as common flooring. Patent Act of 1836, § 5460; Act 1837, §§ 7-9 [5 Stat. 191]; O'Reilly v. Morse, 15 How. [56 U. S.] 122. Neglect to file disclaimer a defense. Wyeth v. Stone [Case No. 18,107]; Brunton v. Hawkes, 4 Barn. & Ald. 549; Hovey v. Stevens [Case No. 6,745]; Lowell v. Lewis [Id. 8,568].

[II. Assuming that the bevel shown in Fig. 3 of the specification, is new, it is not sufficient to support a patent. It is a mere change of form. Hall v. Wiles [Case No. 5,954]; Curt. Pat. § 50.

[III. The bevel is not new. This is shown by Webb and Coen's rejected application, which is admissible as showing the state of the art. Pettibone v. Derringer [Case No. 11,043]; Vance v. Campbell, 1 Black [66 U. S.] 427. Substantially similar bevels existed before this, which defeats patent. Evans v. Eaton [Case No. 4,560]; Howe v. Abbott [Id. 6,766]; Brooks v. Bicknell [Id. 1,944]; Gorham Co. v. White, 14 Wall. [81 U. S.] 511.

[William Lawrence, in reply.

[The patent is not void because it claims too much.

[I. There is no evidence that this form of

siding ever laid flat. Ordinary flooring used as siding did lay flat, but the novelty of this patent is that a siding may lay flat, in which, as the patent claim is, "the outer lip of the upper boards at each joint overlapping outside the board next below it (has the effect of) shedding the water." Now such a board as this never did lay flat before. How can the court say so without evidence? The same may be said of "lock a for holding the boards in the frame." Besides, this patent is for an improvement and it is such.

[II. It is said the bevel "is a mere change of form," not patentable. But the new combination is patentable, as shown by authorities cited.

[At Sept. term of court, 1878.

[William Lawrence, for plaintiff (orally).

[The court cannot, on inspection of specimen produced, declare it is not patentable.

[1. All usage is against it. If there be any case where the court has ever done this, I have been unable to find it. I venture to say there is none.

[2. If the patentable product has utility and novelty, it is patentable. Its utility is not denied. It is apparent on inspection. Ordinary clapboards shed water, but they do not lay flat. This does both. Ordinary jointed flooring as siding will lay flat, but it does not shed the water. In this patent the nail heads are covered and saved from oxidation; they are not in flooring or ordinary clapboards. A smaller nail can be used with the patent, because, where the nail is driven, the board is thin. It is the most useful, and most extensively used siding for houses in the whole country. Its novelty is not a question of law, but one of fact. Upon the authorities cited, a new combination of old and well-known instrumentalities, if it produce a new or "materially better" effect, is patentable. How can the court know without evidence that prior to the date of this patent this combination had been known and used? The evidence fails to show it. The court cannot know, what cannot be proved. The patent is evidence of the fact that in 1854 this invention had not been previously known or used.

[3. Upon the authorities cited this product is prima facie patentable, and this presumption can only be overthrown "upon clear and satisfactory proof." When the specimen is produced it is made by law evidence per se of patentability and validity. The patent is perfect infallibility in law until disproved by clear evidence. The knowledge of a judge is not evidence. Evidence can be looked into, questioned, cross-examined. The law, says the court, looking at the specimen, must, in the absence of all other evidence, say "it is patentable." This legal quality inheres in it as an instrument of evidence. Now to hold that the court can look at it and say it is not patentable, is to affirm that the law may require the specimen to testify patentability and validity, and that the court may declare this testimony not true. It is the duty of the court to say what the law says, not what the court may think.

[4. The law appoints the officers of the patent office as the highest experts known to the law. The court are not presumed to be experts. For the court to declare the judgment of the patent office wrong is to annul the highest experts' evidence by the opinion of those whom the law does not recognize as experts. This judgment of the patent office has been three times declared in 1854, 1863, and 1869. Upon the authority of Manley v. Shaw, Carr. & M. Rep. 361, it is the duty of the court to take the opinion of these experts, even if the court, as a matter of fact, know they are wrong.

[5. The court cannot declare the patent void without evidence except by judicial knowledge. Judicial knowledge has never yet been extended to cover the knowledge which experts only have. When or where was it so extended? See Steph. Dig. Ev. 62; Brown v. Piper, 91 U. S. 37; 1 Greenl. Ev. § 3, etc. And judicial knowledge has never yet in any book been extended to a question of fact as to the date when a valuable invention was first used.][3]

Before BAXTER, Circuit Judge, and WELKER, District Judge.

BAXTER, Circuit Judge. When this case was before us in March last, we inspected the model of the invention and intimated an opinion adverse to complainant. But his counsel are now insisting that we ought not to base our judgment in this case upon a personal inspection of the model, because they say it is not one of the things of which the court can take judicial notice. The proposition is certainly correct. We cannot take judicial notice of the model, nor have we assumed to do so. The patent is prima facie evidence of its own validity, and if nothing more appeared in the case, we would declare it valid and protect it against infringement. But it is only prima facie good and not conclusive. The responsibility of adjudicating it valid or invalid is with the court, and we must do this upon legitimate evidence legally adduced in the case. The model is competent evidence, and has been exhibited as such by the complainant.

If the court is not authorized to inspect and pass judgment upon it, why is it introduced? It is a prevalent, if not universal, practice for the courts in litigation of this character to examine such models. And why may they not do so? Witnesses may be called to examine models of inventions as experts and give their opinions of their merits. And may

[3] [From 7 Am. Law Rec. 197.]

not judges, upon whom the law imposes the duty and responsibility of deciding the question, exercise their natural senses in the same way and to the same extent? It seems to us that judges, sitting in judgment upon the law and the facts, and called upon to decide whether a piece of coin offered in evidence and produced to the court is genuine or spurious, are at liberty to examine the coin for themselves, and apply such tests as are ordinarily applied, and exercise their own judgment in the determination of the question, and in doing so, they would not be exceeding their judicial functions, because the coin thus exhibited is made evidence before them. And if it were made a question of fact, whether a yard-measure produced before a court was greater or less than the legal length, the court would have the right to decide the disputed fact by an actual measurement. And if it is competent for a court to inspect a piece of coin or measure a yard-stick offered in evidence, may we not with equal propriety and under the same rules of evidence examine the model exhibited in evidence by the parties to this suit? The decisions of the supreme court afford numerous instances of criticisms of models exhibited before that court. The model offered in this case is not so complex as to be beyond the comprehension of the court. It is simply a piece of weather-boarding, grooved on one edge and beveled on the other. The invention is not such a new and useful improvement in that branch of mechanism as in our judgment makes it patentable. It, therefore, belongs to the public, and we think the complainant has not acquired such an exclusive right as entitles him to the protection of this court.

There is, however, other testimony on file showing the state of the art at the time which supports the view we have taken. But as we are entirely satisfied, from the personal inspection we have made, that the pretended invention is not patentable, we are content to rest our judgment on this evidence alone, and do not, therefore, desire to hear the evidence read. But in order to preserve the rights of defendants, we will consider it as having been read and as a part of the files of the case.

It has been urged that the patent involved has been adjudged valid by the circuit court of the United States for the western district of Pennsylvania, and this adjudication is relied on as authority here. The judgment of that court, if based upon a bona fide contest, and after careful consideration, would be entitled to great respect. But, as we are advised, that judgment was rendered on a pro confesso without answer or hearing, and upon the complainant's statement of his case. Such decrees are rendered upon mere motion, without investigation, and are not such adjudications as to preclude full inquiry by us.

A decree will be entered dismissing complainant's bill with costs.

Case No. 4,579.

In re EVERITT.

[9 N. B. R. 90.][1]

District Court, S. D. Georgia. 1873.

BANKRUPTCY — CONSTITUTIONALITY OF ACT OF MARCH 3, 1873—HOMESTEAD EXEMPTION — PROTECTION TO BANKRUPT'S VENDEE — WHO MAY INVOKE.

1. Amendatory act of March 3, 1873 [17 Stat. 577], *held* constitutional as to all cases where petition in bankruptcy is filed after the passage of the act.

[Cited in Darling v. Berry, 13 Fed. 670.]

2. Where, prior to filing a petition in bankruptcy, the debtor has disposed of a homestead exempted to him under the state laws, and which, if in his possession, would be protected under the act of March 3, 1873, against liens of prior judgments, he cannot invoke the protection of the bankrupt act in favor of his vendee.

In bankruptcy.

ERSKINE, District Judge. On the 30th of September, 1873, Jared Everitt filed his petition in bankruptcy in this court and was adjudged a bankrupt; and on the same day he also filed here a petition, partaking of the nature of a bill in equity, asking for injunction against Johnson, Shepperd & Saunders, of the state of New York, their attorney, A. P. Wright, resident of this district, and one Luke, sheriff of Thomas county, in this state. Everitt, in his bill, states in substance that he is a bankrupt, and that on the 2d of October, 1869, he procured the setting apart as a homestead for himself and family, lots of land number eighty-one, containing four hundred and ninety acres; also, half of lot of land number eighty-two, containing two hundred and forty-eight acres, said land being situate in Thomas county. That the homestead was set apart by the ordinary, under the constitution and laws of the state of Georgia. He annexes a plot of these lands to his petition. That said Johnson, Shepperd & Saunders, at the June term (but the year is not given) of the superior court of Thomas county, by their attorney, A. P. Wright, obtained a judgment against him, the said Everitt, for eight hundred and nine dollars and interest from January, 1861. That said Luke, the sheriff of Thomas county, has levied an execution, issued upon said judgment, on said lands so set apart as a homestead to him and his family, and has advertised the same to be sold on the first Tuesday in October, 1873. The sale day being very near at hand, and to prevent even the possibility of irreparable injury to the said Everitt, a provisional or temporary injunction was granted on the 1st of October last, as prayed for in the bill, although at the time there was doubt in my mind as to whether it ought to be granted. The injunction is now sought to be dissolved, on the filing of a joint answer and affidavits, and the petition dismissed.

[1] [Reprinted by permission.]

Two questions arise: First, whether, looking to the allegations contained in the bill or petition itself, and schedule B, 1, in the petition of Everitt praying to be declared a bankrupt, the temporary injunction ought to have been awarded; and, secondly, assuming the correctness of the issuing of the injunction, whether it ought not now be set aside, and the petition dismissed.

Defendants answer the allegations of Everitt, admitting that he is a bankrupt, that the property named in his petition or bill was set apart to him in 1869 by the ordinary, and that the defendants, Johnson, Shepperd & Saunders, did obtain the judgment for eight hundred and nine dollars in 1861, and that the defendant, Luke, the sheriff, did levy the execution flowing from said judgment on the land so set apart as aforesaid, and did advertise the same for sale on the first Tuesday in October last; but they aver that prior to said levy the said Everitt and his wife, Caroline A. Everitt, did, on the 4th of January, 1871, grant, sell and absolutely convey to one Jesse Aldridge, of Thomas county, the south half of the said lot eighty-one and the north half of lot eighty-two, containing four hundred and ninety acres, part of said homestead, which conveyance was consented to and approved by the ordinary of Brooks county; and defendants attach to their answer a copy of said deed; the purchase money mentioned in said deed being one thousand six hundred dollars, and which is acknowledged to have been paid to Everitt by said Aldridge. As to the residue of the land so set apart, as aforesaid, defendants say that Everitt, before he filed his petition to be declared a bankrupt, did convey to one Wm. Davis a full legal or equitable title in and to all of said residue of said lands, but the title is not of record; and that they are credibly informed that said Davis has paid to Everitt all the purchase money for this land, and holds the bond of Everitt for making titles thereto; and that Davis was given notice of the existence of the judgment. They append to the answer the affidavits of J. L. Seward and R. W. Fasiori, who swear that Everitt formerly owned said lot eighty-one, and half of said lot eighty-two, and that the same have been sold to said Aldridge and said Davis, and that the land has been in possession of said last named persons for two years or more.

Turning to schedule B, 1, it will be found that in 1871 these very lots of land so set apart as a homestead, were conveyed to Aldridge and Davis, which fact stands disclosed before the court. Not only lot eighty-one, and half of lot eighty-two were set apart to him by the ordinary, but his schedule B, 1, shows that other land and tenements were also set apart as part of his homestead, and which latter property he says was, in 1871, transferred, by permission of the ordinary, by him to one McLarty; he estimates the value of eighty-one, and half of eighty-two, at seven hundred and seventy-two dollars, and the land sold to McLarty at five hundred dollars. And I here reiterate the opinion—an opinion recently expressed in a case which was before me in the northern district—that the ordinary had no authority of law to set apart, so as to exempt from levy and sale under a judgment and execution when the judgment was rendered prior to the passage of the state constitution of 1868, and the acts of the legislature of Georgia passed in 1868 and 1869, any property whatever, owned or possessed by Everitt. The judgment of 1861 was a lien, from its rendition, on all his estate, real and personal, and to allow the ordinary to set it aside would be impairing the obligations of contracts by state authority, and directly to the teeth of the constitution of the United States, and the case of Gunn v. Barry, 15 Wall. [82 U. S.] 610. But, notwithstanding a state cannot impair the obligation of contracts, there can be no question that such a power resides in congress under the provision to the constitution which confers upon the national legislature authority to establish uniform laws on the subject of bankruptcies throughout the United States. See In re Smith [Case No. 12,986], and the authorities cited in that case.

It is quite unnecessary to amplify these views. I may, however, remark that, in my judgment, Gunn v. Barry cannot be invoked as having any bearing on or application to laws of congress, especially to laws on the subject of bankruptcies. I think that the judgment in that case was directed solely against a state constitution and laws which had violated the inhibition in the constitution of the United States, in passing laws impairing the obligation of contracts.

The first section of the ninth article of the constitution of Georgia of 1868 provides that "each head of a family, or guardian or trustee of a family of minor children shall be entitled to a homestead of realty to the value of two thousand dollars in specie and personal property to the value of one thousand dollars in specie, to be valued at the time they are set apart, and no court or ministerial officer of this state shall ever have jurisdiction or authority to enforce any judgment, decree or execution against said property so set apart, including such improvements as may be made thereon, from time to time, except for taxes, money borrowed, or expended in improvement of the homestead, or for the purchase money of the same, or for labor done thereon, or material furnished therefor, or removal of encumbrances thereon." Like language is employed in the first section of the state act of October 3d, 1868. A majority of the judges of the supreme court of Georgia gave these provisions a retrospective instead of prospective effect. This construction, the supreme court of the United States, in Gunn v. Barry, said, impaired the obligation of contracts.

Had the supreme court of the state decided that these provisions were wholly prospective in their effect, creditors would have been prewarned, and would have contracted with reference to these state exemption laws, as found on the statute books. Although no state, as already remarked, can impair the obligation of contracts, nevertheless congress, in enacting bankruptcy laws, under the power conferred on it by the constitution, may not only impair the obligation of antecedent contracts, judgments or decrees, but obliterate them entirely; and in the present bankrupt law—more especially in the amendatory act of March 3, 1873, congress has done so in express terms. This amendment declares that the exemptions allowed the bankrupt, by act of June 8th, 1872 [17 Stat. 334] "shall be the amount allowed by the constitution and laws of each state respectively, as existing in the year 1871, and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgments or decrees of any state court, any decision of such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

None of the property exempted to the bankrupt—by any exemption laws—vests in the assignee; property excepted or exempted shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee. "And," says section 14, Act 1867 [14 Stat. 517], "in no case shall property hereby exempted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." Therefore, if an execution issuing upon a judgment of a state court rendered either before or after the passage of the act just quoted, and the sheriff levies it upon land of the defendant in execution, of a value not greater than two thousand dollars in specie, and the defendant then goes into bankruptcy, and holds the land exempted under the state of Georgia exemption law, in existence in 1871, a sale made subsequently by the sheriff would not displace or affect any interest, right or title of the bankrupt whatever, or convey any right or title to a purchaser at the sale; for notwithstanding the levying of the execution before the filing of the petition in the court of bankruptcy may have given the sheriff a special property, yet as soon as the debtor files his petition in bankruptcy, this special property would, by operation of the bankrupt law itself, be divested out of the sheriff, so far as the homestead or exempted land is concerned. And the same rule would of course obtain where the levy had been made on personal property of value not exceeding one thousand dollars in specie.

If the exempted property of the bankrupt has been wrongfully seized on execution, the bankrupt has the same rights before the state tribunals as any other person whom it is sought to deprive of a homestead. In re Hunt [Case No. 6,883].

The constitutionality of the amendatory or declaratory act of March 3, 1873, cannot, I think, be doubted, at least when it is applied to bankruptcy proceedings which have arisen since its passage; and it is a law as binding on the state courts as on the national, for the constitution and laws of the United States, made in pursuance thereof, are the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding. Const. art. 6, § 2.

No one can rise from the perusal of the petition or bills filed by the complainant or petitioner, Everitt, the bankrupt, with the pleasant satisfaction that the tenor of the language used by him in his petition is ingenuous. The allegations in the petition are met and successfully overcome by the answer of the defendants, and the affidavits of Seward and Fasiori. But if I am singular in this view, then, turning to the bankrupt's statements in his schedule B, 1, it will be found that he has conveyed or disposed of his interest in these lands as far back as 1871, to Aldridge and Davis; and now he claims them as exempted—as a homestead—under the state exemption law of 1871. This cannot be allowed; he, at least, is estopped from setting up title to them.

The temporary injunction (improvidently granted, I think) is dissolved and the petition dismissed.

EVERMAN, The J. W. See Case No. 7,591.

Case No. 4,580.

In re EVERSON et al.

[1 MacA. Pat. Cas. 406.]

Circuit Court, District of Columbia. June, 1855.

PATENTABLE INVENTION — DEGREE OF INGENUITY REQUIRED—DOCK-PUMPING APPARATUS.

[1. The degree of ingenuity required to make out patentable invention is shown in cases where the change and the consequences resulting therefrom are such as to show the exercise of inventive faculty, though in fact the change was the result of accident. But, if the change is merely the employment of an obvious substitute, it will be considered a mere unsubstantial or colorable variation, or a double use, which is not patentable.]

[2. There is no invention in so changing the parts of an apparatus for pumping out the sections of a floating dock, which sections are in contact with each other, so that such sections, or any one of them, may be pumped out by a single first mover, even when they are arranged at any desired distance from each other.]

[Appeal from the commissioner of patents.]

[In the matter of the application of Morgan Everson and Daniel M. Ricard for a patent for improved dock-pumping apparatus. The commissioner rejected the application, and petitioners appeal.]

Z. C. Robbins, for appellant.

MORSELL, Circuit Judge. They state the nature of their invention to "consist in an arrangement of transverse shafts, levers, connecting bars, attaching rods, pumps, and suction pipes upon a section of a sectional dock, in such a manner that a single engine or other motor can be made to pump out any number of sections, whether said sections be arranged close to each other or at any desired distance from each other, as circumstances may require, in the elevation of large or small vessels." They say: "What we claim as our invention, and desire to secure by letters patent, is the arrangement of parts by which we are enabled by a single first mover to pump the water from either side or both sides of any number of sections of a sectional dock, when arranged at any desired distance from each other, substantially as herein set forth, viz.: By means of the pumps e e f f, and the suction tubes f f, the side shafts D D, and their levers C C and h h, the central shaft E and its levers F and h, the detachable rods i i, and the actuating adjustable bars G G, or their equivalents, arranged and operating substantially as herein set forth." The commissioner in his opinion says: "The idea of constructing a floating dock in sections is by no means new, nor do the applicants claim to have originated the idea of dividing each section into two separate compartments for the purpose of more accurate adjustment. They only claim the contrivances and arrangements by which that adjustment is made, so that all may be moved by a single engine or other motor. The idea of using a single motor for this or analogous purposes is not new. (See the rejected application of Clare and Brown, among others.) The question presented is whether there is a patentable novelty in the particular devices and contrivances used in the present case. * * * Nothing more than ordinary skill and ingenuity would be required in that case, and the contrivance of the applicants is such as any competent mechanic acquainted with the subject of dock-building would have been likely to have made."

The first reason of appeal is because the commissioner overlooked what the appellants suppose the gist of their invention consists in; that is, that it allows the respective dock sections with which it is combined to be placed either in contact with each other or at any desired distances from each other. The second is because the commissioner's decision is based upon the ground that in contriving and perfecting their invention they have not exercised extraordinary ingenuity. Upon due notice having been given to the parties interested of the time and place appointed by me for hearing the appeal, the examiner on the part of the office produced the original papers and evidence in the cause, with said reasons of appeal and the grounds of the commissioner's decision in writing; and the appellant by his counsel filed his argument in writing, and submitted the said cause. As to the principle involved in the reasons of appeal relating to the degree of ingenuity to be manifested in the invention, the rule of patent law, as I understand it, is that in cases where the utility of the change and the consequences resulting therefrom (in case of a machine) are such as to show that the inventive faculty has been exercised, though in point of fact the change was the result of accident, the requisite test of a sufficient amount of invention may exist. But if, on the other hand, the change consists merely in the employment of an obvious substitute, the discovery and application of which could not have involved the exercise of the inventive faculty in any considerable degree, the change will then be treated as merely an unsubstantial, colorable variation, or a double use, and of course not patentable.

In the present instance, I think it appears from the drawings exhibited to the patent office on other occasions of applications for patents, and shown in this case, that an invention for pumping out the sections of a floating-dock with the required adjustments, when in contact with each other, by a single first mover, with appropriate arrangement of parts, is not new in a patentable sense; and although in the present instance there are changes in the arrangement of the parts, so as to effect the same thing when they (the connected dock sections), or any one of the number, are arranged at any desired distance from each other, I take this feature to be incidental to, and not a substantial change in, the principle; and generally, with respect to the changes relied on, they appear to me to be only additions of well-known agents of the same kind used in analogous cases with like effect. I think, therefore, that the decision of the commissioner was correct; and I do hereby affirm the same.

Case No. 4,581.

Ex parte EVERTS.

[1 Bond, 197;[1] 7 Am. Law Reg. 79.]

Circuit Court, S. D. Ohio. Oct. Term, 1858.

HABEAS CORPUS—AUTHORITY OF FEDERAL COURTS—JURISDICTION—PARENT CLAIMING CUSTODY OF CHILD—DIVERSE CITIZENSHIP — JUDICIARY ACT OF 1789.

1. The first clause of section 14 of the judiciary act of 1789 [1 Stat. 81], which provides that the supreme, circuit, and district courts of the United States, "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," does not authorize said courts to issue a habeas corpus,

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

unless it is necessary in aid of jurisdiction, in a case or proceeding there pending.

2. The case of a father claiming the custody of an infant child, is not one in which a habeas corpus can issue, by a court of the United States, as ancillary to the exercise of its jurisdiction, under the above-cited clause of the act of 1789.

3. Nor can a circuit court of the United States take jurisdiction under section 11 of the act of 1789, although the father is a citizen of another state, as the matter in dispute has no pecuniary value, and can not be estimated in money.

M. H. Tilden, for relator.

Johnson & Carroll and Mr. Howard, for respondents.

OPINION OF THE COURT. Truman C. Everts, the relator, has filed his petition in this court, for a writ of habeas corpus, averring that he is a citizen of Kentucky, and that in 1849 he was married at Dayton, Ohio, to Eloise H. Morrison, and that in September, 1850, a daughter was born to the parties, named Bessie; that in September, 1856, by reason of the improper conduct of the wife, a separation took place between the parties at Toledo, Ohio, about which time the wife admitted that she had been guilty of adultery; that the said Everts then took charge of the daughter, and removed to the city of New York, where the child was placed in the keeping of his relatives, who, from their wealth and respectability, were fitted to take charge of her nurture and education; that she was placed at school, and was in all things well cared for, happy, and making rapid progress in her education; that in June, 1858, upon the petition of his wife, a proceeding of which he had no notice, and upon allegations which were altogether false, the court of common pleas of Montgomery county, Ohio, rendered a decree annulling the marriage contract between the parties; that while the said Everts was absent in Kentucky, his wife and other persons clandestinely, forcibly, and against the will of the child, abducted her from the school at which she had been placed, and the custody of those having charge of her, and removed her to Dayton, where she is forcibly and unlawfully detained by Mrs. Everts, Lenox Compton, and Fielding Lowry. The prayer of the petition is, that a writ of habeas corpus issue, requiring the said parties forthwith to produce the said child, with the cause of her detention; and that on the final hearing, she may be restored to the care and custody of the petitioner.

A writ of habeas corpus issued from this court, according to the prayer of the petition, which has been served on the parties; and they have appeared and filed their answers. Lowry states, in his answer, that the child is not, and has not been, since the filing of the petition, in his custody or under his control. Compton answers, in substance, that he is the stepfather of Mrs. Everts, who brought the child to his residence, near Dayton, in June last, where she has since remained with her mother; and that he is willing, and has the pecuniary ability to take care of and provide for her till she is of age. He does not claim the right to detain the child, and alleges that she there is, and has been, under the exclusive control and authority of her mother.

Mrs. Everts answers, denying all the allegations of fault or impropriety of conduct on her part, as set out in the petition. She admits the custody of the child, and claims the legal right to retain her in charge, as her mother; and also on the ground of the decree of the court of common pleas of Montgomery county, dissolving the marriage contract between her and her husband, and giving to her the custody of the child. She exhibits the record of the proceedihgs in her application for divorce, from which it appears that Everts being, as averred, a resident of the city of New York, a summons and copy of the petition was addressed by mail to him at New York, and publication made of the filing of the petition in a newspaper printed at Dayton, in accordance with the statute of Ohio. She also avers that the facts set forth in her petition as the grounds of the decree are true, and were substantiated by sufficient and credible testimony, and that there was no fraud or illegality in the proceedings resulting in such decree. [This statement presents, briefly, the points arising in this unfortunate controversy, as exhibited in the petition of the relator, and the answers of the respondents. Upon these, the inquiries are: First, is the decree of the court of common pleas of Montgomery county, dissolving the marriage contract between the parties, and awarding alimony and the custody of the child to Mrs. Everts, so far conclusive as to preclude inquiry into the facts on which the decree was based, and the evidence touching the question, whether the husband or the wife is the more suitable person to have the custody and control of the daughter; and, second, if the decree is not conclusive, whether from the facts before the court, there is sufficient warrant for the order prayed for by the relator, that the child be taken from the possession of the mother, and transferred to that of the father.] [2]

Upon the facts thus presented, the court must first consider the grave question of its jurisdiction to take cognizance of this case, and make the order prayed for by the relator, even conceding the case made by him in the petition to be sustained by the evidence. It is strenuously insisted by counsel that this jurisdiction does not exist, and that, therefore, it is the plain duty of the court to dismiss the petition. It is, perhaps, to be regretted that this question was not made upon the application for the writ, and before the parties had incurred the expense of taking

[2] [From 7 Am. Law Reg. 79.]

the great mass of evidence on file. But it is not too late now, as the want of jurisdiction is not waived by the appearance of the parties, and the presentation of the defense on other grounds.

The question indicated has been argued at great length, and with much ability. In support of the jurisdiction of the court, probably every authority bearing on the question has been adduced, and the cases and principles referred to have been amplified and enforced with great ingenuity and learning. And I enter upon its consideration with a proper sense of its importance, and of the responsibility assumed in its decision. I may add, that I deeply regret the unavoidable absence of the circuit judge at the hearing in this case, which has deprived the parties of the benefit of his great learning and mature judicial experience in the determination of this question.

In the outset, I may remark that it is distinctly conceded by the counsel for the relator that the court must find its warrant for the jurisdiction claimed in the constitution and laws of the United States. No principle can be more definitively settled than that the courts of the Union, from the highest to the lowest, are courts of limited jurisdiction, in the sense that they can call into action no powers not expressly conferred by law, or incidental to those granted. Thus, in Ex parte Bollman, 4 Cranch [8 U. S.] 75, Chief Justice Marshall says: "Courts which originate in the common law, possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction." This principle, thus established at an early day by the supreme court, applicable to the jurisdiction of the courts of the United States, has, in numerous cases, received the sanction of that court.

The question now under consideration must, therefore, be decided with reference to the legislation of congress, defining the jurisdiction of the federal courts in cases of habeas corpus. [But, before noticing the statutory provisions on this subject, it may be well to state the precise character of the detention or imprisonment alleged by the relator to be unlawful, and as a remedy for which the action of this court is sought. The case there briefly stated, as made in the relator's petition, is that of a father living separate from his wife, asserting a legal right to the custody of a female child of the age of eight years, who, he alleges, is illegally detained by the mother. For the purposes of the present inquiry, it is not material to refer to the facts involved in this unfortunate domestic controversy. The sole question now under consideration is, whether, supposing the case as presented in the petition of the relator to be sustained by the evidence, the interposition of this court, through the writ of habeas corpus, can be legally invoked.] [2]

The claim for the exercise of jurisdiction in this case is based mainly on section 14 of the judiciary act of 1789 (1 Stat. 81). This section provides "that all the beforementioned courts of the United States (the supreme court and the circuit and district courts) shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment: provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The question arising on the clause of the foregoing section, granting the power to the courts of the United States to issue the writ of habeas corpus, is, whether the limitation expressed in the words, "all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions," is applicable to the writs of scire facias and habeas corpus, previously named. The learned counsel for the relator insists that the power to grant the two writs specifically named, is distinct and independent, and not affected or controverted by the limitation to "other writs" necessary to the exercise of the jurisdiction of the courts. On the other hand, it is claimed, in an argument of great force, that the words of limitation referred to, apply as well to the writs designated as to all other writs; and that the writs authorized under that clause are such only as are necessary to the just exercise of the jurisdiction of the courts. If this construction of the statute is sustainable, it is clear this court has no authority to act in the case made in this petition, and must necessarily order its dismissal.

It is not a matter that should excite surprise, that no case is found in the reports of the supreme court of the United States, in which an authoritative construction has been given to the clause of the statute under consideration. The supreme court, as decided in Ex parte Barry, 2 How. [43 U. S.] 65, has no original jurisdiction under that clause to issue the writ of habeas corpus. While, therefore, there have been numerous applications to that court for the writ of habeas corpus, they have been based on the latter clause of the section, and have involved only the exercise of the revisory power of the court, in passing on the legality and validity

[2] [From 7 Am. Law Reg. 79.]

of commitments and imprisonments under the orders or process of inferior courts.

In the case of Ex parte Bollman, before referred to, this question was not involved; but Chief Justice Marshall, in giving the opinion of the court, refers to it, though he does not expressly decide it. He remarks, that "the only doubt of which this section (14) can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of deciding. It has been urged that in strict grammatical construction, these words refer to the last antecedent, which is 'all other writs not specially provided for by statute.'" And he adds, "this criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt is, that the true sense is to be determined by the nature of the provision and by the context." This is a clear intimation, that as a question of mere grammatical construction it is not free of doubt, and availing myself of the hint given by the chief justice, I have endeavored to attain a conclusion as to the sense of the clause from its nature, and its connection with other parts of the section.

And, in the first place, it is worthy of remark that the power to award the writs of scire facias and habeas corpus, in the first part of the section, is "to all the beforenamed courts of the United States," meaning the supreme, circuit, and district courts. It is to be noticed that all the courts are placed on a footing of equality as to their power to grant the writs named or referred to. Now, it is most obvious that the grant of this power to the supreme court is not within the cases enumerated in the constitution of the United States, in which that court can exercise original jurisdiction. That court, in the case Ex parte Barry [supra], expressly decided that it had no original jurisdiction to issue the writ of habeas corpus, in the case of a child alleged by the father to be illegally detained in the custody and possession of the mother. There is no room for a doubt as to the correctness of this decision. That court long since decided that congress could not confer upon it original jurisdiction in any case not within the specifications in the constitution.

On the ground taken by the counsel for the relator, the clause of the statute under consideration authorizes all the courts named to grant the writ of habeas corpus in any case where personal restraint or imprisonment of the person is alleged, without restriction or limitation. Our present inquiry is, whether it was within the intention of the act of congress of 1789 to clothe those courts with such a jurisdiction. And it seems to the court, in taking the affirmative of this inquiry, we charge on that congress the folly of attempting to confer original jurisdiction on the supreme court, in palpable conflict with the constitution of the United States. I do not suppose that such a suspicion can attach to the distinguished statesmen who composed that congress. It was the first congress convened after the adoption of the constitution of the United States, and not a few of its most influential members had been prominent in the convention that framed that instrument. Of these men it may be well said, that for sagacity, statesmanship, and profound learning they have had no superiors in any after period of our history, and we should be slow in admitting that they could have sanctioned an intended violation of the constitution. At all events such a conclusion should rest on a firmer basis than a doubtful question of grammatical construction.

But there is no occasion for any inference in the least discreditable to the intelligence or purity of the congress of 1789. No violence was intended, and in my judgment none is committed on the constitution by the clause of the statute under consideration. Its language fairly imports a power in the courts of the United States to grant the writ of habeas corpus and all other writs proper and necessary in the just exercise of their jurisdiction. And I can see nothing in the grammatical construction of the clause that calls for any other sense than I have indicated. There was an apparent propriety in designating the important writs of scire facias and habeas corpus; and then, to avoid prolixity and the useless specification of all the other writs and processes necessary to the salutary exercise of the jurisdiction of the courts, to adopt the comprehensive form of expression, "all other writs." These latter words, by every rule of grammatical construction, are connected with and refer to the writs of scire facias and habeas corpus before named.

There is another consideration in the construction of the statute which is entitled to great weight. As already noticed in the first clause of the section, the power to grant the writ of habeas corpus is to the courts and not to a single judge; while in that clause of the section authorizing the writ "for the purpose of an inquiry into the cause of commitment," any judge of any of the courts is empowered to award it. There is a plain and obvious reason for this distinction. If the power to grant a habeas corpus is given in the first clause of the section only where necessary to the exercise of the jurisdiction of a court, there is great propriety, if not necessity, that the writ should be ordered by the court and not by a single judge. The clause, beyond question, contemplates the grant of the writ for the enforcement of jurisdiction in some proceeding or case pending in the court in which the writ is prayed for. And that court alone, in its capacity as a court, and not a single judge, is best

qualified to decide, judicially, whether the writ is necessary to enforce its jurisdiction. On the other hand, when the great prerogative writ—the writ of liberty—the writ of habeas corpus ad subjiciendum—authorizing an inquiry into the cause of commitment, provided for in the second clause of the statute is referred to, any judge of any of the courts is empowered to grant it. The reason of this is, that when a case of unlawful imprisonment, under color of legal process or authority exists, there is a necessity for prompt and speedy action; and hence the party is entitled to be heard before a single judge, without waiting a regular session of a court, which might be months distant, and at a point remote from the place of the imprisonment of the party applying for deliverance. That this was the writ contemplated by the authors of the constitution in the clause which prohibits its suspension except in certain emergencies, is quite obvious. They could have no reference to the writ as used to relieve from either actual or constructive restraints or imprisonments of the person resulting from the relations of master and servant, guardian and ward, parent and child, or husband and wife. It was doubtless intended to protect against those invasions of personal liberty which are perpetrated under color of legal or official authority. The framers of the constitution had in view those outrages and usurpations which characterized the worst periods in the history of the British nation, by which the personal liberty of the citizen was invaded, from political considerations, but with the forms of legal authority. As a remedy for such abuses of power, and disregard of legal and constitutional rights, the judges of the courts of the United States are invested with the authority to issue the writ of habeas corpus and inquire into the cause of commitment.

And, under the clause referred to, there is no limitation to the power of the judges except that contained in the proviso which prohibits them from granting a habeas corpus where the imprisonment is by state process or under state authority. As before intimated, the numerous authorities cited by counsel refer to cases where the writ has issued under the clause here referred to; and these cases need not therefore be specially noticed, as they have no application to the question under consideration.

It is claimed, however, that there are other cases which sustain the jurisdiction now asserted for this court. The case of U. S. v. Green [Case No. 15,256] has been cited in support of the position assumed by the counsel for the relator. It was a case of habeas corpus, presenting a question as to the rightful custody of an infant daughter, alleged to be wrongfully detained by the grandfather of the child. It is true the writ in that case was allowed by Judge Story, in the circuit court; but it does not appear, that either on the petition for the writ, or upon its return, the question of jurisdiction was presented. And, before any final action by the court, the parties entered into an amicable arrangement, as to the custody of the child, which received the sanction of the court. This can not be claimed as an authoritative decision, on the point now before this court.

It is also insisted that the case of Ex parte Barry, before referred to, is in support of the jurisdiction of this court. The only point decided in that case was, that the supreme court of the United States had no original jurisdiction to issue the writ of habeas corpus prayed for, and therefore dismissed the proceeding. In the opinion by Judge Story, the court say: "Without, therefore, entering into the merits of the present application, we are compelled by our duty to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it." This is but an intimation that the lower courts might have jurisdiction, but the question did not arise in the case, and can not be claimed as a decision by the supreme court.

The case of U. S. v. Williamson [Case No. 16,726] is also relied on as an authority by the counsel for the relator. This case was decided by the late Judge Kane, of the district court of the United States for the eastern district of Pennsylvania. The circumstances under which the writ issued were briefly as follows: Wheeler, the relator, was the owner of three slaves, who, as he alleged in his petition, were forcibly taken from his possession at Philadelphia by Williamson, and by him were unlawfully detained in custody. The prayer of the petition was, that Williamson might be required to produce the slaves before the court, with the reasons of his claim to detain them. The learned judge held that the court had jurisdiction under the first clause of section 14 of the act of 1789. I do not propose to notice critically the grounds on which he asserted the jurisdiction of the court. For reasons stated before, I am clear in the opinion that the construction given by Judge Kane to the statute in question is essentially erroneous. With all my respect for his legal intelligence and ability, I can not acquiesce in his conclusions. And the authority of his opinion is certainly not strengthened by the fact that no other case has been reported in which this latitudinous claim of jurisdiction has been judicially affirmed.

In at least one case of respectable authority, a contrary doctrine has been strongly asserted. I refer to the case In re Barry [42 Fed. 113], in which Judge Betts, holding the circuit court of the United States for the southern district of New York, refused to grant a writ of habeas corpus in a case, the facts of which were very similar to those now before this court, on the ground of a want of jurisdiction. The case was, substantially, that Barry, an alien, married in

the city of New York; and having lived some years with his wife, and after two children were born, by reason of some unfortunate difficulty between them, they separated, one of the children being in the custody of the father and the other of the mother. In 1844, Barry, for the purpose of obtaining the custody of the child remaining with the mother, filed his petition in the circuit court of the United States for a writ of habeas corpus, alleging a lawful right to the child as the father, and that the child was illegally and forcibly detained by the mother. Judge Betts refused to award the writ, on the ground before stated. I have seen no full report of his opinion, but it is referred to in [Barry v. Mercein] 5 How. [46 U. S.] 103, and from the report it appears that Barry obtained a writ of error from the supreme court, to reverse the judgment of Judge Betts. This writ was dismissed by the supreme court, on the ground that there was no pecuniary amount in controversy, and that the court therefore had not jurisdiction. Two of the points of Judge Betts' decision are stated in the report of that case as follows: "I deny the writ of habeas corpus prayed for, because: 1. If granted, and a return was made, admitting the facts stated in the petition, I should discharge the infant on the ground that the court can not exercise the common law functions of parens patriae, and has no common law jurisdiction in the matter. 2. The court has not judicial cognizance of the matter, by virtue of any statute of the United States."

The conclusions thus stated by Judge Betts accord fully with my judgment. I have before given some of the reasons for the opinion, that the statute does not grant the power claimed for the court in this case. And that view is, I think, decisive of the pending question. But it is contended in argument, that if it should be held that the statute does not confer the power, as a matter of substantive and independent jurisdiction, the writ of habeas corpus is proper as an ancillary process, to enable the court to exercise jurisdiction. If I understand the argument on this point, it is, in substance, that the child who is the subject of this controversy, legally owes labor and service to the petitioner, as her father; that she has escaped from the state of New York, where such labor and service were due, into the state of Ohio, and is subject to reclamation as a fugitive, by the father, under the acts of congress of 1793 [1 Stat. 302] and 1850 [9 Stat. 462]; and that the writ issued in this case is in aid of the jurisdiction of this court, under said acts, and therefore within the scope of the first clause of section 14 of the act of 1789. I shall notice this position very briefly, remarking, in the first place, that it would be, in my judgment, a perverted construction of the acts for reclaiming fugitives from service, to hold that they can have any application to a female child of eight years of age. Such a child, within the contemplation of these statutes, can not be said to owe labor and service to the father. And again, it is clear there has been no such escape as within the purview of these statutes is required, to bring a person within their operation. There must be an escape, implying the will or purpose to escape, which certainly can not be predicated of an infant child. But there is a still more conclusive objection to the construction insisted on. The clause authorizing a habeas corpus in aid of the jurisdiction of a court, clearly contemplates a suit or proceeding in esse, and that such writ is necessary as subsidiary to the exercise of jurisdiction. It would vest the courts with a dangerous amplitude of discretion, if they could use the writ of habeas corpus as an instrument to bring a party within their jurisdiction for an ulterior purpose.

The jurisdiction, then, does not exist on the ground just indicated—and I am equally clear there is no other ground on which it can be sustained. I do not say it is not within the competency of congress to give the power claimed to the courts or judges of the United States. The constitution includes in the grant of judicial power controversies between citizens of different states, but there is no statutory provision which brings the proceeding by habeas corpus within the scope of this provision. Section 11 of the act of 1789 gives to the circuit courts original cognizance concurrently with the state courts, of all civil suits at common law and in equity, where the plaintiff is a citizen of a state other than that in which suit is brought, and the matter in dispute exceeds five hundred dollars. But this does not include a proceeding by habeas corpus, for the plain reason, if there were no other, that the matter in controversy has no pecuniary value, and can not be estimated in money.

It follows, as the result of these views, that this proceeding must be dismissed, for want of jurisdiction. If I entertained a serious doubt on this question, I should hesitate to exercise the power invoked for this court. But, in the light in which I view it, the line of duty is so clearly indicated, that I should be wholly without excuse if I did not follow it. This result renders it wholly unnecessary to express an opinion as to the effect of the record in the proceeding in the state court, or to review the evidence introduced by the parties.

Case No. 4,582.

EVORY et al. v. CANDEE.

[5 Ban. & A. 67.] [1]

Circuit Court, D. Connecticut. Jan., 1880.

PLEADING IN EQUITY—AMENDMENT OF ANSWER AFTER REFERENCE TO MASTER.

Where, after the case had been referred to a master, a motion was made to amend the answer, by setting up a new defence, denying the manufacture of the infringing articles, and the omission was not attributed to inadvertence or mistake, and it appeared that the defendant might avail himself of such defence before the master, the motion was denied.

[This was a bill by Alexander F. Evory and others against L. Candee & Co. for an accounting, and the recovery of license fees alleged to be due by virtue of a written agreement entered into between the parties under patent No. 59,375, granted to plaintiffs November 6, 1866, for an improvement in shoes. A decree was entered in favor of the plaintiffs (Case No. 4,583), and a motion is now made on the part of the defendants for leave to amend their answer.]

Betts, Atterbury & Betts, for complainants.

C. F. Blake, for defendants.

SHIPMAN, District Judge. The proposed amendment sets up a new defence. It was not introduced, nor was it intended by the pleader to be introduced, in the accurately and carefully drawn answer of the defendant. There was no inadvertence, or slip, or mistake.

The affidavit of the defendants' manager that he supposed the answer contained a denial of the manufacture of the boots or shoes described or claimed in the plaintiffs' patent, I do not regard as material. The fact is that the defence is not one which was relied upon as a defence to the bill at the time the answer was filed. But the defendant has the benefit of this defence before the master, before whom it can be shown that the licensed article has not been manufactured by the defendant.

The inconvenience of trying this question before the master, (who has commenced his hearing) is not equal to the inconvenience and expense which would result from delay and a trial before the court. The pecuniary result which is probably involved in this suit does not justify the delay, inasmuch as the decision of the question will be reached before the master, and by exceptions to his finding. The motion is denied.

[NOTE. For the disposition of a bill by Evory and others against these same parties to restrain the infringement of this patent, see 2 Fed. 542.]

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

Case No. 4,583.

EVORY et al. v. CANDEE.

[17 Blatchf. 200; 4 Ban. & A. 545.] [1]

Circuit Court, D. Connecticut. Oct. 6, 1879.

PRACTICE IN EQUITY—HEARING ON BILL, ANSWER, AND AFFIDAVIT—PATENTS—VALIDITY ATTACKED BY LICENSEE—ESTOPPEL—PAROL AGREEMENT.

1. A written license under a patent stated that the patent was "lawfully granted," and provided for the revocation of the license by the licensor, for non-payment of royalty, and declared that such revocation should not impair "the effect of the admission of the validity" of the patent. The licensor revoked the license for said cause and then sued the licensee in equity, for an account and the payment of the royalty which accrued prior to the revocation. The licensee set up that the patent was void, for want of novelty, and that he had never paid any royalty under the license. The plaintiff moved for a decree on the bill and answer and an affidavit, and the defendant put in counter affidavits: *Held*, that, under rule 90, in equity, the English practice in 1842 must be followed, and not any later English practice; that the affidavit could not be considered; but that the case should be heard on bill and answer.

2. *Held*, also, that the licensee was estopped, by the terms of the license, from setting up the invalidity of the patent, as a defence.

3. The licensee also set up a parol agreement, made before the written license, reserving to the licensee a right to use the invention without royalty, if he should become satisfied that the patent was void. After the time when such parol agreement was alleged to have been made, the licensee himself drew said written license: *Held*, that he could not be allowed to set up such parol agreement.

In equity.

Frederic H. Betts, for plaintiffs.

Charles F. Blake, for defendant.

SHIPMAN, District Judge. This is a bill in equity for an account, and is brought to recover from the defendant the license fees which are claimed to be due to the plaintiffs by virtue of a written agreement between said parties, dated July 10th, 1877, whereby the defendant was licensed, upon an established royalty, to use letters patent dated November 6th, 1866, for a "double expansible gore flap," in the manufacture of boots and shoes. The plaintiffs are citizens of the states of New York and of Michigan. The defendant is a citizen of the state of Connecticut. The bill alleges, upon information and belief, a manufacture and sale by the defendant, between July 10th, 1877, and October 9th, 1878, of a large number of boots and shoes containing the invention described in the letters patent, and prays for an account of the number manufactured or sold between said dates. The license was revoked by the plaintiffs on October 9th, 1878. The agreement, which is made part of the bill, recites as follows: "Whereas, letters patent of the United States, dated the 6th day of November, 1866, numbered 59,375,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 4 Ban. & A. 545, and here republished by permission.]

were lawfully granted unto Alexander F. Evory and Alonzo Heston, for a new and useful invention, consisting of a double expansible gore flap used in the manufacture of boots and shoes; * * * and whereas L. Candee & Co., of New Haven, Conn., manufacturers of rubber boots and shoes, are desirous of acquiring the privilege and license of using said invention in the manufacture and sale of shoes." The agreement, after authorizing the licensors to revoke the license upon nonpayment of the royalty, provides, that such revocation should not impair "the effect of the admission of the validity of said letters patent or re-issue, or of the novelty, utility and practicability of the said invention." A royalty of three cents per pair on all shoes while the licensee should manufacture or sell was established. The licensee further agreed to pay at least five dollars, as a license fee, upon the first days of each quarter, "even though they should not make enough of said patented shoes to amount to that sum, at the royalty of three cents per pair."

The answer denies that the patentees were the original and first inventors of the alleged improvement, and, admitting that an agreement of July 10th, 1877, was entered into, denies that the defendant, in said agreement, admitted the validity of the patent, but avers, that, "before the said license was granted to the defendants herein, the complainant Belcher presented to these defendants a printed form of license, in which was printed an admission of the validity of the said letters patent here in suit; that these defendants had grave doubts whether said letters patent were good and valid, and refused to sign the said printed form, because of said admission, and expressly stated to the said Belcher that they did not admit the validity of the said patent, but were willing to take a license thereunder at the stated royalty of three cents per pair for all shoes made by them, which embodied the alleged invention set forth and claimed in said patent, but that they reserved unto themselves the right to deny the validity of said patent and to contest the same, and to refuse to pay said license money, and to continue to use said invention without payment of said license money, if they should thereafter conclude that said letters patent were void;" that thereafter an agreement or license was prepared, omitting the said admission, which was then, and on July 10th, 1877, executed by the defendant herein; and that the defendant has never, nor has any one for it, paid any royalties under the said alleged license, and has always refused to pay royalties under said license, on the ground of the invalidity of the petters patent; and that the license was revoked by the plaintiffs on October 9th, 1878. The answer alleges the invalidity of the patent for want of novelty and of patentable subject-matter, and that the license is void for want of consideration, and that the "defendants do not know how many, if any, boots and shoes, containing the alleged invention, they have manufactured and sold between July 10th, 1877, and October 9th, 1878, and they refuse to ascertain and state the same."

In this state of the pleadings, the case was set for hearing upon the bill and answer, and the plaintiffs moved for a decree pursuant to the prayer of the bill, "upon the bill and answer filed herein and the annexed affidavit and the papers therein referred to," and filed an affidavit tending to show that the defendant, in its answer in another case in this court, had relied upon the validity of the licensed patent. The defendant filed counter affidavits.

The plaintiff's motion is in accordance with the comparatively recent English chancery practice which was authorized by an act of 15 & 16 Vict. and by the orders of court passed in August, 1852. 1 Daniell, Ch. Pr. 822–826. The 90th equity rule of the supreme court provides, that, in all cases where the prescribed rules do not apply, the practice of the circuit court shall be regulated by the "present" practice of the high court of chancery in England, "not as positive rules, but as furnishing just analogies to regulate the practice." That rule adopts the English practice, as it was known and understood in 1842, at the time the rule was ordained. Consequently, the practice of this court remains unaffected by the new orders, so called, which the courts of that country have since incorporated into their practice. Badger v. Badger [Case No. 717]; Goodyear v. Providence Rubber Co. [Id. 5,583]. This motion, in the form in which it was made, coupled with affidavits, does not seem to be in accordance with the practice of the federal courts, but I shall regard the hearing as a hearing upon bill and answer, without reference to the affidavit of the plaintiffs.

The question in the case is, whether the answer sets up a legal defence against the admitted facts which are alleged in the bill. "If an answer is insufficient in its responses to the charges and statements in the bill, the objections are to be taken to it by exceptions filed. If it is in substance bad as a defence, and no further proofs are required by the plaintiff, the case can be set down for hearing upon the bill and answer, and will be adjudged accordingly." Story, Eq. Pl. § 456.

Two questions are presented by the answer: (1) Is the licensee estopped, by the terms of the license, from setting up the invalidity of the patent, as a defence in an action for license fees due prior to the revocation of the license? (2) Is a parol agreement, made prior to the license, that the licensee shall be at liberty to attack the patent, to be admitted, in view of the recitals and provisions of the license, there being no allegation or claim that anything was inserted, or was omitted, in the written agreement, through fraud, mistake, or accident?

It is not necessary to consider, upon the

first point, the question whether, in an action to recover overdue license fees, the licensee is estopped from contesting the validity of the patent, by a naked license, and by an unmolested exercise of the right which the license purported to convey, for, in this case, the licensee expressly admitted the validity of the patent, in the recitals of the agreement. It is admitted that the agreement which is set out in the bill is the one which was executed by both parties. The defendant asserts in the license, that the letters patent were lawfully granted to the patentees for a new and useful invention, and has thereby tersely admitted the novelty and utility of the invention specified in the patent, and the validity of the grant to the patentees. It is not permissible to the licensee, unless the recitals were introduced by fraud, imposition, mistake, or accident, to deny their truth, in an action for license fees which accrued before the revocation of the license.

The defendant next relies upon a parol agreement, made prior to the execution of the license, whereby it reserved to itself the right to deny the validity of the patent. It appears, from the answer and from the defendant's affidavit, that a license was sent to the defendant, which contained an express admission of "the validity of said letters patent, and the novelty, utility, and practicability of the invention therein described and claimed, or that may, or can be, described and claimed in any re-issue thereof." This agreement the defendant declined to sign. The parties subsequently met, and the defendant informed the plaintiffs that it would sign a license, but reserved the right to defend on the ground that the patent was not valid, if it should so conclude, and to use the alleged invention described in the patent without royalty, if it became satisfied that the patent was void. Thereupon, the plaintiff requested the defendant to draw up a license in the form which it would sign. The license set forth in the bill was drawn by the defendant, and was signed by the parties.

The defendant suggests that the parol reservation was a valid collateral agreement, which should be enforced. It is true, that, oftentimes, a collateral parol agreement has been permitted to be proved, "which does not interfere with the terms of the written contract, though it may relate to the same subject-matter." 2 Tayl. Ev. § 1049. This parol agreement, reserving a right to use the licensed invention without royalty, if it became satisfied that the patent was void, is substantially inconsistent with the written agreement which the defendant subsequently drew, wherein it promises to pay a royalty during the unexpired term of the patent, reserves no right of revocation, twice admits the validity of the patent, and declares that a revocation by the licensors, for non-payment of royalty, shall not impair the effect of the admissions. The parol agreement is in the teeth of the subsequent written contract.

The bill avers a use of the patented invention by the licensees prior to October 9th, 1878, which, though not denied, is not admitted in the answer. Brown v. Pierce, 7 Wall. [74 U. S.] 205. But the license also provided for a quarterly payment of five dollars, although no shoes containing the patented invention had been made. The execution of the license having been admitted, it is apparent, from the pleadings, that something is due the plaintiffs. Let there be a decree for an account, in accordance with the prayer of the bill.

[NOTE. The cause was referred to a master, but, pending the hearing, defendant moved for leave to amend his answer, which motion was denied. Case No. 4,582. Subsequently, a decree was rendered for complainants in an infringement suit between these same parties. 2 Fed. 542.]

EWBANK, The HENRY. See Case No. 6,376.

EWELL (CLARA v.). Cee Case No. 2,790.

EWELL (DAGGS v.). See Case No. 3,537.

EWELL (LAW v.). See Case No. 8,127.

Case No. 4,584.

EWER et al. v. COXE et al.

[4 Wash. C. C. 487.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

COPYRIGHT—PUBLICATION AND DEPOSIT OF TITLE—NECESSARY STEPS TO SECURE COPYRIGHT—ACT OF MAY 31, 1790—VESTING OF THE TITLE.

1. To entitle the author of a book to a copyright, he must not only deposit a printed copy of the title of such book in the clerk's office, but he must also publish a copy of the record of the title within the period, and for the length of time prescribed by the third section of the act of 1790, and must also deposit a copy of the book in the secretary of state's office, within six months after the publication of the book.

[Cited in dissenting opinion in Wheaton v. Peters, 8 Pet. (33 U. S.) 693.]

2. If the author of a book has not a copyright secured according to law, a court of equity will not grant him an injunction to prevent the publication or sale of the work by another.

3. The requisitions of the third and fourth sections of the act of congress of the 31st of May, 1790 [1 Stat. 125], relative to copyrights, are not merely directory, but their performance is essential to the vesting a title to the copyright secured by the law.

4. The act of congress of the 29th of April, 1802 [2 Stat. 171], declares, that in addition to the requisites enjoined in the third and fourth sections of the act of 1790, and before the person claiming a copyright shall be entitled to the benefits of the same act, he shall perform all the new requisites, and that he must perform the whole before he shall be entitled to the benefits of the act. The act will admit of no other construction. The meaning of the act

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

could not have been more clearly expressed, if the act had declared that "the proprietor, before he shall be entitled to the benefit of the act of 1790, should cause a copy of the record of the title to be published, and shall deliver a copy of the book to the secretary of state, as directed by the third and fourth sections of that act, and shall also cause a copy of the said record to be inserted at full length in the title page, &c."

[Disapproved in dissenting opinion in Wheaton v. Peters, 8 Pet. (33 U. S.) 695. Cited in Wilson v. Rousseau, Case No. 17,832; Lawrence v. Dana, Id. 8,136; Boucicault v. Hart, Id. 1,692.]

This was a bill filed by the plaintiffs, claiming to have a copyright in a book entitled "The Pharmacopoeia of the United States of America," against the defendants [Coxe, Carey and Lea], for an alleged infringement of their right, by publishing a work under the title of "The American Dispensatory," by John R. Coxe; in which work, the bill charges, is incorporated nearly the whole of the matter contained in the plaintiffs' work. The bill further alleges that the plaintiffs, on the 15th of December 1822, deposited the title of their said work in the clerk's office of the district court of Massachusetts, and took all such other steps and measures as they verily believed were required by law to secure to them the sole property in their said work. The bill concludes by praying an injunction to restrain the defendants from publishing or vending "The American Dispensatory," and for an account.

The answers do not admit that the plaintiffs have entitled themselves to a copyright in the Pharmacopoeia; and call upon them for proof of that fact; and particularly to show that they have complied with the acts of congress in publishing, within the time prescribed, a copy of the record of the title of said book for the space of four weeks, and depositing a copy of the work in the office of the secretary of state. The defendants admit that they have caused to be printed and published, since the publication of the Pharmacopoeia, a work under the name of "The American Dispensatory," fifth edition, corresponding with four previous editions printed and published before the publication of the Pharmacopoeia, for each of which a copyright was secured. They deny that they have incorporated into this work nearly the whole, or any part of the Pharmacopoeia, except in the sense the latter work has incorporated the previous editions of the former, and of other Dispensatories, or works of a similar kind, before published.

Upon a motion now made to grant the injunction prayed for, the plaintiffs' counsel admitted that a copy of the record of the title of the Pharmacopoeia had not been published as the acts of congress require; but he insisted, that such publication was not necessary to vest a copyright in the owner of the work, the acts being, in this respect, merely directory, like St. 8 Anne, c. 29. He cited Blackwell v. Harper, 2 Atk. 93; Beckford v. Hood, 7 Term R. 620; Roworth v. Wilkes, 1 Camp. 94. 2. That the defendants' work is a copy, or close imitation of the plaintiffs', though upon a much larger scale, and somewhat differently arranged, but containing all the formulae in the latter. 1 East, 362; 8 Ves. 273; 16 Ves. 269.

For the defendants it was contended: 1. That although the publication of the title of the work is directory from the language of the Statute of Anne, it is clearly conditional; as are all the other requisites prescribed in the act of the 31st of May, 1790, c. 15, and of the 29th of April, 1802 c. 36. They must be performed, or no copyright vests. 2. That the defendants have not infringed the plaintiffs' right, if they have one; the Pharmacopoeia not being an original work, but a mere selection of formulae made from the London, Dublin, and Edinburgh Dispensatories, and from the prior editions of the defendants' Coxe's Dispensatory, together with a preface, and a catalogue of medicines in the English and Latin languages. The defendants' work is in no respect an imitation of the plaintiffs', in language, selection, order, arrangement, or design. It refers to the plaintiffs', no farther than for fair quotation for the purpose of criticism, or otherwise. Amb. 403; 2 Atk. 143, 17 Ves. 424; 1 East, 36; 12 Ves. 273; 1 Coxe, Eq. Cas. 283; 4 Esp. 168.

Mr. Ingraham, for plaintiffs.
Mr. Binney, for defendants.

WASHINGTON, Circuit Justice. The first question is, whether the plaintiffs, not having published a copy of the record of the title of the Pharmacopaeia, within the period, and for the length of time prescribed by the third section of the act of 1790, have entitled themselves to a copyright in that work? If they have not, it will be unnecessary to inquire whether "The American Dispensatory" is a copy or an illegal imitation of the former work, as I hold it to be beyond controversy, that, if the plaintiff has no copyright in the work of which he claims to be the owner, a court of equity will not grant him an injunction. This was formerly the doctrine of the English court of chancery, and still is as I conceive; notwithstanding lord Eldon has, in some instances, granted an injunction, and continued it to the hearing, under circumstances which rendered the title doubtful, if the plaintiff had possession under a colour of title. But surely if he has no title at all, or such a one as would enable him to recover at law, even that judge would, I presume, refuse an injunction. 1 Vern. 120; 6 Ves. 710, 707, 689, 699; 1 W. Bl. 105, 370; 2 Burrows, 661; 2 Eden, 327; Millar v. Taylor, 4 Burrows, 2303, and the cases there cited; Greirson v. Jackson, Ir. Term R. 304; 8 Ves. 505; 7 Ves. 1; 19 Ves. 447; Coop. Eq. Pl. 303.

In deciding this first question, it is material to settle, whether the requisitions of the third

and fourth sections of the act of the 31st of May 1790, c. 42, are merely directory, or whether their performance is essential to the vesting of a title to the copyright secured by the law? The first section enacts, in substance, that the author of any book, being a citizen of the United States, or resident therein, his executors or assigns, shall have the sole right and liberty of printing, publishing, and vending such book, for the term of fourteen years from the time of recording the title thereof in the clerk's office, as thereafter directed. And if, at the expiration of the said term, the author be living, and a citizen or resident as aforesaid, the same exclusive right shall be continued to him for the further term of fourteen years, provided he or they shall cause the title thereof to be a second time recorded, and published in the same manner as is hereafter directed; and that within six months before the expiration of the first term of fourteen years aforesaid. The second section enacts, that, if any person from and after the recording of the title, and publishing the same as aforesaid, and within the times limited and granted by the act, shall print, &c. any copy of such book without the consent of the author or proprietor first obtained in writing, &c. such offender shall forfeit every such copy, &c. to the author or proprietor, &c. and shall further pay fifty cents for every sheet, &c. one moiety thereof to the proprietor, who shall sue for the same, and the other to the United States. The third section declares, that no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book in the clerk's office of the district court, where the author or proprietor shall reside, which record the clerk is required to make; and then follows the form of the record. The section then proceeds as follows: "and such author or proprietor shall, within two months from the date thereof, cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks." The fourth section enacts, that the proprietor shall, within six months after the publishing of the said book, deliver to the secretary of state a copy of the same, to be preserved in his office.

It would seem from the phraseology of the first section of this act, as if the recording of the title a second time in the clerk's office, and the publication of the same as directed in the third section were made essential to the vesting of the copyright for a second term of fourteen years in the author or proprietor; and it is perfectly clear from the language of the second section, that the proprietor can acquire no title to the copyright for the term of the first fourteen years, unless he shall deposit in the clerk's office a printed copy of the title of the book; for the section declares that he shall not be entitled to the benefit of the act, unless he shall make such deposit. But the condition upon which the proprietor is to be entitled to the benefit of the act, cannot, upon any grammatical construction, be extended to the requisition contained in the last sentence of this section, to publish a copy of the record of the title within the time and the period prescribed. It is entirely a new sentence, and is as much disconnected from the condition expressed in the preceding part of the section, as if it had been contained in the fourth section, to which there is clearly no condition annexed. If, then, the title of an author to a copyright, depended altogether upon this act, I should be of opinion that it would be complete, provided he had deposited a printed copy of the title of the book in the clerk's office, as directed by the second section, and that the publication of a copy of the same would only be necessary to enable him to sue for the forfeitures created by the second section. In this respect, the act corresponds, and was probably intended to correspond with St. 8 Anne, c. 19; which, and the construction given to it in the cases of Blackwell v. Harper, 2 Atk. 93; Beckford v. Hood, 7 Term R. 620, and some others, were no doubt within the view of the legislature which passed this act.

But a subsequent act was passed on the 29th of April 1802 (chapter 36), as a supplement to the before mentioned act, which declares, that every person who shall, after a certain day, claim to be the author or proprietor of any book, and shall thereafter seek to obtain a copyright of the same, agreeably to the rules prescribed by law, before he shall be entitled to the benefit of the act to which this is a supplement, he shall, in addition to the requisites enjoined in the third and fourth sections of the said act, give information, by causing the copy of the record, which, by said act, he is required to publish in one or more newspapers, to be inserted at full length in the title page, or in the page immediately following the title. With respect to this new and additional requisite, it is most obvious that the proprietor can acquire no title to the copyright, unless it is complied with. He must cause the copy to be inserted as directed, before he can be entitled to the benefit of the act of 1790. What was the benefit conferred by that act? The answer is apparent,—a copyright for a certain number of years, with all the privileges, advantages and remedies which that act confers upon the proprietor of such copyright. If he has not that right, he can have no remedy of any kind.

But the supplemental act declares that the person seeking to obtain this right, shall perform this new requisition, in addition to those prescribed in the third and fourth sections of the act of 1793, and that he must perform the whole, before he shall be entitled to the benefit of that act. It seems to me that the act will admit of no other construction. The meaning could not, I think, have been more clear and intelligible if the act had de-

clared that "the proprietor, before he should be entitled to the benefit of the act of 1790, should cause a copy of the record of the title to be published; and shall deliver a copy of the book to the secretary of state, as directed by the third and fourth sections of that act; and shall also cause a copy of the said record to be inserted at full length in the title page, &c." That this was the intention of the legislature is strongly illustrated by the second section of this act, which secures to persons who shall invent, &c. any historical or other print, the sole right of printing, publishing, &c. the same, provided he shall perform all the requisitions in relation thereto, as are directed in relation to maps, charts, and books, by the third and fourth sections of the act of 1790, and shall moreover cause the same entry to be engraved on such plate, with the name of the proprietor, and printed on every such print, as herein before required to be made on maps or charts. I am therefore of opinion that the plaintiffs are not entitled to a copyright in the Pharmacopoeia, of which they claim to be the proprietors, and that the injunction ought not to be granted.

Case No. 4,585.

The E. W. GORGAS.

[10 Ben. 460.][1]

District Court, S. D. New York. June, 1879.

PRACTICE IN ADMIRALTY — SERVICE OF PROCESS — POWER OF MARSHAL TO DEPUTIZE — VERIFICATION OF LIBEL — NOTARY'S SEAL — EFFECT OF ADMIRALTY SALE — JUDGMENT BY DEFAULT — MASTER — EQUITABLE ESTOPPEL.

1. Libels were filed against a tug to recover for the loss of three barges while in tow. D. appeared as claimant and owner of the tug and set up that, after the loss in question, the tug was libelled in the district court of the eastern district by C. to recover a claim which was a valid lien on her, and that under a decree in that suit by default the tug was sold, and that D. became the purchaser, and that by such sale, the liens of the libellants, if any they had on the tug, had been discharged. The cause coming on for trial and D. having offered in evidence the judgment record in the case of C. against the tug, the libellants objected to it as void for various alleged irregularities, and also offered evidence to prove that D. was master of the tug at the time of the loss of their boats, and also evidence by which they claimed to show that the sale of the tug in the suit of C. was collusive: *Held*, that, although the libel in C.'s suit appeared to have been sworn to before a notary public, whose seal was not attached to his certificate, the absence of such seal did not vitiate the process issued on the libel, under the rules of the court requiring a sworn libel previous to the issuing of process against a vessel. Under St. 1876, c. 304 [19 Stat. 206], the seal was not necessary to a due verification. At most its absence was only an irregularity, which could not be availed of after decree, in another proceeding before another court.

2. The process in C.'s suit was properly served, being served by one T., who had been, by a memorandum endorsed on the process by the marshal, deputized to execute the process.

3. Neither section 788 of the United States Revised Statutes, in connection with section 102 of the New York Code of Civil Procedure, nor admiralty rule 1 of the supreme court, required process to be served by the marshal himself or a deputy marshal.

4. It would seem that by force of section 788 of the Revised Statutes, which was a re-enactment of section 7 of the act of 1861, c. 25 (12 Stat. 425), marshals of the United States have the powers which sheriffs had on the day of the passage of that act; and if so, the New York Code of Civil Procedure passed in 1877 would not affect such powers.

5. The statutes of the United States conferring on marshals similar powers to those exercised by sheriffs, are laws conferring powers only, and not restricting the powers which the marshals already had.

6. Section 102 of the New York Code of Civil Procedure did not take from sheriffs the power of deputizing other persons to serve process.

7. It was not essential to the jurisdiction in C.'s suit, that the marshal should continuously retain the vessel in his custody.

8. There is no rule or statute requiring the exclusion of Sundays in the fourteen days required before the return of process in rem.

9. The objections to the jurisdiction of the district court of the eastern district in C.'s case must therefore be overruled.

10. Whether the decree of that court in that case when offered in evidence did not exclude the evidence impeaching the jurisdiction of that court, quaere.

11. On the evidence the suit of C. was prosecuted by him in entire good faith, and was not collusive.

12. D., although master of the tug and in charge of her at the time of the libellants' alleged loss, was not bound to notify them that C.'s suit was commenced, or that the tug was to be sold under the decree in it; nor was he bound to defend the tug against C.'s claim, which was a valid one, nor was he prevented from buying the tug at the sale, nor was the effect of the sale to clear the tug from all liens lessened by D.'s having bought her at the sale.

13. D. was not equitably estopped from setting up the decree in C.'s suit and the sale under it, against the claims of the libellants.

14. If the sale of the vessel had been unfair or for an inadequate price, the libellants, who knew of the sale within two days after it took place, might have sought a remedy by applying to the court of the eastern district to set aside the sale and open their default and let them in to defend against C.'s claim, if they had any defence.

15. Having failed to do this, their rights as against the tug were cut off by her sale, and their libels must be dismissed.

In admiralty.

E. D. McCarthy, for libellants McGovern and Joice. W. R. Beebe and F. A. Wilcox, for libellant Harrigan. R. D. Benedict, for claimant.

CHOATE, District Judge. These are three suits brought by the owners of three barges to recover damages for the loss of the barges and their cargoes, alleged to have been caused by the negligence and mismanagement of those in charge of the steam-tug, while the said barges were with other boats

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

being towed from Port Morris to Bridgeport, Conn., on the 13th of March, 1879. The claimant, George H. Dentz, after answering in each case to the merits, set up as a separate defence, "that on the 19th of March, 1879, in the district court of the United States for the eastern district of New York, a libel was filed against said steam-tug by John Collins, to recover $150, as damages alleged to have been sustained by said Collins, by reason of the running on the rocks off Norwalk, Conn., of his canal-boat, the E. L. Anthony, by said steam-tug; that process on said libel was issued against said steam-tug on said 19th day of March, and was delivered to the marshal of the eastern district of New York, which said process was made returnable April 2d, 1879; that said marshal attached said steam-tug under said process on March 20th, 1879; that no claim was interposed by any one and said steam-tug was left in the custody of said marshal, and on the return day of said process, no one appearing for said steam-tug, a decree was made by said court, entering the default of all persons and directing a reference to compute libellant's damages, and that a venditioni exponas issue to said marshal, and that said steam-tug be sold on six days' notice; that on April 9th, 1879, said writ was issued to said marshal, and after six days' notice of sale duly given, said steam-tug was, on the 17th day of April, 1879, duly sold at public auction by said marshal, and was struck off to this claimant, his being the highest bid therefor; that on the 18th of April, 1879, a bill of sale of said steam-tug was duly executed and delivered by said marshal to this claimant, and was on the same day duly recorded by claimant, in the custom house, in New York City. And said claimant alleges and avers that by said proceedings and sale all liens which accrued prior thereto against said steam-tug were cut off, and that this claimant took said steam-tug free and clear from all liens and among others free and clear from the lien set forth in the libel herein." This answer having been filed, the libellant was allowed to amend his libel by alleging as follows:

"1st. That no final judgment or decree has been had or entered in the proceedings set forth in the answer of the claimant herein as pending in the district court of the United States for the eastern district of New York, wherein one John Collins is libellant and the Steam-tug E. W. Gorgas has been attached.

"2nd. That the district court of the United States for the eastern district of New York did not have jurisdiction over the steam-tug E. W. Gorgas, at the time its process was served upon and the said steam-tug attached in the suit or proceedings aforesaid.

"3rd. That the claimant herein, if he purchased the said steam-tug, E. W. Gorgas, at a judicial sale, as is alleged in the answer, got no title to the said vessel, exclusive of and hostile to the lien of this libellant, nor is this libellant cut off from asserting said lien in this court by reason of any matters set up in the answer of the claimant, because, 1st, the said purchaser and claimant had full knowledge of your libellant's lien against or upon said vessel at the time he purchased her; 2nd, he is and should be estopped as to this libellant's lien upon said vessel from setting up his purchase as aforesaid, because by his own acts and declarations he kept this libellant in ignorance of the proceedings or condemnation and sale aforesaid of the E. W Gorgas for the purpose of deceiving this libellant and of cutting off his lien by a pretended judicial sale; 3rd, the said sale of the steam-tug E. W. Gorgas was fraudulent, because of the gross inadequacy of the purchase price; 4th, the purchaser, this claimant, was himself personally guilty of and responsible for the tortious act which became the foundation of your libellant's lien as already pleaded in his libel; 5th, the proceedings aforesaid of the said Collins were collusive and fraudulent, and instituted and carried out with the dishonest intention of cutting off your libellant's lien and the liens of other persons in which fraud this claimant was a participant." Upon these pleadings the cause coming on for trial, it was agreed that the issues, raised by the defence of the suit in the eastern district and the sale under it, should be first tried. The claimant offered the record and bill of sale referred to in the answer. The libellants objected to the record and the bill under it, on the ground that the court had no jurisdiction to make the decree because, 1st, the libel was not properly verified; 2nd, the process based on an unverified libel has no validity; 3rd, the return of the process was not signed by the marshal; 4th, the process was not served by the marshal or a deputy marshal, but by one Tobey, who had no authority to serve it, and that therefore there was no seizure of the vessel so as to give the court jurisdiction; 5th, the process being dated March 19th, was made returnable April 2nd, in less than fourteen days exclusive of Sundays; 6th, that it does not appear by the marshal's return that the vessel was seized within the district; 7th, that after the alleged seizure she was not kept in the custody of the marshal till the time of sale.

It appeared that the libel, which was signed by the libellant, had annexed to it the following certificate "Subscribed and sworn to before me this 24th day of February, 1879. Simeon Ford, Notary Public, Kings and N. Y Cos." The objection to this is that, as the notary's seal was not affixed, the court had not before it any competent proof under the laws of the United States, that the libel was sworn to, the certificate of the notary not being attested by his seal. The practice and the rule of the court require a sworn libel previous to the issue of process against the vessel. Martin v. Walker [Case No. 9,170]. By St. 1876, c. 304 [19 Stat. 206], notaries public are authorized to take depositions and do all

other acts in relation to taking testimony to be used in the courts of the United States; take acknowledgments and affidavits "in the same manner and with the same effects" as commissioners of the United States circuit court may now lawfully take or do. This statute differs from some prior statutes relating to the same subject, in that it does not in terms require the signature and authority of the notary to be attested by his official seal. Rev. St. § 1778; Stat. 1874, c. 390, § 20 [18 Stat. 186]. Under this statute, while a court of the United States may doubtless make any reasonable rule to ascertain the authenticity of the notary's signature, as by requiring his seal to be affixed or a certificate of a state officer to his appointment and authority as such notary, yet it would seem that any such evidence in addition to his official signature would be required not to make the act of the notary valid, but simply to satisfy the court of the fact that the certifying officer was a notary; and if the court is satisfied with the official signature of the notary, I do not see how any other court can question the regularity of its action. The seal was not necessary under this statute to a due verification, and if the affixing of the seal were the proper and customary mode of proving to the court the notary's official character, the irregularity of the absence of such proof would not vitiate the process. At most it would be a mere irregularity which cannot be availed of after decree, even in case of a judgment by default.

The objection to the jurisdiction chiefly urged, is that the marshal cannot depute a person who is not a deputy marshal to serve a process directed to him to serve. In this case the marshal signed on the back of the process the following endorsement: "I hereby depute C. W. Tobey to execute the within process." Tobey was not a deputy marshal nor in any way a regular employee of the marshal's office. He had no official connection with the marshal, except so far as this attempted deputation established it for this particular purpose, and he was the person employed by the libellant to procure the libel to be filed and process thereon to be issued. He received the process from the hands of the marshal with this endorsement, and the arrest of the vessel and the service of the notice on the master as required by the rules of that court were made by him. The marshal made return of the process in the usual form as follows: "In obedience to the within monition I attached the steam-tug, etc." It is insisted that this was no arrest of the vessel, and that by admiralty rule 1, of the supreme court, the marshal or deputy marshal alone can, unless in case they are parties in interest, serve the process. That rule provides as follows: "All process shall be served by the marshal or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court." It is also claimed that by force of Rev. St. § 788, in connection with section 102 of the New York Code of Civil Procedure, the marshal or deputy marshal alone can now serve a process out of an admiralty court in either of the districts within the state of New York, whatever may be the power of the marshal or deputy marshal in other districts to depute another person to do so. Rev. St. § 788 is as follows: "The marshals and their deputies shall have in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in such states may have by law in executing the laws thereof." And the section of the New York Code referred to, provides that "a sheriff or other officer, to whom a mandate is directed or delivered, must execute the same according to the command thereof, and make return thereon of his proceedings under his hand. For violation of this provision he is liable to the party aggrieved for the damages sustained by him, in addition to any fine or other punishment or proceeding authorized by law. A mandate directed and delivered to a sheriff may be returned by depositing the same in the post office, properly inclosed in a post-paid wrapper addressed to the clerk at the place where his office is situated, unless the officer making the return in the name of the sheriff resides in the place where the clerk's office is situated."

It is argued that by Rev. St. § 788, the marshal can exercise no other powers than a sheriff, and that by the Code, section 102, the sheriff cannot depute the execution of a writ.

Independently of any rule of court, or statute affecting this particular duty of the marshal or sheriff, it is clear that such an officer may direct a particular ministerial act, with the performance of which he is charged, to be performed by another, acting for him and under his authority and upon his responsibility. Such is the rule of the common law, and among the ministerial acts which such an officer may so depute another to do in his name and for him, is the service of a writ directed to the sheriff. Hunt v. Burrel, 5 Johns. 137. In that case the under sheriff deputed another person, not an officer authorized by law to serve a writ, to serve a capias, and the question was whether acts done by such person could be justified under the writ. The court held that the service was good, and said: "The deputation was a sufficient authorization to the defendant to execute the writ. The general maxim that 'delegata potestas non potest delegari' is correct, when duly applied; for to make a deputy by a deputy, in the sense of the maxim, implies an assignment of the whole power, which a deputy cannot make. A deputy has general powers, which he cannot transfer; but he may constitute a servant, or bailiff, to do a particular act." And in support of this view the court refer to Parker v. Kett, 1 Ld. Raym. 658, and Leak v. Howel, Cro. Eliz. 533,

and cases therein cited, as showing that the rule is well established at common law. There is no reason why in the absence of restrictive rules or statutes the principle of these decisions should not apply to the marshal or deputy marshal of the United States. Indeed, it is very obvious that they have many duties to perform every part of which they cannot with any convenience to themselves or the public be expected to perform without the aid of other persons; and these authorities are conclusive that there are no reasons of public policy which, independently of rule or statute, except from this class of acts, which such officers may perform by an agent or servant, that part of the service of a monition which consists of the seizure of a vessel under it.

The rule of the supreme court quoted above, does not, in my judgment, have any reference whatever to the regulation of what a marshal must do personally, or what he may do through an agent or special deputy. This and the succeeding rules were framed under St. 1842, c. 188, § 6 (5 Stat. 518), which authorized the supreme court from time to time to prescribe, regulate and alter the forms of writs and other process and other proceedings in the district and circuit courts; and so far as the part of the rule, making it imperative on the marshal or his deputy to serve all process issuing out of the courts of the United States, is concerned, it follows what is the clear implication of the statutes of the United States then existing. St. 1789, c. 20, §§ 27, 28; 1 Stat. 87; Rev. St. §§ 787 and 922, and before the rule was made the supreme court had declared this to be duty of the marshal. Life & Fire Ins. Co. v. Adams, 9 Pet. [34 U. S.] 603. That part providing for the special appointment by the court of a person to serve the process, in case the marshal or his deputy is a party to the cause, is also taken directly from an existing statute (St. 1789, c. 20, § 28, supra). It provides that, in such a case, the court shall appoint a disinterested person to do the service which otherwise under the rule the marshal is to do. Undoubtedly, in such a case, the person so appointed would, by the rule, be required to do all that the marshal would otherwise be required to do under the process, not only to arrest the ship, but to keep it in custody, give the notice required by the monition, and make a return of the process to the court, in his own name. And the "serving of process," as used in this rule, includes all these things. The word "deputy," as used in the rule, clearly means a "deputy marshal," an officer known to the law as such, who equally with the marshal may do all that is to be done under the process. It cannot mean, as used in this rule, a person specially deputed to execute a process or arrest a vessel. It would obviously have been absurd for the supreme court to provide by rule for substituting some other person by special appointment for an interested person so deputed by the marshal. A deputy marshal is an officer for whose appointment, qualification and removal the laws of the United States expressly provide. Rev. St. §§ 780–782. That the rule of the supreme court now in question has not been understood or construed as restricting the marshal or deputy marshal to a personal performance of this particular duty of arresting a vessel or other act in pursuance of process for the seizure of property, is sufficiently shown by the uniform practice of deputing to particular persons, not regular deputies, the execution of such process, as well since the promulgation of this rule in 1844, as before that time. See U. S. v. Jailer [Case No. 15,463]. This rule is to have the same construction with the statutes, whose meaning it was designed to express and embody in the form of a rule; and the words in which the rule is framed do not express nor indicate any intention to prescribe a new or more limited mode of performing the official duties referred to, or any different manner of executing process from that recognized by the familiar decisions of the courts as a proper and lawful mode of service, by such an executive officer.

Rev. St. § 788 is a re-enactment of St. 1861, c. 25, § 7 (12 Stat. 282), and that again was a re-enactment of St. 1795, c. 36, § 9 (1 Stat. 425). This section of the Revised Statutes differs from these earlier statutes only in the substitution of the words "may have" for the word "have." But for the circumstance that the Revised Statutes is expressly declared to be the re-enactment of laws already in force, this change of phraseology might be construed as conferring on marshals, within the several states, such powers in executing the laws of the United States as by the laws of the same state are from time to time conferred upon sheriffs to execute the laws of the state, making the provision perambulatory; whereas the previous acts had apparently conferred on marshals powers of sheriffs in the like cases as existing at the dates of the said acts respectively. The change of phraseology in this case seems hardly sufficient, however, to overcome the presumption against an intended change of construction in the re-enactment of the statute of 1861, and it would therefore seem that the marshals have, by force of this statute, such powers as sheriffs had on the 29th day of July, 1861, the date of the passage of the last named act of congress. If this view is correct, a restrictive state statute passed in 1877, as the Code of Civil Procedure was, cannot affect the question or be deemed to control or take away any power of the marshal conferred by the act of 1861. But whether the foregoing construction of these laws is correct or not, (and the questions may be regarded as disputable), there are two other answers to the present objection to the power thus exercised by the marshal. The first is, that the statutes of the United States above cited, conferring on marshals similar powers

to those conferred on sheriffs by the state laws, are to be construed as laws conferring powers only, and not as laws restricting or taking away from the marshals any powers already vested in them according to the laws of congress and the rules and practice of the courts, and these statutes cannot be construed as if they provided that the marshals shall, in the execution of the laws of the United States, have only those powers exercised by sheriffs. Not only are these statutes in form simply empowering and not restrictive acts, but the general purpose and objects of the acts of congress, of which they constitute parts, are inconsistent with such a restrictive construction. Both the acts, that of 1795 and that of 1861, were acts passed for the suppression of insurrection and rebellion against the United States. It was not within the purview of such statutes to take away or limit the powers of important executive officers of the United States, however much it was consonant with their general purposes to enlarge those powers. Moreover, there would be such practical inconveniences, and even dangers to public interests, in putting the powers of these federal officers under the regulation of the state legislatures, as a restrictive construction of these acts would do, as to forbid such construction, unless clearly a necessary one. It is, therefore, immaterial whether by the laws of New York sheriffs can now, or in 1861 could, make such a deputation for the service of writs, since, as shown above, the marshals of the United States have, independently of any powers conferred on them by these particular statutes, the power to do so. The other answer to the objection is, that the state statute itself (Code, § 102) seems not to take away from sheriffs the power of deputing other persons to execute process, recognized by statute and the decisions of the courts of New York as an existing power of sheriffs. 1 Rev. St. N. Y. p. 379, § 73, which provides that "persons may also be deputed by any sheriff or under-sheriff by an instrument in writing to do particular acts," has never been expressly repealed. The term "particular acts," clearly includes the service of writs. Hall v. Fisher, 9 Barb. 25; Hunt v. Burrel, ut supra. Indeed, the language of section 102 of the Code of Civil Procedure, relied on as importing that the sheriff or deputy-sheriff must personally serve all process, to wit: "A sheriff or other officer to whom a mandate is directed and delivered must execute the same according to the command thereof, and make return thereon of his proceedings under his hand," is simply a re-enactment of 2 Rev. St. p. 440, § 77, which provides that "every sheriff or other officer to whom any process shall be delivered shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him." This provision seems first to have appeared in the Revised Statutes of 1828, and has been in force ever since. The changes of phraseology in the Code are merely verbal, and do not indicate a purpose to require the service to be made by the sheriff personally. Moreover, this section, so far as it imposes the duty of serving all process on the sheriff or deputy-sheriff, was implied in 1 Rev. Laws 1813, p. 423, § 10, and that same statute recognized the power of the sheriff to appoint another person, containing the following provision: "That no person who shall be deputed by any sheriff to do a particular act only, shall be required to take the oath to be taken by the deputies of sheriffs." 1 Rev. Laws 1813, p. 421, § 5. The same act also provides (page 423, § 11) that in case resistance is made to any process of execution, the sheriff, "laying aside all other things and taking with him the power of the county, shall forthwith go in his proper person and do execution." This alone would strongly tend to show that in all other cases the sheriff is not required to go in his own proper person for the service of process. At any rate, the existence on the statute book from so early a time of these two provisions, one requiring the sheriff to execute all process, and the other empowering him to do a particular act through a deputy specially appointed in writing therefor, together with the judicial construction that has been put upon the latter provision as applicable under the statute to the service of process, is conclusive that section 102 of the Code has not the force contended for in this case. And it follows that under Rev. St. U. S. § 788, the marshal can make such a special deputation, because under the laws of New York the sheriff can do so. The construction, so clearly to be applied to these statutory provisions of the state of New York, also tends strongly to confirm the views above expressed as to the proper construction of the similar provisions in the statutes of the United States and the rule of the supreme court.

The other objections to the record are not tenable. It is not essential to the jurisdiction that the marshal should continue his custody of the vessel. The Rio Grande, 23 Wall. [90 U. S.] 463. After decree certainly the act of the marshal will so far be presumed to be regular that the seizure will be presumed to have been made within his district, there being nothing to show the contrary. There is no rule or statute requiring the exclusion of Sundays in computing the fourteen days allowed for the return of process. The objection to the signature of the return is not sustained by the evidence. The objections to the jurisdiction must therefore all be overruled, and it is unnecessary to examine the question raised by the claimant's counsel whether the decree itself, importing the judgment of the court upon these several questions and a finding of the facts in favor of the jurisdiction, does not exclude all evidence impeaching the jurisdiction on these several grounds.

It remains to consider whether the alleged fraud and collusion constitute any ground on which, in this suit, the decree or the title made under it can be attacked.

As regards the allegations of fraud in procuring the title of the claimant under the decree, the averments of the amended libel are not sufficiently certain to make it proper to dispose of the issue on the offers of proof already made. There is a considerable weight of authority for the claim that even a domestic judgment in rem may be treated as a nullity when made the basis of a claim or defence by one who has procured it by means of a fictitious case imposed upon the court, or even by means of a case not in itself fictitious but used not for the benefit of the apparent plaintiff, but collusively with him for the benefit and defence of the party apparently hostile to him, and with a purpose on his part to injure or impair the rights of the party against whom the judgment is sought to be now set up as a bar. Borden v. Fitch, 15 Johns. 145; 2 Smith, Lead. Cas. (7th Am. Ed.) p. 822. See, also, Bradstreet v. Neptune Ins. Co. [Case No. 1,793]; The Storm King [Id. 13,491]; Girdlestone v. Brighton Aquarium Co., L. R. 3 Exch. Div. 137, and same case on appeal, L. R. 4 Exch. Div. 107. Whether, however, the libellants' case can be brought within this principle and what are the proper limits of the principle itself, may more properly be left to be determined when the libellants have produced all their evidence tending to show fraud and collusion.

The cause will stand for further hearing on the issue of fraud and collusion.

Evidence having been taken on that issue, the court rendered the following opinion:

CHOATE, District Judge. The testimony having been now taken bearing on the questions of fraud raised by the libellants in impeachment of the title under the marshal's bill of sale, set up in the answers of the claimant, it is evident that no case is made out by the libellants for holding that the suit of Collins against the E. W. Gorgas was a fictitious suit or was procured to be commenced or carried on by the consent or with the connivance of libellant therein, for the benefit of any other party than himself. So far as the libellant Collins is concerned, the suit was prosecuted in good faith, for the purpose of collecting what he believed to be a valid claim, and all the steps taken in his name and behalf in the progress of the cause were taken in pursuance of his directions given to his proctors and the agent employed by him to collect the claim. It is, however, now insisted that the claimant George H. Dentz has been guilty of such a fraud towards the libellants in respect to said suit, and the sale of the tug under the decree therein, that he is estopped to deny their liens as still existing, notwithstanding the sale of the boat to him under the decree. It is also claimed on their behalf that a sale under a decree of an admiralty court to one who was the former owner of the vessel does not cut off the prior liens created through the acts or contracts of such owner, and that the same principle makes the title of the claimant, who was the master of the tug and representative of the owner at the time when the libellants' liens, if they ever had any, attached, subordinate to their liens. And it is insisted that the rule applies to such a case that the same person cannot be both vendor and vendee.

As regards this latter point, it seems to me enough to say that a sale of a vessel by a court of admiralty, if properly subject to its jurisdiction, is a sale of the thing itself and not a transfer of anybody's title to it. A transfer by the marshal under the decree becomes a new and independent source of title, and all rights in and liens upon the thing sold are transferred and attach to the proceeds in the possession of the court. It differs essentially from a sale inter partes and from other judicial sales where the court undertakes to deal with and transfer only the interest or title of particular persons, parties to the suit before it. And there is no reason of public policy which incapacitates a former owner from buying at an admiralty sale on the same terms as regards the title he acquires with all the rest of the world. Indeed, sales in admiralty are so often submitted to, in practice, for the purpose of disentangling the title to the vessel from embarrassing claims and liens, and vessels so sold have been so frequently purchased by their former owners that this point, if valid, must long ago have been raised and sustained. There is no question that the former owner may buy and all existing liens will be cut off by the sale. Nor does this claimant stand in any worse position as a purchaser than any other person because he was master of the tug at the time libellants' boats were lost. Their claims against the tug, if any, are based wholly on the negligence of those in charge of the boat at the time of the disaster. He was then the master and presumptively the negligent party, if negligence shall be proved. But this fact does not establish any relation of trust and confidence between him and them such as to make it improper for him to become a purchaser with all the rights of any other purchaser.

The point of an equitable estoppel is, however, now chiefly relied on by libellants' counsel. The circumstances insisted on as creating this estoppel are, that the claimant being liable personally, as master of the tug, to the libellants for their claims, suffered the proceedings in the Collins suit to go on to a condemnation and sale, when he might have defended it, or might have settled the claim; and kept the libellants in ignorance of the proceedings till after the sale, misleading them through promises of payment which he did not intend to perform, so that they deferred libelling the boat till after the sale,

whereas but for such promises they would, it is claimed, have libelled her before the sale, and would have discovered the pendency of the Collins suit, appeared therein and contested the claim, or attended the sale and given or procured to be given a higher price; that by these means and other practices designed to secure secrecy, they were prevented from getting information of the sale and so of protecting their interests by bidding at the sale; that these other practices were chiefly the procuring of the sale to be made at an unusual place and the procuring of the consent of the marshal that pending the sale, no keeper should be put on board, and that the boat should remain in the possession of the claimant, making its usual trips about the harbor and in Long Island Sound.

No case for the application of the doctrine of equitable estoppel is made out against the claimant. He was not under the slightest obligation to inform the libellants of the pendency of the suit of Collins, or of the sale which was about to take place. He had a perfect right to allow the Collins case to go on to a decree and sale, even if he might have settled it; and it was no act of bad faith toward other persons having liens on the tug, if he did so with the intention of buying her at the sale clear of their liens. There is no proof that the claim of Collins could have been successfully defended. The arrangement with the marshal for dispensing with a keeper seems to have been made from merely economical considerations, security being given to the marshal that the tug would be produced at the time and place fixed for the sale if the suit was not settled. The place of sale was a proper place, in the absence of any established or usual place for marshal's sales. Some inadequacy of price is shown, and it is probable that, upon a re-sale and with extraordinary efforts to obtain purchasers the tug might bring from a thousand to fifteen hundred dollars, instead of five hundred and fifty dollars for which she was bid off by the claimant. The alleged promises of the claimant to pay libellants' claims are denied by him, and do not seem probable under all the circumstances of the case; but, if made and if they were designed on the claimant's part to lull the libellants into a false security so that they forebore taking measures against the tug which would probably have led them to a discovery of the impending sale, it is not shown that by reason of these promises even in this indirect way they have lost their liens, or that they have suffered any damage as lienors which could not and would not, on their application in that suit, have been remedied. No misstatement of fact was made or is claimed to have been made to them by the claimant. Their liens are cut off by operation of law, by regular proceedings of a court of competent jurisdiction in a suit to which they and all the world having any claim on this vessel were parties. If their interests have been unduly sacrificed and their default in not appearing was excusable, that court had full power on their application to give them relief. No other court can so well give the relief to which they may be entitled. It is said that the claimant has obtained his title through this fraud. If it be in any sense a fraud, it is not true that the claimant obtained his title through or by means of it, but he did obtain his title through the judgment and decree of the court. It does not satisfactorily appear that if what is called his fraud had not existed, the claimant would not equally and on the same terms have obtained the same title. To hold that the liens of the libellants are not cut off would be to put them in a better position than they were in before the alleged wrong, when their claims were subordinate to that of Collins, and would virtually be setting aside the decree and proceedings of the district court in the eastern district by reason of alleged improper practices of one party to a suit in that court towards another party to the same suit. It would be inflicting a punishment for fraud without regard to the damage caused by the fraud. The libellants might have applied to the court for leave to contest Collins's claim at any time before the distribution of the fund in court, the proceeds of the vessel, and it appears that they knew of the proceedings within two days after her sale. If the sale was unfair, or for a grossly inadequate price, or would have been for a higher sum if they had had actual notice of it, they could have applied for a re-sale. But they have suffered no legal damage in not having an opportunity to buy the tug in themselves.

It is a general principle applicable to equitable estoppels, that equity will not carry them beyond indemnity to the party who has been misled. The only deceit which can be claimed to have been made out in this case is that by his acts and declarations the claimant led the libellants to understand that there was not, so far as he knew, any proceeding in admiralty pending against the tug which might result in their liens being cut off by a judicial sale in such suit. This is the utmost that can be made of the evidence, giving it the most favorable construction for the libellants. And the entire immediate resulting damage to them from this so-called deceit, was that they were led thereby not to take measures which would have informed them of the proceedings, and therefore suffered themselves to be in default in that suit. But the remedy and the duty of a party who is in default, if the default is excusable, or induced by the deceitful practice of another party to the cause, is to get out of default as soon as he can, and not to lie by till the injury that may result from his default, and which by application to the court he might prevent, has been sustained, and then throw the entire loss on the other party to the suit by whom he has been misled. It would certainly be a novel application of the doctrine of equitable estoppel for another court to

hold that the proceedings of the court in the suit where the party was so in default are not to have their full, usual and legitimate effect when that party has not even made application to that court to relieve him against his default. And if such application is made, it must be assumed that the party will obtain all the relief to which he is entitled. It is not to be overlooked that whatever the claimant may have done to mislead the libellants, they had all the notice of that suit which the law in like cases gives to lienors, and that they are in any view parties in default, and it cannot be complained, therefore, on their behalf that their application to that court for relief would necessarily be granted on terms usual in cases of default.

I do not think that the acts and declarations of the claimant were such as to amount to a statement by him to the libellants that there was no such suit pending; but if it were, while it would constitute a strong case for relief in that court, it would not, in my opinion, justify the application of the doctrine of equitable estoppel for two reasons: First, because an estoppel is raised only where it is necessary to prevent a loss or injury resulting from the reliance on the statement of the party estopped, and it is not so necessary if in the suit to which the statement refers he has or is entitled to full relief; and secondly, because an estoppel is applied only to the extent required for the indemnity of the party deceived, and to hold the claimant's new title, as is contended for, subject to the libellants' liens, without regard to the antecedent rights and liens to which they were subordinate, and which have been cut off by the decree and sale, would carry the estoppel far beyond such rule of indemnity.

The defence is sustained and claimant is entitled to decrees dismissing the libels.

E. W. GORGAS, The. See Case No. 7,248.

Case No. 4,586.

The E. W. GORGUS.

[3 Ben. 572.][1]

District Court, E. D. New York. Dec., 1869.

COLLISION AT ATLANTIC DOCKS—NARROW PASSAGE—SIGNAL.

The steam tug E. W. Gorgus was intending to come out of the Atlantic docks, the entrance to which is by a narrow gap between piers, on which are built warehouses which obstruct the view, except opposite the entrance. She blew her whistle, as a signal of her intention to go out, and, hearing no answering signal, entered the gap. She then discovered the steam tug W. S. Earle, coming into the dock, and at once stopped, but the two vessels came together: *Held*, that, whether the failure of the Gorgus to hear any signal from the Earle arose from the fact that the latter gave no signal, or from the coincidence of the Earle's whistle with that of the Gorgus, in either case, there was no negligence on her part, and as no subsequent negligence was shown, the libel against her must be dismissed.

In admiralty.

F. A. Wilcox, for libellant.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. The collision, which is the foundation of this action, occurred on the 20th of November last, in the day time, at the mouth of the entrance to the Atlantic docks, between two steamboats, one of which, the William S. Earle, was intending to enter the docks, and the other, the E. W. Gorgus, was passing out of them.

It is clear, upon the evidence, that the Gorgus gave the usual signal, indicating her intention to pass out through the gap, and it seems, also, clear that she heard no signal from the Earle, until it was too late for her to avoid the Earle, by stopping. Whether her failure to hear any signals from the Earle arose from the absence of such a signal, or from the coincidence that the signal from the Earle was blown at the same instant with the whistle of the Gorgus, and, therefore, not heard, would not affect the question of negligence, on the part of the Gorgus.

As soon as the Gorgus passed the corner of the buildings, which surround the dock, and hide the gap from approaching vessels, the Earle was seen, and the Gorgus stopped, and I see nothing, in her subsequent conduct, which indicates negligence.

The proofs, therefore, failing to fasten any negligence upon the Gorgus, which conduced to the collision, the libel must be dismissed, with costs.

Case No. 4,587.

In re EWING.

[2 Lowell, 407.][1]

District Court, D. Massachusetts. May, 1875.

PRACTICE IN BANKRUPTCY—TIME FOR OPENING A HEARING.

1. In bankruptcy, the time for opening a meeting or hearing is to continue one hour from the time fixed in the order.

2. If the magistrate does not appear, and has not been heard from, within the hour, any party may have the meeting adjourned.

[In bankruptcy. In the matter of J. E. Ewing.]

E. P. Nettleton and H. R. Brigham, for objecting creditors.

A. E. Pillsbury, for bankrupt.

LOWELL, District Judge. The meeting to consider the debtor's offer of a composition

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

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

was called before the register at ten o'clock in the forenoon of a certain day. It happened by some oversight, for which the legal accountability must rest on the debtor as the moving party, that no formal notice of the order had reached the register. He had actual notice, and intended to be present, but was prevented, and sent no message to his office on the subject. At half-past eleven, the attorneys of the two creditors, who now object to the acceptance of the resolution, gave notice to the attorney of the bankrupt that they should attend no longer, and objected to a meeting being held after that time; and, on the other part, a notice was given to them that the debtor intended to find the register and proceed with the meeting. The register arrived at his office at about noon, and sent notice to the counsel for the objecting creditors that he should hold the meeting at a certain hour that afternoon. One of these notices was received, and the other was not. Neither counsel attended further. The meeting was held at the hour so appointed, and the resolution was passed.

In Re Gilley [Case No. 5,438], I held that the first general meeting of creditors ought to be kept open to receive votes for assignee for at least one hour. In the opinion then given I cited analogous cases in the practice of several states, relating to hearings before magistrates and before judges at chambers, as well as in bankruptcy and insolvency. The converse of this rule has prevailed at common law, namely, that after an hour has passed, if the magistrate is not present and has not been heard from, either party is at liberty to consider the case as discontinued or postponed; or, if the judge is ready and only one party has appeared, the case may proceed ex parte. See McCarty v. McPherson, 11 Johns. 407; Kimball v. Mack, 10 Wend. 497; Dyer v. Smith, 12 Conn. 384.

This rule is not held with so much strictness as the other. When it was shown, for instance, that no injury could have occurred to the absent party, as he had not appeared at all, the fact that the hearing was not opened until after the hour had elapsed, was decided to be immaterial. Niles v. Hancock, 3 Metc. [Mass.] 568.

In bankruptcy there is even more need of a definite practice than in ordinary suits at law or hearings between one plaintiff and one defendant, because the great number of persons interested, and having a right to take part in the proceedings, increases the chances of misunderstanding and consequent injustice if the practice is loose or variable. If the matter were entirely new, the question would be whether such a meeting may be opened at any time during the day, or during what definite part of it. It could hardly be considered reasonable that the parties should be held to attendance throughout the day in hearings of this sort. Whatever law is applied to one side must apply to the other; and every creditor must have the right to be heard at any time during the day, if the debtor has the whole day in which to have the meeting opened. I think the analogous practice in so many similar hearings points to an hour as the true limit.

There is no need to lay down a rigid rule, without exceptions. In nearly every case, the register, or some substitute, can be reached within the time, and can make at the least a postponement to a fixed hour. In this case, as it is admitted that one of the creditors failed to receive notice of the postponement, I must hold that the meeting, held three or four hours after the time appointed, was irregular. U. S. v. Rundlett [Case No. 16,208].

Leave to record resolution refused. Debtor may call a new meeting within one week.

Case No. 4,588.

In re EWING et al.

[17 N. B. R. 109.][1]

District Court, D. Massachusetts. Jan. 23, 1878.

BANKRUPTCY — COMPOSITION — ASSUMPTION OF DEBTS BY NEW FIRM — DISMISSAL OF PROCEEDINGS IN BANKRUPTCY — FAILURE OF NEW FIRM.

A resolution of composition was adopted in this case, by which the creditors agreed to accept notes of a new firm to be composed of two members of the old firm and such other person or persons, if any, as they might associate with them, with a fresh capital of at least twenty thousand dollars, which, if borrowed, should not be withdrawn until the composition was paid. The new firm was formed of all the members but one of the old firm, with the capital required, and a deed of release was signed by the creditors. The capital had been borrowed and was repaid soon after. The new firm paid the first and second instalments of the composition, but stopped payment on the third. A day or two before this the case had been dismissed. *Held*, that the dismissal should not be vacated and the case sent back into bankruptcy, because (1) creditors of the new firm could not prove their debts or be paid in this proceeding, and (2) because the remaining partner, himself innocent, lost his opportunity, by the discharge, of seeing that the composition was faithfully and fully carried out.

[Cited in Re Herman, Case No. 6,405.]

The firm of Ewing & Company, composed of Charles E. Ewing, Hugh W. Ewing, Nathaniel B. Blackstone, and Henry A. Leslie filed their petition in bankruptcy February 8, 1877, and on the next day proposed a composition to their creditors, which was accepted and recorded. The resolution provided for the payment of sixty-two and one-half per cent. upon all the joint debts, payable in three, six, nine, and twelve months, secured by the notes of a new firm to be composed of the two Ewings and such other person or persons, if any, as they might associate with them, the new firm to have the assets of the old firm, and a fresh capital of at least twenty thousand dollars, which, if borrowed, should not be withdrawn until the composition should be paid. The certificate of a committee of three

[1] [Reprinted by permission.]

certain creditors to be evidence that the new firm had been formed and the fresh capital contributed. February 28, 1877, the committee certified that a new firm had been formed, of three of the partners of the old firm, omitting Mr. Leslie, and that the fresh capital had been paid in. On the fifth day of March following the creditors executed a deed, reciting these facts, and that they had severally received the notes of the new firm for the amounts due them under the composition, and that they were received in satisfaction and discharge of their debts against the old firm, and thereby releasing the said old firm, and each member thereof from the old debts, and consenting that all proceedings in the cause should be dismissed. The capital had not in fact been paid in as agreed, but had been borrowed without condition, and was repaid soon after, and the committee has been deceived by misstatements on the subject. The new firm anticipated the payment of the composition notes to certain of their friends, and paid the first and second instalments of the composition, and stopped payment upon the maturity of the third. A day or two before this, the release above mentioned was filed in court, and the case was dismissed on the same day, October 30, 1877. On 28th November, 1877, certain creditors filed a petition alleging the foregoing facts and praying that the order for dismissal might be vacated and the composition set aside, and that the case proceed in bankruptcy.

H. C. Hutchins, H. W. Suter, and F. Dabney, for petitioners.

D. Thaxter, R. D. Smith, G. R. and W. P. Fowler, opposing.

LOWELL, District Judge. I find the facts to be truly set forth in the petition. The creditors were deceived when they were given to understand that fresh capital had been paid in as provided for in the resolutions for composition. There is, however, no evidence that Mr. Leslie, the retired partner, had any privity with or knowledge of the fraud.

There are two decisive objections against opening the case in bankruptcy. The firm was formed with the consent of the creditors of the old firm, and has been trading and dealing for some months, and whatever debts it may have contracted ought to be paid, or at any rate ought to be provable; and I do not see how they could be proved, much less how they could be paid, if the case is to go on as of last February. The second reason is that Mr. Leslie, himself innocent, was discharged and exonerated by a release under seal, and thereby lost the opportunity, because he was released from the duty, of seeing that the composition was faithfully and fully carried out. After his release, most of the acts now complained of were done, and it would be unjust to hold him responsible for them.

I doubt whether it would ever be safe to send a case back to bankruptcy, under our statutes, which make no special provision for such cases, when the creditors have consented to the formation of a new firm, whose rights and liabilities might be most seriously complicated and interfered with by such a course. Truly, a way might be found in some cases, as for instance, if it could be shown that the debts of the new firm were all known, and that the creditors of the old firm were ready to pay them in full.

What I understand this petition to seek would scarcely ever be admissible; that is, to give an assignee the right to avoid all acts, however honest, which had been done under an arrangement which the creditors themselves had authorized.

For the fraud which has been committed, the creditors have various remedies at law and in equity, and perhaps in bankruptcy, which I need not particularly point out to them. In the old bankruptcy they must abide by the deed they have made, because, by that deed, persons more innocent even than they, because not guilty even of negligence, may be injured by revoking or disregarding the deed. Petition denied.

Case No. 4,589.

EWING v. BLIGHT.

[3 Wall. Jr., 134;[1] 1 Phila. 576; 12 Leg. Int. 335.]

Circuit Court, E. D. Pennsylvania. Nov. 8, 1855.

EQUITY PRACTICE—DILATORY PLEA.

1. It is not requisite in equity suits in the third circuit, that a dilatory plea be filed within four days after the term to which the bill is filed. On the contrary, such a plea may be entered at any time before or on the next rule day succeeding that of the defendant's appearance; there being no distinction in this respect between dilatory pleas and any other pleas. The case is different at law.

2. Where in such suit a plea is filed, though filed irregularly, the complainant cannot treat it as a nullity and take a decree as pro confesso. Before taking such a decree in such a case, he should first obtain an order to set the plea aside, or to take it off the files as irregular.

3. Domicile or citizenship, depending not only on the acts but also on the intentions of the party of whom it is averred, and so being often the predicate of nice legal distinctions, as well as of facts and intentions of which another may be cognizant, need not, in a dilatory plea, be sworn to as of knowledge, nor otherwise than as of belief.

[Cited in Farley v. Kittson, 120 U. S. 317, 7 Sup. Ct. 541.]

In this suit—a bill in equity against a citizen of Pennsylvania—the complainant averred himself to be a citizen of another state; an averment necessary to give the court jurisdiction. A plea was filed [October 5, 1855][2] denying that the complainant was a citizen of another state; and this plea was put in

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

[2] [From 12 Leg. Int. 335.]

twenty-five days after the bill was filed. The settled practice of this court at law requires that all dilatory pleas should be filed within four days after the term to which the declaration is filed, counting both days inclusively; but the rules of this court at equity would seem to have no provision as to this class of pleas, further than as one of them, the 18th, declares generally, that the defendant may enter his plea, demurrer or answer at any time before or on the next rule day succeeding that of his appearance; in default of which the bill may be taken pro confesso.

C. Ingersoll, for Ewing the complainant, had entered an order in the clerk's office, that the bill be taken pro confesso; the ground of his entry being that the plea was not filed within four days. This entry, Mr. Miller, for defendant, now moved to rescind.

GRIER, Circuit Justice. The rules in courts of law, wth regard to dilatory pleas, are very stringent, and require them to be put in within four days after the term to which the declaration is filed, counting both days inclusive. They require also that the affidavit to the truth of the plea be positive, and not according to the belief of the deponent. In the practice of those courts, also a dilatory plea, not filed in time or subsequently authenticated, may be treated as a nullity, and the party making it defaulted for want of a plea.

But such is not the course of practice in courts of equity. By the rules of this court, the defendant may enter his plea, demurrer or answer to the bill at any time before or on the next rule day succeeding that of his appearance. There is no distinction made between pleas to the jurisdiction, or that called dilatory pleas and any other pleadings. Nor can the complainant treat the plea filed as a nullity and enter an order taking the bill pro confesso, where the plea is not sufficiently verified. The proper mode of taking advantage of a formal defect of this description, is by an application for an order setting aside the pleading, or to take it off the files for irregularity. Wall v. Stubbs, 2 Ves. & B. 355; Heartt v. Corning, 3 Paige, 570.

Entry in clerk's office rescinded.

Upon the court's announcement of this order, rescinding the entry made by his direction in the clerk's office, of judgment pro confesso, Mr. Ingersoll now moved for an order that the plea should be set aside, because not sworn to, and therefore not sufficiently verified. Counsel on the other side having been heard against the motion, the court's opinion was given by

GRIER, Circuit Justice. It has been said, by Lord Redesdale, "that pleas to the jurisdiction of the court, or in disability of the person of the plaintiff, as well as pleas in bar of any matter of record, may be put in without oath." But this is true only where the truth of the plea appears by some record. For it is now well settled that wherever the plea puts in issue matter in pais, or which may be established on the hearing, by the testimony of witnesses, it should be verified by oath.

"The principle upon which the court acts in requiring pleas to be put in upon oath, is, that it will not permit a defendant to delay or evade the discovery sought, unless he will first pledge his oath to the truth (or at least to his belief of the truth) of the facts upon which he relies in all cases where the facts are those of which the court does not take official notice." 2 Daniell, Ch. Pr. 786.

Where the facts averred in the plea, are of the defendant's own knowledge, or acts done by himself, they must be sworn to positively. If they are acts done by others not necessarily within his knowledge, they need not be sworn to positively. It is sufficient if he swears to his belief of their truth, and this more especially where the plea is negative, and denies some fact alleged affirmatively in the bill. As where the bill alleges that the complainant is heir, executor, or partner. Drew v. Drew, 2 Ves. & B. 159; Heartt v. Corning, 3 Paige, 570. There is no distinction in equity between pleas to the jurisdiction or other pleas.

The bill in this case avers that the complainant is a citizen of New Jersey, and of course not a citizen of Pennsylvania. This averment is necessary to give the court jurisdiction. The plea denies the fact as averred, and affirms the negative inference assumed from it. Although in strictness it may be said to deny the allegation of the bill by affirming a positive fact, inconsistent with such averment, it may nevertheless be considered a negative plea taking issue on an averment of the bill necessarily within the personal knowledge of defendant. Domicile or citizenship depends not only on the acts, but the secret or declared intentions of the party of whom it is averred. It is the predicate often of very nice legal distinctions, as well as facts and intentions of which another may not be cognizant. It is generally an opinion or belief founded partly on facts known, and partly on information from others. In many cases one man may have such a thorough knowledge of the birthplace and residence of another and the acts of his whole life, that he may conscientiously swear to his citizenship or domicile absolutely and positively. But in many cases a defendant cannot have such knowledge, and can only swear to his belief.

Where an answer sets forth a detail of numerous facts, some on the knowledge of the defendant and others on information, the oath usually makes such distinction. But a plea denying the citizenship of the complainant, being to a single fact, never sets forth the particular facts or reasons which enter into the result. Hence the form of the oath to an answer is not usually found attached to a plea denying a single fact.

If the fact denied be not within the personal knowledge of the deponent, he can but swear to his belief, and the rules of pleading in chancery require no more. It is not necessary to set forth the reasons of such belief or to distinguish between, how much of it is founded on information, how much on personal knowledge, and how much on legal investigation or instruction of counsel. Few persons are capable of such an analysis of their own faith. The law should not compel a party to swear rashly, under penalty of losing his rights.

The motion to strike out the plea for want of a sufficient verification is therefore refused.

[NOTE. During the pendency of this suit a motion was made by complainant's counsel for an injunction and receiver (Case No. 4,590), which was denied, as contrary to the practice of the court.]

Case No. 4,590.

EWING v. BLIGHT.

[3 Wall. Jr., 139.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1855.

EQUITY PRACTICE — INJUNCTION DURING PLEA TO JURISDICTION.

Chancery will not grant an injunction, nor appoint a receiver pending a plea to its jurisdiction; but to guard against the abuse of dilatory pleas, or any irreparable mischief, the court will order an immediate hearing or trial of the plea.

In this case a plea to the jurisdiction had been filed, denying that the plaintiff was a citizen of New Jersey, which he claimed to be in his bill; and before this plea was disposed of, or any further step taken, a motion was made by C. Ingersoll for an injunction and receiver. The point of the case was whether, in these circumstances, the court would entertain such a motion.

GRIER, Circuit Justice. The pendency of a plea to the jurisdiction of the court, necessarily precludes all further action of the court, till it is decided. [See Case No. 4,589.] This rule of practice is founded on reason, as well as fortified by authority. 13 Ves. 164.

While the jurisdiction of the court or the equity of the bill is in doubt by the pendency of a plea or demurrer, it would be highly improper for the court to interfere by the exercise of such high powers over men's property. The court have it always in their power to guard against the abuse of dilatory pleas. If any irremediable mischief should impend, which it is absolutely necessary to meet with promptness, or if there be any just suspicion that the plea or demurrer is merely intended for delay, the court will order an immediate hearing or trial of the plea.

If an issue be desired to try the plea of jurisdiction in this case, it will be ordered; or any other rule which complainant may desire, for the purpose of expediting the final hearing, in case the jurisdiction should be found to exist.

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

Case No. 4,591.

EWING v. BURNET.

[1 McLean, 266.][1]

Circuit Court, D. Ohio. Dec. Term, 1835.[2]

ADVERSE POSSESSION—ACTUAL RESIDENCE ON THE LAND—ACTS OF OWNERSHIP.

1. An actual residence on land, not necessary to constitute an adverse possession under the statute of limitations.

[See note at end of case.]

2. But there must be such an occupancy by exercising acts of ownership over the land, enjoying its profits, &c., as to give notice to the public and all concerned of the claim.

[See note at end of case.]

3. Paying taxes, suing trespassers, &c., not enough to constitute an adverse possession.

[At law. Action by the lessee of James H. Ewing against Jacob Burnet.]

Mr. Fox, for lessor of plaintiff.

Mr. Worthington, for defendant.

OPINION OF THE COURT. This action was brought to recover possession of lot No. 209 in Cincinnati. Both the parties claim under John C. Symmes. The plaintiff has given in evidence a deed for the lot from Symmes to Samuel Forman, dated 11th of June, 1798, who on the next day conveyed the same to Samuel Williams, whose right, on his decease, became vested in the lessor of the plaintiff. The defendant claims by deed to himself from Symmes, dated 21st of May, 1803, accompanied with an adverse possession of more than twenty years prior to the commencement of this suit. Several witnesses have been examined to show acts of ownership exercised over the lot by the defendant, such as drawing sand from it for himself, and selling sand from the lot to others, and driving those away who attempted to take the sand without leave, paying taxes for the lot, &c. It is situated directly in front of the corner of the square on which the defendant, for many years resided; and during which time, as well as afterwards, the acts of ownership were exercised over the lot. Several witnesses state that the lot was known as the property of the defendant and that he was in possession of it, not by actual occupancy, but by using it as above, for sand and gravel. The lot was not enclosed until some ten or twelve years ago. The possession of the defendant, several of the witnesses state, has been exclusive since 1806 or '7, and they had no knowledge of any

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

[2] [Affirmed in 11 Pet. (36 U. S.) 41.]

adverse claim. The witnesses also prove that Samuel Williams resided in Cincinnati, knew of the defendant's title for the lot, and of the acts of ownership he exercised over it; but there is no evidence which shows that he ever demanded possession, took any steps to recover it, or gave notice to the defendant of his claim to the lot. One of the witnesses states that he heard Williams often declare the lot was his, and that so soon as he was able he should improve it. One of the plaintiff's witnesses states that after the defendant had made the purchase of the lot and before he received a deed for it, he had notice of the claim of Samuel Williams.

On the evidence the following charge was given to the jury: "The plaintiff having shown a deed for the premises in controversy older in date than that which was given in evidence by the defendant, on the prayer of the defendant, the court instruct the jury that his actual possession of the lot, to protect his title under the statute of limitations, must have been twenty-one years before the commencement of this suit. That suing for trespass on the lot, paying the taxes and speaking publicly of his claim, are not sufficient to constitute an adverse possession. That any possession short of an exclusive appropriation of the property by an actual occupancy of it, so as to give notice to the public and all concerned, that he not only claimed the lot but enjoyed the profits arising out of it, was such an adverse possession as the statute requires. That to constitute an adverse possession it is not essential that the property should be enclosed by a fence, or have a dwelling house upon it. If it be so situated as to admit of cultivation as a garden, or for any other purpose without an enclosure, and it was so cultivated by the defendant during the above period, it would be sufficient; or if the lot contained a coal mine, or marble or stone quarry, and it was worked the above period by the defendant, he having entered under a deed for the whole lot, such an occupancy would be an adverse possession, though the lot had no dwelling house upon it and was not enclosed by a fence. And also if the lot contained a valuable sand bank which was exclusively possessed and used by the defendant for his own benefit, by using the sand himself and selling it to others, and his occupancy of the lot in this manner was notorious to the public and all concerned; and if the defendant paid the taxes for the same, ejected and prosecuted trespassers on the lot, it being situated adjoining to the lot on which the defendant actually resided, except the intervention of a street, which had not been graded and opened so as to be used by the public; and said lot preserved the view of the defendant from his residence unobstructed, and such possession was continued the time required by the statute, it would constitute an adverse possession for the whole lot, the defendant having entered under a deed as aforesaid. The court would also remark to the jury, that the law had been settled in Kentucky, if a person residing on a tract of land should purchase by deed another tract adjoining to it, his possession would be extended over the tract thus purchased; and this seems to be reasonable, and is sustained by the doctrines of possession as generally recognized. Had the lot in controversy adjoined the premises on which the defendant resided, the case would come within the rule, but a street intervenes between the residence of the defendant and the lot in controversy, which prevents an application of the rule in this case." [Ellicott v. Pearl] 10 Pet. [35 U. S.] 442; [Barclay v. Howell] 6 Pet. [31 U. S.] 513.

The jury found a verdict of not guilty, and a motion being made for a new trial, the cause was continued to the next term, at which term the motion for a new trial was overruled, and a judgment entered on the verdict.

[NOTE. This case was afterwards heard by the supreme court on writ of error, and the judgment of the circuit court was duly affirmed, Mr. Justice Baldwin delivering the opinion. The exceptions taken were: First, to the refusal of the court to instruct the jury that on the evidence the plaintiff was entitled to recover; second, that the defendant had made out an adverse possession. In reference to the first exception it was held that, as the jury is to decide as to the credibility of the witness, and how far his evidence tends to prove a fact, the circuit court did not err in refusing to instruct for the plaintiff on the evidence as set forth in the record. In reference to the question of adverse possession Mr. Justice Baldwin remarked that it has long been well settled that fences, buildings, or other improvements are not necessary, it being sufficient that "visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years after an entry under claim and color of title." It was held that the evidence in this case was sufficient to sustain the claim of adverse possession. Ewing v. Burnet, 11 Pet. (36 U. S.) 41.]

EWING (DRURY v.). See Case No. 4,095.

EWING (SUYDAM v.). See Case No. 13,655.

Case No. 4,592.

The EXCELSIOR.

[2 Ben. 434.] [1]

District Court, S. D. New York. May, 1868.

FREIGHT—AGREEMENT TO SELL VESSEL.

1. Where the master and owner of a canal boat, which was in Hudson, with a cargo on board, bound to Philadelphia, agreed to sell her for $1,000, and to take on board at Philadelphia an engine belonging to the purchasers, and deliver it to them with the boat at New York, on or before a certain day, they to pay all tolls, and the vessel went to Philadelphia and took on board the engine and brought it to New York, and the owner of the boat was not then able to give the purchasers a good title to the boat, and the latter tendered the tolls and demanded the engine, which the master did not de-

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

liver, and they libelled the boat to recover its value: *Held*, that the purchasers were not bound to pay or tender the $1,000 till they received the boat and a good title to her, and the engine.

2. Any freight on the engine was part of the $1,000.

3. The purchasers, having tendered the tollage, were entitled to the engine free of all lien for freight.

In admiralty.

Beebe, Donohue & Cooke, for libellant.

Benedict & Benedict, for claimant.

BLATCHFORD, District Judge. This is a libel to recover the value of a steam engine, owned by the libellant, John S. Ray. The libel alleges that, in April, 1868, the canal boat took the engine on board at Philadelphia, to be transported to New York, subject only to tollage; and that the boat, with the engine on board, has arrived at New York, and the libellant has tendered the tollage, but the master of the boat refuses to deliver the engine, which is of the value of $600.

The defence set up in the answer is, that, on the 7th of April, 1868, an agreement in writing was made between the master of the boat, who was her owner, for the sale of her to the libellant and one Rockefeller, the terms of which were, that the master was to sell the boat for $1,000, she then being at Hudson, (N. Y.) loaded with marble; that she should go with that cargo to Philadelphia, and be delivered at New York on or before April 21st; that, upon such delivery, the $1,000 should be paid; that, for the same consideration, the master should take on board of her, at Philadelphia, a steam engine belonging to the libellant and Rockefeller, and deliver it with the boat at New York, on or before April 21st, they to pay all expense of tollage. The answer avers, that the engine was transported under that agreement and no other; that the claimant was prevented from delivering the boat at New York on the 21st, by the failure of the other parties to have the engine in readiness for shipment; that the claimant arrived with the boat at New York on the 25th, and offered to deliver the engine and the boat according to the contract on that day; that the other parties did not accept them, but refused to receive them, and it was agreed between the parties that every thing should remain as it was, and the engine should remain on board of the boat until the return of the claimant from Philadelphia on the 28th, but that the libellant, in violation of such agreement, commenced this suit before the return of the claimant; that the claimant is ready and willing to perform the agreement on his part; and that the other parties have failed to perform it.

I think, on the evidence, that this defence fails. It appears, that the claimant did not have the legal title to the boat so that he could convey it by a bill of sale. He had an equitable title only. The money to buy the boat for him had been advanced by a friend of his in Philadelphia, who took a bill of sale of the boat in his own name. The claimant was entitled to receive a bill of sale of the boat from his friend whenever he should reimburse the money. These facts were not disclosed when the agreement of sale was made. When the claimant was in Philadelphia with the boat, he endeavored to procure a bill of sale to himself for the boat, but his friend was too ill to transact business. The claimant had not reimbursed the money to him, nor has he yet done so fully, and he is not now entitled to demand a legal title to the boat, nor is he yet in a condition to convey one. This difficulty was disclosed by him to the other parties when he reached New York with the boat. They were not bound to pay or tender the $1,000 till they received the boat and a good title to her, and also the engine. The $1,000 was to be the consideration for the purchase of the boat and for the transportation of the engine. The engine has been transported, and is the property of the libellant. He proves that he has tendered the tollage to the proper party, and I think he is entitled to the possession of his engine free of all lien or charge for freight. He was so entitled when this suit was brought. Any freight on it is a part of the $1,000. After the claimant shall have made proper delivery of both boat and engine, he may be entitled to the $1,000, but not till then. Meantime he has no right to withhold the engine, the tollage having been tendered.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

EXCELSIOR INS. CO. v. SHAW. See Case No. 14,366.

EXCELSIOR MANUF'G CO. (BRIDGE v.). See Case No. 1,859.

Case No. 4,593.

The EXCHANGE.

[10 Blatchf. 168.][1]

Circuit Court, S. D. New York. Sept. 23, 1872.

COLLISION—VESSEL AT ANCHOR IN PATH OF STEAM FERRY-BOATS—FOG—FAULTS.

1. Observations as to the navigation of ferry-boats on the ferries between New York and Brooklyn, and of other vessels with reference to such ferry-boats, and as to their reciprocal rights and duties.

2. A vessel anchored, in the afternoon, in the track of one of such ferries. She was requested, by the ferry boats, to remove, but did not.

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

In the night, a fog arose. The vessel used no audible means to give notice where she was, and a ferry boat, using all caution, and giving proper audible signals, collided with the vessel, and damaged her. On a libel by her owner, against the ferry-boat: *Held*, that the vessel should not have anchored where she did.

[Cited in The St. Lawrence, 19 Fed. 330; The Ophelia, 44 Fed. 941.]

3. She should, on request, have changed her anchorage.

4. She was in fault, in giving no audible signals.

5. The ferry-boat was not in fault.

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

[In admiralty.]

Charles Donohue, for libellants.

Benjamin D. Silliman, for claimants.

WOODRUFF, Circuit Judge. The libel herein was, I think, properly dismissed, upon either of several grounds, involving fault in the bark Ellingwood, the libellants' vessel, injured by the collision with the Exchange, and also on the ground, irrespective of fault in the bark, that the Exchange was itself free from fault.

It is true, that having respect only to the private interests and merely personal rights of the parties, the law has no favorites. Owners of ferry-boats have not, in their own behalf, any exclusive privileges of navigation over owners of other vessels. But it does not follow that the business of running a ferry between two crowded cities, where tens of thousands of persons pass and repass daily, and must necessarily pass at all hours of the day, and in all weather, is not governed by rules which, on the one hand, involve more stringent responsibility for care, vigilance, and caution, and, on the other, secure to them more than ordinary diligence on the part of others, for their protection. The ferries between New York and Brooklyn are a public necessity. Their managers are, more than ordinary carriers, either of freight or passengers, public servants. The public are especially interested in the good management and safe conduct of these ferries. Hence, they are largely under the control of the authorities of the state and city.

It is not necessary to hold, that, from this, results such an exclusive privilege, that the interests of commerce are to be disregarded, or that navigation is to be unnecessarily hindered. So far as possible, the running of the ferry-boats, and the navigation of the river by ordinary boats and vessels, are to be harmonized, so that neither may impede the other. But, by so much as the protection of large numbers of human lives, the prosecution of the daily business, and even the maintenance and support, of large numbers, cast upon the managers of the ferries the duty to be prompt, regular, active, vigilant, and careful, by so much, the same considerations cast upon others the duty of abstaining from whatever will make the management of the ferry needlessly difficult or dangerous.

If the time shall hereafter arrive when the number of ferries required between the two cities, and the number of boats to be run thereon, shall be so great, that safe anchorage ground in the river, where they cross, cannot be found, without interrupting the ferries, or rendering passage thereon dangerous, then the enquiry will arise, whether vessels engaged in ordinary navigation must not seek other anchorage; and that enquiry will arise, not as a mere question of abstract private right, it will not be determined out of any especial regard to ferry managers, in their merely private interests, but it will be a question of public interest. At present, it is sufficient to say, that, while the river is a great national highway, and is open to navigation by all, all who navigate it are bound to have respect, not merely to the ordinary rights of others, but to consider the nature of the business of such others, and the exigencies which that business involves.

Without affirming, and, certainly, without denying, the validity of the state and city legislation, designed for the protection of the lives and safety of passengers on the ferries, and intended to facilitate the conduct of business so important not only to both cities, but to the country having business intercourse with those cities, it is obvious, that that legislation rests upon the principles above stated, and those principles are to be recognized and applied, whether such legislation is valid or not.

In the present case, it is shown, that the bark Ellingwood, the vessel of the libellants, bound for the foot of 21st street in the North river, came up from below, in the afternoon of the 6th of December, 1864; and that, instead of going up the North river, to her destination, she came up the East river, and, between five and six o'clock in the afternoon, anchored in the East river, in, or very nearly in, the track of the ferry between Wall street, New York, and Montague street, Brooklyn. The evening was clear, and she was seen and twice successively hailed from the ferry-boats, informed that she was in the track of the ferry, and requested to remove to anchorage ground lower down, out of the way of the ferry-boats. No attention was paid to the request. The ferry-boats succeeded in avoiding her during the evening. But, in the morning, when the ferry-boats resumed their usual trips, a dense fog was over the river, and, notwithstanding the most painstaking vigilance, the most careful lookout, and the constant giving of signals by the ferry-boat, the ferry-boat Exchange came in contact with the bark, doing some damage, for which her owners filed the libel herein. The bark gave no notice of her presence or near neighborhood in the morning, by bell, horn,

or otherwise, and could not be seen from the ferry-boat, until she was so near that the collision was inevitable.

The bark should not have anchored where she did. I do not say that she was in fault in coming into the East river. At the hour when she anchored, it may have been too late to expect safely to enter the slip, or come to the wharf, at 21st street, on the North river, or there may have been some difficulty in finding a suitable and convenient anchorage on the North river side, though no reason has been given, on behalf of the libellants, why she came up into the East river at all. Be the reason what it may, there is an utter failure to show any reason for selecting the place where she did anchor. The bark should have given heed to the requests made by those on the ferry-boat, and, admonished thereby, have changed her anchorage. It is not proved, or even claimed, that this was not entirely practicable. It is not too much to say, that, choosing such a place to anchor, and persisting in lying there, notwithstanding the warning she received, the bark took the risk of any collision with a ferry-boat navigated with ordinary care and caution. It is still more obvious, that she took the risk of a collision, in the on-coming dense fog, which occurred in spite of very special and diligent care and caution on the part of the ferry-boat.

The bark should have given notice of her location, apprising the ferry-boat of their near approach, by bell or fog-horn, in the morning. It it claimed, that, because those navigating the ferry-boat had seen her where she was the evening previous, they were bound to take notice of her location in the morning, and avoid her, notwithstanding her omission in this respect. If the ferry-boat was bound to assume that she remained still at anchor at that place, and that she had not moved, as twice requested, and was not at liberty to infer, from the absence of the sound of bell or horn, that she was no longer there, then it is true that knowledge of her location the previous evening required that the ferry-boat should be more vigilant than, without such knowledge, was required of her; but, that is all. She was not bound to suspend her trips, and it is not shown that she omitted any reasonable precaution to make her passage safely.

Finally, the libellants have failed to show any fault on the part of the ferry-boat. She was not bound, and the court cannot say she was at liberty, in a dense fog, to depart from her usual course. The consequences of her doing so cannot be foreseen. If she had voluntarily done it, and collision with some other vessel properly lying out of such usual course had happened, and injury to her, or to the lives and property she herself carried, had followed, she could not have been justified. The libel was properly dismissed, and the dismissal must be decreed, with the costs of appeal.

Case No. 4,594.

The EXCHANGE.

[Blatchf. & H. 366.][1]

District Court, S. D. New York. March 14, 1833.

SEAMEN — ALTERATION OF SHIPPING ARTICLES BY MASTER — COMPENSATION FOR EXTRA SERVICES — DEPOSITION OF MASTER AS EVIDENCE FOR OWNERS.

1. The deposition of a master, who has interposed a claim and answer in an action in rem, and continues a party to the suit, cannot be read in evidence, on the part of the owners of the vessel.

2. Whether the master can vary the contract contained in the shipping articles, except by proof of deceit or fraud on the part of the seaman, quere.

3. A master may displace a mariner, and allot him other services than those for which he shipped, in case of his incapacity, or because the health or safety of the ship's company requires the change.

[Cited in The Topsy, 44 Fed. 634.]

4. Compensation may be allowed a mariner for extra services, different from those agreed to be rendered, and carrying a higher rate of wages—as, for example, those of a caulker.

[Cited in Sheridan v. Furbur, Case No. 12,761; Knee v. American Steamship Co., Id. 7,877.]

5. The measure of compensation is the difference between the two rates of wages, for the time employed in the extra services.

In admiralty. This was an action in rem, by a cook, to recover compensation for extra services as a caulker, on a voyage to South America. The libel averred, that the libellant was compelled to relinquish his business as cook on board, and do service as a caulker, at Buenos Ayres and other places, during the voyage, for seventy-five or eighty days, and that the regular wages of a caulker at Buenos Ayres were $3.75 per day. The master interposed a claim and answer, and denied that the libellant was employed as a caulker for more than forty days in all, and that the rate of wages at Buenos Ayres was as stated by the libellant; and alleged that the libellant was wholly incompetent to do the duty of cook, so that the crew preferred that he should be discharged from that service, and that they should do their own cooking; and, also, that he shipped upon the understanding that he would do duty as a caulker when required, being for such time relieved from duty as cook; and averred that the libellant never performed at one time the double duty of cook and caulker. It appeared, from the shipping articles, that the libellant shipped for the voyage as cook, at the rate of $12 per month. It was proved that he had been paid those wages in full. It also appeared that he was an experienced caulker; that the wages of caulkers who shipped for a voyage were the same as those of a mate; and that it was usual to allow seamen extra compensation for services ren-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

dered as caulkers. The evidence was contradictory as to the time during which the libellant was employed as a caulker, one of the crew testifying that, in his opinion, it did not exceed thirty days. As to the rate of wages per day, it appeared, that they varied, at different ports, from $2 to $3.50. The deposition of the master was offered on the part of the owners, and was objected to by the libellant.

J. D. De Lacey, for libellant.
Walter Edwards, for claimants.

BETTS, District Judge. The deposition of the master cannot be admitted. After having intervened and answered the libel, he cannot be received as a witness. If he has no interest in the suit, and is a competent witness, the owners should have moved to strike his name from the answer, and then his testimony might have been taken for the defence.

The answer sets up an agreement by the libellant to do duty as a caulker when required. This answer is not, of itself, evidence of the agreement. It would not be so in chancery, not being responsive to the allegations in the libel. It is matter of avoidance or excuse, on the part of the claimants. Moreover, such evidence would have the effect of varying the contract in the shipping articles; and I am not prepared to say, that the claimants can be permitted to vary that contract, except by proof of deceit or fraud on the part of the libellant. There is, accordingly, no proof supporting this allegation of the answer; and the contract contained in the articles having been, that the libellant should perform the duties of cook for the voyage, for wages manifestly adapted to that service, a new and different agreement cannot, under the circumstances before the court, be set up and substituted for the written one. Emergencies, arising during a voyage, may render it necessary to displace a mariner from the situation for which he shipped, and to allot him other services on board; and the acts of the master, in so doing, would be upheld by this court, whenever it was shown that the incapacity of the sailor or the health or safety of the ship's company required such change. Atkyns v. Burrows [Case No. 618]. See, also, Mitchell v. The Orozimbo [Id. 9,667]; The Mentor [Id. 9,427]; U. S. v. Savage [Id. 16,225]. It is, indeed, alleged, that the libellant was unqualified for the business he undertook, never having been employed as cook before. But he was not disrated for that cause; and the reason offered by the answer, in justification of the exaction of different services, is, that he was shipped under an engagement to render such services whenever required. There is no legal proof of that engagement, and the court must, accordingly, consider it not to have existed. The question, then, is, whether a seaman, shipped in one capacity, at a rate of wages sufficient to compensate that service only, can be required to perform, for the voyage, services of a more difficult and important character, and which always command higher wages, without being entitled to an increase of compensation.

Had the master found it necessary or expedient, during the voyage, to promote the libellant to the place of mate, the appointment would, under the settled rules of maritime law, have carried with it a right to corresponding wages, as incident to the new position. Such changes are of frequent occurrence, and are sanctioned by admiralty courts, and the promoted seaman is awarded the wages which appertain to his changed situation.

The testimony before the court is, that the wages of a caulker, who is shipped for a voyage, are the same as those of a mate; and, if the libellant had been put to that duty during the principal part of the voyage, I should be inclined to adjudge him the same rate of payment. But, it appears that he was only occasionally transferred to that employment, and performed, for the greater part of the time, the duties of cook. The proof is by no means clear as to the period of his employment as caulker, or as to the ordinary rate of wages allowed in the ports where the services were performed. The libellant avers that he worked in the vessel, as caulker, between seventy-five and eighty days. The master denies that extent of work, and avers that it did not exceed forty days, and one of the crew testifies, that he believes it did not exceed thirty days. The master ought to have been able to make certain, from his log-book, the amount of time during which the libellant served as caulker. I shall, therefore, accept the longest period named by him as the one for which the libellant is entitled to charge. The libel avers, that caulking wages in Buenos Ayres and Bahia were $3.75 per day; that a caulker there declined to do the business required by the ship for less; and that the master refused to give it, and compelled the libellant to do the work. The answer denies that such rate of wages was allowed, and says, that no more than $2 Spanish were charged in those ports; that caulkers were known to have worked for $1 per day; and that a first rate English caulker offered to do the work for twelve paper dollars per day. No testimony is produced in support of these averments. On the part of the libellant, a witness testifies, that he has been several times to South America as an officer on board of vessels, and is a caulker by trade, and that a caulker's wages in South America are from $3 to $3.50 per day; but he does not specify the time, or what places he visited, nor does he afford the court the means of deciding whether those wages were higher or lower than the wages at Buenos Ayres when the ship was at that port. The party claiming the extra compensation is bound to show,

satisfactorily, the amount to which he is entitled. The only proof fixing, with certainty, the price the libellant's services could command per day is, what he received in this port, which nearly corresponds with the sum admitted in the master's answer to have been given at Buenos Ayres and Bahia. The lowest and not the highest sum indicated by his evidence must, accordingly, be taken, and that will be $2 per day. The libellant having performed services not stipulated for in the contract, and which must necessarily have cost the ship more in procuring them than the wages of a seaman, he is entitled to receive that extra recompense. He will be considered as having been employed at the ordinary wages allowed per day for those services, deducting the amount paid him as monthly wages.

Let it be referred to the clerk to ascertain and report the amount payable, on the principles of this decision, allowing the vessel credit for all deductions which are properly chargeable against the libellant.

Decree accordingly.

EXCHANGE, The (L'ARINA v.). See Case No. 8,088.

EXCHANGE, The (M'FADON v.). See Case No. 8,786.

EXCHANGE BANK (DEMERITT v.). See Case No. 3,780.

Case No. 4,595.

EXCHANGE NAT. BANK OF COLUMBUS v. HARRIS.

[The case reported under above title in 14 N. B. R. 510, and 1 Cin. Law Bul. 357, is the same as Case No. 6,119.]

EXPORTER, The (GRAHAM v.). See Case No. 5,667.

Case No. 4,596.

The EXPRESS.

[1 Blatchf. 365;[1] 6 N. Y. Leg. Obs. 401; 1 Am. Law J. (N. S.) 289.]

Circuit Court, S. D. New York. Nov. 12, 1848.[2]

COLLISION BETWEEN TOW AND THIRD VESSEL—LIABILITY OF TUG.

1. A steamboat was towing a canal boat in New York bay, the latter being attached to the former by a hawser from her stern. The canal boat took a sheer, and came into collision with and damaged a third vessel. The captain of the tug was warned, before he lashed the canal boat astern, that she steered badly, and ought to be taken alongside. The tow was steered by her captain. The tug was under the command of her own captain, and did not take proper measures to arrest the sheer and prevent the collision: *Held*, that the tug was liable for the damage to the third vessel.

[Cited in Marshall v. Marshall, Case No. 9,128b; The Hector, Id. 6,317; Langley v. The Syracuse, Id. 8,068; The Alabama, Id. 122; Nelson v. The Goliah, Id. 10,106; The Quickstep, 9 Wall. (76 U. S.) 671; The Belknap, Case No. 1,244; The Swallow, Id. 13,663; The Express, 46 Fed. 865.]

2. And this, although the master of the tow may have been in fault in not exhibiting proper skill or attention in steering his vessel and was therefore properly responsible for the collision.

3. The tug is also responsible, if the damage could have been avoided by the exercise of reasonable skill and attention on her part.

4. Where the helm of the tow is under the direction of her captain, but all other means used in her navigation are under the absolute control and direction of the master of the tug, the whole duty of the tug is not discharged when she is so navigated as to avoid committing an injury herself. She must guard, so far as fairly lies within the power she exercises over the tow, against the danger of any injury being committed by her.

[Cited in Marshall v. Marshall, Case No. 9,128b.]

Appeal from the district court [of the United States for the southern district of New York], where Mortimer Livingston filed a libel in rem against the steamboat Express. After a decree in favor of the claimants [Case No. 4598], the libellant appealed to this court. New proofs were produced by the libellant on the appeal, which materially changed the aspect of the case as it appeared in the court below. The facts sufficiently appear by the opinion of the court.

Francis B. Cutting and Theodore Sedgwick, for libellant.

Washington Q. Morton and George R. J. Bowdoin for claimants.

NELSON, Circuit Justice. This is a libel filed by the owner of the yacht Mist, against the steamboat Express, for damage occasioned by a collision occurring in the port of New York.

The Mist was lying at anchor off Whitehall dock, at the usual anchorage ground for vessels of that description. The steamboat had just taken in tow, at one of the North river piers, a canal boat heavily laden with coal, for the purpose of carrying her around to the East river, there to be taken, with other boats, in tow to Albany. The canal boat was towed by a hawser some fifty fathoms in length, fastened to the stern of the steamboat, and, in coming around from the North to the East river, the latter passed on the inside of the Mist, between her and the Battery. As she came around Castle Garden, the boat in tow took a sheer out into the river, which the captain and hand on board of her, with all their exertions at the helm, could not break, by reason whereof she came in contact with the Mist, head on, abaft the forward chains, staving in her planks and timbers and doing other serious injury. The captain of the tug was warned by the master

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

[2] [Reversing Case No. 4,598.]

of the tow, at the time she was lashed to the stern, that the boat steered badly, especially when heavily laden, as she then was, and a request was made that she should be taken alongside, instead of being towed at the stern; but this was refused, and a hawser was flung to the master of the tow to lash her astern. The tug was not under the command or direction of the master of the tow, but under the command and direction of her own captain and hands. The tow was steered under the direction of her captain. The collision took place about five o'clock p. m. on the 13th of October 1845, in calm and pleasant weather, the tug having in tow no other vessel than the canal boat. The sheer of the tow commenced, according to the clear weight of the evidence, as soon as the tug straightened up in her course from the North river piers, or as she was coming around Castle Garden, and it continued widening from the track of the tug, notwithstanding the exertions of the captain and hand on board of the tow, until the collision occurred.

There is very little doubt, if any, that this sheer was seen by the hands on board of the tug, soon after it commenced, and that it was also seen that it was not in the power of the master of the tow, with all his efforts, to break it; and yet no measures were taken to arrest the sheer, or avoid the danger which must have been apparent. On the contrary, the tug continued her course at a speed of from six to eight miles an hour. It is true the hawser was paid out from the tug some ten or fifteen fathoms, but this was not for the purpose of arresting the sheer, but of increasing it, so that the tow might be enenabled to pass the Mist on the opposite side from the tug. Under these circumstances, though the master of the tow may have been in fault in not exhibiting proper skill and attention in steering his vessel, and is, therefore properly responsible for the collision, the captain of the tug was also in fault for not taking earlier measures to avoid it by stopping his vessel. There can be no reasonable doubt, upon the evidence, that the collision might have been avoided, if proper attention had been paid to the navigation of the tug; and, after her captain had been warned that the tow steered badly, and was requested, for that reason, to take her alongside, it was his duty, in passing around among the vessels lying at anchor in the bay, to have kept the strictest watch over the tow, and to have seized the first moment of apparent danger for the purpose of arresting the sheer and preventing the collision.

An idea seems to have been entertained on board of the tug, that if she was not in fault as respected her own navigation, that is, if she was so navigated as to avoid coming in contact herself with the damaged vessel, no responsibility could be properly attached to her; but that it must rest exclusively upon the vessel in tow, to whose bad navigation the collision was immediately attributable. This is a mistake. The tug is also responsible, if the damage could have been avoided by the exercise of reasonable skill and attention on her part. The navigation of a tow is dependent upon and controlled by the navigation of the tug, and it may not unfrequently happen, that the joint action of the hands on board of both vessels is essential to prevent the happening of a collision between the former and a third vessel. In all such cases, at least, there exists a common obligation to make every reasonable effort to avoid the danger, and a common responsibility in case of neglect.

The case at bar is one of this description. Whether the sheer happened, at first, by the fault of the master of the tow, or not, it is quite plain that he and the hand on board were unable to break it, and bring the vessel back to her proper track, without the aid and co-operation of the tug. They might have been rendered in season to have avoided the disaster, if proper attention had been given to the condition of the tow. Such attention should have been bestowed, especially after the warning that had been given in respect to the bad navigable qualities of the tow. By consenting to take charge of her under these circumstances, and particularly by taking her in tow by a stern hawser after the admonition, the captain of the tug became measurably responsible for her navigation, or, at least, for extraordinary care and attention to her navigation in the passage from river to river among the vessels in the bay.

The business of towing vessels by steamboats is comparatively modern, and has become extensive upon all the navigable rivers of the country. The obligations and responsibilities arising out of this kind of navigation, and properly resting upon the respective vessels concerned, are novel and peculiar, and there may be some difficulty in assigning to each vessel its proper measure of responsibility—a difficulty that is intrinsic and arises out of the peculiar relations which the respective vessels bear to each other in the course of the navigation. In all cases where the tug is under the direction and control of the master and hands on board of the tow, there is no difficulty in assigning to the latter a responsibility for all the damage that may happen through the fault of either vessel. The converse of the proposition will hold equally good, where the tow is under the exclusive direction and control of the tug. But, where there is a divided command and direction in the navigation of the vessels, there must necessarily be, in some measure, a divided and several responsibility assigned to each. What that measure shall be, is a question of some difficulty. In the case before us, the helm of the tow was under the direction of her captain, but all other means used in her navigation were under the absolute control and direction of the master of the tug. Such is understood to be the common relation which these different vessels bear to

each other in the business of towing up and down the North river.

Now, although the tow and her master and owners are properly chargeable for any injuries that may happen by reason of neglect or unskilfulness in her management in the course of the voyage, it by no means follows that the tug is free from fault. Her power over the navigation of the tow is paramount and controlling, and a corresponding responsibility necessarily attaches. Therefore in all cases where the proper and reasonable exercise of that power can be interposed, for the purpose of arresting and avoiding the impending injury, she is bound to exert it faithfully, and should be held answerable in case of neglect. Her whole duty is not discharged when she is so navigated as to avoid committing immediately the injury herself. She must guard so far as fairly lies within the power she exercises over the colliding vessel, against the danger of any injury being committed by her.

In this very case, if the master of the tow had had the control of the motive power himself, he might have avoided the collision, notwithstanding the sheer of his vessel. Seeing and apprehending the danger, he would, as would have been his duty, have stopped the tug at once, and thus have arrested the dangerous consequences of the sheer, whether it arose from the fault of the helmsman or of the navigable qualities of the canal boat. The motive power being entirely under the control of the tug, this duty devolved upon the master and hands of that vessel, and the neglect to discharge it properly, under the circumstances and in the emergency, fairly enough subjects her to accountability for the damage that happened.

For these reasons, the decree below must be reversed, and the case be referred to the clerk to ascertain and report the amount of the damage sustained.

Case No. 4,597.

The EXPRESS.

[Blatchf. Pr. Cas. 128.]

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

PRIZE—VIOLATION OF BLOCKADE—FISHING VESSEL—APPRAISED VALUE.

[1. A fishing vessel which left New Orleans after the port was blockaded, with intent to catch a cargo of fish and return to that port, being herself enemy property seized at sea, is subject to condemnation.]

[2. The appraised value at which a prize is accepted by the United States and devoted to the public use will be regarded as her true value, and that amount declared forfeited to the libelants.]

[In admiralty.]

BETTS, District Judge. This sloop was captured in Lake Borgne, Louisiana, December 11, 1861, by the United States steamer New London, and, as in the last preceding case, the vessel was, after valuation by a naval survey, taken to the use and service of the United States. She was documented as a vessel belonging to the port of New Orleans August 10th, 1861. No cargo was arrested with the vessel. She was a fishing vessel, and owned one-half in New Orleans, and one-half by her master, a native of Connecticut, residing in, and a citizen of, New Orleans, and was built in New London, Connecticut. The other half-owner also resides in New Orleans, and is an American citizen. She went out of New Orleans on a fishing voyage, and was to return to that port, and was destined to no other port. She left New Orleans December 7. Both owners knew that New Orleans was blockaded, when the vessel sailed. The vessel, after seizure, was taken down to Ship island, and was stripped and sunk by United States officers there. She was of about twenty-four tons burden. The master and crew were brought on to this port, and were examined in praeparatorio. No appearance or defence was made for the vessel.

The vessel having left the port of New Orleans after that port was blockaded, with intent to catch a cargo of fish, and return with it to that port, for a market, and being herself enemy property seized at sea, was subject to condemnation and forfeiture, and judgment to that effect must be accordingly ordered.

The appraised value at which she was accepted by the United States and devoted to the public use and service, will be regarded by the court as her value, and that amount will be decreed forfeited to the libellants. Decree accordingly.

Case No. 4,598.

The EXPRESS.

[Olc. 258;[1] 6 N. Y. Leg. Obs. 434.]

District Court, S. D. New York. Feb., 1846.[2]

COLLISION BETWEEN TOW AND THIRD VESSEL—LIABILITY OF TUG — INDEPENDENT CONTROL OF THE TOW.

1. A vessel, although towed by a steamboat, if she has the full control of her own movements, will be liable for any damage inflicted by her coming in contact with another vessel.

[Cited in Boyer v. The Wisconsin and The Hector, Case No. 1,756, 46 Fed. 865, note.]

2. The master and owners of a ship, towed by a steamer, will be answerable for damage occasioned by a collision with another vessel, unless they use all possible skill and care to prevent it.

3. A vessel coming in collision with another vessel is prima facie liable for the damage, and the rule is not varied, whether her motive power is the old and ordinary method, or is supplied in some novel manner.

4. Third parties, receiving an injury by collision, can rarely be required to lay the responsi-

[1] [Reported by Edward R. Olcott, Esq.]

[2] [Reversed in Case No. 4,596.]

bility to any other agency than that which was the proximate cause.

5. If a vessel is run upon by another under way, the latter must be answerable for the wrong, unless she can prove the occurrence to be the result of inevitable accident, or without fault on her side.

6. A tug will not be responsible for damages done by vessels in her tow, whether they be lashed alongside or drawn by hawsers, except it be proved that the injury was owing to want of care or skill in the tug, in performing the duties belonging to her.

[Cited in Whitehead v. The Tempest, Case No. 17,563a; Boyer v. The Wisconsin and The Hector, Case No. 1,756, 46 Fed. 864, note.]

7. The analogy of principal and agent does not apply to this description of business. The tug, in executing the employment for which she is engaged, acts independently of all authority or direction of the tow, while the tow was, in this case, master of her own movements, and so answerable for them.

In admiralty.

T. Sedgwick, for libellant.

H. Morton, for claimant.

BETTS, District Judge. This cause was instituted for the recovery of damages, occasioned by a collision, and the particular feature of importance in the case is, the question of the liability of a tug, employed in her customary business, for injuries caused by the towed vessel coming in collision with a vessel at anchor. In October, 1845, a canal boat, loaded with coal from Philadelphia, was taken in tow by the tug Express, at one of the North river piers, to be hauled round to the East river, and there united with other boats, and, together with them, to be towed by the tug to Albany or Troy. The tug was at the time publicly engaged in that line of business. The master of the tow desired to be lashed alongside the tug, because his boat steered badly, but the master of the tug declined giving her that position, and threw out a hawser from his stern, fifty fathoms in length, which was attached to the bow of the canal boat, and she was taken in tow in that manner. Much testimony was given to the point whether that was a judicious and safe method of towing in this harbor. The plain weight of evidence proves that to be the usual and safe course of the business, in hauling loaded crafts of the size of the tow about the harbor, the tow fastened in that manner, being easily managed by her own helm, so as to protect herself and other vessels she may meet or pass. The tug was worked at her lowest speed, and such as was proved to be prudent and proper at the time and place, and which afforded the tow full opportunity and means of safe and easy navigation. Below Castle Garden and near Whitehall pier, the tug passed between the shore and the yacht Mist, owned by the libellant, lying at anchor, and 80 to 100 feet from her. At that point, the tow took a sheer out into the river. Ten or fifteen fathoms additional line was payed out to her from the tug to give her free steerage. She did not recover her track, but struck the yacht abaft her forward chains, stove in her plank and some timbers, and caused very serious damage to her.

The testimony in the case is exceedingly diffuse, and not wholly reconcilable. The above facts are, in my opinion, the fair results, and present the essential points to be decided. There is no question that the yacht was properly anchored and attended to, and that no fault was committed on her part, any way conducing to the disaster. She is accordingly entitled to indemnity for the injuries she sustained from the party inflicting them, unless he can discharge himself of all blame also. The libellant contends, that the tug having supplied the motive power, and thereby forced the tow against the yacht, she is to be regarded the direct cause of the injury; that the vessel in tow is only a prolongation of the tug, and the latter is accordingly liable for the acts of the tow whilst under way, the same as for her own. If this proposition cannot be maintained, the libellant insists the tug was guilty of misconduct and negligence at the time, in her own movements, and thereby caused the collision and injuries received by the yacht.

The transportation of property and persons, by aid of steam tugs, has, within a few years, become an important branch of navigation in this harbor and the waters connected with it. In other sections of the country it is also a business of great magnitude, and vessels of all dimensions are employed in its prosecution. Sproul v. Hemmingway was an action at law against the owner of a vessel towed by a steamer with a cable run out from the stern, for damages caused by a collision with the tow. The jury found that the collision was caused by the negligence, unskilfulness or misconduct of those who had charge of the steamer (14 Pick. 1), and the court decided that the owner of the vessel towed was not, therefore, liable for the injury. The court, in rendering its decision on the verdict, assume principles of law which have a bearing on the present case, but the point adjudicated under the facts cannot be regarded as involved in this, as no fault or negligence is here found against the tug. Another case was in the supreme court of this state, and is distinguished from this one in the important feature, that the tow was lashed by the side of the tug, and the tow being the vessel injured, the question was between those two vessels as to the obligation of the tug to protect the tow from injury by other vessels. The decision turned upon the effect of a special contract of towing between the parties. Alexander v. Greene, 3 Hill, 9. These cases do not accordingly afford direct authority upon the question presented in this. The evidence now before the court clearly proves that a vessel towed in open water, in rear of another, with a fifty-fathom line, has perfect command of her

own direction, so far, at least, as to keep in the track of the tug, and to avoid all stationary objects which the latter escapes, and that such was the safest method of towing her in this case, under the facts, for the tug and tow, and other vessels they might meet with. Not only has the tow perfect command of her own course, but she can also control the direction of the tug, and the usage of the business accordingly requires a competent helmsman to be stationed at the helm of the tow, better to protect her, and to aid in the safe navigation of the tug.

The evidence further proves, that if in this case the tow line had been shortened, and the canal boat drawn near to the tug, the means of managing both safely would have been impaired; and that the tow, if competent to navigate in those waters, was placed, at the time, in a proper position. I limit myself to stating the clear result of the evidence produced on the hearing. It is not necessary to spread out its details to elucidate the principles of law adopted in this decision. They are intended to meet the state of facts attendant upon the transaction, as laid before the court by the proofs. Beyond all question, the tow is liable in this case for the damages caused by her to the yacht. The Duke of Sussex, 1 W. Rob. Adm. 274. She placed herself in connection with the tug, undertaking to navigate across the waters of the bay by aid of the propelling power thus procured, which, though not itself under her control, left her, in respect to her own movements, a perfect capacity to prevent the injury caused by her in this instance. The case of Sproul v. Hemmingway is claimed to be apposite to this, and of controlling weight on the point. It is, however, to be observed, that the case was decided with hesitation by the court, and as one of first impression.

Some of the analogies offered in support of the decision are so far equivocal, that it may not be unreasonable to suppose a review of the subject may lead the same court to doubt the justness of the rule indicated, at least to the full extent suggested. At most, it cannot be regarded as authority to the point, that a tow placed astern of a tug, is not responsible for collisions with other vessels, the same as if navigated by her own means, and independent of the aid of a tug. She selects that method of propulsion; and on general principles, by so doing, she ought to remain subject to the same liability that would attach to her if the motive power was within herself, or exclusively at her command. The Hope, 2 W. Rob. Adm. 9. Third parties, receiving an injury by collision, can rarely be required to lay the responsibility to any other agency than that which was the proximate cause of it. If a vessel is run upon by another under way, the latter must be answerable for the wrong, unless she can prove the occurrence to have been the result of inevitable accident, or without fault on her side (The George, 9 Jur. 670); and no reason is perceived why she is exonerated by having submitted herself to be moved by a steam vessel, unskilfully or incautiously managed, more than if the cause of the injury was the want of attention or prudence in the application or use of her own means of navigation. It is not inevitable to her in any other sense than if the accident resulted from the insufficiency of her own equipments to keep her in a safe course, or disengage her from a position dangerous to others, or even the incompetency of her pilot or master. If it be conceded that the conclusion of the court in Sproul v. Hemmingway is correct upon the facts found by the jury, I think the case cannot be accepted as settling the law, that a tug is responsible for damages done by vessels in her tow, whether they be lashed alongside or drawn by hawsers, except it be proved that the injury was owing to want of care or skill in the tug in performing the duties belonging to her. Chief Justice Shaw, in delivering the opinion of the court, plainly recognises a liability of the tow for her own acts. He says, "On board the ship towed astern by means of a cable, something may and ought to be done by the master and crew in steering, keeping watch, observing and obeying orders or signs, and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the tow, and she and her owners must sustain it." I think, therefore, that the case of Sproul v. Hemmingway cannot be regarded as authority to the position that the tug is primarily liable in case of collision, when caused by the culpable fault of the tow and not her own. This novel business demands an explication of legal principles adapted to its character and nature, and conducing to the protection of those concerned in it, and of the public; so that the liabilities incurred in its management may be allotted to that party alone which is justly chargeable with it.

Two distinct agencies are concerned in the operation of towing by lines, each capable of actions independent of the other. The tow in rear has the capacity of running off upon her hawser, in directions opposing the course of the tug, and to commit injuries to other vessels which the tug cannot restrain, and the tug may also compel the tow to cause like damages, which the latter has no power to prevent. The principle sought for cannot be deduced from the case supposed in Sproul v. Hemmingway, of a vessel under charter, or the liability of the owner of cargo in respect to wrongful acts of the vessel carrying it. The inquiry in those cases is, how did the injury arise? and as consequent upon that, where does the responsibility for the damages attach? To render the analogies put in Sproul v. Hemmingway pertinent to the

point raised in this case, it must be admitted that the liability of the tug is the same when the tow is navigated according to the usage of the business, as it would be were she transported upon the deck of the steamer. If so placed, she would undoubtedly have, in respect to the movements and responsibilities of the tug, no relation to other vessels with which she should be brought in collision, other than that of cargo on deck. But this supposition most inadequately figures the true character of vessels navigated by towing. The largest and most valuable shipping afloat are carried out and brought into port, and moved from point to point, and place to place, within our harbors and internal waters, by this mode of navigation, and the rule which gives the law in respect to small canal boats, worth a few hundred dollars, must settle it also essentially in relation to ships and cargoes of highest value. Clearly, they cannot furl their sails and be towed through harbors and bays, without using their own means to protect other vessels encountered, and be free from liability for damages caused by them in being so navigated. The sound doctrine, in my judgment, is still what it always was, that the vessel coming in collision with another is prima facie chargeable with the damage sustained thereby (9 Wend. 1), and the rule cannot be dependent upon her being navigated by old and well-known methods, or that her officers procure it to be done for her in some novel way, by a power communicated independent of their volition or command. It is at her hazard that she is placed under direction of such power; and if the tug which supplies it is liable for wrongful acts on her part, the tow cannot, in reason or law, claim to stand exonerated from the injury she inflicts, and which she might have avoided.

Neither, in my opinion, does the analogy of principal and agent apply to this description of business. There may be traced a degree of similitude in certain points of the relationship between the tug and tow, and that of principal and agent, so far as concerns the end to be answered by the association of the two in one business, essentially transacted by one for the benefit of the other. But the tug in executing the employment after it is entered upon, acts independently of all authority or direction of the tow and stands no way in the relation of her agent. In all respects, except the general direction of the course to be run, the tow in this case was master of her own movements, and could vary them, in respect to objects in her path, as if wholly disconnected with the steamer. The analogy is, therefore, too faint to supply any sure principle applicable to this peculiar association of vessels. It seems to me it might be defined, with a nearer approach to exactness, by regarding the tow as taking into service the power of the tug hired out to her, independent of the boat itself, or its command or direction. If we might suppose locomotives employed on the tow-paths of canals, and the boats using that force as their propelling power, the parallel to the case under consideration would be nearer, and an illustration would be afforded indicating the responsibilities each would be placed under by the connection in towing, more correctly than is furnished by any cases familiar to the common law. It could not be supposed, under such circumstances, that the locomotive holding to its course, would be chargeable for collisions or injuries committed by the boat in the ordinary train of its navigation. The boat would be held to assume, at its peril, its own control and direction, and subordinate to propulsion ahead by a power which it could not vary or check, and differing in that only in the degree of its force, and its independence of the efforts to control it from on board the boat, from towing by hand or horse-power. The responsibilities of those mutual but independent agencies should accordingly be limited to their separate acts, except it be shown that either of them wrongfully caused a mischief to be done by the other; and it would follow that the boat, equally with the locomotive, must take on itself the precaution to shun objects in its track, or which might come within the range of its movement. When varying its line of direction to the limit of its capacity would not be sufficient to protect others from contact with it, she must have command of means, enabling her to be disconnected from the moving power, and thus have the ability to act for the safety of all in her pathway, as if using only oars or sails, or machinery attached to herself. This principle is, in effect, involved in The Hope, where the colliding vessel was warped by those towing her down the Thames. 2 W. Rob. Adm. 9.

Considering this case, then, as standing only upon the fact that the tow, whilst being properly hauled by the tug, came into collision with the yacht at anchor, I hold the responsibility therefor is not cast upon the tug, but that as the tow is the direct and immediate cause of the injury, she is the blameable party against which the remedy for the wrong is to be pursued. So the comprehensive justness of the civil law renders the culpable party alone responsible for damage occasioned by his misfeasance, his negligence, his imprudence or want of skill. Code Nap. art. 1583; Toullier, p. 3, §§ 95, 209. Each boat was separately and independently steered on this occasion, and the tow running three hundred feet in rear of the tug, with the free use of all her functions for self-direction in regard to the vessel injured, cannot, with any justness of figure or association of objects, be deemed a prolongation of the tug, subjecting the latter to the same liability for her acts as if the tow was bodily a part of her. I do not think the libellant has succeeded in proving any misconduct or want of precaution

on the part of the tug leading to the disaster, and which, upon general principles, or within the spirit of the decision in Sproul v. Hemmingway, 14 Pick. 1, might render her liable for the damage. It is a clearly settled principle in the authorities, English and American, that the vessel which sues for damages occasioned her by a collision, must prove the injury was owing to the fault of the colliding vessel. Abb. Shipp. (Shea's Ed.) pt. 3, c. 1; 3 Kent, Comm. 230. The proof that the injured one was herself blameless, would ordinarily be sufficient, prima facie, to cast the burthen of exonerating itself on the colliding vessel. Foot v. Wiswall, 14 Johns. 304. Yet there is a manifest distinction when the action is not based upon any wrongful act directly committed by the vessel sued, but upon her alleged responsibility for the acts of another, that is, in effect, for damages consequential to the fault of another. The tug not coming in contact herself with the yacht, it is not to be presumed, to her prejudice, that the act of the tow was culpable; and accordingly, the libellant is bound, as in ordinary cases resting in misfeasance, to prove that negligence, want of precaution, or other fault of the tug, caused the collision. The whole evidence being before the court, it is of little moment to this particular case, whether it is to be received as excusatory on the part of the claimant, or accusatory by the libellant; the court must judge from its entire weight and bearing, without regard to the source from which it was derived, what rights are established between the parties.

First, then, I find upon the proofs, that the method of hauling the tow, by a hawser fifty fathoms long, attached to the stern of the tug, was, at the time and place, a prudent and safe mode of towing her. That the tow was conducted carefully by the tug, on a proper route, and so as to be able to keep a safe distance from the yacht; and that with ordinary care and skill on the part of her crew, she could have kept in the wake of the tug, and been steered widely clear of the yacht. That the collision was occasioned by inattention or want of skill in steering the tow, and was not owing to any defect of equipment, or the want of navigable qualities in the tow, and that nothing was done by the tug impeding the free steerage and action of the tow, or necessarily impelling her upon the yacht. That the tow had a competent number of men stationed on watch and at the helm, and was easily steered and kept by them in the track of the tug before and after the collision, through a route equally difficult, without danger or inconvenience. The endeavor to show, on the part of the libellant, that the tow was hauled into an eddy by the tug, and thereby suddenly varied her course, giving her a sharp sheer off her track, failed of success. It was not made to appear but that the water at the place referred to was in a tranquil state, and every way favorable to the easy and safe manoeuvering of the tow. The accident is probably attributable to the want of attention or judgment of the pilot at the helm of the tow. There was ample room for her to have followed the tug between the shore and yacht, without exposure to the latter, and if the men on board had done their duty, there would have been no difficulty in her passing the yacht safely. In my opinion the risk of her navigation, under the circumstances, was not cast by law on the tug, and she is not bound to make reparation for the severe loss and injury the libellant has suffered in consequence of the fault of the tow. She is answerable for no more than her own acts of mischance, negligence, want of skill, or other culpable faults. The remedy should be pursued against the tow in this instance, and this libel must be dismissed as to the tug, with costs to be taxed.

NOTE. This case was appealed [Case No. 4,596], and additional proofs were introduced. The circuit court held that the libellant had proved that the collision was caused by the fault of the tug; that the sheer of the tow was inevitable, and without fault on her part; and that the tug had the power, and it was her duty to prevent the mischief caused by this sheering movement of the tow. The decree of the district court was reversed, and damages adjudged against the tug.

EXPRESS, The (DUTTON v.). See Case No. 4,209.

EXPRESS, The (UNITED STATES v.). See Case No. 15,066.

EXPRESS CO. (EARNEST v.). See Case No. 4,248.

EXPRESS CO. (ROSENFIELD v.). See Case No. 12,060.

EYRE (DOUGLASS v.). See Case No. 4,032.

Case No. 4,599.

The EZILDA.

[Blatchf. Pr. Cas. 232.][1]

District Court, S. D. New York. Oct., 1862.[2]

PRIZE—PRACTICE — EXCEPTIONS TO PROCEEDINGS BEFORE PRIZE COMMISSIONERS NOTICED ON FINAL HEARING—VIOLATION OF BLOCKADE—ENEMY PROPERTY—CONTRABAND OF WAR.

1. The court cannot, in a prize case, notice, on final hearing, exceptions to proceedings before the prize commissioners, because of alleged irregularities in the admission of testimony, or in the method of conducting the examinations, or to the competency of the witnesses examined. Relief in respect to such matters must be sought by a special motion, on notice to the district attorney, pointing out the irregularities complained of.

2. Vessel and cargo condemned for the following causes: (1) The vessel was enemy property. (2) There was an attempt to violate the blockade. (3) A large part of the cargo was

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

[2] [Affirmed in Case No. 4,600.]

contraband of war, and was laden on the vessel with knowledge, on the part of her owner and of the other freighters of the cargo, that the voyage was an illicit one, and was destined to a port of the enemy.

[In admiralty.]

BETTS, District Judge. The cargo proceeded against in this suit was captured at sea, on board of and with the schooner Ezilda, September 30, 1861, by the United States steamer South Carolina, the day preceding and at the same place with the capture of the Joseph H. Toone, named in the previous cause. The Ezilda was subsequently, after appraisal, appropriated by the captors to the use of the United States, and the cargo was transmitted by other sea conveyance to this port for adjudication. The libel against the cargo, as prize of war, was filed November 23, 1861. On the return of the monition and attachment, on the same day, a proctor appeared for the claimant, and, on the 10th of December thereafter, obtained from the court an order allowing him three weeks' further time to put in a claim and answer to the libel. The answer and claim was filed December 31, 1861. On the 23d of May, 1862, the libellants moved for and obtained from the court an order to amend the title of this suit, so as to make it "The United States v. The Schooner Ezilda, Her Tackle, and Cargo," which order was granted by the court, after notice to the claimant's proctor, and in his presence in court. No further claim or answer has been filed.

The answer put in legally inures only to form an issue with the libel, and the vituperative tone of its assertions respecting the captors and the witnesses might have been spared in a paper having no further effect in the suit than to fulfil a legal formula, and to give the respondent a standing in court, to be heard upon the law and the facts drawn from the ship's papers and the witnesses present at her capture.

The appearance and answer are limited to the vessel alone. No answer or claim has been interposed for the cargo. The case was submitted to the court for decision, on written points and briefs, by the counsel for the respective parties, and without oral argument, on the 9th of October, 1862.

The court cannot notice, on final hearing, exceptions to proceedings before the prize commissioners, because of alleged irregularities in the admission of testimony, or in the method of conducting the examinations, or to the competency of witnesses examined. If there was ground for rectifying or suppressing the proofs for any like cause, the application to do so should have been brought before the court on special motion, with notice to the district attorney, pointing out the irregularities or deficiencies complained of, and praying the proper relief.

The prize commissioners report the testimony of three witnesses examined before them in preparatorio in the suit—William A. Hicks, navigator for the voyage, on board the prize, William Johnstone, mate, and Charles A. Scott, seaman. One of the witnesses was examined November 27, and the other two December 5, 1861, before the prize commissioners, and the depositions were placed in the registry of the court. The ship's papers produced before the prize commissioners, as reported by them to the court, consist of a provisional register of the vessel, taken before the British consulate at Havana, dated September 16, 1861, registering the vessel in that port to William Henry Aymar, a British subject; a bill of sale of the vessel to the said Aymar by Peter Foster, of Boston, Massachusetts, dated September 13, 1861; shipping articles, dated September 19, 1861, for a voyage on board the Ezilda from Havana "to the port of Matamoras, or any other port or ports of the Gulf of Mexico, and back to Havana," which article was signed by three persons, only one of whom was found with the vessel when she was captured; various bills of parts of the cargo; some invoices, and a bill of health. Most of the exhibits represent the intended voyage to be from Havana to Matamoras; but, in addition to the special language in the shipping articles covering all ports in the Gulf of Mexico, and necessarily embracing confederate ports, the bill of lading executed on the 18th of September, 1861, at Havana, by the then captain of the schooner, Sullivan, expressly states that the vessel is "bound for either of the Confederate States ports, not further south than Brazos." The answers of the acting master, the mate, and the seaman, prove that the vessel was bound to Barataria, or some other enemy port; that Aymar, her owner, was proprietor, with Brudendorf, her former master, of the cargo, and that the vessel and cargo were really destined for the enemy, and were intended to run the known blockade of enemy ports. The testimony of the owner, Aymar, invoked from the case of the Joseph H. Toone, proves that he was a domiciled trader in New Orleans.

There seems to me, therefore, no room for doubt that the vessel and cargo are subject to forfeiture for each of three causes: First. There was no bona fide neutral ownership of the vessel in the claimant Aymar. Second. The voyage was set on foot at Havana with intent to violate the blockade of the port of New Orleans, and the vessel and cargo were captured directly on the coast of Louisiana, whilst attempting to execute that purpose. Third. A large part of the cargo was contraband of war, and was laden on the vessel with knowledge, on the part of her owner and of the other freighters of the cargo, that the voyage was an illicit one, and was destined for the Confederate or Secession States of the Union.

It is therefore ordered that judgment of condemnation and forfeiture of the vessel and cargo be rendered in this suit.

Case No. 4,600.

The EZILDA.

[Blatchf. Pr. Cas. 664.] [1]

Circuit Court, S. D. New York. Nov. 11, 1863.[2]

PRIZE—VIOLATION OF BLOCKADE.

Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed.

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

[In admiralty.]

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

[2] [Affirming Case No. 4,599.]

NELSON, Circuit Justice. The vessel and cargo in this case were captured about the 1st of October, 1861, by the United States steamer South Carolina, while attempting to break the blockade off New Orleans. The proof is full on this point. The vessel was taken into the service of the government, as also some arms found on board of her. The vessel and cargo were condemned in the court below. On appeal by the claimant the case was submitted, on briefs, at the last April term, but no copies of apostles were delivered to the court. I have taken the original papers on file and looked into them. There does not appear to have been any claim for the cargo. I agree that the vessel and cargo were rightfully condemned, and affirm the decree below.

F.

Case No. 4,601.

FABER v. BARNEY.

[6 Blatchf. 305.] [1]

Circuit Court, S. D. New York. March 2, 1869.

CUSTOMS DUTIES—JUDGMENT AGAINST COLLECTOR—EXECUTION—CERTIFICATE UNDER ACT MARCH 3, 1863.

1. Under the act of March 3, 1863 (12 Stat. 741), the certificate therein provided for must be applied for in proper season.

2. Where, in a suit against a collector of customs, to recover back duties alleged to have been illegally exacted by him, a judgment was recovered against the defendant, and no application for such a certificate was made at the trial, nor until the expiration of nearly two years thereafter, and after a motion was noticed by the plaintiff for execution on the judgment, and such application was then made, on affidavits, before a judge who took no part in the trial: *Held*, that the application ought not to be granted.

This case came before the court on a motion for an execution to enforce the payment of a judgment. The action was assumpsit, for money had and received, brought against [Hiram Barney] the collector of the port of New York, to recover back certain duties alleged to have been illegally exacted by him. It was tried in February, 1867, and a verdict was rendered for the plaintiff [Gustavus W. Faber], on which a judgment was duly entered against the defendant in April, 1867. Since that time no steps whatever had been taken toward moving for a new trial, or bringing a writ of error, nor had the judgment been paid. No certificate of probable cause, or that the moneys in question had been exacted by direction of the secretary of the treasury, was given or applied for at the trial, nor had any such application been since made to a judge who was present at the trial. After the motion for execution was made, the defendant coupled with his opposition to the motion an application for a certificate, under the 12th section of the act of March 3, 1863 (12 Stat. 741), which application was opposed by the plaintiff. The judge now holding the court was not present at the trial.

Webster & Craig, for plaintiff.
Simon Towle, for defendant.

BENEDICT, District Judge. Of the many propositions which were discussed upon the hearing of these motions, I deem it necessary to consider but a single one.

It is conceded that the plaintiff is entitled to his execution, unless the certificate provided for by the 12th section of the act of March 3, 1863 (12 Stat. 741), be granted; but it is insisted, on the part of the defendant, that the act of 1863 is mandatory on the court to grant the certificate whenever applied for, whether the application be made before a judge who tried the cause, or some other judge holding the court at the time of the application, and that such certificate, when granted, is a final bar to any execution. To this doctrine I do not assent. The act of March 3, 1863, although, no doubt, intended to afford a means of protecting a collector from loss, by reason of liabilities assumed by him under the direction of the secretary of the treasury, must, if it confers upon a collector an absolute right to a certificate in every case where he has acted under the direction of the secretary, be considered as implying that the application therefor is to be duly made, and at a proper time.

In the present case, no application for the certificate was made at the trial, nor until the expiration of nearly two years, and after a special motion for execution is noticed; and it is then made before a judge who took no part in the trial, and upon affidavits. An application for a certificate, under such circum-

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

stances, comes too late. The defendant must be deemed to have waived his right to the entry of a certificate, by delaying his application for the space of nearly two years, and until after a motion for execution is noticed, and when the certificate, if it can be granted at all, must be ordered by a judge who took no part in the trial of the cause.

The application of the defendant must, therefore, be dismissed, and, consequently, the application of the plaintiff for an execution is granted.

Case No. 4,602.

FABER et al. v. The NEWARK.

[4 Betts, D. C. MS. 52.]

District Court, S. D. New York. Feb. 21, 1844.[1]

CARRIERS—LIABILITY FOR DAMAGE TO CARGO—"DANGERS OF THE SEAS"—COSTS.

[1. The leaking of a vessel through stress of weather, and consequent injury to the cargo, is a danger of the sea, within an exception against liability for damages caused thereby in an agreement for transportation and delivery by a vessel.]

[Cited in Baxter v. Leland, Case No. 1,124.]

[2. On dismissal of a libel against a vessel for damages to the cargo libellants should be charged with costs, in the absence of fraudulent deception or concealment of facts on the part of the claimants, where the contestation was as to faulty stowage and lading only.]

[This was a libel in rem by Conrad W. Faber and Leopold Bierwith against the ship Newark, Thomas Dunham & Co., claimants, for damages sustained from injury to cargo.]

BETTS, District Judge. This cause having been heard upon the proofs and allegations of the parties, and due deliberation being had, and it appearing to the court upon the proof that the tobacco of the libellant shipped on board the said ship was injured on the voyage in the pleadings mentioned by grease, oil or lard stowed in barrels or casks on board the said ship and transported on said voyage together with the tobacco aforesaid: and it further appearing to the court, upon the proof, that the said hogsheads of tobacco and the said casks or barrels of lard or oil were well, properly and securely stowed on board said vessel for the voyage aforesaid and that the injury received by the tobacco thereon was not occasioned by any faulty or insufficient stowage of the said hogsheads, or barrels or casks: and it further appearing to the court upon the proofs that the said casks or barrels of oil or lard were well secured and coopered when laden on board said ship: and it further appearing to the court upon the proofs that the injury to the said tobacco was not occasioned by the leaking, dripping or passage of the said oil or grease directly from the barrels on to the hogsheads: and it further appearing to the court upon the proofs, that the said ship on her said voyage was by stress of weather caused to leak and take in water so as to require at times pumping at the rate of 90 strokes the hour, to free her of such leaking: and it further appearing to the court that the tobacco aforesaid was injured by occasion of such stress of weather and such leaking of the ship: It is considered by the court that the damage and injury sustained by the said tobacco and by the libellants thereby accrued and was occasioned by the dangers of the seas. And it further appearing to the court, that the undertaking of the master of the said ship, was to transport and deliver the said tobacco at the port of New York in good order and condition, the dangers of the seas excepted: wherefore it is considered by the court that the said ship is not liable and responsible for the damages aforesaid demanded by this action: It is therefore ordered, adjudged and decreed, that the said libel in this behalf be dismissed with costs to be taxed.

Sept. 9, 1844. A motion being made on the part of the libellants to modify the decree in respect to costs, so that they be relieved from the payment of costs, and counsel on both sides having been heard, and it being considered by the court that no fraudulent deception or concealment of facts, was made by the claimants, and that the contestation of the case upon the pleadings and proofs was as to the faulty stowage and lading of the cargo of said vessel: Wherefore it is ordered and adjudged that the motion be denied and that the decree stand as originally rendered.

[1] [Reversed in Case No. 10,141.]

FABER (RECKENDORFER v.). See Case No. 11,625.

FACTORS' & TRADERS' INS. CO. (WHEELER v.). See Case No. 17,495.

Case No. 4,603.

The F. A. EVERETT.

GREENE v. The F. A. EVERETT.

[4 Adm. Rec. 621.]

District Court, S. D. Florida. Jan. 28, 1853.

SALVAGE—COMPENSATION.

[1. Four vessels, carrying 49 men, with much difficulty and personal danger saved, from a vessel wrecked on the American reef, cargo and materials valued at $31,220. *Held*, that one-third thereof, less one-third the costs and expenses, would be allowed as salvage.]

[2. The sum of $326.10 was allowed for saving additional property, of the value of $632.79, by small boats picking up goods and materials afloat and ashore.]

[In admiralty. Libel by William C. Greene and others against the cargo and materials of the bark F. A. Everett for salvage services.]

Wm. R. Hackley, for libellants.

O. B. Hart, for respondent.

MARVIN, District Judge. This bark, laden with an assorted cargo, on the night of the 7th of January, ran ashore on that part of

the Florida reef known as the "American Shoal," situated about twenty miles from this port. The weather was tempestuous and the sea very high Early in the morning of the 8th the captain cut away his masts to ease the vessel, and threw overboard a considerable quantity of cargo, hoping to save the bark. But notwithstanding this, she bilged and became a total loss. On the morning of the 8th the libellant Greene, master of the schooner Euphemia, arrived at the wreck, but was unable to board her because of the high sea and breakers. He lay to, off and on, near the wreck, during the day. In the afternoon three other wrecking vessels, making four in all, carrying forty-nine men, arrived at the wreck, and Lowe, master of the Relampago, succeeded, with much difficulty and personal danger, in getting on board. None of the other wreckers were able to get on board. On the 9th, the weather having somewhat moderated, the wreckers boarded, and commenced saving cargo and materials. They saved, in cargo and materials, in value, $31,852.77. Of this amount $31,219.98 was saved by the four large wrecking vessels and crews, and the one-third thereof, less one-third of the costs and expenses of this suit, and the wharfage, storage and bills for labor, is deemed a reasonable salvage. The remainder of the first-mentioned sum was saved by small boats, which will be noticed in the decree.

It is ordered, adjudged and decreed, that the four large vessels and crews named in the libel recover, for their salvage, the one-third of the value of the property saved by them, after deducting from the amount the costs and expenses of this suit, the wharfage, storage and bills for labor in storing the cargo, and that upon the payment thereof the marshal restore the cargo remaining unsold to the master, for and on account of whom it may concern. That there be allowed to the owners and crews of the boats Waterwitch and Union $103.98, being sixty per cent. on the amount saved by them; and to the boat Union alone $13.80; to Wall $22.87; to C. F. Thompson $106.52; to Wm. Dennis $41.12; Stevens $24.56; to Baker $3.25; to Geiger, for bringing down the boat and men, $10,—being the salvage on materials and packages of goods picked up at sea and on shore.

Case No. 4,604.

In re FAGAN.

[2 Spr. 91.][1]

District Court, D. Massachusetts. Sept., 1863.

HABEAS CORPUS—SUSPENSION OF "THE PRIVILEGE OF THE WRIT"—PRESIDENT'S PROCLAMATION OF SEPTEMBER 15, 1863—ACT OF MARCH 3, 1863.

1. What is meant by "the privilege of the writ of habeas corpus."

2. Suspension of the privilege of the writ practically distinguished from the prohibition of the issue of the writ and other preliminary intermediate proceedings.

3. The intent of the proclamation of the president of the United States, of 15th September, 1863 (13 Stat. Append. iv.), suspending the privilege of that writ.

4. The proclamation was authorized by the act of congress of 3d March, 1863 (12 Stat. 755).

[At law.]

E. A. Alger, T. H. Sweetser, and Mr. Sanford, for petitioners.

Major-General Devens, pro se.

SPRAGUE, District Judge. These are writs of habeas corpus; several of them were issued on the 14th of this month; on one of them due return was made on the 15th, and on the others on the 16th, and the hearing on all was postponed to the 19th. The proclamation of the president of the United States, suspending the privilege of the writ of habeas corpus in certain cases, which was issued on the 15th, was not known here until the morning of the 16th. The respondent interposes that proclamation as an objection to further proceedings.

To this objection three answers have been made by the counsel for petitioners. First, that these writs were issued before the proclamation of the president, and for that reason are not subject to its operation; second, that the proclamation does not embrace cases like these; and, third, if it does, it is not warranted by the act of congress upon which it is founded.

I proceed to consider the sufficiency of these answers. It is contended by some of the counsel that the writs of habeas corpus having been actually issued before the proclamation, and the return of one of them having been made by the respondent on the day of the date of the proclamation,—perhaps before it was issued, certainly before it was known here,—it came too late to intercept the writs which had been previously taken out, and especially the one which was fully executed.

This argument confines itself to the legal process called the writ of habeas corpus, and insists that the process, having been served and returned, is functus officio, and of course cannot be prevented or suspended by the subsequent act of the president. This brings us to the inquiry, what it is that the proclamation suspends? Is it merely the process called the writ of habeas corpus, or is it the proceedings thereon,—the inquiry into the cause of detention and the granting relief by admitting to bail, granting a speedy trial or an immediate discharge, as law and justice may require? It is to be observed that the proclamation, using the language of the constitution, declares that the privilege of the writ of habeas corpus is suspended in certain cases. The constitution (article I), says that "the privilege of

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

the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." What is the privilege intended to be thus secured? Is it merely the privilege of having the legal process or writ, technically called habeas corpus? or is it the privilege of having judicial inquiry made into the cause of imprisonment, and a discharge, if the detention be found to be unlawful? Suppose that congress, in time of peace, should enact that the courts of the United States should, upon application therefor, issue the writ of habeas corpus, and cause it to be executed by bringing the alleged prisoner before them, but should proceed no further; that they should make no inquiry, grant no relief, but leave the prisoner in the same custody as before,—would not the privilege, the benefit, of the writ of habeas corpus be taken away, although the process by which the benefit was intended to be practically obtained would remain untouched? Again, the constitution, in declaring that the privilege shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it, has in effect declared that in such cases the privilege may be suspended. Suppose that, in pursuance of this provision, the privilege had been suspended in certain cases, but the process generally not prohibited, and that a petitioner, ignorant of the true cause of the detention, alleges a different one, obtains the process, has the prisoner brought before the court, and then it is found that the real cause of detention constitutes a case in which the privilege of the writ has been suspended, can the court then proceed further and inquire whether such detention is legal, and order a discharge if it be not? Can the court properly say that although the privilege of the writ of habeas corpus has been constitutionally taken away for the time, yet they will grant all the relief, all the benefit, which they would if the privilege had not been taken away, merely because the process remained and had been executed? If so, then unless there be a universal prohibition of the writ, even in cases not affecting the public safety, it may be obtained and used as the means of bringing the prisoner before the court, and then the inquiry must proceed and relief be granted, to the same extent as if there had been no suspension of the privilege.

I have suggested cases in which the process might remain, although the privilege or benefit to be obtained thereby was taken away. May there not be cases in which the privilege will remain although that particular process is not allowed? For example, in Massachusetts, unless the imprisonment be by a sheriff, deputy-sheriff, coroner or jailer, the writ for bringing in the prisoner is not to be directed to the person having the custody, but to the sheriff, who is thereby commanded to take the body of the prisoner and have him before the court. Thus, what in law was always before known as a capias writ has in those cases been substituted for what has always been called habeas corpus. The process has been changed. Massachusetts in those cases has no technical writ of habeas corpus; and yet, have not her citizens the full enjoyment of the privilege of that writ? Have they not all the benefit which that writ was the means of securing? The change was not made to abrogate the privilege, but to render it more safe and certain. I am constrained to believe that if the president's proclamation has suspended the privilege of the writ of habeas corpus in the cases now before me, I ought not to proceed further, being precluded from granting the privilege, benefit, or relief which they ask.

This brings us to the second question; that is, does the proclamation embrace the cases now before us? After referring to the statute authorizing the suspension of the privilege, the proclamation declares that "in the judgment of the president, the public safety does require that the privilege of said writ shall now be suspended throughout the United States, in the cases where, by the authority of the president of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers or soldiers or seamen, enrolled, drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom."

It appears by the petition and the return of the respondent, in each of these cases, that these prisoners are all, in fact, held by a military officer as soldiers drafted or enlisted into the service of the United States; and it is not controverted that such is the real cause of detention. But it is insisted that they are not legally held, because the two who were drafted were not liable to enrolment, and the three who enlisted are minors, having parents who did not consent thereto. By the terms of the proclamation, the privilege of the writ is suspended in cases where military officers hold persons under their command, or in their custody as soldiers drafted, mustered, or enlisted, &c. It is insisted that by this description those only are meant who are legally held as soldiers, drafted or enlisted, and that it cannot mean those who are illegally and wrongfully held, and therefore, that the court in order to determine whether they come within the meaning of the proclamation, must inquire and ascertain whether they are legally detained, and, if they are not, then the proclamation does not reach them and they must be discharged. If this be so, it is difficult to see how the proclamation is to have any effect whatever, for the proceedings must be the same as if the proclamation had never been issued. The

question whether the prisoner be legally held or not, is of course to be determined by the court or judge. Prior to the proclamation, the course was this: if the petition showed on its face that the party was legally imprisoned, no writ was granted, because it would be useless. If the petition set forth an illegal imprisonment or restraint, then the writ was granted, the party brought up, and the cause of detention inquired into. If found to be legal, he was remanded: if found not to be legal, he was discharged. Now, upon the construction of the proclamation contended for, the course must still be the same. Under it the writ must be refused or granted, according as the petition sets forth a legal or illegal imprisonment; and when granted, the court must inquire into the cause of imprisonment, and, if found to be legal, must remand the prisoner, and, if otherwise, must discharge him. By this construction, the proclamation suspends the privilege as to those soldiers only who are legally held. But what privilege of the writ had such soldiers which could be taken away or suspended? They had no right to be discharged, or to any relief from their restraint; they had no right even to the process, for, if the true character of their detention appeared on the petition, the writ would be rightfully refused.

It is not reasonable to suppose that it was intended to suspend the privilege as to that class of soldiers only, who, without such suspension, would have had no right to the writ, and could derive no benefit therefrom; who, indeed, had no privilege to be suspended. I think that in cases like these now before me, where persons are held as soldiers by a military officer, the proclamation intended to take from them for the time the privilege of having the legality of their detention inquired into, and relief granted by means of the writ of habeas corpus.

It is in the next place contended that if such be the true construction of the proclamation, it is not authorized by the statute of the 3d of March, 1863, upon which it is founded. That statute begins as follows: "That during the present Rebellion, the president of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof."

The president is thus authorized to suspend the privilege in any case throughout the United States. No case is excepted. Not one is withheld from the operation of this power. All come within its scope, and the cases now before me are clearly comprehended in this language. But it is urged that this comprehensive and unrestricted language is limited by what follows, which is in these words: "And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the president; but upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under authority of the president, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ." It is assumed in the argument for the petitioner that this provision extends only to persons in confinement by special authority of the president, as state or political prisoners, and that it does not embrace those held under the ordinary or usual operation of any code or system, civil or military.

Without pausing to inquire whether this assumption be well founded, I will, for the present at least, consider it to be so, and that the special provision in this clause of the statute embraces only one class of cases. What is this special provision? It is that, when the privilege is suspended as to such prisoners, the officers by whom they are detained shall not be compelled to return their bodies, in answer to any writ of habeas corpus, and that upon making a certificate, upon oath, that they are detained as prisoners by authority of the president, the court shall proceed no further. Here two things are enjoined in this class of cases. The officer is not to be compelled to produce the body, and his certificate, under oath, of the cause of detention is to be conclusive. Does the circumstance that this special provision extends only to those cases, prove that no other were contemplated in the previous clause of the statute, and that the generality of its language should be restrained and limited to the single class to which the subsequent clause is applicable? Is such a deduction legitimate? The writ of habeas corpus had long been in frequent use, in a great variety of cases. One class was under the Civil Code, when persons were held by color of legal process, or as infants or lunatics, or otherwise. Another class consisted of persons detained under military authority as soldiers or prisoners of war, or spies, or as having committed some offence subjecting them to military restraint. The writ of habeas corpus is unquestionably applicable to all these cases, and had long been actually and frequently used therein. This must have been well known to the members of congress; and when they declared in this statute, that the president should be authorized to suspend the privilege in any case throughout the United States, they were well aware that each and all of these cases were embraced in that language. Indeed, one of the classes, which I have just referred to, must have been especially present to their minds in connection with this very matter of the suspension of the privilege.

Several instances had previously occurred in which writs of habeas corpus had commanded officers to return the body of a sol-

dier, and obedience thereto had been refused. One such case, in particular, is now in my recollection. It was early in 1861, in the city of Washington. An officer of the army having refused to bring up a soldier in obedience to a writ of habeas corpus, which had been granted by a court of the United States, the judges of that court severally delivered opinions insisting emphatically upon the legal authority of the court, and one or more of them animadverted in terms of much indignation upon the refusal of the officer. These proceedings and opinions were published in the newspapers, and were of general notoriety. The refusal to obey the writ was by a subordinate officer in the city of Washington, and under the eye of the president himself. Congress must have been aware that the president claimed and was disposed to exercise the right to suspend the privilege in the very class of cases now before me; and yet, in declaring what authority the president should have to suspend the privilege, they used language clearly embracing this class.

That language is to be understood and carried into effect according to its fair import, unless there be something in the subsequent portion of the statute inconsistent therewith. Is there any thing? The terms of the first clause, as we have seen, comprehend three classes of cases. One is, where persons are held in restraint under the ordinary administration or operation of the military code or system. Another is, where persons are held under the ordinary operation or working of the civil code or system: the term "civil" being used in contradistinction to "military." In the practical working of both these systems, it sometimes occurs, either by mistake or design, that persons are wrongfully held in confinement, and seek relief by the writ of habeas corpus. The third class is, where persons are held through the extraordinary interposition of the president and by his especial authority. As to such persons, the second clause of the statute has made a special provision in case of a supension of the privilege relieving the officer from all obligation to return the body, and making his certificate conclusive. But the existence of this special provision can in no way interfere with the suspension of the privilege in other cases, but they are left to the operation of the suspension just as if that special provision had never been made.

In the ordinary course of procedure, some facts must exist to bring the prisoner within the class of persons as to whom the privilege is suspended, and such facts must be set forth in the return of the officer, and may be contested; and during the contestation, the court will require that the prisoner shall be within its control and brought up for that purpose. For example, if the proclamation had suspended the privilege in the case of persons held as soldiers, and who had been so held for the term of three months, then the officer's return must have set forth both those facts, and both might have been contested. By the present proclamation only one of these facts is required, namely, that he is held as a soldier; but that may be controverted, and we may imagine a case in which this might be done with success. It may be made to appear, for instance, that a person held in restraint by the officer is a child of tender years, and that the return of the officer that he is held as a soldier is a false pretence. Such is the course of procedure in ordinary cases. But, in the extraordinary case of persons held by the special authority of the president, the legislature has declared that the certificate of the officer shall be conclusive, and that he shall not be compelled to produce the prisoner. It is not necessary that we should fathom the reasons for this peculiar provision. But it may be remarked that congress, with respect to political prisoners, appear to have thought it best that the courts shall not have any custody of the body, or try any question upon habeas corpus, but leave them to seek relief by some other procedure. And by the same statute congress has provided another mode of relief as to all such prisoners who are "citizens of states in which the administration of the laws has continued unimpaired in the said federal courts."

But whatever may be the reason, the truth is, that if we assume that the second clause in the statute extends only to political prisoners, or those held by special authority of the president, it is plain that congress has made a difference between the mode of procedure in that class and all other cases, and we must be governed thereby.

One thing further. The argument for the petitioners rests wholly upon the ground, that the second clause was intended to be co-extensive with the first, and that it is necessary to give it such a construction as will make them both embrace only the same cases. If this were so, then the result, I apprehend, would not be to contract the language of the first clause, but to extend the second so as to make it applicable to all the cases within the terms of the first. The language in the second clause is "persons detained by authority of the president," and again a "person detained as a prisoner under authority of the president." Now it might be contended that persons held by a subordinate officer are held by authority of his commander-in-chief, and that a person restrained of his liberty is imprisoned. And it would be more reasonable to adopt this construction, than it would to contract the first clause to a single class of cases which could not be done by any construction; but only by doing violence to its plain and inflexible language. I do not dwell upon this, because I do not see the necessity of making the two classes co-extensive.

I am brought to the conclusion that the objections which have been made to the appli-

cation of the proclamation to these cases cannot prevail, and that I am precluded from proceeding further in this inquiry.

If these parties or any of them are entitled to relief, they must seek it from the officers or tribunals which are authorized to afford it.

See Ex parte Milligan, 4 Wall. [71 U. S.] 2, 131.

Case No. 4,605.

FAGAN et al v. The PLUTO.

[N. Y. Times, April 24, 1857.]

Circuit Court, S. D. New York. April 23, 1857.

COLLISION BETWEEN SAIL AND TOW—INCOMPETENT NAVIGATOR—LOOKOUT—FAULT — TUG AND TOW NOT IN MIDDLE OF STREAM.

[1. A schooner in charge of an incompetent navigator, in coming about in the East river, sagged down upon a tow, and sustained the injuries complained of. It appeared that the schooner had no proper lookout at the time, and might have avoided the disaster by continuing her course before tacking. *Held*, that she could not recover.]

[2. The mere fact that the tow did not keep as near the middle of the river as might be, as required by state law, did not render the tug liable, it not appearing that the failure to comply with the requirement caused or contributed to the disaster.]

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

[This was a libel by Denis Fagan and others, owners of the schooner Charles Hopkins, against the steamtug Pluto, for injuries sustained by collision. From a decree of the district court dismissing the libel, libelants appeal.]

Mr. Benedict and Mr. Malcolm, for appellants.

Mr. Bryan, for appellee.

NELSON, Circuit Justice. This libel was filed by the owners of the schooner Charles Hopkins against the Pluto, to recover damages for a collision in the East river. The wind was southwest and the tide ebb; the schooner was beating down the river on her larboard tack, and was crossing from the Brooklyn to the New York side, towards the foot of Jackson street; the Pluto was coming up the river on the New York side, with a heavy tow on her larboard quarter; she was ascending against the tide at a rate of speed not to exceed a quarter or a half mile an hour. The schooner came about nearly ahead of the tug, and sagged down upon her, causing the damage that occurred. The person in charge of her did not see the Pluto until he had come about, or was in the act of coming about. He might have run nearer the New York shore with safety before he tacked, and thus have avoided the collision. The tug stopped immediately, and seems to have done everything, under the circumstances, in her power to prevent the injury. It is apparent that the cause of it is attributed to the want of a proper lookout on the schooner. If the hands had seen the tug in time, the collision could have been easily avoided.

It is said that the Pluto was in fault in not being in the middle of the river, or as near as might be, regard being had to other vessels navigating it, as directed by the state law. But it does not appear that this omission led to the collision, or in any way contributed to it. It furnished no reason for the schooner's unnecessarily tacking about ahead of the steamer. This was gross inattention to duty on the part of the person in charge of the vessel. The schooner at the time was not in command of its ordinary master, but in charge of one temporarily engaged, and who was manifestly incompetent to navigate her at a place where skill and attention were indispensable.

The decree of the court below, dismissing the libel, we think is right, and should be affirmed.

FAGAN (STEWART v.). See Case No. 13,426.

FAILES (SCOTT v.). See Case No. 12,530.

Case No. 4,606.

FAILING v. STARK.

[See Starr v. Stark, Case No. 13,317, note.]

FAIR AMERICAN, The (BREVOOR v.). See Case No. 1,847.

FAIR AMERICAN, The (CRAMMER v.). See Case No. 3,347.

FAIR AMERICAN, The (FIVE SEAMEN v.). See Case No. 4,846.

Case No. 4,607.

The FAIRBANKS.

[Cited in The City of Paris, Case No. 2,765. Nowhere reported; opinion not now accessible.]

FAIRBANKS (HALSEY v.). See Case No. 5,964.

Case No. 4,608.

FAIRBANKS et al. v. JACOBUS.

[14 Blatchf. 337; 3 Ban. & A. 108.][1]

Circuit Court, S. D. New York. Oct. 15, 1877.

TRADE-MARKS—"FAIRBANKS' PATENT" AS APPLIED TO SCALES.

E. & T. Fairbanks & Co., manufacturers of scales, alleged that J. made scales, by using, to make the iron castings thereof, the correspond-

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 3 Ban. & A. 108, and here republished by permission.]

ing parts of a scale made by them, to form the moulds for those castings, and that the general shape and arrangement and color and external appearance of such scales were imitated from the Fairbanks' scale so nearly that only an expert in scales could distinguish the differences between them. The words "Fairbanks' Patent" were cast on the scales made by both parties. All the patents which Fairbanks & Co. had had, had expired. Fairbanks & Co. applied for an injunction to restrain J. from using the words "Fairbanks' Patent" on his scales, and from making or selling an imitation of Fairbanks & Co.'s scales: *Held*, that the application must be denied; that the words "Fairbanks' Patent" were not a trade-mark; and that J. did not represent his scales to be of the make of Fairbanks & Co.

[Cited in Wilson & Gibbs Sewing Mach. Co. v. The Gibbens Frame, 17 Fed. 625; Coats v. Merrick Thread Co., 36 Fed. 327; Adee v. Peck, 39 Fed. 210; Philadelphia Nov. Manuf'g Co. v. Rouss, 40 Fed. 587; Hiram Holt Co. v. Wadsworth, 41 Fed. 36; Frost v. Rindskopf, 42 Fed. 409; Hohner v. Gratz, 52 Fed. 872.]

[This was a bill in equity by Thaddeus Fairbanks and others against Samuel H. Jacobus.]

Lucius E. Chittenden, for plaintiffs.
Reed & Drake, for defendant.

JOHNSON, Circuit Judge. This motion is made for a preliminary injunction to restrain the defendant from the use of the words "Fairbanks' Patent" upon platform scales, and from making or selling an imitation of Fairbanks' scales. This preliminary relief is sought substantially upon the grounds of imitation of the article made and sold by the plaintiffs, and of violation of the plaintiffs' alleged trade-mark. No question of violation of patent right is involved, for there is no claim by the plaintiffs that the scale complained of is, either in the whole, or in any part, an invasion of any existing patent owned by the plaintiffs. Indeed, it is not claimed, on the part of the plaintiffs, that any part of their scale alleged to be imitated is protected by any existing patent, or that any existing patent owned by them applies to their own scale, except a small and unessential, though useful, addition to the scale frame, by which the oscillation of the weighing beam is prevented, under certain circumstances. This addition, which the scale complained of does not possess, is secured by an existing patent to the plaintiffs, and bears the proper words required by statute, "Patented Feb. 11, 1862," cast upon it.

The alleged imitation, as claimed by the plaintiffs, consists in this, that the scale complained of, as to the iron castings entering into its structure, was made by using the corresponding parts of a scale made by the plaintiffs, to form the moulds for those castings; and that the general shape and arrangement, as well as the color and external appearance, are imitated from the plaintiffs' scale so nearly that only an expert in scales could distinguish the difference between them. While, as matter of fact, I should, after an inspection of the two scales, not think the discrimination so very difficult, yet it may be taken to be not only difficult, but impossible, to discriminate between them. That fact does not give the plaintiffs any right. Their patents, while they existed, (and those concerned terminated in or about 1845,) protected them in the essential structure of their invention, but exterior form, painted color, and such non-essentials, were not, and could not be, the subject of the patents, and did not, and could not, secure these to the plaintiffs. Much less could these be secured as a trade-mark, for, a trade-mark is always something indicative of origin or ownership, by adoption and repute, and is something different from the article itself which the mark designates. An invention of structure a patent for the invention secures; a design is secured by a patent for that. Apart from these, any one may make anything in any form, and may copy with exactness that which another has produced, without inflicting any legal injury, unless he attributes to that which he has made a false origin, by claiming it to be the manufacture of another person. Any other doctrine is impossible to be maintained; for, otherwise, all the colors, all the unessential forms, could be monopolized as trade-marks, and exclusive rights would be created, not limited in time, as patents are, founded upon no public utility, and subject to no control but the will of the adopter. I think there is no difference in the cases on this subject. Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599; Gillott v. Esterbrook, 47 Barb. 455; Newman v. Alvord, 49 Barb. 588. I conclude, therefore, that there is no invasion of the plaintiffs' rights, in the purposed and actual identity, both of structure and appearance, in the scales in respect to which the defendant is sued, with those which the plaintiffs manufacture.

The case does not, however, rest here. On the base of the platform of what I may call the defendant's scale, are cast the words, "Fairbanks' Patent," with the number indicative of size, 11, and upon the weigh beam are stamped the words "Fairbanks' Patent." These are all the words which appear upon these scales, which can be the foundation of a charge of invasion of trade-mark, and, indeed, are all the words or figures upon any part of the scale. The same words appear on corresponding parts of the plaintiffs' scale, and, if they constitute a legal trade-mark, I shall assume, for the present purpose, that the defendant's scales violate it. Are these words a name of origin, or a name of quality, indicating structure? Whatever they are in the one scale, they are, also, in the other. In some of the plaintiffs' scales their origin is signified by a quite different mark: "Fairbanks' Standard, made only by E. & T. Fairbanks & Co., St. Johnsbury, Vermont." This is a valid trade-mark of the plaintiffs, but does not appear upon their scale produced in

court. The other words must be understood as claiming that the thing on which it appears is protected by a patent. Especially is it thus localized and referred to the particular parts on which it appears, when, upon another part, is found the proper patent mark, which is necessary to support an action for an infringement, in the absence of notice, under section 4900 of the Revised Statutes. This gives significance to the use of the other marks, and makes the conclusion almost irresistible, that the purpose of the other words, on the beam and the frame, are to impress upon the incautious public, that the scale is the subject of a patent, and, therefore, not open to competition in manufacture or sale. I agree, on this point, with the position of the plaintiffs' counsel, in his printed points, that "it is an error to suppose that even the patentee may so stamp his articles and deceive the public after the expiration of his patent"—citing Leather Cloth Co. v. American Leather Cloth Co., Am. Trade Mark Cas. 688, 713. And I add, in confirmation of this view, the decision of Judge Cadwalader, in the Eastern District of Pennsylvania, October 4th, 1875, in Consolidated Fruit Jar Co. v. Dorflinger [Case No. 3,129], upon reasons which seem to me quite satisfactory, and by which, on a motion for a preliminary injunction, I ought to be guided. It is, of course, no answer, that the defendant is, at least, guilty of the same fault, or even a greater. The plaintiffs fail to make these words out to be a lawful trade-mark, and, of course, cannot maintain upon them their claim for relief.

As to the charge that the defendant threatens various supposed wrongs to the plaintiffs, in imitating their manufacture, and that he represents his scales to be of the plaintiffs' make, the allegations are not so made out as to satisfy my mind of their substantial truth. Byam v. Bullard [Id. 2,262]. I doubt whether the defendant meant anything beyond the assertion of a right to use the words on the scale, which had been for many years openly used by him and his predecessors, under claim of right, and for some time, at least, and to some extent, with the knowledge of the plaintiffs or their predecessors.

Certainly, if the words "Fairbanks' Patent" do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is, to pretend that a scale is made by one person, which is, in fact, made by another.

In trade-mark cases, it is by no means of course to grant preliminary injunctions, even where the plaintiff's case seems to be made out; and I shall, therefore, leave the further consideration of the case to the final hearing, when the questions as to the defendant's claim of right to the use of the words, "Fairbanks' Patent," and the other questions of fact just referred to, and the unexplained circumstances and terms of the writing claimed to have extinguished the right of Chamberlain, can, if necessary, be further considered. The motion for an injunction must be denied, and the order heretofore made, granting an injunction till the decision of the motion, must be vacated.

FAIRBANKS (TUCKER v.). See Case No. 14,218.

Case No. 4,608a.

FAIRBANKS & CO. v. The ARBUSTIS.

[See Case No. 7,589.]

Case No. 4,609.

FAIRCHILD et al. v. The AURELIUS.

[5 Hunt, Mer. Mag. 263.]

District Court, D. Massachusetts. 1841.

SEAMEN'S WAGES—PORT OF DISCHARGE—PORT OF DISTRESS.

[Seamen shipped for a voyage to "a port of discharge in the United States" cannot maintain a libel for wages after leaving the ship at a port of distress in the United States.]

In admiralty.

This was a libel for seamen's wages. The libellant Fairchild was second mate, and the other libellant steward of the ship on a voyage from Richmond to Havre, and a final port of discharge in the United States. The ship performed her voyage to Havre, and there cleared for Richmond, Va., but experiencing heavy weather, and having carried away her mainmast, fore and mizzen topmasts, and sustained other damages, put away for Boston, where she arrived on the ninth of June, and the crew all left. The defence was, that the voyage was not terminated, this being a port of distress merely, and not a port of discharge; and that a libel would not lie until the libellants had performed the contract on their part. THE COURT sustained these positions, held that the libel was premature, and ordered it to be dismissed.

Case No. 4,610.

FAIRCHILD v. CAMAC.

[3 Wash. C. C. 558.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1819.

JUDGMENT ENTERED ON WARRANT OF ATTORNEY.

A judgment having been once entered on a warrant of attorney, the warrant becomes functus officio; and although in the warrant, authority may have been given to enter judgments, in the plural, that can only mean a second judgment, where the first has been set aside; and not as authority to enter two judgments subsisting at the same time.

[Cited in Whitaker v. Bramson, Case No. 17,526.]

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

Rule to show cause why the judgment rendered in this case should not be opened.

The plaintiff produced a bond executed by the defendant, to the plaintiff, both subjects of the king of the United Kingdoms of Great Britain and Ireland, and at the time, residents in Ireland, bearing date in 1801, with a warrant of attorney annexed, to confess judgment thereon; under which power, this judgment was entered.

The defendant, in support of the rule, contended, that judgment had long since been entered upon this bond, in Ireland, as appeared by the following endorsement on it:—"Judgment entered the 29th of October 1803;" consequently, that there no longer remains any remedy on the bond; but an action should have been brought on the judgment. It was also objected, that according to the practice of the courts of this state, as well as of the English courts, judgment upon a warrant of attorney could not be entered up after ten years from the time the money became due, without leave of the court, upon a motion for that purpose; and the judgment in this case was entered seventeen years after.

In answer to these objections, it was insisted—1. That the entry upon the bond is not sufficient or proper evidence, to prove that a judgment had been entered up prior to the present; and if it were, still, the warrant authorizes the entering up of judgments;—and 2. That the rule as to the necessity of obtaining leave of the court after ten years, is only applicable to cases where the plaintiff has been within the state during that time.

Cases cited, M'Clure v. Dunkin, 1 East, 436; Drake v. Mitchell, 3 East, 251.

Charles J. Ingersoll, for plaintiff.
Mr. Gibson, for defendant.

WASHINGTON, Circuit Justice. The first objection is fatal to this judgment. The proof of a prior judgment is not given by the defendant, but appears upon the bond and warrant of attorney, upon which this judgment was rendered, and which the plaintiff himself gives in evidence, to support the present judgment. Taking it, then, as proved, that a judgment was entered on the 29th of October, 1803, the warrant of attorney was then functus officio.

As to the argument, that the warrant authorizes the attorney to confess a judgment, or judgments, in the plural, there is nothing in it; the latter expression could only apply to an imperfect judgment, which might be set aside, or reversed for error. It could never contemplate the existence of two valid and subsisting judgments, at the same time, and upon the same bond. Rule made absolute.

FAIRCHILD (LOVING v.). See Case No. 8,556.

Case No. 4,611.

FAIRCHILD v. SHIVERS.

[4 Wash. C. C. 443.][3]

Circuit Court, E. D. Pennsylvania. April Term, 1824.

ACTION ON JUDGMENT FROM ANOTHER STATE.

Action on a judgment rendered in New York, and a discharge under the insolvent law of that state, made prior to the contract on which the judgment was rendered. On motion, an appearance on common bail was allowed.

[Cited in Woodhull v. Wagner, Case No. 17,975.]

Rule upon the plaintiff to show his cause of action, and why the defendant should not be discharged on common bail. The plaintiff showed as the cause of action, a judgment obtained by him, against the defendant, in the state of New York, on the 13th of February 1804, upon a contract entered into in that state, in August 1801. The ground of the rule to be discharged on common bail was a certificate of one of the judges of the supreme court of that state, dated the 28th of February 1805, that the defendant had in all respects conformed himself to the insolvent law of that state, passed on the 3d of April 1801, and a regular discharge of the defendant from all his debts theretofore contracted, in conformity with the provisions of the said law.

J. R. Ingersoll, for plaintiff.
Mr. Broome, for defendant.

PER CURIAM. The judgment upon which this action is brought having been rendered in the state of New York, upon a contract entered into subsequent to the insolvent law of that state, under which the defendant was regularly discharged, the rule to discharge the defendant on common bail must be made absolute.

FAIRCHILDS (UNITED STATES v.). See Case No. 15,067.

FAIRCLOUGH (UNITED STATES v.). See Case No. 15,068.

FAIRFAX (CATLETT v.). See Case No. 2,516.

Case No. 4,612.

FAIRFAX v. FAIRFAX.

[1 Cranch, C. C. 292.][1]

Circuit Court, District of Columbia. March Term, 1806.[2]

ACTION AGAINST EXECUTORS—ISSUE OF PLENE ADMINISTRAVIT.

If the jury find for the plaintiff on the issue of plene administravit, the plaintiff shall have

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

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

[2] [Reversed in 5 Cranch (9 U. S.) 19.]

judgment de bonis testatoris, for his whole debt.

. [See note at end of case.]

Non assumpsit et plene administravit, general replication and issue. Verdict: "We of the jury find the issues for the plaintiff [Ann Fairfax], and assess her damages at $220.95."

Mr. Swann, for defendant [Fairfax's executor], moved, in arrest of judgment, that the jury ought to have found specially that the defendant had in his hands goods unadministered sufficient to satisfy the debt; and relied on the case of Booth v. Armstrong, 2 Wash. [Va.] 301.

THE COURT (CRANCH, Chief Judge, and FITZHUGH, Circuit Judge) were of opinion that the finding was sufficient to support the judgment, and said: If a particular sum of assets less than the debt claimed by the plaintiff had been found it would not have altered the judgment. It would still have been to recover the whole debt, de bonis testatoris. But the jury have in substance found that the defendant had assets sufficient to pay the debt, out of which the debt might have been made. They have found the issue for the plaintiff. The issue taken by the plaintiff, in her replication, is, that the defendant had at the time, &c., in his hands, goods and chattels of the testator to be administered more than sufficient to pay, &c., and out of which he might have paid, &c., and this she prays may be inquired of by the country; and the defendant likewise. There is no more necessity of the special finding on this issue than on the issue of non assumpsit. Shipley's Case, 8 Coke, 134; Waterhouse v. Woodstreet, Cro. Eliz. 592; Gaudy v. Ingham, Style, 88. See Oxendam v. Hobdy, Freem. 351; Br. Ex'r, pl. 34, pl. 82; Newman & Babbington's Case, Godb. 178; Dorchester v. Webb, Cro. Car. 373; Lex. test. 414.

[NOTE. On writ of error this judgment was reversed by the supreme court, Mr. Chief Justice Marshall delivering the opinion. It was held that the jury should have found specially the amount of assets in the hands of the executor, to enable the court to enter judgment on the verdict. Fairfax v. Fairfax, 5 Cranch (9 U. S.) 19.]

Case No. 4,613.

FAIRFAX v. FAIRFAX.

[2 Cranch, C. C. 25.][1]

Circuit Court, District of Columbia. July Term, 1811.

ACTION AGAINST EXECUTORS—ISSUE OF PLENE ADMINISTRAVIT—EVIDENCE — PAYMENT BY EXECUTOR OF DEBT BARRED BY STATUTE.

1. Upon the issue of plene administravit, a surety in the administration-bond is a competent witness for the defendant.

2. If the defendant offer evidence of the payment of the testator's bond, he need not prove its execution by the subscribing witnesses.

3. The executor may pay a debt barred by the act of limitations.

4. Bills purchased and remitted to pay a foreign debt may be given in evidence as payments, if purchased and remitted before the writ was served on the defendant.

Assumpsit [by Ann Fairfax against Fairfax's executor]. Plea, plene administravit.

H. Gunnell, one of the sureties in the administration-bond, was admitted as a witness for the defendant, to prove plene administravit. (THRUSTON, Circuit Judge, absent, and FITZHUGH, Circuit Judge, doubting.)

CRANCH, Chief Judge, thought the interest too remote to disqualify the witness.

The defendant offered to prove that he had paid a bond of the testator.

E. J. Lee, for plaintiff, required proof by the subscribing witnesses that the bond was signed, sealed and delivered by the testator, and cited Saunderson v. Nicholle, 1 Show. 81.

THE COURT (THRUSTON, Circuit Judge, absent) decided that it was not necessary to produce more than prima facie evidence of the debt. If fraud be alleged, it ought to be proved. THE COURT also decided that an executor might pay a debt barred by the act of limitations.

The action was brought on the 18th of May, 1804. Certain debts were paid by the defendant's agent in England, in July and October, 1804. The bills to pay those debts were purchased by the defendant on the day of the date of the writ (18th May, 1804).

THE COURT left it to the jury to decide whether the bills were purchased before the service of the writ on the defendant, and directed them that if the bills were purchased and remitted for the purpose of payment before the service of the writ, it was a good payment on plene administravit.

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

Case No. 4,614.

FAIRFAX v. HOPKINS.

[2 Cranch, C. C. 134.][1]

Circuit Court, District of Columbia. May 17, 1817.

TRUSTEE'S SALE OF MORTGAGED PREMISES — COMPETITION IN BIDDING — PURCHASE BY CREDITOR —DEFICIENCY JUDGMENT.

A trustee appointed by a debtor to sell the mortgaged premises to the highest bidder, is bound to see that the sale is fairly made, and that there is a real competition. He is as much bound to take care of the interest of the debtor, as of the creditor; and if he finds only sham competitors, he ought not to proceed with the sale at that time, but adjourn and give a new notice. If there were no competitors at the sale, and the creditor has bought the property at his own price, and recovered judgment at law for the balance of the debt, the court will enjoin that judgment until the real value of the land bought in by the creditor, and the circumstances of the sale shall be ascertained upon final hearing.

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

This was a bill for an injunction to stay execution upon a judgment at law recovered in the circuit court of the District of Columbia, by Hopkins against Fairfax. Heard upon motion to dissolve the injunction.

Mr. Jones, for complainant.
Mr. Swann, for defendant.

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

CRANCH, Chief Judge (MORSELL, Circuit Judge, doubting). The facts of this case appear to be as follows:—On the 27th of September, 1811, Ferdinando Fairfax, being indebted to John Hopkins in the sum of $7,294, made a deed of trust to B. Taylor and T. Parker, for twelve hundred and sixty-seven acres of land in Jefferson county in Virginia, with power to them or either of them to sell the same for ready money to the highest bidder, after giving two months' notice of the time and place of sale in the newspaper printed in Charleston, in case F. F. should not pay the debt on the 1st of October, 1812. Mr. F. failed to pay on that day, and on the 9th of the same month the property was advertised for sale under the trust. At the sale there was no real bidder but Mr. Turner the agent of Mr. Hopkins. Mr. Humphreys and Mr. Dixon admit that they had not the money. Their bids therefore would not have been received. The land was, of course, struck off to Mr. Turner for Mr. Hopkins, at the price of $5,320. Mr. Hopkins, in his letter to Mr. Turner, of the 13th of November, 1812, admits that the land was good security for the debt, and authorized Mr. Turner to bid to the full amount of the debt, interest, costs, and commissions. On the 13th of April, 1813, B. Taylor, one of the trustees, conveyed the land directly to Mr. Hopkins. After crediting the purchase-money, ($5,320) the balance stated to be due to Mr. Hopkins was $2,780.95, for which he brought suit on the bond. Mr. Fairfax was arrested and not being able conveniently to give bail, made another deed of trust, in lieu of bail (not admitting any thing to be due) for two hundred and fifty acres of land in Loudon county. Judgment was recovered, and not being satisfied, the trustees of the Loudon land advertised it for sale at Leesburgh, on a court day. Only two bids were made; one by some person, as it seems, merely to set it up, at $5 an acre; the other by Mr. Hopkins, Jr., in behalf of his father, to whom it was struck off at $6 an acre. The only real bidder was Mr. Hopkins. The proceeds of this sale being credited ($1,500) Mr. Hopkins took a ca. sa. against Mr. Fairfax for the balance, being about $1,900. Mr. Fairfax filed this bill and obtained an injunction, which it is now moved to dissolve, upon the coming in of Mr. Hopkins's answer. Mr. Hopkins admits that he has sold these last 250 acres of land, at about 10 dollars per acre, and that for the Jefferson land remaining unsold, being about 1000 acres, he would take the same price at long credits. Without taking into account the 267 acres of Jefferson land, which Mr. Hopkins has sold, he has 1000 acres worth 10 dollars an acre, 10,000 dollars, and has sold the Loudon land for about 2,500 dollars, making 12,500 dollars. The whole debt and interest to the 27th of September, next, would be a little less than 10,000 dollars, so that he has already received 2500 dollars more than his whole debt and interest. If we add the 267 acres of Jefferson land sold by Mr. Hopkins, perhaps at 10 dollars, it will make upwards of 5000 dollars more than the whole debt and interest.

A mere statement of the facts of this case show its injustice. That a creditor should have the power of appropriating to himself, at his own valuation, the property of his debtor, strikes every one as unjust in the extreme, yet this has been the fact in the present case, and may be the fact in many like cases, if, by mere compliance with exterior forms, we can tie the bandage of law over the eyes of equity. In the present case, although the forms of the contract may have been pursued, so that, if a stranger had been the purchaser, his title would have been protected at law, yet, in substance, as between these parties, the contract has not been complied with. The land was to be sold to the highest bidder; meaning, unquestionably, the highest bonâ fide bidder; and unless there be at a sale, more than one such bidder, the sale cannot be made to the highest bidder; because where there is only one there can be no comparison. The word "highest" was used in order that there should be no sale unless there should be a real competition. Such is undoubtedly the intention of the parties; and where the intention of the parties has not been fairly executed, a court of equity will interfere in cases where third persons have not acquired legal rights without notice of the equity. In the present case the rights of third persons do not interfere. The transaction has been entirely between the debtor and creditor. The creditor has, under the forms of law, appropriated to himself, at his own valuation, the property pledged. He has stood by and seen the property of his debtor sacrificed in consequence of his own pressure, and has even taken to himself the whole benefit of that sacrifice. He has gained all that his debtor has lost. Not contented with this he seizes the body of his debtor, and when his debtor asks a court of equity to look into his case, the creditor presents to the court his shield of legal forms. We are told in the answer that we cannot question either the legality or the equity of the sale of the Jefferson lands, because that subject has been acted upon by the chancery court at Winchester. This may be so as it respects the title to those lands. The creditor may keep them, and perhaps his title may be

unquestionable by this court. But this court is not bound, while inquiring whether the creditor shall be permitted further to prosecute his debtor, to shut his eyes to the facts in evidence before us. We are not forbidden to see that the creditor has, in fact, appropriated to himself those lands which he admitted to be good security for his debt; nor that he has also acquired other lands of his debtor at a very inadequate price. If those lands were good security while in the hands of the debtor, why should they not, in equity, be considered as good payment when they get into the hands of the creditor? We are not forbidden to see that the debt is in fact paid which the creditor seeks to enforce. We may not perhaps set aside the conveyance of the property to the creditor; we may not, perhaps, on final hearing, compel the creditor to account for a surplus, but we think we ought to continue the injunction till final hearing. It may then be time enough to inquire whether we can decree a perpetual injunction. In cases like this, the trustee appointed by the parties is substituted for a master in chancery under the decree of a court of equity. The one is as much bound as the other, not only to see that the sale is fairly made, that is, that no fraud or deception be used, but to ascertain that there is a real competition; not a mere sham sale. He is not to suffer a creditor to bring with him a few nominal bidders, for the purpose of enabling him to take to himself the property at his own price; he is as much bound to take care of the interest of the debtor, as of the creditor; and if he finds only sham competitors, he ought not to proceed with the sale; but adjourn and give new notice. For these reasons the opinion of a majority of the court is that the injunction should be continued till final hearing.

At November term, 1818, the cause having been set for hearing, on the same evidence, THE COURT (THRUSTON, J., absent) decreed the bill to be dismissed—that being the opinion of MORSELL, Circuit Judge—and CRANCH, Chief Judge, doubting as to the conclusive effect of the decree of the court of chancery in Virginia.

FAIRFIELD TOWNSHIP (WESCOTT v.). See Case No. 17,418.

Case No. 4,615.

The FAIR PLAY.

[1 Blatchf. & H. 136.][1]

District Court, S. D. New York. Feb., 1830.[2]

SEAMEN—PARTICIPATION IN EARNINGS OF VESSEL—LIBEL IN REM—ACCOUNTING.

1. Where a seaman agrees to serve for one-half of the earnings and profits of the vessel, he cannot maintain an action in rem to recover such share, unless an account has been stated, or the claim has been otherwise reduced to a certainty. An action in rem cannot be brought to compel an accounting between parties.

[Cited in Duryee v. Elkins, Case No. 4,197; Martin v. Walker, Id. 9,170; The International, 30 Fed. 377; The H. E. Willard, 53 Fed. 601.]

2. Whether an action in personam in admiralty will lie for that object, quere.

[Cited in Duryee v. Elkins, Case No. 4,197.]

In admiralty. This was a libel in rem for seamen's wages, as upon an ordinary hiring. The vessel was chartered from the owner, for a trading voyage between Halifax and New-York, by the claimant, who was her master. The owner was to receive one-half of her earnings. The libellant served as second in command for a period of five months, on an agreement with the claimant to divide with him equally the earnings and profits of the vessel whilst she was navigated under the charter party. The libel alleged that $305 81 were due to the libellant as his share. The answer denied this, and averred that the libellant was himself indebted upon the adventure in the sum of $139 60. It did not appear that any account had ever been stated or made up between the parties, of the earnings and expenses of the vessel.

George Sullivan, for libellant.
Daniel B. Tallmadge, for claimant.

BETTS, District Judge. There is no proof before the court that any profits have been made in the adventure. This the court cannot presume from the fact that freight was earned, as, in the point of view most favorable to the libellant, he could have no claim upon the freight until the charges and expenses of the voyage had been ascertained and satisfied. But the true character of the arrangement, as it appears by the pleadings, was one of mutual hazard and risk between the libellant and the claimant, and it is not in the power of the former to change it at his option, to a hiring on wages certain.

The contract was, in its nature, indubitably maritime. A seaman may hire for a share of the earnings of a voyage, in lieu of a stipulated sum, and his interest and compensation under such a contract will be wages, and be recoverable in that name. Abb. Shipp. (Ed. 1829) 432; The Frederick, 5 C. Rob. Adm. 8. It is, however, the adjusted balance to which his interest attaches, and he has no property or right in anything beyond that. Abb. Shipp. 432, note. The equitable claim of a seaman to earnings in an adventure, which are not liquidated, cannot assume the privilege of wages, so as to attach as a lien to the vessel, subjecting it to arrest and detention to abide the winding up of such transactions. This doctrine is maintained in the case of The Sydney Cove, 2 Dod. 11. When the voyage is terminated, and the profits, if any, have been ascertained

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

[2] [Affirmed by circuit court, case not reported.]

on an adjustment of the accounts, the proportion of those profits which belong to the seaman is wages, and may be sued for and recovered as such in admiralty or at law. Wilkinson v. Frasier, 4 Esp. 182; 1 Chit. Com. Law, 359. A proceeding in rem is not a method allowed to be taken to compel an accounting. A vessel cannot be seized and detained to ascertain, on the settlement of accounts, whether the seaman has a claim against her. There must be positive evidence that wages are due, to justify that process. The 2d section of the act of congress of June 19, 1813 (3 Stat. 2), which gives a remedy in rem to fishermen for their shares of a fishing voyage, plainly imports that courts of admiralty are incompetent to afford that kind of relief without the authority of a positive statute.

Whether an admiralty court can entertain an action of account, on a libel in personam, is exceedingly doubtful, but that point is not raised for decision in the present case.

The libellant having failed to make out a claim which is a lien on this vessel, his libel must be dismissed, with costs.

On appeal to the circuit court, this decision was affirmed by THOMPSON, Circuit Justice. [Case not reported.]

Case No. 4,616.

The FALCON.

[Blatchf. Pr. Cas. 52.][1]

District Court, S. D. New York. Sept. 5, 1861.

PRIZE—ENEMY PROPERTY — CONDEMNATION—SUSPENSION AFTER DEFAULT — TESTIMONY OF CAPTORS AND WITNESSES PRESENT AT CAPTURE.

1. On special order of the court the testimony of captors and witnesses present at the capture was allowed; the master, crew and passengers not having been sent in with the vessel, but having been inadvertently allowed to leave her near the place of capture.

2. Vessel and cargo condemned as enemy property, and also under the acts of July 13, 1861, and August 6, 1861 (12 Stat. 257, § 5; Id. 319, §§ 1–3).

3. The practice of American prize courts is to make final condemnation of enemy property at the hearing of the cause, upon the ship's papers and the evidence in preparatorio.

4. The suspension of a year and a day after a default is allowed only when it is doubtful upon the evidence whether the property captured belongs to the enemy or is neutral.

[In admiralty.]

BETTS, District Judge. This vessel was captured on the 5th of July, 1861, by a United States war steamer, under command of James Alden, commander in the United States navy, off Galveston, Texas, in the Gulf of Mexico, and was sent in charge of a prize crew by the master of the steamer, as prize of war, to this port, where she arrived and was delivered to the possession of the prize commissioners about the 20th of August thereafter. At the time of the capture of the schooner the commander of the steamer inadvertently allowed the master, crew, and passengers of the schooner to go on shore in Texas, and no person who was on board the schooner at the time of her capture was detained and sent with her in charge of the prize master and crew, or was or could be produced on the examination in preparatorio in the suit. On affidavit showing these facts, and on motion of the attorney for the United States, the testimony of captors and witnesses present at the capture was, by order of the court, allowed to be taken and read on the hearing. This is the established practice of the French prize courts, but would, it seems, be regarded as irregular in the English and American tribunals, except upon special circumstances outside of the common-law rules of practice prevailing in those courts. The Henrick and Maria, 4 C. Rob. Adm. 57, note; The Eliza and Katy, 6 C. Rob. Adm. 189, 190; Pritch. Adm. Dig. 421 (333); C. Robinson, Collectanea Maritima, 75, art. 6; 1 Wheat. [14 U. S.] Append. 496.

The papers found with the schooner on her capture prove that she was enrolled by H. Seaburn, her owner, a resident of Texas, March 19, 1857, and licensed to him at the same place June 11, 1860, and was laden with cargo shipped from enemy ports in Louisiana to enemy ports in Texas. No party intervenes to claim the vessel and cargo. In addition to these facts, proving the vessel and cargo to be enemy property, the evidence in preparatorio shows that the vessel had on board an enemy flag, and that the master admitted he had used it on the last voyage. It is of less importance to scrutinize the regularity of points of practice in the suit, as purely a suit in prize, because the property captured and seized, being now held in custody by the United States, both on its capture and also by arrest upon process out of the court, appropriately falls within the provisions of the acts of congress of July 13, 1861, and August 6, 1861 (12 Stat. 257, § 5; Id. 319, §§ 1–3); and being thus held within the cognizance of the court, the attorney for the United States moves the court to order its confiscation, pursuant to the authority of those acts. It is adjudged by the court that, both upon the original capture of the property libelled and the prayer of the libel, and upon such motion of the United States attorney on the pending arrest and seizure of the schooner, her tackle and cargo, the same be condemned as enemy property and prize of war, and be confiscated to the use of the libellants, according to law. The practice in American prize courts is to make final condemnation of enemy property at the hearing of the cause upon the ship's papers and the evidence in preparatorio. The Harrison, 1 Wheat. [14 U. S.] 298. The suspension of a year and a day after a default is

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

allowed only when it is doubtful, upon the evidence, whether the property captured belongs to the enemy or is neutral. Id.

Case No. 4,617.

The FALCON.

[3 Blatchf. 64;[1] 30 Hunt, Mer. Mag. 201.]

Circuit Court, S. D. New York. Oct. 6, 1853.

CARRIERS—NON-DELIVERY OF GOODS—BURDEN OF PROOF.

1. In order to charge a carrier for the non-delivery of goods, some evidence of their non-delivery must be given by the shipper or owner; but, slight evidence will be sufficient to throw upon the carrier the burden of showing the delivery.

2. Where the bill of lading of goods specified that they were to be delivered to L. or Z.: *Held*, in an action against the carrier for their non-delivery, that it was not enough for the shipper to show the non-delivery to L., but that he must also give some evidence of the non-delivery to Z.

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

This was a libel in rem, filed in the district court, to recover the value of a box of goods alleged to have been lost in the course of shipment from New York to Chagres, in the steamship Falcon, in April, 1849. The bill of lading, which was signed by the purser of the ship, acknowledged the receipt of the box, and engaged to convey and deliver the same at Chagres, in good order, the dangers of the seas excepted, outside of the bar, to S. Lea or Zachrisson & Nelson, or their assigns. The shippers were Livingston, Wells & Co., and the goods were destined to the house of Cooke, Baker & Co., of San Francisco. On the arrival of the ship at Chagres, the box was put on board of a boat in charge of the second mate of the ship, and sent on shore to be delivered to one Ramos, who had a place of business at Chagres, and who was the agent of the house of Zachrisson & Nelson, of Panama, on the other side of the Isthmus. The ship was anchored a little over a mile from the place of landing. Afterwards, S. Lea came on board, and called for the box. The purser, who had charge of the landing of the goods at that place, advised him that it had already been sent on shore. There was no warehouse at the place of landing, and the usual custom of the ship, in 1849, was to land goods at the store-house of Ramos, which was across the Chagres river, in the old town of Chagres. Whether the box ever reached that place, or the hands of Ramos, did not appear. There was proof that it did not reach the house of Cooke, Baker & Co., of San Francisco, the ultimate place of its destination. The district court dismissed the libel [case unreported], and the claimants appealed to this court.

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

Erastus C. Benedict, for libellant.

George F. Betts, for claimants.

NELSON, Circuit Justice. The court below dismissed the libel on the ground, principally, that evidence of the non-delivery of the goods to S. Lea, was not sufficient to charge the carrier—that evidence should also have been given of the non-delivery to the house of Zachrisson & Nelson, the other consignees. The case, as thus presented on the evidence, is undoubtedly a close one, and, if it had been before me originally, I might possibly, in weighing the evidence, have inclined to a different conclusion from that at which the court below arrived. But, as the weak point in it has not been strengthened by the additional testimony in this court, and as the libellant has, since the appeal, had an opportunity to supply the defect, it is but right, perhaps, to conclude that the inference of the court below was the proper one.

It seems to be well settled, that, in order to charge the carrier, some evidence must be given, on the part of the shipper or owner, of the non-delivery of the goods, according to the requirement of the bill of lading. Griffiths v. Lee, 1 Car. & P. 110; Gilbart v. Dale, 5 Adol. & El. 543; 2 Greenl. Ev. § 213; Ang. Carr. 470. Very slight evidence will be sufficient to throw upon the carrier the burden of showing that the goods have been delivered. But there must be some evidence by the shipper, in the first instance, of the non-delivery.

Now, the weak point of the case, on the part of the libellant, is this: According to the bill of lading, the box was to be delivered to S. Lea or to Zachrisson & Nelson, at Chagres. Lea has been examined and proves clearly that the goods were not delivered to him. But, there is a total absence of any evidence of a non-delivery to the other consignees. There is evidence that the box did not reach the house of Cooke, Baker & Co., of San Francisco, but this affords no inference, legal or logical, that it did not come to the hands of Zachrisson & Nelson, of Panama.

And, besides, the tendency of the evidence on the part of the claimants is, not that there was a delivery to Lea, but to Ramos, who was the agent of Zachrisson & Nelson, at Chagres, to forward goods to them. His place of business, and the place where the goods were landed, was on the opposite side of the river from Lea's place of business. The box had been sent there before Lea called for it on board the ship; and, if any effect is to be given to the rule of law, that the owner must give, at least, some evidence of the non-delivery, in order to charge the carrier, it seems to me, that the fair application of it, in this case, sustains the view taken by the court below. As I have already said, proving that the box did not reach Cooke, Baker & Co., of San Francisco, in no respect helps the case. It may have

been lost in the hands of Ramos, or in the transit across the Isthmus, before it reached Zachrisson & Nelson, or while in their hands at Panama.

I admit that the point on which the case turns is a nice one, and not without its difficulties, which might have been cleared up and disembarrassed by further testimony. But, I am inclined to think, that upon the strict principles of the law governing the case, the burden lay upon the libellant to furnish the evidence. He should have given some testimony legally tending to show that the goods had not been delivered to Zachrisson & Nelson, or to Ramos, their agent at Chagres. I find no such evidence in the case, and must, therefore, affirm the decree below, with costs.

Case No. 4,618.

The FALCON.

[4 Blatchf. 367.][1]

Circuit Court, S. D. New York. Sept. 29, 1859.

PRACTICE IN ADMIRALTY—PARTIES — INTEREST IN SUIT.

In admiralty, the name of any party who has lost his interest in the suit, can, on a proper application, be stricken from the record.

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

This was a libel in rem, filed in the district court. After the commencement of the action, the name of Henry P. Gardiner, one of the libellants, was stricken out, on motion, by the district court, on an affidavit showing that he had parted with all his interest in the claim, and Gardiner was examined as a witness for the libellants. The district court decreed in favor of the libellants [case unreported] and the claimants appealed to this court.

Welcome R. Beebe, for libellants.

Charles L. Benedict and Edward C. Delavan, for claimants.

NELSON, Circuit Justice, said that, in admiralty, the name of any party who had lost his interest in the suit could, on a proper application, be stricken from the record. Decree affirmed.

Case No. 4,619.

The FALCON.

FLYNN v. The FALCON.

[17 Betts, D. C. MS. 15.]

District Court, S. D. New York. Nov. 3, 1849.

COLLISION — STEAM AND SAIL — LOOKOUT AND LIGHTS — DUTY OF SAILING VESSEL TO KEEP COURSE—INEVITABLE ACCIDENT.

[1. A vessel brought, without fault of her own, into imminent peril of collision, is not responsible for an error of judgment in attempting to escape therefrom.]

[2. In a collision case, the testimony of competent witnesses on board one of the vessels is of greater weight, as to her movements, than that of persons on board the other vessel.]

[3. A sailing vessel closehauled on a course S. S. E. need take no precautions to avoid a steamer approaching to meet her from the windward on a course E. N. E., unless the steamer appears ignorant of the sailing vessel's situation.]

[4. If the steamer has, by reason of a negligent lookout, come dangerously near the sailing vessel, she should pass the stern, not the bows, of the latter.]

[5. A collision is not an inevitable accident merely because it could not have been prevented after realization of the dangerous position of the vessels, if they were negligently brought into that position.]

[6. Under ordinary circumstances, sailing vessels at sea are not in fault for not carrying lights.]

[Cited in Jones v. The Hanover, Case No. 7,466.]

[This was a libel by Oscar R. Flynn, owner of the schooner Ellen, against the steamboat Falcon (George Law and Marshall O. Roberts, claimants), to recover damages for collision.]

BETTS, District Judge. The libel alleges that the schooner Ellen, owned by the libellant, on the night of January 23rd, 1849, on her voyage from New York to Suffolk, Virginia, encountered the steamboat Falcon between Little Egg harbor and Absecom beach, off the Jersey shore, running towards New York. The wind was S. W. by S., and the schooner was closehauled, heading S. S. E., and was struck by the steamboat on her starboard bow, and sunk immediately, and she charges that the collision was caused by the fault and negligence of the steamer, without blame on the part of the schooner; that the schooner, at the time, was worth $3,000. The claimants, by their answer, aver their ownership of the steamer, and deny that the collision was caused by the fault or negligence of those in her charge, or that it could not have been avoided by the schooner, and aver that it was caused by the fault of the schooner, but set up no particulars as to the position and courses of the two vessels. Evidence, partly depositions and partly oral, was given on both sides. Benjamin H. Moss, master of the schooner, and Joseph Moss and William Waters, hands on board of her, supported the allegations of the libel. They testify that the collision occurred about six o'clock in the morning. The captain and Waters were on deck when they first discovered the smoke of the steamer. She was then, the captain supposes, two and a half miles off and to the windward of the schooner, and Waters noticed her about a mile off, and apparently 100 yards to windward. At six the two other men were called. Joseph Waters says when he came on deck the steamer appeared about a mile off to the

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

windward, steering pretty well in shore of the schooner. These three witnesses all state that the steamer, as the vessels approached, changed her course to about east, and towards them, and the collision occurred almost instantaneously, or within two or three minutes. They judge she would have gone 100 or 200 yards clear of the schooner if she had held her course. That the schooner did not change her course. She was ordered to go about by the steamer, and captain put her helm down, and ordered the men to lighten the jib sheets, and, when in the act of obeying, the steamer struck the schooner forward the fore rigging on the starboard bow. These statements were all adhered to by the witnesses throughout their direct and cross examinations. The captain of the steamer was examined orally, and the first and third mates, and one heard by deposition on the part of the claimants. The captain did not get on deck and see the vessel until they were in the act of striking. The wind was then on the starboard of the steamer, and she was heading, he thought, E. N. E., and the schooner S. E. or S. E. by E. He fixes the time to be before 6 a. m., and says, in conversation with the captain of the schooner after he was taken on board and his wounds were dressed, he asked why the schooner attempted to cross the steamer's bows, and the captain answered that he thought her farther off, and that he could get across before meeting. Samuel R. Robertson, the first mate, was on deck. He makes the courses of the two vessels the same as the above witness. He says the collision took place at half past 5 a. m. The schooner, when he first saw her, was on the wind, off the larboard bow of the steamer, and about a quarter of a mile distant. He had ordered the helm of the steamer aport, and had hailed the schooner to go about. She did not obey his order, but kept off about four points from the wind. If she had held her course, and not kept off, would have gone clear. The steamer obeyed her helm, and at the time of the collision was on the swing to the eastward, and the schooner had fallen off about five points, and she struck with her starboard bow upon the starboard bow of the steamer. He says, if she had luffed, or held her course on the wind, she would have gone clear. He supposes the collision was fifteen miles from land. It was dark at the time. John C. Hannings, 3rd mate, was at the wheel. The steamer was going about twelve knots, and heading N. N. E., the wind S. W. The man forward as a lookout sung out "A sail ahead," and first mate ordered helm aport, which order witness obeyed; then saw schooner heading S. S. E., and thinks might be a quarter of a mile off, and thinks she changed her course after he first noticed her, but his attention was otherwise occupied. Judges she fell off considerably, from the manner the two vessels struck. He thought she had begun going about, and had luffed a little. If she had luffed the collision would not have happened, and there was nothing to prevent her doing it. He thinks the steamer had swung round three points. The wind was brought on the opposite tack. When they struck, he can't say how she then headed; supposes it must be as far as N. E. by E. She was on full swing round. He rang to stop the engine, but does not know that it had stopped. He heard the captain of the schooner say that he had time to go about, and called all hands to do it, but then made up his mind to cross the bows of the steamer. Henry R. Francis was stationed as a lookout on the larboard side forward, about eight feet abaft the chocks, in conversation with another man about five feet from the stay-sail and ten feet from the peak from the chocks forward. When he discovered the schooner she bore a point and a half on steamer's larboard bow, and he supposes a quarter of a mile off, apparently coming directly towards the steamer. Could not tell how the steamer headed. He sung out "A sail ahead," and gave her bearings, and the mate ordered the helm hard aport, and then called to the schooner to go about. Heard no reply, and the vessels were instantly together. He thought the schooner was going about. She appeared nearly in stays. He thinks she had changed her course after he first saw her. She appeared to have kept away with intent to stand across steamer's bows. Thinks she had run off four points, and, as near as he could judge, headed E. by S. at the time of the collision, and two or three points across the steamer's bow, and to the southward of her. It was his opinion the schooner would have avoided the collision by holding her course as he first saw her, or by luffing up, which she could have done. This was his second voyage.

The testimony has been more fully stated than usual, as it affords, by this direct collation of its parts, an explanation of the cause of the disaster probably more satisfactory than could be deduced from a general reasoning. Two men were stationed forward on the steamer to keep a lookout, and one of them was examined, and his account of his position and occupation does not denote that the charge was fulfilled by them with any very careful attention. They stood considerably aft of the night heads, and were in conversation together, discussing the question whether an object supposed to be seen at a distance was a light or a light-house, it is presumable, as they were looking for one. The mate and man at the helm, the only other persons on deck, were first apprised of the appearance of the schooner by the cry of "A sail ahead." She was then, as they seem all to have computed the distance, a quarter of a mile off. She was palpably very close to them, but no reliance can be placed on any estimate of yards, in the confusion of the moment and the obscurity of the atmos-

phere. The Iron Duke, 2 W. Rob. Adm. 380. Indeed, if it had been broad daylight, the most experienced seaman could not be expected to judge satisfactorily whether two objects on the water at sea were 80 or 60 yards apart. The Emily [Case No. 4,453]. The united speed of the two vessels would pass a mile in less than four minutes, and the few seconds of sailing they found themselves apart when the steamer was first aware of the schooner's position could leave but little chance for either to do anything effectually to avoid the danger. If brought together without blame being imputable to either, it would seem that neither could be reasonably chargeable with the consequences of adopting the wrong means for extricating themselves, or for not attempting anything. No court could expect entire justice of judgment or conduct on a sudden emergency of great peril, and would not, in such circumstances, visit a mistake with any penalty upon the party committing it. The Iron Duke, 2 W. Rob. Adm. 381. It is natural that the witnesses on each vessel should think the course pursued by the other a wrong one and the cause of the collision, and great circumspection is therefore always exercised in reviewing the opinions as given with respect to the movements or acts of the opposite vessel. Id.

In evidence necessarily, from the character of the cases, imbued more or less with a partisan feeling, or one full of self confidence as to the propriety of their own conduct and the errors of the other vessel, it is found, in experience, better to rely upon what the witnesses assert of their own acts on their own vessels than their judgment or opinion of the acts on board the other, or what acts the others might advantageously have performed. The Neptune [Case No. 10,120]. In the present case the witnesses on the steamer differ widely in their ideas of the movements of the schooner. One of them supposes she gave away five points, and the other that she luffed into the wind so that her sails shook, and both those movements must have occurred within the instant of time, as it were, that she was seen before striking. Those on the schooner think the collision was caused by the steamer's veering around to head about east, and so as to run directly down upon her. Instead of taking these suppositions as grounds for deciding the question of blamable conduct between the parties, it is more satisfactory to ascertain from each class of witnesses what was done at the time on their particular vessel, with their personal observation and knowledge, and from the facts so established seek a proper conclusion as to the faultiness of the one or the other, or of both. In this mode of considering the evidence, it appears to me that no improper step was taken on board the schooner. Her course in fact was not altered at all. This is expressly asserted by her crew in their testimony, and, notwithstanding the notions entertained by the three persons on board the steamer that the schooner both bore away and luffed, yet they and the captain in effect corroborate the evidence given from the schooner, for they all assert when she struck she was heading S. E. or S. E. by E., either of which courses correspond substantially with that the schooner had all the while held closehauled upon a southwest wind, and is entirely incompatible with her having borne away four or five points, or come up into the wind so as to shake her sails.

I think, then, no ground is shown for charging misconduct in the navigation of the schooner. She was entitled, as against a sailing vessel, to hold her course upon the wind, being closehauled, and on her starboard tack, and more absolutely so as against a steam vessel. It was not, therefore, her duty to take any precaution to get out of the way of the Falcon, or make preparations in expectation of a necessity to do so, there being nothing to indicate to her that the latter was ignorant of her situation. The Girolamo, 3 Hagg. Adm. 173; 2 W. Rob. Adm. 1, 23. Furthermore, I think it proved that the steamer was to the windward of the schooner as they were approaching, and the latter could accordingly have no reason to expect the former, if the two came near each other, would attempt to pass her to the leeward under her bows. Id.; The Woodrop-Sims, 2 Dod. 87. The wrong maneuver, if any, was made on the steamer, in porting her helm, as that tended to bring her more directly in the path of the schooner. The Rose, 2 W. Rob. Adm. 4. But, as before remarked, I should not regard an error of that kind, committed in the suddenness and alarm of a night encounter, as a fault on the part of the steamer, if she had been guilty of no previous negligence or misconduct. I cannot regard the occurrence as an unavoidable accident, in which each vessel would be acquitted of liability to the other for the damage. The Catherine of Dover, 2 Hagg. Adm. 154. It could clearly have been prevented by the exercise of a suitable care and caution in due time, and it does not become an inevitable accident because it could not be prevented at the moment it occurred. The Virgil, 2 W. Rob. Adm. 205. Those previous measures and precautions must be more carefully observed in navigating during the night. Id.

The case, in my opinion, then turns upon the point whether the schooner was blamable for not showing a light or giving some signal to indicate her situation, or whether the accident was owing to an imperfect and negligent lookout on board the steamer. The English admiralty denies it to be a general rule that sailing vessels shall carry or exhibit a light at sea. The Rose, 2 W. Rob. Adm. 4; The Columbine, Id. 33; The Iron Duke, Id. 382, 383. In this court it has been held expedient and proper they should do so in great darkness, or make other signals to warn ap-

proaching vessels of their situation. Thain v. The North America [Case No. 13,853]; The Bay State [Id. 1,148]. Still the general law recognized in the English court is applied here. The Neptune [supra]. And sailing vessels at sea, under ordinary circumstances, would not be regarded in fault for not carrying or exhibiting lights. This was a starlight night, and at or about day dawn, when the collision occurred; and the weight of evidence is that the schooner was to leeward, so that the advantage of the approaching daylight would be with the steamer, enabling her to see objects east of her more easily than those inland. The duty was imperative upon her to keep up a competent and attentive watch forward, and any remissness in that respect must necessarily throw on her the liability for injuries thus caused to others. The George, 2 W. Rob. Adm. 389; The Woodrop-Sims, 2 Dod. 83; The Chester, 3 Hagg. Adm. 316; The Blossom [Case No. 1,564]. The two men entrusted with the service on the steamer when the schooner was seen coming upon them were not at their proper stations or performing their duty. They were in conversation together, and their attention withdrawn wholly from the lookout. There is no fact before me authorizing a doubt that if they had been at their proper positions and giving reasonable care and attention to the lookout, they could have discovered the schooner in ample time to have enabled the steamer to avoid her. The steamer had the advantage of a full sailing breeze abeam, in addition to her engine, and was easily steered; so that, with her velocity, she could have been put out of the way of the schooner on exceedingly short notice. This was the second voyage of one of the watch, and no evidence is given of the experience or capacity of the other man. The duty of the steamer, under the circumstances, was to have given way, by going under the stern of the schooner, and not attempted to cross her bows. The Rose, 2 W. Rob. Adm. 4. And it was incumbent on her, in order to exercise the necessary precaution in sailing, to know the true situation and bearing of the schooner, and she fails proving there was any natural impossibility, from the darkness of the night, in their so doing. Neither the obscurity of the night nor the situation of the schooner interposed an impediment to her being discerned by a vigilant lookout without the aid of lights exhibited from her. The conversation of the master of the schooner after he got on board the steamer, importing that he was trying to run under the bow of the Falcon, ought to have no great weight in the case. He had been much hurt, and was just rescued from the water, and had his wounds dressed, and his opinion, as stated by the witness, was in reply to questions put him in that condition. He is understood to say he thought he was far enough off to be able to pass the steamer's bow and relinquished his first intention of luffing, and bore away for that purpose. But I do not understand it to be charged that he admitted he in any way changed the course he had been running until the instant of striking; he thought the vessels were further apart, and that he should get across the steamer's bow before meeting. The impression gathered under such circumstances from a hasty conversation should not be allowed to weigh against his deliberate testimony, confirmed by the captain of the Falcon, that to the moment of the collision the schooner was running S. S. E., or from that to S. I think that it results upon the whole evidence that due precautions have not been observed on the Falcon, and with the exercise of them she might have avoided the schooner; and as the sailing vessel was closehauled on the wind, and held that course to the instant of collision, that the responsibility of not keeping out of her way is cast upon the steamer. I shall accordingly decree that the libellants recover their damages and costs to be taxed. A reference to a commissioner to ascertain the value of the schooner must be taken.

Affirmed by the circuit court [case unreported] October 2, 1852.

Case No. 4,620.

FALCONER et al. v. CAMPBELL et al.

[2 McLean, 195.][1]

Circuit Court, D. Michigan. Oct. Term, 1840.

CONSTITUTIONAL LAW—ACTS OF INCORPORATION—TWO-THIRDS VOTE OF LEGISLATURE — SEVERAL CORPORATIONS CREATED BY ONE ACT—RESPONSIBILITY OF DIRECTORS FOR CORPORATE DEBTS—PLEADING—ACTION OF DEBT.

1. The 2d section of the 12th article of the constitution of Michigan provides, that "the legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each house." This does not restrict the legislature from creating more than one incorporation in the same act.

2. No act of the kind can pass, except by the requisite majority; but in the same act as many bodies corporate may be created, as the legislature, in the exercise of their discretion, shall deem proper.

3. In such an act as distinctive a character, and as effectual guards against abuse, may be provided in each corporate existence, as if each were established by a separate law. And if, in the exercise of their discretion, the legislature may establish any given number of corporations in the same act, they may establish an indefinite number. The number, whether limited or indefinite, is a question of policy, but, under the Michigan constitution, is not one of principle.

4. The act of the legislature of Michigan, entitled "An act to organize and regulate banking associations," passed 15th March, 1837 [Sess. Laws, p. 76], under which the "Detroit City Bank" was incorporated, is constitutional.

[Cited in White v. How, Case No. 17,548; Nessmith v. Shelden, Id. 10,125.]

[Cited in Green v. Graves, 1 Doug. (Mich.) 367.]

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

5. The directors and stockholders of that bank are a corporation, and not merely a partnership or joint stock association. By the amendatory act of 30th December, 1837, all banks under the former law, were recognized as corporations—and the "Detroit City Bank" was then organized and doing business.

6. To create several corporations in one act is an ordinary mode of legislation.

7. Where a statute imposes liability, as in this case, where the directors are made responsible for the debts of the bank, the action of debt is proper.

8. The existence of the bank is sufficiently stated in the declaration, though by way of recital.

[Cited in State v. Leffingwell, 54 Mo. 467.]

9. Facts are stated in the declaration which show that the defendants became a body corporate and politic, and this is sufficient without a special averment to that effect.

[Cited in Paterson v. Arnold, 45 Pa. St. 413.]

10. The fact of incorporation is an inference of law. Not necessary to aver that the law was passed by the constitutional majority.

11. That question, if raised, must be raised by plea. Where the law bears upon its face the requisite authentication, the vote by which it was passed cannot be inquired into.

12. Having acted as directors the defendants might be estopped to deny their own authority; but they may object if the declaration do not show every ground necessary to a recovery. In this respect the declaration is sufficient.

13. The legislature cannot create an obligation or impose a penalty, for an act, which, when done, incurred no such liability.

14. If the declaration is founded on an amendatory act, which refers to and continues the provisions of a former act, it should conclude "against the form of the statute," and not statutes.

[15. Cited in Mason v. Wallace, Case No. 9,255, to the point that a delay of payment for two years will not bar a bill for a specific execution of a contract.]

[This was a suit by Falconer and Higgens against Henry M. Campbell and others.]

Seaman & Frazer, for plaintiffs.

Romeyn & Joy, for defendants.

OPINION OF THE COURT. This action is brought against the directors of the Detroit City Bank to recover from them the amount of a bill of exchange, drawn by the bank, in favor of the plaintiffs, on the Albany City Bank of New York; which was protested for nonpayment. The declaration states that, whereas, heretofore, in the year 1837, books were opened to receive subscriptions of stock for a bank to be called the Detroit City Bank, under the act entitled "An act to organize and regulate banking associations;" which subscriptions were received. That, afterwards, the defendants were elected directors of said Detroit City Bank or banking association, and then and there entered into the duties of their offices respectively, as directors of said bank. That Frederick H. Harris was elected cashier of the bank, and that the defendants, claiming to have complied with all the provisions and requirements of said act of the legislature, and claiming to constitute a body corporate under the name of the Detroit City Bank, at Detroit, commenced doing business as a bank or banking association, under the name aforesaid, and by virtue of said act of the legislature; and continued to do business as a bank until the 10th of February, 1839, when the bank failed. And the plaintiffs aver that the bank then and there became insolvent, and is still insolvent, and that the defendants continued to act as directors of the bank the whole time aforesaid; and that as directors, they became subject to the provisions of an act to amend "An act entitled 'An act to organize and regulate banking associations, and for other purposes,'" which took effect the 10th January, 1838. And the plaintiffs aver that the 6th December, 1838, the bank, by its cashier, made its bill of exchange, directed to the cashier of the Albany City Bank, of the state of New York, for seven hundred and seventeen dollars and thirty nine cents, to be paid in six months after the date thereof to John Falconer & Co., who indorsed the same to the plaintiffs. That the bill not being paid at maturity was protested, of which due notice was given; and that by force of the statute the defendants became liable to pay, &c. In the second count the plaintiffs allege that "the said Detroit City Bank was organized and transacted business as a banking institution," &c., and the same allegation is contained in the third count, which is a general one.

The defendants filed a general demurrer, and in the argument it is insisted that the declaration, in several particulars, is insufficient. Before these are considered we will examine the principal questions raised by the demurrer. These are: First: Are the associations authorized by the general law corporations? Second: Had the legislature power to pass such a law?

The act in question is entitled "An act to organize and regulate banking associations." The first, second, third, fourth, fifth, sixth and seventh sections, provide in what mode the associations shall be formed. Application is to be made, in writing, to the treasurer and clerk of the county, where the business is to be transacted, stating the amount of capital proposed. Of this application public notice is required to be given. Bond, in the sum of thirty thousand dollars, to be approved of by the treasurer and clerk, must be entered into. The capital stock is limited, and the subscriptions are to be received and apportioned, &c. Ten per cent. on shares subscribed are required to be paid. And when the capital stock of the proposed association shall be subscribed and ten per cent. paid, on notice being given to the stockholders, they are authorized to meet and elect nine directors, a majority of whom are authorized to manage the affairs of the association. They are required to elect one of their number president and in the 9th section it is provided, that "all such persons as shall become stockholders of any such association, shall, on compliance with

the provisions of the act, constitute a body corporate and politic in fact and in name, and by such name as they shall designate and assume to themselves, &c.; and by such name they and their successors shall and may have continued succession, and shall, in their corporate capacity, be capable of suing and being sued, pleading and being impleaded, &c., in all courts whatsoever; and that they and their successors may have a common seal, and by such name as they shall designate, adopt and assume as aforesaid, shall be in law capable of purchasing, holding and conveying any estate, real or personal," &c. By the 15th section the directors, for the time being, or a majority of them, have power to make bylaws.

The ordinary powers of a corporation are—(1) Perpetual succession; (2) to sue and be sued, and to receive and grant by their corporate name; (3) to purchase and hold lands and chattels; (4) to have a common seal; and (5) to make bylaws. Some of these powers are incident to a corporation, but they are all, generally, expressly given by statute in this country; and these powers are all given in the act under consideration. It expressly provides that the association, authorized by the act, when formed, shall "constitute a body corporate and politic in fact and in name." The act not only gives in terms all the requisites to constitute a corporation, but the body, when formed, is technically designated by it as such. Where, then, is the ground for argument or doubt on the subject? Did not the legislature comprehend the force of the language they used? They have created an artificial being, given to it, in well defined terms, its just proportions and powers, and have called it by its appropriate and technical name. Could the legislature, in language more clear and forcible, have created a corporation? Not a quasi corporation; not a joint stock company, or a limited partnership, but, substantially and technically, a corporation. In illustration of this act of the legislature, it is unnecessary to refer to the mode of creating corporations in England by grant from the crown, or point out the distinction which may exist between a body thus created and one created by a statutory grant; or between an ancient and modern being of this sort. It is enough to know that it is not essential to the character of a corporation, that its powers should be equal to any similar association, either ancient or modern. It is sufficient, if, in its corporate name, it exercises the powers and rights of a natural person in the management of its concerns. We can entertain no doubt that the associations authorized under the above act were intended to be, and are, in fact, corporations.

Had the legislature power to pass this law? This is the great question in the case, and it is fully and fairly presented by the demurrer. The 2d section of the 12th article of the constitution of Michigan declares, that "the legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each house." And it is earnestly, ingeniously and ably contended, that this is an inhibition of the creation of corporations by a general law. That corporate powers, under it, can only be conferred by express enactment in each case. That the majority of two thirds of each house is required to pass the law, whether general or special, cannot be doubted; and although this question must be raised by a special plea and is not now before us, it may not be improper to suggest that this act having the constitutional sanctions required upon its face it is not perceived how, in regard to the majority by which it was passed, it can be distinguished from any other law. To pass an ordinary act a majority of each house is necessary, but to pass an act of incorporation a majority of two thirds is required. Now if, in the latter case, the majority by which the bill was passed may be denied by a plea, why may it not be done in the former? And if the court may go behind the law and canvass the votes by which it was passed, why may they not investigate the qualifications of the members of the legislature?

We are told that the people of Michigan were jealous of monopolies, and, especially, of bank monopolies, and that by the introduction of the above section into their constitution they intended to restrict the powers of the legislature in making such grants. That such was their intention is clear from the language of the section. A law which confers corporate powers can only be passed by a vote of two thirds of the members of each house. But must each corporation be created by a separate act? This is the ground taken in support of the demurrer. No "act of incorporation" shall be passed by the legislature unless with the assent of at least two thirds of each house," are the words of the section. The word "act" is used in the singular, but does it necessarily import that not more than one corporation can be created in the same act? Suppose ten distinct applications were made to the legislature for bank incorporations at the same session, and the legislature were disposed to grant each application, must they pass ten acts of incorporation, or may not the ten corporations be granted in the same act? Would not such a law be within the letter and spirit of the constitution? Of this there would seem to be little doubt. As distinctive a character may be given to each corporation in such an act, as if each were established by a special law. In 1834 an act was passed by the legislative council of the territory of Michigan, entitled "An act to establish branches of the Bank of Michigan, Farmers' and Mechanics' Bank of Michigan, the Bank of the River Raisin." [Sess. Laws, p. 63.] Such acts are common, and it is believed never to have been supposed that the legislative power might not be exercised in this mode. The restriction

in the constitution does not prohibit it. And if this may be done under the constitution, then the construction, that each corporation must be created by a special law, can not be sustained.

This is a question of power, and not of policy. The court may look at the circumstances under which the constitution was adopted, and these may explain, at least to some extent, the objects which its provisions were intended to secure. But whether these objects be wise or politic we can not inquire. The constitution bears the impress of the sovereign will, and it must stand as the paramount law. It regulates and limits the exercise of legislative powers. And if an act of the legislature be clearly repugnant to the constitution, it is of no validity. But to produce this result the repugnancy must be obvious. It must not arise by implication, but by giving to the constitution and the act the full import of their provisions. And if, on this comparison, the provisions of the one are irreconcilable with those of the other, the act must be made to yield. But if the repugnancy be doubtful, and the act may be so construed as to harmonize with the constitution, it must stand. This is due to the legislative construction of the constitution, and is a well established rule of judicial decision. At the time the constitution of Michigan was adopted, in many of the states, and in this territory, it was the ordinary course of legislation to create corporations by a general law. This was the case in Ohio, and in many of the other states. And it can be of no importance whether banking or other associations were thus incorporated. The power was exercised. Does the constitution prohibit the exercise of this power?

It has already been shown that an act which shall establish several banking corporations is not repugnant to the constitution. And this reduces the objections to the law under consideration to two points: First: That a corporation, being a grant, must be made to a person or persons in esse. Second: The indefinite number of banking corporations which, under the law, may be established.

The first objection, on examination, will be found to have but little force. The creation of a corporate existence can never take effect until the association be formed, and the organization completed. Commissioners are generally designated in the act, who are to superintend the opening of the books and receive subscriptions of stock. And when the amount shall be subscribed, and the necessary payments made, the stockholders elect directors who appoint a president and cashier. The organization being completed, existence is given to the artificial being, and its agency commences. It is now in esse, but before this it was not. Vitality is given to it by the voluntary association and organization of its members. Had they remained passive the law could have had no effect. In this case, then, the grant of the franchise is not made to a person or persons in esse. The commissioners did not constitute the corporation, nor was the franchise, in any form or degree, vested in them. This is the general mode in which corporations are created, and it has stood the test of time, and of legal scrutiny. No valid objection is perceived to it. In regard to this objection the act under consideration rests upon the same ground as other and more special acts on the same subject. The franchise is not vested in either until the organization be completed, and this depends upon the voluntary association of individuals. In a special act commissioners are named to open the books and receive subscriptions of stock; in the act under consideration the clerk and treasurer of each county are required to perform this duty. They are commissioners for this purpose. And, so far as the grant is concerned, if it be valid under one law it must be so under the other.

We come now to consider the objection that an indefinite number of banking corporations are authorized by the general law, and this, it is supposed, is not only repugnant to the policy, but the express provision of the constitution. It can not be said that this law violates any express provision of the constitution. The extent of the provision referred to is, that no act of incorporation shall be passed except by at least a majority of two thirds of each branch of the legislature. Now, this does not limit the number of corporations which shall be established, nor the number which may be created in one act. The act must be passed by a majority of two thirds, and this is the only express restriction on the subject. If the range of legislative power be restricted beyond this, it must be done by construction. There may be a wide distinction between the policy of a general and a special banking law, but this is not a question for judicial cognizance. Is there such a difference in principle, as to make the one constitutional and the other unconstitutional? This is the inquiry now to be made. As it regards the power of the legislature, it is unquestionable, whether they establish one or fifty banking institutions. The same power which may establish one bank, under the constitution, may establish fifty.

In the general law, as above observed, commissioners are appointed, the county clerk and treasurer, to receive subscriptions of stock the same as in a special act. And the mode of organization, under both acts, is substantially the same. The only difference seems to be that in the special act the number of corporations is limited, whilst under the general act they are indefinite. And here it is contended that the legislature have, in substance, conferred the power to

form corporations by voluntary associations, without exercising that special scrutiny, in each case, as is required by the constitution. But is this a sound and practical view of the case? It may be admitted that it derives great force from the disastrous results which have been realized under this law; but these have nothing to do with the question of power under consideration. Suppose the results had been as beneficial as they have been injurious, how changed would have been the argument. But the question remains unaffected by the good or evil which resulted from the law.

The legislature, in the exercise of their discretion, seem to have concluded, that, by requiring securities on real estate, and subjecting the directors to certain liabilities, it would be good policy to multiply the banking institutions of the state. And in order to avoid the charge of monopoly, which had been so liberally applied to banking incorporations by a general law, they held out to the community at large equal privileges in forming such associations. The act which thus sanctions an indefinite number of banks, depending upon voluntary associations, is passed by the requisite majority of two thirds of both houses of the legislature. Now, what is the practical operation of this law? It, in effect, declares that the clerk and treasurer of each county in the state shall be authorized to open books and receive subscriptions of stock, and when the associations, thus formed, shall become organized, they shall be in fact and in name bodies corporate and politic. The law acts as directly upon associations thus formed, as if it had been passed expressly to incorporate each association. It is special to each. And the difference between a general and a special law of this character, in this respect, seems to be that the one is passed on the special application of a few individuals, whilst the other is enacted under the influence of a general policy. But the question of power is the same. May not the legislature determine the number of banks that shall be established? This will not be controverted. And if they may do this, may they not, under the constitution, pass an act, by a majority of two thirds in each house, to establish voluntary associations without limiting their number? Suppose the general law had limited the number of banks, to be established under it, to ten, could their power to pass the law have been doubted? They throw around the institutions, thus to be organized, all the guards and checks which they deem necessary for the public interest. The law acts as directly and distinctly upon each association as if it had been the only one established under it. And, in passing the law, the legislature exercise the same scrutiny as if they were about to incorporate only one bank. Such a law would be within the letter and the spirit of the constitution. And if the legislature may do this, may they not fix on a greater number of banks than ten; or, may they not, in the exercise of their discretion, authorize the establishment of an indefinite number? Whether the number shall be large or small is a question of policy and not of constitutional power. If a large or indefinite number of corporations may be created in the same act, under as salutary restrictions as the creation of one, is the policy of the constitution disregarded?

It is contended that the general law throws off the restraints imposed by the constitution. But is this so? There is not a restriction in the exercise of corporate powers, which can be imposed by a special law, that may not be imposed under a general law. And the power of the legislature acts as directly in the one case as in the other. In the general law, then, there is no disregard of the restraints of the constitution. Having the power to establish more than one corporation in the same act, the legislature may establish many, or an indefinite number. The number, whether indefinite or limited, does not render the law repugnant to the constitution. If it has been passed by the constitutional majority, it is within the restriction. By the thirty sixth section of this law the legislature reserve "the power to alter or amend the act, and to dissolve any association to be incorporated under its provisions, by a vote of two thirds of each house." Here is a power not usually reserved in granting franchises. And it would seem that, so far as the policy of the law may be considered, this reservation of power gives to the legislature as salutary a control over these grants, for the public good, as would have been exercised in acting on special applications for charters. And the presumption is, that if the general law had not passed, the number of banks, under special laws, would have been as great, and the consequences not less disastrous. The evil is not to be found in the constitution, or in the construction of the constitution, but in the elements of which the government is composed. The true remedy is found in the sober reflection, experience and intelligence of the community.

In the argument reliance was placed in the decision of the case of Thomas v. Dakin [22 Wend. 9], in the court of errors of New York. That case involved the constitutionality of "An act to authorize the business of banking." The constitution of New York declares "the assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill, creating, continuing, altering, or renewing, any body politic or corporate;" and the question was, whether the associations formed under the act were corporations; and, if they were, whether the state had power to create them by a general law; and, also, whether the law must not have been passed by a majority of two thirds. The opinion of the high court of errors has not been published, but it is understood that they decided the associations

were limited partnerships and not corporations. In the same case, however, the supreme court decided that the associations, under the law, were corporations, and that the legislature, by the requisite majority, could pass the law. The argument in that case was, as in the case under consideration, that the legislature could only create corporations by a special law in each case. On a comparison of the respective constitutional provisions, it will be found, that the language of the restriction in the constitution of New York is more specific and individual than the provision in the constitution of Michigan. The former uses the words, in reference to the majority required, "every bill," "creating, continuing, altering, or renewing, any body politic or corporate," whilst the terms used in the latter are general. The decision, therefore, of the supreme court of New York, by a majority of the judges, that a general law, creating corporations, is constitutional in that state, is a strong authority in the present case.

There is another view of which this case is susceptible, and which would seem to be conclusive. The first general law was passed the 15th March, 1837, and, under the reserved power to alter or amend that act, the legislature, the 30th December, 1837, passed an amendatory law, which took effect the 10th of January, 1838. This amendment, with some modifications, covers the whole ground of the former law. It provides for the formation of banking associations, and, when organized, declares them to be corporations. To pass this amendment the constitutional majority was necessary. At the time this amendment was passed the Detroit City Bank, as appears from the declaration, had been organized and was in operation. And the 36th section of the amendatory act declares that "all banking associations, incorporated under the act to which that was an amendment, shall, within ninety days from the passage of that act, give the security required by the sixth section of that act, and shall, in all other respects, be subject to, and governed by, the provisions of that act." The sixth section required "bonds and mortgages to be given to the auditor general, for the use of the state, as collateral security for the final payment of all debts and liabilities of such associations." Here is a direct legislative sanction of the incorporation of the Detroit City Bank, and all other banking associations under the first law. And the provisions of the amendatory law are extended expressly to all such incorporated companies. If it were then admitted that under the first act the associations formed were not incorporated, are they not incorporated by the second? Its provisions confer corporate powers, and they apply to associations then subsisting under the former law. This designates these associations with as much certainty as if they had been specially named in the amendatory act; and can there be any doubt that this act would confer corporate powers on these associations if, under the former, they had not received them? As it regards banking associations then subsisting, it could not be contended that the legislature disregarded the restrictions of the constitution, by creating or authorizing an indefinite number of banks. These institutions were in operation, they were known, and expressly sanctioned, and provisions, which conferred corporate powers, were made to embrace them. Thus it would seem, that, in a double aspect, the institution, in question, may claim corporate powers.

We will now examine the objections to the declaration. There can be no doubt that, if the plaintiffs are entitled to recover, they may recover in the action of debt. This is not controverted. But it is objected that the averment of the existence of the bank, as a corporation, is not positive, but by way of recital, as, whereas, &c. This objection might be urged in an action of tort, but it does not lie where the action is founded on contract. 2 Chit. Pl. 236; 1 Chit. Pl. (Ed. 1837) 286, 380; Ring v. Roxbrough, 2 Cromp. & J. 418, 2 Tyrw. 468. Indeed, it has been doubted in some modern decisions, whether this objection, even in actions of tort, should be sustained, when raised by a special demurrer.

The second objection is, that there is no averment that the defendants became a body politic and corporate. There is no formal averment of this fact, but we think the facts, stated in the declaration, show that, under the law, the directors and stockholders of the Detroit City Bank did become a body corporate and politic. And, from such statement, the inference of law arises without a special averment. It was unnecessary to aver that the law was passed by the constitutional majority in each house. That question is not now before us.

It is again objected that there is no averment that the defendants were elected directors, and were duly qualified to act as such. On the part of the defendants, it is contended, that this is essential. That the defendants are charged to have incurred a penalty under the law, which the plaintiffs seek to recover; and that they must be brought strictly within the law. By the 21st section of the amendatory law, it is declared that, "for all debts of such banking association, the directors thereof, if such association shall become insolvent, in the first place, shall be liable in their individual capacity, to the full amount which such insolvent association may be indebted." And it is under this provision the present action has been brought.

It is contended by the plaintiffs' counsel that the defendants are estopped to deny that they acted as directors. The doctrine of estoppel would seem to have no application in the present state of the pleadings. If by plea they should deny their own au-

thority to act, after having acted as directors, the question whether they were not estopped might arise. But the question is now on the sufficiency of the declaration, and it is clear that the plaintiffs must show every thing material to the maintenance of their action. After stating that subscriptions were received, &c., the declaration alleges that the defendants were elected directors, and that they entered into the duties of their offices respectively. That they continued to act as directors until the bank became insolvent. And the plaintiffs aver that the defendants, as directors, became liable to pay their demand, under the amendatory act. The protest of the bill is, also, averred, and that due notice was given. We think that, in this respect the allegations of the declaration are sufficient. They show specifically the grounds of action, in a form sufficiently technical, against the defendants as directors.

It is objected that the provisions of the amendatory act are retrospective, and, therefore, void. That it impairs the obligation of the contract, or is in the nature of an ex post facto law. The bill of exchange, on which the action is brought, bears date the 6th December, 1838, which was long after the amendatory law took effect. And it is difficult to perceive how this law can be considered as impairing the obligation of the contract. Under the first law the directors were made personally responsible for the debts of the institution, should it become insolvent after exhausting its effects. This, though not the express provision of that act, is understood to be the settled construction of it. But under the amendatory law, in the event of insolvency, the directors are made personally responsible in the first instance. If the amendatory law made the defendants liable for a debt, on grounds which existed before its passage, and on which, as the law stood, they were not liable, there would be great force in the objection. It would then appear that the law attempted to create a liability which did not before exist. The legislature may create a remedy for an existing obligation, but they can not, by legislation, create an obligation on a past transaction. And more especially they can not subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility. But as the case now stands this question does not arise. The obligation, if incurred by the defendants, was incurred under the law. Under its provisions, from the declaration, the defendants appear to have acted as directors, and to have incurred the liability, which this action is brought to enforce.

The defendants again object, that it does not appear from the declaration that the demand, for which the action is brought, is subsisting against the bank, but we think this sufficiently appears. The bill of exchange, drawn by the bank, is set out, that it was protested for nonpayment, at maturity, and due notice given to the bank. Here, then, is a liability on the part of the bank, as the drawer of the bill, clearly and technically shown. The declaration avers that, "by force of the statue in such case made and provided, an action has accrued to the plaintiffs, &c., and it is insisted that, as the action is founded on two statutes, the averment should have been by force of the statutes." And 1 Chit. Pl. 406, is cited where it is said, "The words whereby and according to the form of the statute will not suffice when the action is founded on two statutes." Hawk. 71; Com. Dig., "Action on Statute," H. But Mr. Chitty adds, "Where, however, a statute refers to a former act, which adopts and continues the provisions of it, the declaration should conclude only against the form of the statute." 1 Saund. p. 135, note 3; 2 Saund. p. 377, note 12; 7 East, 516. The action of the plaintiffs is founded on the second and amendatory act, so that it appears the averment is strictly technical. Demurrers withdrawn, and leave to plead, &c.

Case No. 4,621.

FALES et al. v. GIBBS et al.

[5 Mason, 462.][1]

Circuit Court, D. Massachusetts. May Term, 1830.

FORECLOSURE OF MORTGAGE — WRIT OF ENTRY AGAINST TENANT IN POSSESSION.

A writ of entry, to foreclose a mortgage, may be well maintained against a tenant in possession, who is only lessee at will to the mortgagor.

[Cited in Fiedler v. Carpenter, Case No. 4,759.]

This was a writ of entry to foreclose a mortgage, brought on the 18th day of March last past. It counted upon the seisin of one David Greenough, who, on the first day of September, 1820, mortgaged the same to Martha, the wife of the demandant [Joseph J. Fales], and another person since deceased, and alleged an ouster by the defendants. The defendant Mrs. [Ellen M.] Gibbs made no defence. The defendant [William R.] Kelly pleaded a special plea in abatement, that Mrs. Gibbs was tenant of the freehold, and on the 3d of November, 1828, leased the same to him for one year, and that he had continued tenant at will under her, paying rent from quarter to quarter, ever since the expiration of the same year, and that he had nothing in the premises, and that the fee and freehold were at the commencement of the suit, and ever since, in Mrs. Gibbs. The prayer of the plea was, that the writ might be quashed as to him, Kelly, and for his costs. To this plea, the demandant demurred, and there was a joinder in demurrer.

Mr. Aylwin, for demandant.

Mr. Osgood, for defendant Kelly.

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

STORY, Circuit Justice. I give no opinion upon the exactness or regularity of the pleadings in this case, though they might be open to observation, because the parties have at the argument put the case upon the single point, whether Kelly, as tenant at will, is liable to be sued in the present action. It is true, that the defendant has suggested, that he has principally in view the question, whether he is liable to pay rent to the demandant since the commencement of the suit, he having paid it up to the 19th of April last. But that point cannot arise in this case, for no rent is recoverable in the present form of action. Where the rent has been paid to the mortgagor, or any person claiming under him, without objection by the mortgagee, the doctrine of Lord Mansfield, in Keech v. Hall, 1 Doug. 21, might be deemed applicable. But that is the less necessary to consider, because in Wilder v. Houghton, 1 Pick. 87, the supreme court of Massachusetts have held, that a mortgagee cannot maintain an action for mesne profits for the time elapsed after the commencement of his suit, and before his obtaining possession in an action to foreclose the mortgage. This was thought by the court, to be a necessary result from our statutable provisions on the subject of mortgages. See Bigelow, Dig. (2d Ed.) note of the editor, page 526.

It is well known, that writs of entry to foreclose mortgages according to our local practice are not governed by the strict doctrines of the common law, applicable to writs of entry. Our statutes have necessarily introduced some modifications of the principles and practice under the writ, when brought to enforce a mortgage. The judgment is not a general judgment for possession, but is a conditional judgment, that the demandant shall have a writ of possession, unless the tenant shall pay the amount of the mortgage money with interest, within two months after judgment.

The present point appears to me closed in by authority. I do not advert to the doctrine in ejectment, that a tenant under the mortgagor may be at any time displaced, and his estate ended by the mortgagee at his will, and without any prior notice to quit. That is sufficiently established in Keech v. Hall, 1 Doug. 21; Thunder v. Belcher, 3 East, 449. Here the point raised by the pleadings is, whether a tenant in possession, not seised of the freehold, but holding as lessee under the tenant of the freehold, can be sued in this action. Now, it was expressly decided in Keith v. Swan, 11 Mass. 216, that any person in possession of the mortgaged premises is liable to the action of the mortgagee. In that case, the defendant, who raised the question, asserted himself in his plea, to be tenant at will to the tenant of the freehold. It is, therefore, directly in point. It is true, that the case as to another point, viz., that nontenure cannot be pleaded except in abatement, has been since overruled (Otis v. Warren, 14 Mass. 239), whether for reasons entirely satisfactory it is unnecessary for me now to say, though the supreme court of the United States have adhered to it, as will be seen in Green v. Liter, 8 Cranch [12 U. S.] 229. But as to the main point, it has not only not been overruled, but expressly affirmed in the later case of Penniman v. Hollis, 13 Mass. 429, 430. See, also, Fitchburg C. M. Co. v. Melvin, 15 Mass. 268. The point then is entirely at rest upon the authorities under our local law. But upon principle, I should have arrived at the same result, and I concur entirely in the reasoning, upon which those authorities have proceeded. The plea must therefore be overruled, and a respondeas ouster awarded.

Case No. 4,622.

FALES et al. v. MAYBERRY.

[2 Gall. 560.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1815.

SLAVE TRADE—ILLEGAL CHARACTER OF CONTRACTS—ASSIGNMENT—SUIT BY ASSIGNEE.

1. No action can be maintained, against a master and part owner of a ship engaged in the slave trade, by his partners in the joint concern; nor against an agent, who is party to the original illegal traffic, and has the proceeds in his hands. If a ship be sold in a foreign port, to evade a forfeiture incurred to the United States, no action can be sustained for the proceeds.

[Cited in Chauncey v. Yeaton, 1 N. H. 157; Udall v. Metcalf, 5 N. H. 398.]

2. An assignment, with notice, of a chose in action, founded in illegality, will not protect the parties from the legal consequences attached to the original contract. If a chose in action, not negotiable, be assigned, without notice of any fraud or illegality in its origin, the parties are not precluded from setting it up as a defence, in the same manner, as if there had been no assignment.

[Cited in Corbett v. Woodward, Case No. 3,223.]

[Cited in Allen v. Deming, 14 N. H. 138; Bliss v. Brainard, 41 N. H. 268.]

3. In an action between the original parties, an assignment to a third person cannot be set up to defeat the defence of illegality in the original contract, which is assigned.

Assumpsit to recover a balance of account due from the defendant, as agent and factor of the plaintiffs [Fales and Athearn]. The declaration contained the money counts, and several special counts; in some of which the promise was alleged to be to the plaintiffs, and, in others, to the plaintiffs as trustees of Benjamin Homer. The action was brought in May, 1803, and had been continued for many years under a reference to arbitrators. The cause was tried upon the general issue. It appeared in evidence, or was admitted by the parties, that the plaintiffs were owners of two third parts of the brig Peggy, and the defendant was master and owner of the other

[1] [Reported by John Gallison, Esq.]

third part. In the year 1799, the brig was fitted out, on joint account, on a slave voyage, from Boston to Georgia, thence to the coast of Africa, and thence to the West Indies. The brig accordingly sailed on the voyage, went to Africa, and there took on board 150 slaves, who were carried to the West Indies and sold; and afterwards the brig was, under the original instructions for the voyage and as a part of the project, sold by the defendant at St. Bartholomews. The present action was brought to recover the two third parts of the proceeds of said voyage, and also of the outfits of the voyage, advanced or paid by the plaintiffs. The plaintiffs having failed in business, on the 24th of June, 1801, drew an order, in favor of Samuel Brown, requesting the defendant to pay him or order the balance due on one half of the brigantine's voyage, deducting outfits, &c., which order was, on the 17th of the ensuing July, accepted by the defendant. On the same day (24th of June, 1801) the plaintiffs drew another order in favor of Benjamin Homer, requesting the defendant to pay him or order one sixth part of the net proceeds of the brig Peggy's voyage, and, on the 1st of December following, the defendant agreed, in writing, to pay to said Homer one sixth part of the balance that might be due on said voyage. It was asserted, but no proof was offered, that Brown had assigned over all his interest, under his accepted order, to Homer. Upon these facts, a verdict was taken for the defendant, under the direction of the court.

And now Mr. Robbins, of counsel for plaintiffs, moved for a new trial. He said, that he did not contend against the general principle, that no action at law could be maintained upon an illegal contract. Here, however, the interest of the plaintiffs had been assigned, and the assignees are purchasers for a full and valuable consideration; and the suit is for their benefit. They are not affected by the illegality of the contract. Besides, here is an express promise to pay the assignees. In the next place, the defendant is sued as an agent; and an agent cannot take advantage of an illegality in the contract to withhold money from his principal. To this effect, are Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russell, Id. 296. But supposing this be not correct, yet the plaintiffs are entitled to recover the money, for which the brig was sold in the West Indies.

Mr. Hunter, for defendant. The sale of the brig was a part of the original illegal transaction. It was done to evade the forfeiture incurred to the United States. The case of Aubert v. Maze, 2 Bos. & P. 371, is decisive against the argument of the other side. See Cannan v. Bryce, 3 Barn. & Ald. 179.

STORY, Circuit Justice. You need not labor the argument. Certainly this action cannot be maintained. The traffic in slaves is a most odious and horrible traffic, contrary to the plainest principles of natural justice and humanity. And it has been very forcibly and correctly observed by a learned judge (Sir W. Grant,—Wheat. Mar. Capt. 229), that, abstractedly speaking, it cannot have a legal existence. The laws of the United States, long before the inception of this voyage (Act 22d March, 1794, c. 11 [1 Stat. 347]), prohibited, under severe penalties, (including the forfeiture of the vessel) any trade by American citizens in carrying slaves to, from, or between any foreign countries. The voyage was, in its very elements, infected with the deepest pollution of illegality; and the present action is brought between the very parties, who formed and executed this reprehensible enterprise. But the court are told, that an agent has no right to set up, in his own defence, the illegality of the contract between himself and his principal. It might be a sufficient answer to this argument, that this is not the case of a mere agency, but of a partnership in an illegal transaction; and nothing is better settled, than that, as between partners, no action can be sustained upon a contract in violation of the laws. But there is nothing in the argument itself, standing upon the footing of a mere agency. The cases cited do not at all come up to the position contended for by the plaintiffs' counsel. The most that they decide is, that if money due on an illegal contract be paid into the hands of a third person, for the benefit of one of the parties, he may maintain an action to recover it, for it is money paid to his use. But they do not decide, that if the agent be a party to the original transaction, and the money in his hands be the proceeds of the illegal contract, such a recovery can be had against him. Nor do I perceive how, upon principle, such a decision could be sustained. A party alleging his own turpitude shall not be heard in a court of justice to sustain an action founded upon it; and, where the parties stand in pari delicto, the law leaves them, as it finds them, to reap the fruits of their dishonesty, as well as they may. Simpson v. Bloss, 2 Marsh, 542.

As to the sale of the ship, it was a part of the original scheme, evidently adopted to evade the forfeiture inflicted by the laws of the United States; and cannot be distinguished from the other items of claim.

But great stress is laid on the circumstance, that there has been an assignment to Mr. Homer; and it is argued, that at all events this completely purges away the original sin of the transaction, especially as the defendant has expressly promised to pay the assignees. In respect to the express promises, founded on the acceptance of the orders drawn by the plaintiffs, it is sufficient that the present action is not founded on them. The plaintiffs cannot draw in aid of the present suit promises made to third persons; and the counts alleging the promises to be to the plaintiffs as trustees are wholly unsupported

by the evidence. Whatever may be the case therefore in a suit brought by the assignees in their own names on the acceptances, it is clear that as between the parties to this suit, the assignment cannot affect the legal conclusion applicable to cases of illegal contracts.

It is not, however, pretended that the assignees are purchasers for a valuable consideration without notice of the original transactions. If, under such circumstances, the assignment could wipe away the original stains, it would be the most cheap and facile absolution, that fraud or cunning could devise. It would be a carte blanche for a general pardon of all offences. I do not so understand the law. The general rule is, that the assignee of a chose in action cannot stand in a better situation than his assignor, as to his rights against other persons, derived from the assignment. There are exceptions to this rule, founded upon public policy; but they do not touch the present case. Where the assignees have notice of the nature and the circumstances of the claim, they are uniformly held affected by all the legal consequences attached to its original character, even in respect to negotiable instruments. Steers v. Lashley, 6 Term R. 61; Brown v. Turner, 7 Term R. 630. And where the instrument is not negotiable, even a want of notice has not been supposed to give validity to the assignment of a chose in action, which, as between the original parties, was infected with fraud or illegality. It is indeed extremely doubtful, whether after the express acceptances of the defendants, an action can be maintained, even with the consent of the assignees, against the defendants, upon the original contract. As the point was not raised at the trial, it is not necessary to decide it. But for the other reasons the motion for a new trial is overruled.

Case No. 4,623.

FALES et al. v. WENTWORTH.

CHIPMAN v. SAME.

[Holmes, 96; 5 Fish. Pat. Cas. 302; 2 O. G. 58.] [1]

Circuit Court, D. Massachusetts. Feb. 12, 1872.

PATENTS—VALIDITY—PRELIMINARY INJUNCTION—INFRINGEMENT.

1. A preliminary injunction to restrain infringement of a patent refused, where the court was in doubt as to the validity of the patent.

[Cited in Foster v. Crossin, 23 Fed. 400.]

2. The claim of a patent was for "a carpet-lining composed of a lap of soft, sheet, fibrous material, surfaced or protected not only on its opposite sides, but also around its opposite edges." One mode of making the lining was described in the patent to consist in leaving the fibrous material narrower than the sheets of paper between which it was placed, and then uniting the edges of the sheets by paste or cement. *Held*, that the patent was infringed by a carpet-lining made by enclosing a lap of fibrous material in a single wide sheet of paper, the edges of which were folded over so as to overlap along the centre of the lap, and there secured to each other and the lap by a line of stitching.

[Motions for provisional injunctions in two suits, brought by Joel F. Fales and George W. Chipman, against Frederick B. Wentworth, upon two letters patent for "improvement in carpet-lining;" the first [No. 52,835] granted to complainant Fales, February 27, 1866, and reissued March 14, 1871 [No. 4,296]; and the second [No. 60,476] granted to complainant Chipman, December 18, 1866, and reissued July 12, 1870 [No. 4,066]. The nature of the two inventions and the claims are sufficiently set forth in the opinion.] [2]

B. F. Brooks and J. D. Ball, for complainants.

J. S. Abbott and C. S. Lincoln, for defendant.

SHEPLEY, Circuit Judge. The patent of Fales, upon which the bill in equity first named was filed, was granted Feb. 27, 1866, and reissued March 14, 1871. The Chipman patent, upon which the second bill is based, was granted Dec. 18, 1866, and reissued July 12, 1870.

The claim in the Fales reissued patent is for "a carpet-lining substantially as described, the filling of which, and the paper adjoining such filling, are retained together by means of stitching." The carpet-lining described in the specification and drawing was "a sewed or quilted carpet-lining, . . . composed of a filling, such as a layer of cotton, or some equivalent material, contained between two surfaces of the paper employed to enclose said filling, . . . the stitches or sewing retaining the filling and adjoining surfaces of the paper, . . . being applied in rows running lengthwise of the carpet-lining, and they pass through from surface to surface of the paper, thereby connecting the adjoining surfaces and the filling together."

The claim in the Chipman patent is for "a carpet-lining composed of a lap of soft, sheet, fibrous material, surfaced or protected not only on its opposite sides, but also around its opposite edges." After describing the invention as obviating the objections of want of unity of the parts in carpet-linings previously patented or in use, and also obviating the objection that dust and moths accumulated in the fibrous filling along the open edges of the paper or other fabric with which the fibrous lining was surfaced, the patentee describes his invention as consisting "in enclosing the lap of fibrous material between two surfaces of paper when the lap is also enveloped or surrounded at its edges,

[1] [Reported by Jabez S. Holmes, Esq., and Samuel S. Fisher, Esq., and here compiled and reprinted by permission. Syllabus and opinion from Holmes, 96. Statement from 5 Fish. Pat. Cas. 302.]

[2] [From 5 Fish. Pat. Cas. 302.]

so that, in effect, the lap is enclosed in a bag-like or flat tube-like wrapper, both broad surfaces, and the opposite edges being all protected, instead of having only the top and bottom surfaces protected with paper left open at the edges, as in all carpet-lining of this kind made previous to my invention." In practice, the Chipman carpet-lining was made by leaving the fibrous material narrower than the sheets of paper between which it was placed, and then uniting the edges of the surfacing sheets which extended beyond the layer of fibrous material by paste or cement, thus rendering it impervious to moths or dust. This is described in the patent as one mode in which the invention may be practised; but the claim is broader, as before stated, covering, in fact, any carpet-lining composed of a sheet of fibrous material enclosed in a bag-like or flat tube-like wrapper, thus "surfaced or protected not only upon its opposite sides, but also around its opposite edges."

Briefly stating the claims of the two patents, so far as the claim of novelty is concerned, (the use for this purpose of the materials named being old,) the Fales patent claims the use of sewing or quilting together the lap and the surfacing material; and the Chipman patent, the enveloping or enclosing the lap in a bag-like or flat tube-like wrapper. In view of the state of the art at the date of the Fales patent, and the fact that sewing or quilting fibrous material interposed between two opposite surfacing fabrics was in common use, the court entertain so much doubt of the validity of the broad claim in the Fales reissued patent, as to be unwilling to issue the preliminary injunction at this time, leaving the question of the validity of the patent to be decided on a final hearing of the case. The motion for an injunction in the case of Fales v. Wentworth is therefore denied.

The carpet-lining manufactured by the respondent, and alleged to infringe the Chipman patent, is made by enclosing the lap of fibrous material in a single sheet of paper. The lap of soft fibrous material is first deposited on the central portion of the paper, and the paper is then folded over the lap, the two edges of the paper overlapping each other over the centre of the fibrous material, where they are secured to each other and to the lap by a line of stitching through the lap. This is evidently an improvement over any of the other carpet-linings in use. It dispenses with the use of any paste or cement, the use of which is objectionable, as attracting moths and other insects; and it allows the lap to extend the entire width of the lining. But it does also embody the invention claimed in the Chipman patent of enclosing the lap in a flat tube, so that the lap is surfaced or protected not only on its opposite sides, but on its opposite edges. Although the defendant is manufacturing the Wentworth stair-lining under a patent, and although the article manufactured by him is manifestly an improvement over that patented to Chipman, yet it is a familiar rule of law that a patent for such an improvement does not per se give the right to use the thing improved upon. In order to make his patent available, the patentee of an improvement upon a patented article must have the consent of the original patentee, where he cannot use his improvement without using the patented thing improved upon. The affidavits do not make out a case of knowledge or use prior to the date of Chipman's invention; and, for the purposes of this hearing, we must consider the reissue of the Chipman patent to have been rightfully granted by the commissioner of patents, as, upon the face of the reissued patent, it does not appear to have been for an invention not within the terms of the description in the original patent.

In the case of Chipman v. Wentworth, the injunction is to issue, as prayed for in the bill, unless the respondents give a bond, in a sum to be fixed by the court, to respond in such damages, if any, as may be awarded upon final decree for any infringement of complainant's patent between the date of this decree and the final decretal order in the cause; and a decree may be drawn up accordingly, and submitted to the court. Decree accordingly.

FALKE (POPPENHUSEN v.). See Cases Nos. 11,279 and 11,280.

Case No. 4,624.

In re FALKNER.

[16 N. B. R. 503.][1]

District Court, D. Massachusetts. Dec. 14, 1877.

BANKRUPTCY—ADJUDICATION AGAINST A PARTNER—RIGHTS OF SEPARATE CREDITORS.

Where a separate adjudication is made against a bankrupt who is or has been a member of a firm, the separate creditors have a right to vote for the assignee.

In bankruptcy. The assignee in this case was chosen by all the creditors who voted at all; but they were all separate creditors of the bankrupt [F. A. Falkner], and he had been a partner with one Sanborn in a firm which was dissolved some months before the bankruptcy. The only joint debt which was offered was disputed by the bankrupt in good faith and suspended by the register, and his action was not objected to. At the request of this creditor the register certified to the court the question whether the separate creditors had a right to vote in the choice of the assignee.

A. G. Briscoe, for joint creditors.

F. T. Blackmer, for separate creditors.

[1] [Reprinted by permission.]

LOWELL, District Judge. When a separate adjudication is made against a bankrupt who is or has been a member of a firm, the courts of equity decided that the joint creditors could only prove their debts for the purpose of assenting to or dissenting from the bankrupt's discharge and of sharing in any joint estate that might come to the hands of the assignees, and in the surplus, if any, of the separate estate. The reason for not permitting them to vote for the assignee appears to have been, that for the purpose of speeding such causes, a general practice had been adopted that only those creditors could choose the assignee who had the right to prove without an order from the lord chancellor, and joint creditors could not so prove at the time those decisions were made. See Ex parte Taitt, 16 Ves. 193; Ex parte Hall, 9 Ves. 349; Ex parte Clay, 6 Ves. 814; Ex parte Chandler, 9 Ves. 35.

By these cases it will appear that if a joint creditor was the petitioning creditor, he could not only prove, but vote—an inconsistency with the general rule, which was often observed upon. In law there is no reason why the joint creditors should not vote for the assignee. They are creditors of each partner, and though the assets are to be marshalled in such a way that they may get a smaller dividend than the separate creditors, yet this does not deprive them of the right to be creditors; and it is not according to the true theory of the bankrupt law [of 1867 (14 Stat. 517)], that the right of a creditor to vote should depend upon questions of this sort which cannot be tried at the first meeting. The statute of 6 Geo. IV. c. 16, § 62, removed this anomaly and gave the joint creditors their full rights. I do not consider that a statute is necessary in this country, where there is no rule or method of practice which is opposed to it. In truth, when the courts held, and rightly, that joint creditors might petition for adjudication against one partner, and that they might act and sign for or against the discharge, they had decided the other question, excepting, as I have said, for some accidental rule of practice. There never was a question that the separate creditors could vote in the choice of assignees under a separate adjudication, though the bankrupt had been a partner with others. Where there is a joint adjudication, of course the joint creditors are creditors of each partner, but the separate creditors of one are not, as such, creditors of the others; therefore, the rule was early established and is adopted by our statute, that the joint creditors must choose the assignees.

It has always been the practice in England to permit the separate creditors to choose an inspector, as he is called, who has many of the powers of an assignee, to take care of their interests, when there seemed occasion for it; and we arrive at the same result by giving the court power to appoint additional assignees. The rule, however, ceases with the reason of it, and does not apply when the late partners are severally bankrupt. The courts simply take the case as it is. An individual is bankrupt and all his creditors vote for his assignee. I have never seen a case in England or America that decides that the separate creditors cannot vote. Cases were cited which show a diversity of opinion upon some points of the settlement of bankrupt partnerships; but I have seen none which holds that in a collateral matter not arising on a petition to stay proceedings or anything of that sort, the court is to go into any such matters. If there are any joint debts in this case, which is denied by the bankrupt, they may be proved, though they cannot, unless under very peculiar circumstances, share in the separate estate until the separate creditors have been fully paid. The assignee was voted for by all the separate creditors, and under the rules above set forth was duly chosen. Choice of assignee confirmed.

Case No. 4,625.

FALLECK v. BARNEY.

[5 Blatchf. 38.][1]

Circuit Court, S. D. New York. Feb. 12, 1862.

CUSTOMS DUTIES—UNDERVALUATION — DISCHARGE OF FORFEITURE PROCEEDINGS — PENALTY — RECOVERY BACK—PROTEST—MERCHANT APPRAISER — WAIVER OF OBJECTIONS TO HIS QUALIFICATIONS—DEPUTY COLLECTOR—ADMINISTRATION OF OATH.

1. After imported goods have been seized by a collector, as having been invoiced and entered below their value, to defraud the revenue, and have been libelled for forfeiture, and discharged on a trial, the collector may still impose upon them the additional duty of twenty per cent ad valorem, for undervaluation, provided for by the 8th section of the act of July 30, 1846 (9 Stat. 43).

2. If such additional duty is paid, it cannot be recovered back, unless a proper protest against its payment is made at the time of such payment.

3. A deputy or acting collector has power to appoint a merchant-appraiser, on a re-appraisement, and to administer the oath to him.

[Cited in Chadwick v. U. S., 3 Fed. 753.]

4. All objections to the qualifications of the merchant-appraiser must be made at the time of the re-appraisement. If not so made, they will be deemed to have been waived.

This was an action against [Hiram Barney,] the collector of the port of New York, to recover back an alleged excess of duties paid under protest by the plaintiff [Baer Falleck], on a quantity of diamonds imported into the port of New York. After entry of the diamonds was made, they were appraised by one of the general appraisers, and the appraised value, as fixed by him, exceeded, by more than ten per cent., the value declared in the entry. The plaintiff, not being satisfied with this appraisement, gave notice of his dissatisfaction to the collector, as

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

he had a right by law to do, and the collector appointed a merchant-appraiser to act, in a re-appraisement of the diamonds, with one of the general appraisers. The re-appraisement resulted in no reduction of the value fixed in the original appraisement. In the meantime, the diamonds were seized by the collector, as forfeited to the United States, on the alleged ground that they were originally invoiced and entered below their value, with intent to evade the payment of duties and defraud the revenue. A libel was filed in the district court to forfeit the property, and, upon a trial before a jury [case unreported], a verdict was rendered for the claimant, the present plaintiff, and the property was discharged. The collector then imposed the additional duty of twenty per cent. ad valorem, provided for by the 8th section of the act of July 30, 1846 (9 Stat. 43). This additional duty was paid by the plaintiff under protest, in order to get possession of the property, and this action was brought to recover back such additional duty.

Martin V. B. Wilcoxson, for plaintiff.

E. Delafield Smith, Dist. Atty., for defendant.

SHIPMAN, District Judge (charging jury). The first point raised by the plaintiff is, that, when the collector had instituted proceedings to forfeit the property, and failed, his power was exhausted, and he could not then legally exact the twenty per cent. additional duty. But I do not think this position can be sustained. The exaction of the twenty per cent., when the appraised value exceeds, by ten per cent. or more, the value at which the property was invoiced and entered, is imperative on the collector. He has no discretion in the matter. The law fixes his duty. The seizure of the property and the determination of the proceedings in the district court in favor of its owner, cannot affect the question.

But, if this were a valid objection to the exaction of the additional duty, it should have been stated in the protest. It has been repeatedly decided, that no objection can be made, in an action of the present character, to the validity of the duties demanded, which is not distinctly and specifically set forth in the protest. The protest, in this case, does not allude to the matter now set up, as one of the grounds of objection to the payment, and, therefore, it cannot be urged on this trial. The statute which requires the grounds of objection to the payment to be set forth in the protest, applies to this additional twenty per cent., as well as to the ordinary rate of duty. This is well settled.

We must look, then, to the protest alone, for the grounds upon which the plaintiff's case rests. The protest objects to the validity of the appraisement, on the ground that the appointment of the merchant-appraiser was made by a deputy or acting collector, and that the oath was administered to such appraiser by him. But, it was held in U. S. v. Barton [Case No. 14,534] that a deputy collector was a permanent officer of the customs and could lawfully perform the duties of the collector. I see no reason to distrust that decision, especially as it seems to have been generally acquiesced in, and the practice under it has become universal.

The protest also raises the point that the person who acted as merchant-appraiser was not a discreet or experienced merchant, within the true intent and meaning of the act of congress. It is a sufficient answer to this objection, that it comes too late. The importer who sought the re-appraisement was present, or had notice to be present, at the time and place when and where the goods were to be appraised, and should have made his objections to the qualifications of the appraiser then, if at all. As he did not do so, he must be deemed to have waived them, and cannot now set them up.

The defendant is entitled to your verdict.

FALLEN (SADLIER v.). See Case No. 12,209.

Case No. 4,626.

FALLIAGE et al. v. The HOPE.

[Bee, 385.][1]

State Admiralty Court, Pennsylvania. 1779.

ADMIRALTY—RIGHTS OF FOREIGN OWNERS IN AMERICAN COURTS.

If American owners, in cases of recapture, are allowed the benefit of the American law in the admiralty courts of France, French owners ought also to have the benefit of the American law in the ports of the United States.

Mollineaux, and others, Frenchmen, were owners of the schooner Hope, which was captured by a British privateer in her voyage from Maryland to France. Falliage, and others, the former crew, but now prisoners on board, contrived to make the British prize-master and his companions very drunk, and to keep them so till the vessel was brought into the port of Philadelphia. And now the owners claim their vessel again, on paying salvage, agreeably to the marine laws of America.

But it was urged, that they, being French subjects, ought to be determined by the law of France, which gives the whole of recaptured vessels to the recaptor, when the prize has been more than twenty four hours in the possession of the enemy.

But the judge was of opinion, that as American owners were, in cases of recapture, allowed the benefit of the American law in the admiralty courts of France, French owners ought also to have the benefit of the American law in the ports of the United States.

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

Verdict, that the schooner be restored to her former owners, they paying to the recaptors one half of the value in lieu of salvage.

Case No. 4,627.

FALLIS et al. v. McARTHUR et al.

[1 Bond, 100.][1]

Circuit Court, S. D. Ohio. Oct. Term, 1856.

JOINT ACTIONS — REMOVAL FROM STATE COURT — SERVICE ON ONLY ONE DEFENDANT — PROCESS FOR OTHER DEFENDANT — PROCEEDINGS AGAINST DEFENDANT SERVED.

1. If in a joint action against two defendants, both residents of another state, brought in an Ohio court, as to one of whom the process is served, and as to the other, returned "Not found," the party served removes the case to the circuit court of the United States, pursuant to section 12 of the judiciary act of 1789 [1 Stat. 73], the plaintiff is entitled to process from that court against the defendant, who was not made a party in the state court.

2. In such case, the plaintiff may proceed against the defendant, who has been served with process, as the circuit court has jurisdiction under section 1 of the act of February 28, 1839 [5 Stat. 321], and may hear and decide the case as against such defendant, without making the other defendant a party to the suit.

[This was a suit by Fallis, Brown & Co. against McArthur and Berry.]

Collins & Herron, for plaintiffs.

OPINION OF THE COURT. This suit was brought originally in the superior court of Cincinnati, and process issued jointly against both of the defendants, who, it appears, are citizens of the state of Kentucky. The writ was returned served, as to the defendant McArthur, and not served, as to the other defendant. McArthur entered an appearance in the superior court, and filed his petition for the removal of the case to this court, pursuant to the act of congress. An order was made for the removal, and the papers have been duly filed, and the case docketed in this court. An application is now made by the counsel for the plaintiff, in the nature of a motion for leave to issue a summons against the defendant Berry, to make him a party in this court. The question whether process can issue against him so that the case may proceed here, against both defendants, depends on the proper construction of section 12 of the judiciary act of 1789 (1 Stat. 79), which provides, in substance, that where a suit is brought in a state court against a citizen of another state, if the matter in dispute exceeds five hundred dollars, the defendant may, at the time of entering his appearance, file his petition for the removal of the case to the circuit court of the United States; and on giving satisfactory security that the case shall be entered in that court, and special bail given, if required, all further proceedings in the state court are suspended. And when so entered in the circuit court, it is declared it "shall then proceed in the same manner as if it had been brought there by original process."

This motion presents a new question of practice in this court, and no decisions in other circuit courts bearing upon it have been referred to. We think it clear, however, that under the provision of the statute just noticed, it is the undoubted right of one of two joint defendants, sued in a state court, to remove the case to this court; and where but one defendant has been served with process, the case may be removed upon his application. The act of congress as to him would be wholly useless and nugatory in any other view. And having this right, it will follow necessarily that the plaintiff may prosecute the suit against both defendants here. Otherwise he would be wholly frustrated in seeking his remedy by a joint action against both; and when brought into this court by the act of a defendant and against his own will, would be compelled either to discontinue the action or proceed against one of the defendants only. This would be giving to a defendant an unfair advantage not intended by the act of congress, and not required by a just construction of its language. In providing that when removed to this court, the case shall proceed as if originally brought here, the implication is clear, that if necessary, process may issue to make the defendant who was not served in the state court a party. It is analogous to the case of process issuing against two defendants in a suit in this court, but one of whom is brought in by service. It is the uniform practice in such a case, and is a matter of course, to issue an alias writ to make the other defendant a party. So, under the statute, the proceedings in the state court are to be viewed as making one defendant a party; and the case being thus in this court, it is the right of the plaintiff to have process against the other defendant.

There can be no question that under section 1 of the act of congress of February 28, 1839 (5 Stat. 321), it is competent for the plaintiff to proceed in this court against the defendant McArthur alone. That section provides, that if several defendants are sued in a court of the United States, some of whom are not residents of, or can not be found within the district in which suit is brought, the court may take jurisdiction, and proceed to trial and judgment against those served with process. But the plaintiff in this case is not bound to proceed under this statute. If he prefers to bring in the other defendant by process from this court, his right to do so scarcely admits of a doubt.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

Case No. 4,628.

In re FALLON.

[2 N. B. R. 277 (Quarto, 92);[1] 1 Chi. Leg. News, 107.]

District Court, S. D. New York. Dec. 7, 1868.

ADJUDICATION IN BANKRUPTCY—VALIDITY OF PETITIONING CREDITOR'S DEBT.

While an adjudication in bankruptcy stands unrevoked, all enquiry into the validity of the debt of the petitioning creditor in the involuntary proceedings, is precluded.

[In bankruptcy. In the matter of James W. Fallon.]

L. S. Chatfield and L. W. Brown, for Wylie.
D. T. Walden, for assignee in bankruptcy.

BLATCHFORD, District Judge. The motion by the creditor Wylie, to vacate the order of stay made herein, July 1st, 1868, and that he have leave to proceed to collect his execution, is denied. He cannot be allowed to interfere with the proceedings of the assignee in bankruptcy, to set aside the alleged fraudulent conveyance to Shaffer, or to embarrass those proceedings. When the assignee shall have realized anything out of the real estate on which Wylie claims a lien by his judgment, Wylie can then apply to this court, by petition, to have his judgment paid out of the proceeds of such real estate, and the questions at issue between Wylie and the general creditors of the bankrupt, represented by the assignee, can then be adjudicated by this court. Until then an enquiry on these points is premature.

So long as the adjudication of bankruptcy stands unrevoked, all enquiry as to the existence or validity of the debt claimed to be due to the petitioning creditor in the involuntary proceedings, is precluded. The debt due to such creditor was established for the purposes of the adjudication, and neither the debt nor the adjudication can be attacked, on a motion of this kind, by a creditor who claims an adverse interest to the assignee in bankruptcy.

Case No. 4,629.

FALLON et al. v. RAILROAD CO.

[1 Dill. 121.][2]

Circuit Court, D. Missouri. 1870.

SPECIFIC PERFORMANCE OF RAILWAY CONTRACTS.

The complainants contracted with the defendant (a railroad company) to furnish and lay down the iron for its road, to erect the necessary buildings, and to build the bridges, &c., and were to be paid in mortgage bonds and stock, but the complainants (in consequence as alleged, of defendants' fault) had not entered upon the work; the road bed to be graded and prepared by the company, was not ready for the iron, nor the route fully located. The court sustained a demurrer to a bill by the contractors, seeking to enjoin the company from making a contract with others to iron and equip the road, and praying a specific execution of their contract with the company, and refused to retain the bill for compensation.

[Cited in Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co., 24 Fed. 521.]

[Cited in St. Louis, I. M. & S. Ry. Co. v. Anthony, 73 Mo. 433.]

On demurrer to the bill. On the 13th day of August, 1869, by written contract of that date, the plaintiffs agreed with the defendant, the Missouri & Mississippi Railroad Company, to furnish and lay down all the iron rails, chairs, and spikes for its railroad from Glasgow to Clark City (a distance of 121 miles), to fill up and surface the track, to furnish all locomotives and rolling stock; and to erect the necessary buildings, all of which was to be done on or before December 31, 1871. The defendant, on its part, agreed with plaintiffs, to obtain the right of way; to grade and construct the road bed and all bridges, to furnish ties, and to have the road in such condition that the iron could be readily laid down, on or before the 1st day of August, 1870. By the contract, the company was to pay the plaintiffs for the iron, rolling stock and work, which they contracted to do, the sum of $40,000 per mile, $20,000 of which were to be paid in the first mortgage bonds of the company, and $20,000 on its capital stock, said payments of bonds and stock to be made from time to time, on the completion of each five miles of track, or earlier or otherwise, as thereafter provided in the contract. It was stipulated that the bonds should be the first and exclusive lien upon the whole road and its equipments; they were to be made to mature in forty years, and draw 7 per cent interest per annum. The capital stock was to be limited to $30,000 per mile, of which the company could only expend $10,000 per mile in preparing the road bed, and for expenses. It was further stipulated that the bonds were to be issued and delivered to a trustee within ninety days, and that the plaintiffs might use or sell the same, or any part of them, for iron or rolling stock, and if sold for cash the proceeds were to be deposited with the trustee in their stead, to be drawn on the order of the company to pay for the iron and materials, which were to be bought and shipped in the name of the company and to be its property; but said iron and materials were to be used by the plaintiffs, to build the railroad. None of the bonds or stock were to be drawn from the trustee except by consent or order of the company, and only to pay for iron and materials, or labor, or estimates due. The company agreed to pass all orders and do all acts needful to enable the plaintiffs to obtain and sell the bonds and stock, to buy the iron and rolling stock, whenever the plaintiffs should request it to be done. It was stipulated that when the company

[1] [Reprinted from 2 N. B. R. 277 (Quarto, 92), by permission.]

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

should finish the road bed and bridges, and deliver the ties for the road from Clark City to Macon City (which was to be on or before August 1, 1870), and give assurance that it would complete the balance in a reasonable time, that the plaintiffs should commence at both ends to lay down track.

The bill, which was filed October 25, 1870, sets out the contract in extenso, and avers that the plaintiffs have always been ready, willing, and able to perform the same on their part; and alleges that the company has failed to keep it on its part, and has prevented the plaintiffs from complying therewith. It is averred that on part of the route the right of way has not yet been obtained, nor the road located, and no grading been done; that on other parts of the route grading has been done, but the road bed and bridges have not been completed, nor the ties delivered; that the company has never notified the plaintiffs that the road bed was ready for the track; that it has never executed the mortgage or bonds, never issued the stock, nor deposited the same with the trustee. The bill alleges that in September, 1870, the plaintiffs, with their own means and credit, contracted for the purchase of iron, materials and locomotive cars for the defendant's road, to the extent of between twenty-five and fifty miles, and have incurred therefor liabilities in the sum of $900,000, and that a considerable portion of the iron and materials thus purchased has been delivered to the plaintiffs, and fifteen hundred tons of iron on the way to the defendant's road. The bill states that on the 12th day of October, 1870, the plaintiffs, in writing, notified the defendant of their readiness to comply with their contract, and that on the 18th day of October, 1870, the defendant's directors passed a resolution reciting that the plaintiffs had wholly failed to comply with their contract "for the grading, tieing, and bridging the road from Clark City to Edina, and the contract for ironing the road from Clark City to Macon City, and from Glasgow to Salisbury, and thereupon resolving that the company is no longer bound by the contract. but will make other arrangements for the speedy completion of its road;" of which resolution the defendant gave the plaintiffs notice. The bill alleges that it is true that on the 13th day of August, 1869 (the date of the contract before mentioned), the plaintiffs contracted with the defendant to do all the earth work and bridging, and to furnish all the ties for the road from Clark City to Edina, as the same should be surveyed, and to commence within sixty days from the time the plaintiffs should have been notified in writing, by the defendant, that it had all the bonds and stock, mentioned in said contract, in the hands of one A. Bechtel, for the benefit of the plaintiffs, which notice was never given, nor the bonds and stock deposited with Bechtel, nor the route finally located between those points. The bill avers that the defendant is endeavoring to make a new contract with others for ironing and equipping its road, and will do so unless enjoined; that it has determined to, and will, execute a first mortgage on the road to others unless restrained; and will issue, assign, and pass away the stock; to all of which the plaintiffs allege themselves to be entitled. That defendant will not keep said contract with plaintiffs unless compelled by the court; that unless the plaintiffs are permitted to iron and equip the road and receive the mortgage bonds and stock, they will be without remedy, and if the defendant makes the mortgage to others, as it intends to do, and passes away the bonds and stock, it will be unable to respond in damages to any action at law which the plaintiff might bring. And the prayer of the bill is that the defendant be compelled specifically to perform the contract, and that it be enjoined from preventing the plaintiffs from complying with their contract, when the road bed is ready; that the defendant be ordered to execute and deliver to the trustee, the stipulated bonds, and mortgage, and stock, and to cause the mortgage to be properly recorded; that defendant be preliminarily enjoined from making any contract with others to iron and equip the road; from transferring to others the mortgage, bonds, and stock, and from doing any act to prevent plaintiffs from complying with and completing their contract; and that the injunction be made perpetual on the hearing. The bill also asks for general relief. No preliminary injunction has been allowed, and the bill is now before the court on a general demurrer.

Noble & Hunter and Jas. A. Clark, for the demurrer.

Glover & Shepley, opposed.

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

DILLON, Circuit Judge. The main purpose of the bill is to compel the defendant specifically to execute the contract of the 13th day of August, 1869. Whether equity will decree a specific performance or leave the parties to their remedy at law, rests in the discretion of the court to be exercised in view of the special circumstances of the particular case. And the settled rule is that equity will leave or remit the parties to law where the remedy in the legal forum is plain, adequate, and complete. But if the remedy there is doubtful or inadequate, or will not so completely effectuate justice, and specific execution be practicable, equity will entertain jurisdiction and decree it.

Upon the case made by the present bill the court is of opinion that it cannot decree the specific execution which the complainant seeks. Bills of the same general character with the one before us, and, in principle, not distinguishable from it, have repeatedly and upon full consideration, been held in England

not to be maintainable. South Wales Ry. Co. v. Wythes, 1 Kay & J. 186; Ranger v. Great Western Ry. Co., 1 Eng. Ry. Cas. 1, 51; Peto v. Brighton, etc., Ry. Co., 1 Hem. & M. 468; 1 Story, Eq. (10th Ed.) 778a, and note.

The grounds upon which this doctrine rests are so fully set forth in the opinions in these cases that it is unnecessary to re-state them, or enlarge upon them. No cases in this country holding a contrary view, or denying the soundness of the English decisions have been called to our attention. The question upon authority, therefore, is decisively against the complainants.

But if the question be not regarded as controlled by authority the circumstances of the present case are not such, in our judgment, as to call upon the court to decree a specific execution. The proposed road is one of considerable length, and requiring a large sum of money to construct. A large portion of the road bed and bridges is unfinished. For part of the distance the right of way has not yet been secured, nor the route finally located. We cannot know that the resources and credit of the company are such that it would be practicable for it to carry into execution any order we might make to comply with its part of the agreement. Comparatively but a small proportion of the contract has been actually performed by the complainants. The difficulties which the court might reasonably expect to meet in attempting to enforce from both parties a specific execution in all its parts of a work of this nature are many and great. Compensation in damages would, under these circumstances, appear to be a much more plain and practicable and just as adequate and complete a remedy as a specific execution, and less oppressive or injurious in its effects to the defendant. Demurrer sustained.

(Since the foregoing opinion was delivered, the case of Ross v. Union Pac. R. Co. [Case No. 12,080] has been published, in which Mr. Justice Miller, after full consideration of the subject, upon the authorities and upon principle, held that such a contract when principally executory, would not be specifically enforced. In the case of Fallon v. Railroad Co., after the demurrer was sustained to the bill, the question was made and argued by the same counsel, whether the bill ought to be retained for compensation? And upon this subject the opinion of the court was against the complainant, and was delivered by Mr. District Judge TREAT.)

TREAT, District Judge. This case is now before the court on a single proposition, viz. whether the bill should be retained for compensation.

In the opinion delivered heretofore, upon the main object of the bill, viz: to secure a decree for specific performance, it was held that no such decree could be had; but it was suggested that possibly the court could properly retain the cause for the purpose of securing compensation to the plaintiffs for the breach of contract, especially under the averment that certain securities by the terms of the original contract were to be for the benefit of the plaintiffs.

The argument and authorities on this subject are reducible to this proposition: that a court of equity should not "except under particular circumstances" (no where defined), in a case like the present, retain the bill for the purpose of awarding and securing compensation for the breach of the contract. That rule means, that although generally the bill will not be retained for compensation, when the court is compelled on equitable principles to refuse a decree for specific performance, still there may be special circumstances developed which require, in order to prevent gross wrong and injustice to the plaintiff, that compensation should be given, and under those circumstances, it may proceed to do so when no special oppression or injury would thereby be done to the defendant. The judicial discretion involved is, however, to be exercised with due regard to the rights of both parties.

The case presented is, for the purposes of this question, simply this: Instead of proceeding, as they had a right to do, under their contract, to negotiate for the purchase of iron, &c., or to purchase, with the means to be furnished therefor by the defendant, the property purchased to be in the name of, and for, the company, as its own, the plaintiffs chose to buy in their own names and with their own funds, some property of the kind described, and negotiate on their own responsibility for more. It is averred in the bill that some of the property so purchased has been delivered to the defendant, and that outstanding liabilities have been incurred as just stated. What loss or damage they have suffered thereby, if any, does not definitely appear. But those dealings were dehors the contract.

It is stated that the defendant is about to make a new contract on the same subject matter, with other persons, and to execute bonds and mortgages in connection therewith, whereby plaintiffs will be practically remediless at law. It is not necessary to inquire whether the attachment act of the state, or the bankrupt law, would, under the supposed contingency, afford adequate means of redress; for the important facts apparent on the face of the bill must determine the action of this court. What are the damages and how ascertainable with a view to compensation? The road has scarcely been commenced. Here, then, is a railroad yet to be built, and at nearly the inception of the enterprise, a court of equity is asked to retain a bill filed for specific performance of a contract for doing most of the work therefor, which relief cannot be granted in consequence of the intrinsic difficulties of the

case as connected with equitable jurisdiction and administration—to retain that bill for the purpose of ascertaining the amount of damages to be awarded for the alleged breach of the contract. The damages actually sustained thus far, if any, did not occur under the specific terms of the contract. The damages ultimately recoverable depend on many matters which have not yet occurred, and which may never occur, and which if they do occur, may be in such ways as yet unknown, and under such unknown conditions as leave no definite mode of causing such unliquidated and speculative damages to be reduced, before the road is completed, to any ascertainable sum for which a charge can now be made as a lien on the unbuilt road. It may be that, the road, if built by the plaintiffs from the proceeds of bonds and stock as contemplated, the price they would bear in the market being unknown, would cost more than the sum agreed in the contract, and hence instead of a loss of profits to the plaintiffs from the breach, the reverse would follow. If others build the road in the same way, in the most economical manner, even if all the bonds and stock do not have to be sold for the purpose, the value of the remaining stock and bonds contemplated to be paid to the plaintiffs at that time cannot be now ascertained, and consequently there is no practicable way whereby this court can determine for what sum to charge a lien on this road, as security for compensation in the way of possible and unascertainable profits. If the road is not built and equipped, it is of no value, and a charge upon it would be worthless as security to plaintiffs for any sum; and if it be charged in advance under a decree of this court, with an uncertain sum to be hereafter ascertained, the road probably can never be constructed. Hence the intrinsic difficulties presented on equitable rules. If the road were completed or nearly finished, the case might be different, for the court would then have something definite on which to act, without destroying the contemplated enterprise. But a road to be built on credit, when scarcely begun, stands in a strange position as to the question here to be considered.

The security sought for prospective damages, or rather for loss of profits, would necessarily destroy the value of the security; would, if given, make the security worthless, and prevent the defendant from obtaining, by completing the work, the only means of compensating the plaintiffs.

It is in view of these, and like considerations, which must necessarily suggest themselves to the minds of the counsel, that the court is constrained to decide that the bill cannot be retained for compensation. Bill dismissed.

FALLON (SADLIER v.). See Case No. 12,210.

Case No. 4,630.

FALLS BRIDGE TURNPIKE CO. v. ADAMS.

[1 Hayw. & H. 95.][1]

Circuit Court, District of Columbia. Aug. 9, 1842.

SUIT AGAINST AN ADMINISTRATOR—OVERPAYMENT TO DISTRIBUTEE.

1. An administrator who pays a distributee more than is due on a final distribution will be considered accountable for the amount as being overpaid if the administrator's own wrong.

2. The amount overpaid is *held* to be in the hands of the administrator, who is liable for a bona fide debt of the testator to the full amount of the assets so found.

At law. This is a suit brought by the plaintiff [the Falls Bridge Turnpike Company against George A. Adams, administrator of Thomas G. Waters] to recover a balance of an account.

Clement Cox, for plaintiff.
Wm. Redin, for defendant.

The affidavit of a certain Goszler was given in evidence on the part of the plaintiff; he stated in substance that he called repeatedly upon George A. Adams, administrator of Thomas G. Waters, for the payment of the balance due to said company from said Waters, the late treasurer, amounting to about seventy dollars; that said Adams promised to settle the same; that such applications were made while the defendant was in the employment of the company as superintendent of the Falls Bridge Turnpike. The verdict of the jury was for the plaintiff. It was referred to the auditor for report of assets in the hands of the administrator. The auditor reported that the intestate left three children, Thomas S., William H., and the wife of the administrator. The administrator made a distribution of the assets among the distributees; the share of each was $1,048.52. He paid Thomas S. $1,200, being $159.50 more than his share; to William H. he paid $834, being $208.50 less than his share, and which the administrator now has in his hands. That he applied and used the share which he considered due to himself in right of his wife. The overpayment to Thomas S., beyond his supposed share, was in the administrator's own wrong, and he must be supposed still to have in his hands the $208.50 less than the supposed share of William H., and which is more than sufficient to pay the judgment of the said company.

Judgment on the above report for $70.21 and costs.

FALLS CO. (MILLER v.). See Case No. 9,570.

FALLS CO. (SICKELS v.). See Case No. 12,834.

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

Case No. 4,631.

The FALMOUTH.

[1 Gall. 130.][1]

Circuit Court, D. Massachusetts. May Term, 1812.

EMBARGO—REPEALING ACT OF MARCH 1, 1809—SAVING CLAUSE OF SECTION 14.

The saving of the 14th section of the act of March 1, 1809, c. 91 [2 Story's Laws, 1118; 2 Stat. 531, c. 24], saves such provisions or sections only of the embargo acts as were exclusively directed to collection districts adjacent to a foreign territory, or to vessels bound to such districts.

[Appeal from the district court of the United States for the district of Massachusetts.

[This was a libel by the United States against the sloop Falmouth and cargo (Robert Little & Co., claimants). The United States had taken possession of the vessel and a portion of her cargo, as being laden without a permit, in violation of the existing embargo laws. The district court decreed in favor of the claimants (case unreported), and the United States appealed.]

G. Blake, for the United States.

Amory and Dexter, for claimants.

STORY, Circuit Justice. The sloop Falmouth and part of her cargo have been libelled as forfeited, 1. Because the said cargo was taken on board of said sloop at Boston, without a permit, contrary to the 2d section and 5th section of the act of 9 January, 1809, c. 72 [2 Story's Laws, 1102; 2 Stat. 506, c. 5]; and 2dly, because the said sloop, being a licensed coasting vessel, after being laden under the inspection of the proper revenue officers, and after having received a clearance at Boston for the port of Eastport, being a port within a collection district, adjacent to the territories and colonies of a foreign nation, to wit, of Great Britain, did receive and take on board divers goods and merchandizes, viz. that part of her cargo which has been seized, contrary to the same sections of the same act. There is a third count, which on the trial has been abandoned.

It is admitted, that the facts proved fully support both counts, and the defence relied on is, that at the time of lading the said goods, which was on the 18th of April, 1809, the 2d and 5th sections of the act of 9th of January, 1809, had been repealed, and of course that no forfeiture has been incurred. The repeal is argued to be contained in the 14th section of the act of 1st of March, 1809, c. 91. That section declares, that so much of the acts respecting the embargo, as compels vessels owned by citizens of the United States, bound to another port of the said states, or vessels licensed for the coasting trade, &c. to give bond, and to load under the inspection of a revenue officer, or as renders them liable to detention merely on account of their cargo, shall be repealed from and after the 15th of March, 1809. But from the operation of this clause are excepted "such provisions as relate to collection districts adjacent to the territories, colonies, or provinces of a foreign nation, or to vessels belonging or bound to such districts." The whole controversy turns on the nature and extent of this exception.

The attorney for the United States contends, that the exception leaves the whole embargo acts in full operation, as to collection districts adjacent to a foreign territory, and as to vessels belonging or bound to such districts. The counsel for the claimants on the other hand contend, that all the provisions of the embargo acts stated in the enacting clause are repealed; and that the exception saves only such provisions or sections of the acts, as are exclusively directed to such collection districts and such vessels, as are stated in the exception. Now neither the 2d section nor the 5th section of the act of January 9, 1809, contain a single syllable exclusively applicable to such districts or vessels.

In order more clearly to understand the nature and force of the objection, we must review some of the provisions of the embargo acts. By the act of April 25, 1808, c. 66, § 6 [2 Stat. 500], no vessel is permitted to depart with a cargo from any port of the United States, for any other port or district of the United States adjacent to the territories, colonies, or provinces of a foreign nation, without the special permission of the president of the United States, under very severe forfeitures and penalties. The 12th section of the same act provides, that if any unusual deposits of provisions, lumber, or other articles of domestic growth or manufacture, shall have been, or shall be, made in ports adjacent, as aforesaid, the collector of the district shall be authorized to take them into custody, and to prevent them from being removed, until bonds are given for the landing and safe delivery of the same goods in some ports of the United States. These are the only parts of the embargo laws, which exclusively apply to districts adjacent to foreign territories, or to vessels belonging to or bound to such districts. And it cannot escape observation, that the terms of the exception seem exactly adapted to describe precisely such provisions. The exception necessarily is of some provisions named in the enacting clause; and the enacting clause covers all provisions applicable to vessels, bound from one port to another of the United States, and to detention thereof on account of the nature of their cargoes, and of course covers the two sections which I have quoted. By excluding these sections from the enacting clause, and considering them as within the exception, we completely satisfy the terms and natural import thereof. If the intention of the legislature had been, to leave the provisions of the acts in full force, as to such districts and vessels, the natural expression

[1] [Reported by John Gallison, Esq.]

would have been, that these acts should remain in force, as to such districts and vessels, not that some provisions, which relate to them, should remain in force. What are provisions, which relate to a particular subject? Certainly the answer must be, such provisions as definitely point to that subject, not such as embrace whole classes of subjects. Indeed, on a careful inspection, I am not sure, that the exception is not yet of a more narrow construction, and ought not to be restrained to the last preceding clause, to wit, that relative to detentions on account of the nature of the cargoes of vessels. In this view, the act would take from collectors all power to detain vessels, unless in districts adjacent to a foreign territory, or in cases of vessels bound or belonging to such districts. However, I incline to adhere to that which the counsel for the claimants have so elaborately expounded.

On the whole I cannot but consider the words of the enacting clause, "so much of the acts," &c. as meaning, so many provisions of the acts, and the words of the exception, as excluding the enumerated provisions from the operation of that clause. The former sweep away all general provisions, and the latter save those only, which point specially and distinctly to a particular purpose. If the construction of the act were even doubtful, I should unhesitatingly pronounce the same decision. When the legislature speak in clear and distinct terms, I am bound and with cheerfulness shall obey them. But when they choose "spargere ambiguas voces," I know no duty imposed on a court, to hunt through dark and doubtful passages, to catch a glimmering meaning, whereby to load the citizen with penalties and forfeitures. In a doubtful case, it is a sound rule of construction, that the words are to be expounded in favor of the citizen, and against the legislators.

I affirm the decree of the district court restoring the property.

Case No. 4,632.

The FAME.

[See Case No. 7,845.]

Case No. 4,633.

The FAME.

[1 Brown, Adm. 42.][1]

District Court, D. Michigan. Dec., 1858.

FORFEITURE—DUTY OF DELIVERING MANIFEST—UNLADING AND DELIVERY.

1. Where a vessel and cargo appear by her manifest to be consigned to an American port, parol evidence will not be permitted to control the intention so expressed, and to show that the cargo was, in fact, destined to a Canadian port.

2. Under the first section of the act of 1821 [3 Stat. 616], the master of a vessel entering a port of the United States, with merchandise subject to duty on board, and consigned to such port, is bound to deliver his manifest, notwithstanding he may intend such merchandise to be returned to Canada.

3. The transhipment of a cargo from one vessel to another, while lying at a wharf in port, is an unlading and delivery within the meaning of the 50th section of the act of 1799 [1 Stat. 665].

4. Innocence of an intent to defraud the revenue will not prevent a forfeiture where a violation of the statute is clearly proven.

Information for forfeiture. The first count charged a violation of the first section of the act of March, A. D. 1821, in that the bark, being an unregistered vessel, imported and brought into the port of Detroit, from the province of Canada, certain liquors subject to duty, without a manifest of the same being delivered by the master to the collector nearest to the boundary line, or nearest to the waters by which the liquors were brought, but that the master passed by and avoided the office of the collector at which the manifest ought to have been delivered, &c. The second count was founded upon the 50th section of the act of 1799, and charged that the same liquors were brought, by some person unknown, in the Fame, from a Canadian port to Port Huron, in the district of Detroit, and there unladened and delivered from her in the night time, without a license from the collector or other proper officer. The answer simply denied, in general terms, the allegations of the libel. The liquors were taken on board at Amherstburg, Canada, and were manifested to Detroit, although they were not, in fact, intended for exportation, but were designed to be delivered at Sarnia and Goderich, in Canada. The Fame passed by Detroit without stopping, and arrived at Port Huron late at night, where the steamer Ploughboy was waiting to receive the liquors. Efforts were made to find an officer of customs at Port Huron who could give a permit, but, owing to the lateness of the hour, they were unsuccessful, and the liquors were transhipped from the Fame to the Ploughboy without authority, and by the latter carried to Sarnia and Goderich and unladened.

Jos. Miller, Jr., Dist. Atty., for the United States.

Levi Bishop, for claimant.

Our defence is simply that the goods were not consigned to the United States; that they were not imported into the United States; that there was no intention to import them; they were not landed; they were not, therefore, subject to duty; and they do not, therefore, cause a forfeiture, and none has, in fact, taken place. The facts are simple and are clearly proved. The goods

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

were shipped at Malden, consigned to another Canada port, but as the Fame only went to Port Huron, the instructions were to put the liquors on another boat, bound to the port of destination, which was done, and the goods were never, in fact, imported into the United States.

The following authorities bear on the subject: A claimant may explain a prima facie case against him so as to show his innocence, and that there is no cause of forfeiture. The Robert Edwards, 6 Wheat. [19 U. S.] 187; U. S. v. Nine Packages of Linen [Case No. 15,884]. The construction of all revenue laws must be according to the commercial sense of the terms used in them, by congress. Lee v. Lincoln [Case No. 8,195]; Bacon v. Bancroft [Id. 714]; U. S. v. 112 Casks Sugar, 8 Pet. [33 U. S.] 277; Curtis v. Martin, 3 How. [44 U. S.] 106. The mere transit, on our side of the line of a boundary river, if not done with the intent to import the goods, is not a cause of forfeiture. The Apollon, 9 Wheat. [22 U. S.] 362; Conk. Pr. 326. To make an importation complete, there must be an arrival at the port of entry with an intent to unload the goods there. U. S. v. Lindsey [Case No. 15,603]; U. S. v. Lyman [Id. 15,647]. By importation, is to be understood bringing goods into port with intent to land them. U. S. v. Vowell, 5 Cranch [9 U. S.] 368; The Mary [Case No. 9,183]; U. S. v. Arnold [Id. 14,469]; Prince v. U. S. [Id. 11,425]; Perot v. U. S. [Id. 10,993]. The revenue laws relate solely to goods imported into the country for trade, sale and consumption. The Gertrude [Id. 5,370]. Merely bringing goods into the country for a temporary purpose, with the intention of returning with them, and without any intention to import them, does not occasion a forfeiture. U. S. v. One Sorrel Horse, 22 Vt. 655. In this case the goods were not merely put on another ship, without landing them, and sent forward, but the goods were landed and actually used a long time in this country. To occasion a forfeiture, a clandestine importation, or a fraudulent smuggling traffic must be intended. The Boston [Case No. 1,670]; The Forester [Id. 15,132]. Now I presume this seizure is made pursuant to the act of March 2, 1821, § 1 (Conk. Pr. 322, 323; 3 Stat. 616). So that in order to establish the forfeiture, the goods must have been subject to duty, under the act of July 30, 1846 (9 Stat. 42). That act imposes duties on imported goods alone (same authorities). But these liquors were not imported. They were not intended for the United States; they were not consigned here they were not landed here for any purpose; and in short, they were not imported; they were not, therefore, subject to duty; there was no forfeiture, and we ought to be dismissed. The good character of the claimant, and also of the owner of the liquors, go far in such a case. U. S. v. Nine Packages of Linen [Case No. 15,884]. And it cannot for one moment be supposed that Mr. Bagg, or Mr. McLeod, intended to incur the heavy penalties of a clandestine importation. Such a supposition becomes supremely absurd, in view of the testimony that these same liquors are worth double in Canada what they are here. We ask credit for a little common sense on this subject.

The act of 1821 was repealed by the act of 1831, so that the case cannot stand. This is clearly Mr. Conklin's opinion. Act 1821 (3 Stat. 616); Act 1831 (4 Stat. 487, § 3); Conk. Pr. 327, 330, 331. The foregoing argument was prepared on the original libel, which was founded on section 1 of the act of 1821. Since then an amended libel has been filed, containing a count on the same section of the act of 1821, and a second count on section 50 of the act of 1799 (1 Stat. 665). It becomes necessary, therefore, to say something on this latter count. We insist that the case does not come within the letter or spirit of the act of 1799. That statute does not contemplate a mere transit of goods which chanced to be temporarily in the waters of the United States, but which were not consigned or destined for the United States, and which were not landed or imported for trade, sale, or any other purpose. See authorities above cited. The act of 1799, as expressed in its title, was intended to regulate the collection of duties on imports, tonnage, &c. 1 Stat. 627. This character is imparted in every section. And it clearly did not have reference to goods not landed, not imported and not destined for the United States. The amendatory act, also, of 1821, is expressly, "further to regulate the entry of goods imported into the United States." 3 Stat. 616; Conk. Pr. 322, 320. So also the act of 1823, further amendatory, has the same title and object. 3 Stat. 729; Conk. Pr. 320. Such is the scope of all these acts, and many other like acts of congress. They all look to duties on imports, which must be regarded as their whole object. And such only must be regarded as the object of section 50 of the act of 1799, on which the second count is based. 1 Stat. 665. In construing statutes, the text, context, object, scope, and spirit must all be regarded. The unloading and delivering within the United States, without a special license from a collector, of goods brought in any ship from any foreign port or place, must, in order to constitute a forfeiture, be of goods imported, or intended for importation. A different construction would work great injustice, and cannot have been the intention of congress. Section 50. Congress meant goods imported or delivered at the port of destination, and they did not mean a mere transfer from one carrier, or one mode of conveyance to another, of goods in transit from one Canadian port to another. Such are clearly Mr. Conklin's

views. Conk. Pr. 326, 327. And I think that the course of reasoning and the authorities, before applied to the first count, apply also to the second.

WILKINS, District Judge. I regret the necessity of condemning the Fame, but the statute is imperative. The first count is based upon the 1st section of the act of 1821, and the facts clearly establish a violation of its provisions. The Fame sailed from the port of Amherstburg, in Canada, bound for Detroit, with 200 barrels of whisky, ten kegs of gin and five of brandy, all of Canadian manufacture, and failed to deliver her manifest to the collector at Detroit, where the nearest customs office was located. The excuse is that the liquors were not intended to be imported into the United States, but were designed to be transhipped into another vessel bound to a Canadian port. Of this intention I have no doubt; yet the master was bound to deliver his manifest when lying at or off the port. Such merchandise was subject to duty, had an importation been intended, and from the "Report Outwards," signed and verified by the master at Amherstburg, it appears the vessel was consigned to Detroit. As no other destination is mentioned for the liquors, they must be presumed to have been consigned to the same place. Foreign liquors are subject to duty; and although this freight was clearly intended elsewhere, yet such intention proved by oral testimony, contrary to the ship's papers, cannot be admitted as an excuse for a palpable violation of the statute. It would open the door to a vast amount of fraud upon the revenue.

But had I any doubt as to the 1st count, the second is sustained beyond all question. The cargo is of greater value than $400, and the proofs establish the fact that she was unladened within the United States, at midnight, without license or permit. I say unladened, for the steamer Ploughboy was lying at the dock at Port Huron, where the Fame transhipped her cargo. It is contended that this transhipment is not an unlading within the meaning and spirit of the 50th section of the act of 1799. It is true the cargo was not landed in the literal sense of the word—i. e., placed on shore—but it was taken from one vessel to the other while both were in port. This was clearly a landing within the intent of the statute, which was designed to prevent frauds upon the revenue. It was easy for the master to procure a permit, and thus save his owners from this prosecution. But the court cannot make the law bend to the convenience of masters. Decree of condemnation.

NOTE. For definition of importing and entering a port, see the following recent English cases: The Bahia, Brown & L. 61; The Pieve Superiore, 2 Asp. 162; The Ironsides, Lush. 458; The Danzig, Brown & L. 102; The Patrie, L. R. 3 Adm. & Ecc. 437, 439.

Case No. 4,634.

The FAME.

[3 Mason, 147.][1]

Circuit Court, D. Maine. Oct. Term, 1822.

BOUNDARIES—BETWEEN UNITED STATES AND BRITISH PROVINCES—MIDDLE OF STREAM — EXCLUSIVE OCCUPATION.

1. The true line of territorial boundary between the United States and the British provinces on the bay and waters of Passamaquoddy, is the middle of the stream or channel between the territories of the nation, running the line at low water mark.

[Cited in The Atlantic, Case No. 621.]

2. Where there is no exclusive occupation of a river or bay, the law of nations gives to the nations inhabiting the opposite sides a territorial jurisdiction to the middle of the stream.

[Cited in Open Boat, Case No. 10,548.]

3. But each nation may also have a common right of passage and navigation over the whole river or bay, where it is necessary for the convenient access and trade of its own ports.

[Cited in Open Boat, Case No. 10,548.]

[Cited in Mahler v. Transportation Co., 35 N. Y. 356.]

Libel on information of seizure for a violation of the coasting act of 1793, c. 8 [1 Stat. 305], and the revenue act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22]. At the trial at October term, 1821, the acts of illicit trade being proved to be in Passamaquoddy bay, the principal question was, whether they were done within the territorial limits of the United States, or within the British waters.

The deposition of the person who made the seizure, was offered in support of certain facts, on behalf of the United States, and objected to by the counsel for the claimants [B. Adams and others], on the ground, that he was interested in the event of the suit, being liable for damages, if the seizure was wrongful, even though he had no interest in the forfeiture. But the court overruled the objection, saying that the admissibility of such a witness had always hitherto been allowed in practice upon the ground of public policy; that the liability of the party was remote and contingent, and probable cause of seizure would excuse him; and that to deprive the government of his testimony would, in many cases of seizure, be equivalent to an acquittal, since seizures were often made under circumstances conclusive of guilt, but of which no proof could be effectually obtained, except from persons concerned in the seizure. As, where goods were found concealed, or in remote places, or disguised; and where an immediate seizure must be made, or the goods, though loaded with the strongest presumptions of guilt, would be carried beyond the reach of the law. Officers of the customs and others entitled to a part of the forfeiture were made competent witnesses by the revenue acts. Yet if this objection could now prevail, all such officers,

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

who made or adopted the seizure, as collectors, &c., would be excluded; which certainly could not have been the understanding of the legislature.

It appeared in evidence, that there had been a sort of conventional understanding between the American and British collectors at Passamaquoddy, as to what line they would deem the true boundary line of their respective governments; and there was strong proof that the acts of illicit trade were committed on the American side of that line, which was about one third way over between Moose Island and Campo Bello Island. If the middle of the stream constituted, by the law of nations, the true line, then it was admitted by the parties, that the illicit acts were done within the American waters.

Shepley, for the United States, contended, that the line agreed upon by the collectors was not binding upon either government. The line could only be fixed by a national compact. If not so fixed, it must be decided by the general principles of the law of nations, which gave title to the middle of the stream. Neither the treaty of 1783 nor of 1815 fixed any definite line. There was no prior occupancy or exclusive possession, and therefore the law of nations must govern. He cited Vatt. Law Nat. bk. 1, c. 22, §§ 266, 274; Mart. Law Nat. bk. 4, c. 3, §§ 3, 4; [Handly's Lessee v. Anthony] 5 Wheat. [18 U. S.] 379.

Mr. Longfellow, for claimants, contended, that the conventional line of the collectors might be considered as an agreed line of occupancy by the governments. That if not so, still the general principle of the middle of the stream was not applicable; for, before the Revolution, the British had an exclusive occupancy of the whole waters of the bay, and if they had ceded nothing by the treaty of 1783, they still held the exclusive right to the whole.

The cause was continued for advisement to the next October term, and at that term the following opinion, in substance, was delivered by the court:

STORY, Circuit Justice. The general principle in relation to the rights of a nation to rivers and bays, of which it has an exclusive and prior occupancy, is laid down by Vattel and Martens in the passages cited at the bar, need not be disputed. Whether there has been, in point of fact, such an exclusive occupancy, is often a matter of great difficulty to ascertain. The nature, breadth, and extent of a river or bay, and the necessity of its constant use, in all parts, for purposes of trade and navigation, by the nations inhabiting the opposite banks must, in many cases, repel the supposition of an exclusive right. Where no such exclusive right exists, the general principle of the law of nations, as deduced from the authorities, is, that each nation has a right to go to the middle of the stream, calculated from low water mark, as the limit of its territorial boundary. This doctrine has been affirmed by the supreme court in the case of Handly's Lessee v. Anthony, 5 Wheat. [18 U. S.] 374. But although the territorial line of a nation, for purposes of absolute jurisdiction, may not extend beyond the middle of the stream; yet, consistently with this doctrine, the right to the use of the whole river or bay for the purpose of navigation, trade, and passage, may be common to both nations. Such a right does not destroy the territorial jurisdiction to the middle of the stream; but it is in the nature of an easement as it is called at the common law, or a servitude, as it is called in civil law. It is like the right of a highway, or private way, over the land of another. This right of passage and navigation must exist, as a common right in all those cases, where such passage or navigation is ordinarily used by both nations, and is indispensable for their common convenience, and access to their own shores. A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all times. If, in such a case no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of passage and navigation in both. These are all the principles which I think it necessary to bring into review on this occasion, so far as the case stands upon the general law of nations.

There is no pretence to say, that Great Britain had, as to us, acquired, previously to the revolution, any exclusive right to the waters of Passamaquoddy bay. These waters were common to all the subjects of the realm; and just as much a part of our right and inheritance, as of any other of the British dominions. The American colonies used them on all occasions; and the province of Massachusetts, which was contiguous to the bay, and perpetually used the waters for the purpose of navigation, and trade, and passage, might just as well be deemed the proprietor, as the province of New Brunswick, or as the realm of England. In truth, the law of nations must, under such circumstances, be presumed silently to prevail, and annex the bay to the middle of the stream, to the territories of the adjacent provinces;—and as there was at all times a common right of passage and navigation exercised over the whole bay, and it was necessary for the convenience of all parties, the whole waters must be deemed common for these purposes. When the separation took place by the American Revolution and the treaty of peace, if nothing was stipulated on either side, the status ante bellum prevailed, and there was a continuance of the old rights and privileges.

The treaty of peace of 1783 contains nothing definite on this subject. It fixes generally the eastern boundary line of the United

States on the Bay of Fundy, of which Passamaquoddy bay is part; but it is silent as to the exact line, and the use of the waters. No subsequent treaty has changed or in any shape regulated the general rights growing out of the law of nations on this subject; and therefore, as I conceive, they remain in full force. In the negotiations which have taken place between the governments of Great Britain and the United States, as to this boundary, and which ended in conventions, which, though not ratified, are not understood to have involved any real difference of opinion on this particular point, the view taken by both governments seems entirely in harmony with that of this court. The conventions of 1803 and 1807, take the middle of the channel between the islands belonging to the respective nations, to be the true and proper line.[3] This is the same rule which results from the general law of nations.

As to the line agreed upon by the collectors, it cannot for a moment be admitted as of any validity. They were not public agents intrusted with such negotiations; and their acts are not to be construed as indicating the sense of either government.

Upon the whole, my opinion is, that the Fame, being within the jurisdictional waters of the United States, and on this side of the middle of the channel, when she committed the illicit acts for which condemnation is sought, is brought within the forfeiture. Decree of condemnation accordingly.

Case No. 4,635.

The FANITA.

[8 Ben. 11.][1]

District Court, S. D. New York. Feb., 1875.[2]

COLLISION IN EAST RIVER—STEAMER AND SCHOONER—LOOKOUT—LIGHTS — CHANGE OF COURSE—EVIDENCE.

1. A collision occurred between a steam propeller and a schooner, in the East river, on the evening of August 20th, 1870. The schooner was bound up the river, against the ebb tide, with the wind north-west or west north-west, having her booms off to starboard. She was struck on her starboard bow by the propeller, the blow cutting in angling towards her port quarter. She claimed that she made the lights of the propeller on her starboard bow, when she was about 150 yards off from the line of the pier; that she kept her course; and that the propeller would have passed her on her starboard side but the propeller ported and thus ran into her. The propeller claimed that she made the red light of the schooner a little on her starboard bow, and ported, so as to pass the schooner to the right, and steadied, but, shortly before the collision, the schooner, then being on the propeller's port bow, changed her course so as to bring herself right ahead of the propeller, which was at once stopped and backed, but the collision could not then be avoided; and that the schooner showed no green light at any time. The man at the wheel, and the lookout of the schooner, were her only witnesses, and both swore that there was no change of course of the schooner, and that her lights were burning bright just before the collision. The lookout testified to the alleged change of course of the propeller. The man at the wheel had no notice of her approach till just at the moment of the collision. The captain and the lookout of the propeller testified that they saw the schooner's red light, and ported till it bore on the propeller's port bow, and after that saw the schooner luff across the propeller's course till the red light went out of sight; and that she had no green light burning. As to the lights they were sustained by a passenger. They did not agree as to the bearing of the red light when first seen, one putting it on the propeller's starboard bow, and one on her port bow: *Held*, that the evidence from the schooner that both her lights were set and burning was overborne by the evidence from the steamer; and that, as the propeller saw the schooner's red light, it was right for the steamer to port.

2. On the evidence, the propeller kept a good lookout.

3. The collision was not due to the fact that the propeller was not navigating in the middle of the East river; as the wheelsman of the schooner was not aware of the approach of the propeller till just before the collision, and, therefore, had no special reason for keeping his course with reference to her, the evidence from the propeller that the schooner changed her course, while the former was taking measures to avoid her, was more reliable.

[Cited in The Maryland, 19 Fed. 556; The E. A. Packer, 20 Fed. 329; The Columbia, 29 Fed. 719; The Britannia, 34 Fed. 558.]

4. The schooner was in fault, and the propeller was free from fault, and the libel must be dismissed.

In admiralty.

W. R. Beebe, for libellant.

J. E. Parsons, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owner of the schooner Samuel G. Miles, against the steamship Fanita, to recover for the damages sustained by the libellant through a collision which occurred between the two vessels in the East river, between New York and Brooklyn, at about 9 o'clock, p. m., on the 20th of August, 1870. The schooner had come around the Battery, and was bound to Williamsburgh, with a cargo of brick. The steamship was a propeller of 434 tons burden, and was bound down the river on a voyage to Philadelphia. The wind was north west to west north west, and the schooner was sailing up with her booms off to starboard. The tide was ebb. The stem of the propeller struck the starboard bow of the schooner between her forechains and her stem. The wound went in as far as the forehatch of the schooner, a distance of about fourteen feet, in a direction towards the port quarter of the schooner, and on a line which, if continued, would have reached to a point on the port side about ten feet forward of the stern of the schooner. The schooner sank immediately, in from 40 to 45 feet of water.

The libel alleges that the schooner had all

[3] See 8 Wait, St. Pap. 387–394; 10 Wait, Confid. St. Pap. p. 470.

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

[2] [Modified in Case No. 4,636.]

her regulation lights set and burning brightly, and a competent man on the lookout, who was carefully attending to his duty, and a competent and careful man at the wheel; that she had reached a point in the East river to the westward of pier 10; that the lights of the propeller were made off the starboard bow of the schooner and ahead, and in such a position and course, that, had she kept it, she would have passed on the starboard side of the schooner, the schooner then being about 150 yards from the end of the piers, and sailing steadily along upon her course; that both vessels kept on their respective courses until they had neared one another: that, when about abreast of pier 10, the propeller suddenly changed her course by porting, and came rapidly upon the course of the schooner, and upon the schooner; and that the collision was the fault of those navigating the propeller, in not having a competent and careful outlook, attending to his duty, and not keeping in the middle of the river as required by law to do, in running so close to the docks, in not keeping her course, and not keeping upon a course which would have carried her clear of the schooner, and in changing her course and running upon the schooner.

The answer alleges, that, some distance before the propeller reached pier 10, those in charge of her observed the red light of the schooner very nearly ahead, bearing about half a point on the starboard bow of the propeller; that thereupon the wheel of the propeller was ported, so as to enable her to pass the schooner to the right; that the course of the propeller was changed sufficiently to enable her to safely pass the schooner, and she was then steadied on her course; that she continued on such course until shortly before the collision, the schooner bearing on the port bow of the propeller, when the course of the schooner was changed, so as to bring her directly across the bow of the propeller; that in consequence, the schooner was struck by the propeller and sunk; that no green or starboard light on the schooner could be observed from the propeller; that the course of the propeller was from 150 to 200 yards from the ends of the piers; that, as soon as the danger of collision became apparent, the propeller was slowed and stopped; and that the collision was caused by the fault of those in charge of the schooner, in trying to pass to the starboard instead of to the port side of the propeller and in crossing the course of the propeller.

At the time of the collision there were four hands on board of the schooner, namely: Lancaster, the sailing master, who was at the helm; Mackey, who was forward, as a lookout; a cook, who was drowned in the sinking of the schooner; and another hand, who died in 1873. Lancaster and Mackey have been examined as witnesses for the libellant.

Lancaster had not seen the lights of the propeller until just as the propeller was striking the schooner, and then he saw them off his foreboom, on the starboard bow. He says that he had not heard any report of the propeller or of her light, from Mackey, until just as she was coming into the schooner, and that, when he first saw her, her stem was but a very few feet, probably ten or twelve, from the schooner. He also says, that he had made no change in his helm after he came around the Battery and before the collision. But it is manifest, that, as his attention had not been directed to the propeller, he had no especial reason to keep his helm steady, or to keep his course with reference to the propeller as an approaching vessel. The propeller, as the evidence shows, had seen the schooner and was taking measures to avoid her, relying on the fact that she would keep her course; but Lancaster, the man at the helm of the schooner, was ignorant of the approach of the propeller, and had no especial reason for adhering steadily to his course, and, therefore, no reason for remembering particularly whether he did or did not shift his helm.

Mackey says that he saw the propeller's white bow-light a quarter of a mile off, to the starboard, which was the leeward, and over the starboard bow, and that, when she was 150 yards off from the schooner, she sheered across the course of the schooner and ran into the schooner. He can tell nothing as to any change of course in the schooner.

Freeman, the master of the propeller, was outside of the pilot house, forward, directing the navigation of the propeller, the mate being at the wheel. Tomlin, a Delaware river pilot, attached to the propeller, was on the forecastle deck, acting as a lookout. Freeman testifies that the propeller, after leaving her dock, pier 33, East river, went down the river under one bell; that he ported to go under the stern of a ferry boat that was going out from the Fulton Ferry slip on the New York side; that, directly after coming out from under the stern of such ferry boat, he saw the schooner's red light nearly directly ahead, about a half a point on his starboard bow, the lookout having reported a red light ahead; that, when he saw such red light, he ported his wheel, so that the red light got to be a point and a half on his port bow; that he was looking at the schooner through a glass, and ran on, having hooked on to full speed, and saw the sails of the schooner, and saw her, when she was 150 or 200 feet away, luff across his bows; that her red light went out of sight, and he saw her sails go across his bow; that she had no green light burning; and that, as soon as he saw her luff across his bow, he rang to slow, stop and back, and starboarded his wheel, but the propeller struck the schooner almost immediately.

Tomlin testifies that he saw the red light of the schooner; that, when he first saw it, it was a little, half a point, on his port bow;

that as the propeller drew ahead, such red light got to be a point on her port bow; that such red light continued to show until the vessels were 200 feet apart; that he was looking at the schooner with a glass at the time; that the red light went out of sight, and the schooner went across the bow of the propeller; that he saw no green light on the schooner; that the propeller's bells to slow, stop and back were rung as soon as it was discovered that the schooner had starboarded; and that, if the schooner had not starboarded, the vessels would have passed port to port 150 feet apart.

Ohl, a passenger on the propeller, who was forward of her pilot house up to the collision, testifies that he saw the red light of the schooner and saw no other light on her.

Freeman and Tomlin differ, in that Freeman says the red light of the schooner was made on the starboard bow of the propeller, before the propeller ported to avoid the schooner, while Tomlin says that he reported the red light to Freeman when it bore about half a point on the port bow of the propeller and that Freeman then ported right away. But they agree in the main features, that the red light of the schooner was made; that the propeller ported to clear the schooner; that such porting brought the red light to a safe distance on the port side of the propeller for the two vessels to clear each other, if both kept their courses, and that then the schooner hid her red light and came across the bow of the propeller, so as to be struck as she was struck. They also agree, and are supported in this by Ohl, that it was the red light of the schooner that was seen; that no other light on the schooner was seen at any time; and that no green light on the schooner was seen. Seeing a red light ahead and no other light, and no green light, indicated a vessel drawing across from starboard to port of the propeller, and made it proper for the propeller, in the discharge of her duty of avoiding the schooner, to port her helm. If it was the red light of the schooner that was seen, but one light on her having been seen, porting by the propeller would have enabled her to clear the schooner, such porting having brought the red light to be a point and a half on the port bow of the propeller, if the schooner kept her course. It follows, therefore, that, as the propeller did not afterwards starboard, the collision must have been caused by a change of course in the schooner, by her having starboarded after she had been seen by the propeller and after the propeller had taken steps to avoid her.

Was it the red light of the schooner that was seen? The persons on the propeller saw but one light, and that light, they say, remained in view till the schooner drew across the bow of the propeller, to starboard of the propeller, and then disappeared. The schooner was struck on the starboard bow, the line of the blow being in such a direction that if it had been the green light of the schooner that was seen from on board of the propeller, such light would not have gone out of view before the blow. Everything, therefore, concurs to show that it was the red light of the schooner that was seen. If so, it was right for the propeller to port and the schooner must have starboarded.

Testimony was given by Lancaster and Mackey to show that both of the colored lights of the schooner were burning just before the collision. So far as this evidence is relied on to establish that the schooner had a green light burning, which ought to have been seen from on board of the propeller, when the schooner's red light was shut in, I do not think it overcomes the evidence from the propeller that no green light on the schooner was visible to persons on the propeller who were attentively looking for the lights on the schooner. So far as such evidence is relied on to establish that it was the green light of the schooner that was seen and not her red light, it is overborne by the evidence that the propeller saw but one light on the schooner, and that that light was shut in before the blow, and that, after it was shut in, no light on the schooner remained visible.

The allegation in the libel, that the propeller did not have a competent lookout attending to his duty, is not supported.

The libel alleges that the propeller was in fault in not keeping in the middle of the river, and in running so close to the docks. The collision was not in any manner due to the fact that the propeller was not further off from the docks, or was not in the middle of the river, or was too close to the docks, except, as it may be said, that, as the schooner was not in the middle of the river, the collision would not have happened if the propeller had been in the middle of the river. There was abundant room for the propeller to clear the schooner, between the schooner and the New York docks, without embarrassing or crowding the schooner, if the schooner had kept her course.

There is no allegation in the libel that the propeller was in fault in regard to her rate of speed. She was going at the rate of from 7½ to 8 knots an hour by the land, with the tide. The schooner had a strong and favorable wind and was sailing at about the same speed with the propeller. On all the evidence it cannot properly be said, that the rate of speed of the propeller was excessive or improper.

I have not overlooked the testimony as to the position in which the schooner was found under water. But, in addition to the fact that, as she sank, the tendency would be for her to settle down in a line with the course of the tide, I do not perceive, that a conclusion that the schooner was, when struck, in a line with the course of the tide, has any tendency to show that the collision did not take place in the manner and under the circum-

stances contended for on the part of the claimants. The libel must be dismissed, with costs.

[NOTE. Subsequently, an appeal was taken to the circuit court, where it was held that the propeller was equally in fault with the schooner, and a division of damages was decreed. Case No. 4,636.]

Case No. 4,636.

The FANITA.

[14 Blatchf. 545.][1]

Circuit Court, S. D. New York. June 27, 1878.[2]

COLLISION—STEAM AND SAIL—MUTUAL FAULTS.

1. In a collision between a steamer and a schooner, in the East river, between Brooklyn and New York, the steamer going down the river and the schooner up, the steamer was *held* in fault for attempting to pass too close to the schooner, between her and the New York shore, when there was plenty of room on the other side, and the steamer knew that the schooner was not crossing the river to the Brooklyn side, but was going up under the New York shore, to avoid the current.

2. The schooner was *held* in fault, because her lookout, although he saw the steamer's light, failed to report it to the man at the wheel as soon as he could and should have reported it.

This was an appeal by the libellant from a decree of the district court [of the United States for the southern district of New York (Case No. 4,635)] dismissing the libel, in a suit in rem, in admiralty.

Franklin A. Wilcox, for libellant.

John E. Parsons, for claimant.

WAITE, Circuit Justice. On August 20th, 1870, the libellant was the owner of the schooner Samuel G. Miles, bound on a voyage from Croton landing, Hudson river, to Clott's brickyard, in Williamsburg, Long Island, nearly opposite Corlaers' Hook, New York, with a cargo of 42,000 brick, weighing about eighty-four tons. Her length was sixty-two feet keel, her breadth about twenty-three feet, and she was loaded almost to the water's edge. The schooner left Croton about four o'clock in the afternoon of that day. Her crew consisted of four men all told—one at the wheel, one on the lookout, one on deck, and the cook. After rounding the Battery, she laid her course up the East river, from one hundred to one hundred and fifty yards from the ends of the piers on the New York shore, and, at about nine o'clock in the evening, when off pier 10, was run into and sunk by the steamer Fanita. The wind at the time was from northwest to west-northwest, blowing about an eight knot breeze, and the tide was ebb. The schooner had her foresail, mainsail, topsail and jib all set, with the wind upon her port side, and the sails well off to starboard. Her deck load came well up to her booms, and the wheel was at her stern. The Fanita was a steam propeller, of 432 tons burthen, and 155 or 160 feet in length, engaged in regular trade between New York and Philadelphia. She backed out of her slip, between piers 33 and 34, East river, at 8:40 o'clock, in the evening of that day, swung her bow down the river with the tide, while holding to the pier with a stern line, and started on her way out of the harbor. When she got straightened upon her course, she was between fifty and sixty feet from the ends of the piers. On her arrival opposite the pier of the East river bridge, on the New York side, between piers 27 and 28, her master discovered a Fulton ferry-boat coming out of the slip between piers 21 and 22, and ported his wheel to go under her stern. To accomplish this, his course was changed from two to three points, and he passed the ferry-boat off the end of her slip, and not far from it. Before passing, however, the course of the Fanita was changed somewhat to port, and, when she got by, she was running upon her starboard wheel, heading a little toward the middle of the river. Soon after, and while she was on this course, a red light was discovered about half a point off her starboard bow, nearly ahead, and a little distance above the Battery. Upon examining it through the glass, the master of the Fanita, although no green light was seen, discovered that it was upon a schooner which was headed up stream, and, as he judged, keeping along the New York shore to avoid the current. When about half-way between the Fulton ferry slip and the Wall street ferry slip, which is between piers 15 and 16, the master of the Fanita gave orders to port her wheel, in order that she might go between the schooner and the New York shore. She was then about 150 yards from the ends of the piers, and there was nothing to prevent her keeping her course out into the river. Up to that time she had been running at slackened speed, but then the engine was hooked on and her speed increased. When the light of the schooner had been brought to bear somewhat over the port bow of the Fanita, she was straightened on a course which would have brought her in upon the piers before she reached the Battery, and not far above it. The man at the wheel of the schooner did not discover the steamer until his attention was called to her by the lookout a few seconds before the collision. The sails were so set as to make it impossible for him to see forward over the starboard side of his vessel. The lookout saw the white light of the steamer when it was supposed by him to be a quarter of a mile away, and off the starboard bow of the schooner. He gave no notice of this to the man at the wheel until the collision was imminent. The wind was baffling, and the schooner was steering by the wind and not by compass. The schooner held her course all the time until the two vessels were within 150 feet

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

[2] [Modifying Case No. 4,635.]

of each other, when she came up somewhat into the wind, though her sails were all the time full, and, before the steamer could change her course or slacken her speed, the collision occurred. The stem of the steamer struck the bluff of the starboard bow of the schooner, and cut into her as far as the forward hatch, on a line which, if extended, would have come out about ten feet from the stern on the port quarter. The schooner sank immediately, and the cook, who happened to be below at the time, was drowned.

While only a red light was seen upon the schooner from the Fanita, the master of the Fanita, who was watching the light through his glass, testifies, that, from the beginning, he judged the vessel was passing up under the shore, to keep out of the way of the current. When discovered, the light was a little off his starboard bow, and the course he was heading, on his way out of the harbor, would necessarily have carried him outside the schooner, and well clear of her. Knowing, as he did, that he was already crossing the course of the schooner, and must soon be entirely out of her way, it was bad judgment to cross back again and undertake to pass between her and the New York shore. Had he not known her course, the case would have been different, for the red light alone in view indicated that she might be crossing the river.

But, even if this were otherwise, and he was right in changing his course, it is clear that he attempted to pass too close. The schooner kept steadily on her course until the two vessels were within 150 feet of each other, approaching from opposite directions, at a combined speed of at least twelve miles an hour. This is a conceded fact. It is apparent, therefore, that, with her sails full all the time, the schooner could not get much out of her course in going but little more than her length of sixty feet. The direction of the blow, also, shows the same thing. The steamer was headed toward the New York shore, so as to strike the piers somewhat above the Battery, and the collision was off pier 10, 100 or 150 yards from the shore. The line of the blow was from the bluff of the starboard bow to a point on the port quarter, ten feet forward of the stern. The course of the schooner, therefore, could not vary a great way from a line parallel with the piers. It was clearly a fault in the steamer to undertake to pass, at full speed, so close to the schooner, that a variation of a few feet from their course, by either of the vessels, would cause a collision.

The schooner was also in fault. Her lookout testifies that he saw the Fanita's light when it was a quarter of a mile away. He may have been mistaken in his judgment as to the distance, but it was some time before the collision. He neglected entirely to report to the man at the wheel until the very moment when the two vessels came together, although he knew, or ought to have known, that the light could not be seen from the wheel. This was a plain and palpable fault. It is as much the duty of a lookout to report what he sees to those who are to act upon his knowledge, as it is to watch. In this case, the schooner was required to keep steadily on her course. Had this light been reported to the man at the wheel, he might have prevented what little change of course there was in his vessel, by watching more carefully the effect of the baffling wind.

The damages should be equally divided between the two vessels, and a reference may be had to one of the commissioners of this court, to ascertain the amount.

FANJUL (UNITED STATES v.). See Case No. 15,069.

FANNIE, The (THURBER v.). See Case No. 14,014.

FANNING (BARING v.). See Case No. 982.

Case No. 4,637.

The FANNY.

[1 Betts, D. C. MS. 62.]

District Court, S. D. New York. Feb. Term, 1841.

ADMIRALTY — DISTRIBUTION OF REMNANTS AND SURPLUSES — LIENS AND UNCONTROVERTED CLAIMS.

[1. The fact that objection is made to the title of one claiming remnants and surpluses in the registry of an admiralty court is sufficient to stay all summary proceedings; and the money must remain until the conflicting claims have been properly adjudicated.]

[2. Remnants and surpluses will be applied in satisfaction of outstanding claims, which, in themselves or their origin, were liens on the thing out of which the fund was produced, and enforceable by suit in admiralty. But, where the demand is not such that it could be enforced in a court of admiralty by a suit either in rem or in personam, the court has no power to order it paid.]

[3. The district court for the southern district of New York has further extended this rule so as to permit the satisfaction of claims, not controverted, which are within the jurisdiction of the court, although clothed with no privilege, without waiting for them to be reduced to judgment.]

[4. A loan of money to the master to enable him to discharge the lien of seamen's wages, and relieve the boat from arrest therefor, stands in the place of the lien discharged, and is entitled to be satisfied out of remnants and surpluses; but not so with moneys advanced to purchase fuel to enable her to continue her trip, or to pay expenses of bonding her.]

[Cited in The Alida, Case No. 200.]

[In the matter of the surplus proceeds of the steamboat Fanny (George C. Knight and Baucher, claimants). Ex parte Howell & Coffee, Adam Hall, M. M. & R. Martin, Jesse A. Marshall, John W. Latson, Moses C. Hall, and Nathaniel Milliken.]

BETTS, District Judge. The steamboat Fanny having been sold under a decree of this court, and the proceeds brought into court, various petitions were filed claiming satisfaction of demands accruing for materials furnished or services performed on board the boat. These petitions were referred to the clerk to examine and marshal the respective claims, and report to the court the amounts due thereon and the considerations upon which they rested. On the coming in of the report, exceptions have been taken to the allowances made therein, and, as the right of the several petitioners to any compensation out of the fund is an open question not yet adjudged by the court, it is also objected that no part of the respective claims can be recovered in this manner. The petitioners in their own behalf thus become, in some instances, the opposers of the petitions of others.

George C. Knight claims to be entire owner of the steamboat, and entitled to all the funds after satisfaction of such demands as may be deemed to be liens on the boat. But the title of Knight to more than a moiety of the boat is contested by Baucher, and upon the proofs it is rendered at least doubtful whether he can maintain a right to more than one half the proceeds, and even strong shades of suspicion are thrown upon the justice of his claim to that. This part of his claim is not, however, directly contested before the court, Gibbons, the only one shown to have an interest in it, not having made himself in any way a party to these proceedings. It is a sufficient objection to the petition of Knight that his right to the fund is in dispute, and that the proceedings are not so shaped that the matter can now be properly and definitely decided. If this court is competent to the adjustment of the equitable title of the respective parties to these monies, it could not assume such jurisdiction in a summary and ex parte proceeding, but would require the case to be put in such form that all parties could litigate upon their interests, and that the judgment of the court could be subject to review. Courts of admiralty would, as a general rule, regard an objection to the title of the petitioner to the fund as sufficient to stay all summary action in the matter. The Maitland, 2 Hagg. Adm. 253. Accordingly, the monies counter-claimed by Knight and Baucher must remain in court until the one or the other establishes a clear title to them. And unless some one intervenes in respect to the other half, or the case is removed to a higher court upon such grounds as shall bring the whole subject passed upon here under review, I shall order that portion of the funds to be paid over to Knight or his proctor, after such deductions as may be hereafter specified.

In respect to the other petitions, it may be considered an established principle governing courts of admiralty in the disposition of remnants and surpluses remaining in court, that they will be applied in satisfaction of outstanding claims in themselves or their origin liens on the thing out of which the fund is produced. Gardner v. The New Jersey [Case No. 5,233]; Brackett v. The Hercules [Id. 1,762]; Harper v. New Brig [Id. 6,090]; 5 Wend. 540. This doctrine is probably subject to the exception that the lien be of a character to be enforced in admiralty (The Robert Fulton [Case No. 11,890]), and that the matter in demand is not controverted (2 Hagg. Adm. 253). Libels were filed upon several of these demands against the boat, and the decisions rendered by the courts in those suits apply to the character of most of the other petitions. The lien claimed for those demands was under the statute, and the court decided that the cases did not come within the statute, and the libels were accordingly dismissed. The matter of the same libels is now presented in the form of petitions against the proceeds in court, and they are supported by arguments which assume that the court, by virtue of its general powers over the proceeds, can exercise equities existing in respect to them, or the owner, when distribution of the funds is desired, which could not be enforced here by a direct action in rem or in personam. Such doctrine would necessarily import that the court can direct accounts to be taken between such parties, and indeed perform all the essential powers of a court of chancery in order to arrive at a just adjustment of the respective rights and equities of parties. Such powers are out of the sphere of its jurisdiction, even in respect to causes pending in court, and indisputably within its cognizance. [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175. In respect, therefore, to all the cases of material men, wharfingers, etc., the demands not being, in themselves or their origin, liens which could be enforced in this court against the boat, they are not entitled to come upon the fund in court under the principle on which that species of relief is ordinarily administered. This court has extended the rule beyond the limits assigned it in the Pennsylvania district, and applied it to demands not controverted which are within the jurisdiction of the court, although clothed with no privilege, and it has accordingly held that such claims suable here in personam are entitled to like relief out of the remnants as if they carried liens with them. It seems to me there is a most impressive equity sustaining such decision, when the justness and amount of the demand is not disputed, and the matter is in prosecution in the court holding the funds which ought to satisfy it. This carried the doctrine no further than courts of law go in extending relief to their suitors. They order, as matter of course, monies raised from a party and brought into court on one execution to be

paid over on other executions against the same party (Doug. 219); [Turner v. Fendall] 1 Cranch [5 U. S.] 117), and sometimes even direct the transfer to be made by the sheriff, the money and the subsequent execution being in his hands (3 Caines, 84), especially if the right of the junior execution creditor is ascertained (5 Johns. 163; 1 Wend. 87). If, then, the demand is authenticated by a decree, it would fall directly within the principle of those cases, and, instead of enforcing the decree by execution against the property or person of the respondent, the court might order it satisfied out of his surplus about to be paid him from the registry. Nor would the principle be any way varied by regarding a demand not disputed as standing upon equal equity with one reduced to judgment, and discharging it without waiting till it is pushed to a formal decree, and charged with a heavy burthen of costs.

Two objections intervene to prevent the most of the petitioners availing themselves of either of those rules for the admission of their demands: First, that they establish no right of action against Knight, who claims the entire fund, the debts having accrued previous to the 5th of December, 1840, when he became owner of the boat; and, second, that he denies the liability of the boat to these debts, and he is entitled to be heard in defence before his property shall be appropriated to their payment. It is true that Sir Wm. Scott in one instance did admit claims to be satisfied out of the remnants in the registry, for which no action could have been sustained in that court. The John, 3 C. Rob. Adm. 288. Sir Christopher Robinson doubts the authority of the court to that extent (The Maitland, 2 Hagg. Adm. 253), and it would certainly present somewhat of an anomalous doctrine to admit the power of the court to pass upon and satisfy demands indirectly and without suit of which it could take no cognizance under any form of action. I think this objection is conclusive against the admissibility of those accounts which fall within it, and accordingly the petitions of Howell & Coffee, Adam Hall, M. M. & R. Martin, Jesse A. Marshall (for $113.46), John W. Latson, and Moses C. Hall must be rejected.

There is a further objection to the jurisdiction of the court, which I do not now feel called upon to decide; that is, that a party can maintain no action in personam in admiralty for materials or repairs furnished a domestic vessel. The emphatic and vehement denunciation of such jurisdiction by two distinguished judges of the supreme court would be sufficient to induce this court to proceed cautiously in declaring a different doctrine, when the exigencies of the case did not demand a decision upon that point,—[Ramsay v. Allegre] 12 Wheat. [25 U. S.] 620; Bonaparte v. Camden & A. R. Co. [Case No. 1,617]; Bains v. The James and Catherine [Id. 756],—and therefore this decision is not to be understood as asserting or disclaiming such jurisdiction.

The claim of John W. Latson for wages as master is obnoxious to a further objection, that it is at least exceedingly questionable upon the proofs whether he was not half owner of the boat during all the time he served as master, and in such case the court would expect far more full and explicit evidence of his right to raise a debt for his services against his co-owner, than is now furnished in support of his demand. Either objection is sufficient to prevent that demand being levied upon the fund in court.

Jesse A. Marshall seeks payment of $160 out of these proceeds (besides the claim for the $113.46, already considered and disposed of), and founds this part of his petition upon the allegation that those monies were advanced by him to discharge seamen's wages and to relieve the boat from arrest therefor, and also to supply wood to enable her to complete her trip. The wages being liens on the boat, admiralty regards a third party who interposes, and pays them, as equitably acquiring the privilege of the sailor, at least so far as to be entitled to bring in the demand against surpluses in court (Gardner v. The New Jersey [supra]) in behalf of the master, and this court has in repeated instances applied it as well to other third parties as the master. And to entitle the payment to such privilege it need not appear to have been made directly and specifically in satisfaction of the lien claim. A loan of money to the owner or master to be applied by him to that object would come within the fair range of the principle, because it justifies the intendment that the advance is made on the credit of the vessel, and, if not a mere credit to the borrower personally, the privilege may be considered as transferred, upon evidence fairly importing that the security of the vessel was contemplated at the time, and was a moving consideration of the advance. This doctrine is constantly applied in upholding liens against foreign vessels for advances made the master to procure her necessary supplies. The advance of money required by the necessities of the vessel is regarded the same as furnishing materials or services in kind themselves, and will support an implicit hypothecation of the vessel in security of the advance as well as a direct one by bottomry bond. Manchester v. Milne [Case No. 9,006]; Davis v. Leslie [Id. 3,639]; 3 Paige, 323. Such novation may be regarded one of the most wholesome equities derived from the civil law. It must undoubtedly appear that the demand the loan extinguishes was a privileged one, and therefore the petitioner in this case, can acquire no higher advantage than the party whose claim he represents could have in a like proceeding. All that part of the account re-

lating to the purchase of wood (5 Wend. 510) or payment of costs on bonding the boat is accordingly rejected, and the petitioner is entitled to be paid the sums advanced by him and paid over by the master for seamen's wages. This sum is not clearly specified. Twenty one dollars was paid Williams, but the amount paid the other two who had arrested the boat does not appear from the petition or proofs. The petitioner may have a further reference to the clerk to ascertain the sums paid Ten Eyck and Waters, out of the $60 advanced by him, and also their costs of that suit, if paid out of his money, and receive payment therefor from the fund in court.

Nathaniel Milliken seems also to have a claim for wages. There is a confusion and clashing of the proofs in relation to this demand, not easily to be reconciled or comprehended. The clerk reports $34.75 due him, and I think the fair result of all the proofs, derived from direct testimony and the declarations and admissions of the parties, is that there was a balance of fourteen or fifteen dollars due him on the 6th of January for his services on board subsequent to his settlement of the 10th of December, and that he continued afterwards with the boat until her sale, rendering services on board. The testimony of Birdseye, if legally admissible (which is at least doubtful, as there is strong proof that he is a party in interest), that he had paid the petitioner in full, is quite irreconcilable with his offers and declarations to the proctor, in what he terms an attempt to compromise. The court perceives no reason upon which that negotiation can be regarded as an offer for compromise. Birdseye, according to his representation, had no interest in the boat or her proceeds. If this was so, he was only an agent of the owner, and the expense having already all accrued, or nearly so, that the petition could involve, and withdrawing this small claim not tending to release the fund or quiet the litigation pending, no satisfactory reason is shown for offering twenty or thirty dollars to compromise as he alleged a demand he swears to be wholly unfounded and even to have been paid off in full by himself. Ellis proves that there was admitted by Birdseye to be $14 due the petitioner on the 6th of January, which the petitioner then said was in full of his claim to that time; and the preponderance of proof certainly is that he continued on board entitled to wages at least 20 days subsequently. There was also an unpaid arrearage of wages of $34 due the 10th of December previous, and I am satisfied the payments made by Birdseye, if applied upon the whole debt outstanding in favor of Milliken, would still leave due him about the sum reported by the clerk. That report is accordingly affirmed.

The decree of the court will accordingly be that Marshall and Milliken recover the said respective sums out of the proceeds, together with their costs, to be taxed.

Case No. 4,638.

The FANNY.

[2 Lowell, 508.][1]

District Court, D. Massachusetts. Nov., 1876.

PRACTICE IN ADMIRALTY — ORDER OF HEARING SEVERAL LIBELS—LIENS—PRIORITY—RIGHTS OF ONE OBTAINING FIRST DECREE.

1. Libels or petitions against a vessel are heard by a court of admiralty in any order in which they are brought up.

[Cited in The Minnie R. Childs, Case No. 9,640; The E. A. Barnard, 2 Fed. 719; The Frank G. Fowler, 8 Fed. 333; The J. W. Tucker, 20 Fed. 131.]

2. Until all libels and petitions have been heard, the proceeds are not distributed except to those who have an undoubted priority, such as seamen and salvors; and this not without notice to all others. One who obtains the first decree has no priority over others whose liens are in themselves of equal degree with his.

[Cited in The Lady Boone, 21 Fed. 732.]

3. If there has been a break, such as a voyage, between the times of supplying the vessel, those who supplied the last voyage have precedence over those who furnished an earlier outfit.

[In admiralty.]

H. H. Mather, for Dolbeare & Co.

H. P. Harriman, for Eldredge.

LOWELL, District Judge. This steamboat was arrested in August, 1876, and has been condemned and sold to meet a small demand for salvage; and from her proceeds in the registry the salvage and wages have been paid. There remains a sum insufficient to pay in full two demands for domestic repairs, both of which are admitted to be due. Dolbeare & Co. furnished repairs in April and May, 1875, and Eldredge in July, 1876. Both took the requisite steps to record and recover upon their liens as provided by the statute of Massachusetts. Eldredge filed his libel against the vessel before she had been sold, and a decree was entered for him for debt and costs, but has not been paid. Dolbeare & Co. filed their petition some time after the libel of Eldredge, and after the decree in his favor. The question is how the insufficient proceeds are to be marshalled.

The general rule in admiralty is that all lien-holders of like degree share pro rata in the proceeds of the res, without regard to the date of their libels or suits, if all are pending together. It appears, however, to be the practice in England to give priority to a plaintiff who has pursued his remedy with such diligence as to obtain a decree, before another, holding a debt of equal or even higher degree, has moved the court for an order governing the distribution. The leading case is The Saracen, reported 4 Notes of Cas. 498, 2 W. Rob. Adm. 453, and, on appeal, 6 Moore, P. C. 56, 75. In that case, the owners of a ship, and a part of her cargo

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

damaged or lost by collision, brought their action and obtained an interlocutory decree for the damage and a reference to ascertain the amount. On the day this decree was pronounced the owners of the remainder of the cargo brought their action. The courts decided that the interlocutory decree was a judgment, and, by some not very intelligible analogy to the distribution of the assets of a deceased person, a judgment was regarded as converting the debt into one of a higher nature than it was before. There was in that case the difficulty that the first plaintiff had a bond, and the second could not share in the benefits of that security; so that what the court was asked to do was to pronounce for a part of the damage in each case, the whole damage being more than the value of the vessel proceeded against and her freight. They decided that the court of admiralty could not work out the equity of the statute limiting the liability of shipowners; and this decision amounts to saying that the libellant who can first reach the proceeds shall satisfy his own debt, whatever becomes of the others, and that only a court of equity can regulate the equitable distribution. It must be observed that Dr. Lushington has twice expressed the opinion that this rule is unsatisfactory, and not to be extended; and in one case he refused to apply it to a decree which was not technically final, though as much so, apparently, as those which were called so in some of the earlier decisions. See The Clara, Swab. 1; The Desdemona, Id. 158.

The reasons for the rule are not applicable to this country, where our courts of admiralty do work out the limited liability, and where debts by specialty have no precedence over others. The rule has not been adopted in this district, and I do not suppose that it has been in any other. See the elaborate opinion of Judge Hall and the cases cited by him in The America [Case No. 288]. Judge Sprague has, to my knowledge, decided that the order in which the libels are brought is immaterial; and this was agreed by counsel to be undoubtedly sound. When a vessel is seized here, and not bonded, our practice is to hear the libels or petitions in any order in which they are brought up, but not to distribute the proceeds until all have been heard, unless to those, such as the salvors and seamen, who have, by the nature of their claims, an undoubted priority; and even this is not done without notice to all others. The libellant who has pursued his remedy with diligence before others are brought forward may have priority for his costs; and that is as far as justice or sense will admit of an advantage to him.

Between these material-men, what is the rank of their liens? Counsel on both sides inform me that the statute of Massachusetts does not deal with this question, and I have not looked at that law. In admiralty, the rule is that liens take rank in the inverse order of their dates: First, recent salvage; next, wages of the current voyage; next, bottomry of that voyage; and so on, backwards. This reverses the ordinary practice of marshalling in matters of title. But the reasons for our rule are sound. "In the hazardous trade of the sea," says a learned writer, "the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefited by means of the succeeding incumbrance, and the equity of the court of admiralty, in adjudicating cases of conflicting liens of this nature (ex contractu) takes that as the principle of its decisions." 49 Lond. Law Mag. 146.

Another reason, perhaps, was that a creditor of this kind, his lien being secret, holds out the vessel as a fit subject for services which will create liens. But the controlling consideration is the necessities of commerce which have given to salvors and material-men the right to an interest in the thing saved or benefited, to whomsoever the benefit may accrue, just as seamen cannot be postponed to the most meritorious mortgagees, no matter what misfortune has prevented them from taking possession of the ship and controlling her navigation.

Concerning material-men, I have found but few decisions; but the analogy of bottomry bonds is reasonably close, that where repairs are furnished at different times, the last man is presumed to have added a value to the thing which was subject to liens, which he may therefore realize before those earlier liens are paid,—I mean, when a voyage or part of a voyage has intervened,—for repairs put on in a port during one stay of the vessel there, would usually be contemporaneous in the sense of the law.

One other point is taken. It seems that Dolbeare & Co., pursuing their remedy under the state statute, took a bond with sureties for the payment of their debt. The statute says that such a bond merely releases the vessel from custody, and shall not discharge the lien. The point taken by Eldredge is that Dolbeare should look to his bond, and leave the fund free for him. This would be so if the sureties were secured by property of the shipowner; but of this there is no evidence. As mere sureties, they have an equity of subrogation to the creditor's lien, which balances and renders nugatory the right in equity which Eldredge might have, to insist that Dolbeare has two funds. He has not two funds of the debtor; but one of the debtor, and one of a person who, in equity, can require him to look to his lien as far as it will go, in exoneration of the surety. This is one reason, I suppose, for the statute provision that the lien shall not be lost. The point, however, is not necessary to the decision, because I have given precedence to Eldredge for other reasons. Fortunately, his debt is very small, and most of the remain-

ing proceeds will come to Dolbeare & Co. after all.

Decree that Eldredge's lien has precedence, and the amount awarded him is to be paid, and the remaining proceeds to Dolbeare & Co., unless there are other petitions not yet heard.

FANNY, The (FREDERICK v.). See Case No. 5,077.

Case No. 4,639.

FANNY v. KELL.

[2 Cranch, C. C. 412.][1]

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

SLAVERY — CONTRACT BETWEEN SLAVE AND MASTER—CHILD OF SLAVE—PROMISED FREEDOM.

1. There can be no binding contract between a slave and his master.

2. The child of a female slave is a slave, although the mother has the promise of the master that she shall be free at the end of a certain term of years.

This cause was submitted to the court upon a case agreed. The case stated was to the following effect: That W. Simms, in the year 1796, purchased Dorcas, the mother of the plaintiff, for a term of years, of one Alexander Smith, who was the owner of the said Dorcas. That Smith voluntarily promised to execute a deed of emancipation for the residue of her life. Dorcas was put into the possession of the said W. Simms; but the deed of emancipation was, from inadvertence, neglected to be executed. After holding the said Dorcas some years, Simms sold his right to her for that portion of the term then unexpired, to one Carrington, with whom the said Dorcas served out her term, and was then discharged by him as a free woman. During her servitude with Carrington, she had two children, one of whom, the plaintiff Fanny, is now in the possession of the defendant Isaac Kell, who purchased her of the executors of Carrington, with notice of the rights of the said Fanny.

At November term, 1822, it was agreed by the counsel of the parties that a verdict should be taken for the plaintiff, subject to the opinion of the court on the said agreed case.

R. J. Taylor, for plaintiff.
Thompson F. Mason, for defendant.

Judgment was rendered for the defendant, upon the case stated; upon the authority of the case of Brown v. Wingard [Case No. 2,034], in Washington, at April term, 1822.

FANNY, The (MOXON v.). See Case No. 9,895.

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

Case No. 4,640.

The FANNY v. SIMPSON.

[Nowhere reported; opinion not now accessible.]

Case No. 4,641.

The FANNY FOSDICK.

[4 Blatchf. 374;[1] 18 How. Pr. 328; 16 Leg. Int. 348.]

Circuit Court, S. D. New York. Oct. 8, 1859.

SHIPPING—USAGE—BAD STOWAGE—WHEAT AND KEROSENE—EVIDENCE AS TO DAMAGE.

1. The question of usage, as to the stowage of wheat in bags, in the presence of kerosene, in a general ship, considered.

2. A libel in rem, filed against a vessel, to recover damages for injury to wheat in bags so stowed, the injury alleged being an offensive odor imparted to the wheat by the kerosene, was dismissed, on the ground, as to a part of the wheat, that there was no sufficient evidence that it was affected by such odor, and, as to the rest, that the testimony was conflicting, and that the odor might have been removed by properly ventilating the wheat, after its delivery.

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

This was a libel in rem, filed in the district court, to recover damages for injury to a quantity of wheat, shipped from New Orleans to New York. That court having dismissed the libel [case unreported], the claimant appealed to this court.

Townsend Scudder, for libellants.
Benjamin F. Mudgett, for claimant.

NELSON, Circuit Justice. The wheat, 990 sacks, containing 2,306 bushels, was put on board the vessel in the month of December, 1857, and arrived at New York on the 10th of January following. The vessel was a general ship, engaged in carrying general cargo, and had laden on board, with the wheat, flour, sugar, molasses, hides, oil, &c. It is claimed that the wheat, when it was discharged at New York, emitted an offensive smell, as if impregnated with the odor of kerosene, or Breckenridge coal oil, of which some one hundred and fifty barrels had been stowed in the hold of the ship. Two hundred bags of the wheat were stowed in the hold, on barrels of flour, which rested on a ground tier of hogsheads of molasses. The wheat was not, however, within twenty feet of the oil. The rest of the wheat was stowed between decks. The cargo was well stowed and properly cared for during the voyage, unless the stowage of the oil in the presence of the wheat affords evidence of bad and unskilful stowage, and want of due care and caution in the transportation. The wheat was, when discharged, in fine condition in all respects, except the offensive odor. This smell, the witnesses state, reduced its value some twenty-five cents per bushel.

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

The case upon the facts, is peculiar. There is considerable conflict of evidence, upon the questions—(1) whether or not there was any stench or offensive odor emitted from the wheat, when delivered; (2) whether, if there was, exposing it to the air a short time, with proper ventilation, would not have removed the smell; and (3) whether coal oil would produce the effect sought to be established in this case, it being claimed, as the result of actual shipments with assorted cargoes, that it would not. The solution, doubtless, of this contrariety of evidence, may, in part, be found in the fact, that the article of coal oil is comparatively new, as a commodity in the trade, and its effects upon other cargo, stowed in the same hold of the vessel, are not yet understood. For this reason, I am not prepared to say, that there can have been such a clear and well-known usage and custom, in respect to its stowage with other cargo, as would exempt the carrier, within the principle of the case of Baxter v. Leland [Case No. 1,125].

But, there is another ground upon which, on the facts of the case, I think that the libel was properly dismissed by the court below. The wheat was delivered from the ship, in the sacks, into lighters, and was discharged from the sacks into the lighters in bulk, mingling the portion stowed in the hold, which was in the vicinity of the oil, with the portion stowed between decks. The consignees are responsible for thus blending the two parcels, and I am not at all satisfied, upon the evidence, that the portion stowed between decks was affected by the disagreeable odor of the oil, even if it had been otherwise with the portion stowed in the hold. As it respects the two hundred bags in the hold, I am not, in the conflict of the testimony, disposed to interfere with the decree. Indeed, I am inclined to think, that, if some care had been bestowed in airing and ventilating the wheat, the offensive odor would have disappeared, and the damages would have been slight, if any. A sample was brought into the court below, which the judge states, in his opinion, "clearly failed to show that it retained any discernible effects of the taint."

The decree of the court dismissing the libel, is affirmed.

Case No. 4,642.

The FANNY GARDNER.

[5 Biss. 209.][1]

District Court, N. D. Illinois. Aug., 1872.

SEAMEN—CLAIM ON DEATH OF OWNER—DUTY OF MATE ON DEATH OF CAPTAIN—COMPENSATION.

1. A mariner can maintain his libel against the vessel, though the captain be the owner, and die during his service. He is not bound to take any notice of the ownership of the vessel nor to follow the estate of the owner into the probate court.

2. A mate who takes command on the death of the captain is entitled to maintain a libel for the entire voyage at his contract price as mate. It is an incident to his contract as mate that it may become his duty to take command, and in that event, he neither loses his lien, nor becomes entitled to master's wages.

In admiralty. This was a libel by A. W. Moran for wages, averring in substance, that on the 25th of May, 1871, the libellant agreed to serve and commenced on that day to serve as mate on board the brig Fanny Gardner at the rate of two dollars per day; that he served in that capacity during the voyage, until the 10th of June, when the captain fell overboard and was drowned, and libellant assumed the command of the vessel and completed the voyage and brought her back to Chicago, her home port, with a cargo. He claims for his services as mate from the 25th of May until the 10th of June at the rate of two dollars per day, the contract price, and, for his services as captain, from the 10th of June to the 22d of June at the rate of one hundred dollars per month.

Rae & Mitchell, for libellant.

W. F. Whitehouse, for respondent.

BLODGETT, District Judge. There are two questions made upon this libel.

First, that the admiralty court has not jurisdiction, because the brig was the property of the captain who is dead, and that libellant should prove his claim before the probate court of this county and take his pay in due course of administration.

This principle cannot be sustained. The law giving a specific lien for the mariner's wages upon the vessel, takes no notice of who owns it, or of the life or death of the owner, or of any change of ownership. The mariner's lien attaches to the vessel, and it is not necessary for the mariner to inquire whether the owner be living or dead. If he has performed maritime service on board the vessel he is entitled to his pay, and entitled to enforce his lien upon the vessel in a court of admiralty.

Second, the other question made is that the libellant, having assumed command of the vessel by the death of the captain, has lost his admiralty lien.

By the common law of the sea, in the case of the death or disability of the captain it becomes the mate's duty to take command of the ship. This is a part of the condition of his entry upon the service; it is what is expected of him and what would be enforced against him. He would be derelict in his duty if he did not assume command of the ship at once upon the death or disability of the captain, he being the next officer in command. It does not follow, because he performs the duties of captain that he is entitled to captain's wages. It is one of the chances which he takes when he enters upon his employment as mate that he may be called upon during the voyage to assume the duties of captain, but inasmuch as the hiring of a

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

captain is a personal transaction between the owners and the captain, the law will not imply any change in the relation of the mate to the vessel from what the original contract of shipment made, and he still remains mate in command by the occurrence of a contingency which he ought to anticipate. His maritime lien attaches for his wages as mate during the entire voyage, it being his duty to bring the vessel into a place of safety. In this case it does not appear affirmatively whether the mate was obliged to bring the vessel back to Chicago or whether he could have brought her to any other safe port and notified the owner; but he voluntarily assumed command and brought the vessel into Chicago and is entitled to enforce his lien for the amount of his wages according to his contract, which is two dollars per day for twenty-eight days. He admits that he has received five dollars, making fifty-one dollars as the amount due, which will be the amount of the decree.

Consult The Gate City [Case No. 5,267], as to compensation of captain when serving as clerk.

Case No. 4,643.

FANSHAWE v. TRACY et al.

[4 Biss. 490.][1]

Circuit Court, N. D. Illinois. April, 1868.

PRESERVING RIGHTS PENDING MOTION FOR INJUNCTION — PRACTICE IN ALLEGED CONTEMPT— NINETIETH RULE OF SUPREME COURT — ATTACHMENT IN FIRST INSTANCE — EFFECT OF SUPPLEMENTAL BILL—CONTEMPT IS AN OFFENSE AGAINST THE UNITED STATES—OFFICER OF CORPORATION —WHEN IN CONTEMPT — SUBSEQUENT ARREST— PURGING CONTEMPT.

1. On the filing of a bill praying an injunction, it is proper practice for the court to make an order that the defendants do nothing prejudicial to the rights or interests of the complainants, pending the hearing of the motion for the injunction.

[Cited in U. S. v. Anon. 21 Fed. 767.]

2. The established practice in this court, when affidavits are filed charging any person with disobedience of the orders or process of the court, is to enter a rule on him to show cause why an attachment should not issue.

[Cited in Re Graves, 29 Fed. 67.]

3. Such a practice is not in conflict with the ninetieth rule of the supreme court, but comes within the exception in that rule.

4. It is, however, competent for the court, in its discretion to issue an attachment in the first instance, and without any rule to show cause.

5. The filing of a supplemental bill, for the purpose of bringing some of the defendants into contempt, is not a waiver of the rule nisi previously entered.

6. A proceeding for contempt, though growing out of a civil action, is distinct in its character, and is really a proceeding on behalf of the United States, against whose authority the offense was committed.

[Cited in Kirk v. Milwaukee Dust-Collector Manuf'g Co., 26 Fed. 508.]

7. It seems, that if a man imprisoned for contempt of a federal court, breaks jail and escapes to another state, he can be arrested and returned.

[Cited in Corbin v. Boies, 34 Fed. 699.]

8. Officers representing a corporation defendant are not in court for the punishment for contempt unless they personally knew of the order, the disobedience of which is alleged.

9. Persons guilty of contempt can be arrested at any time thereafter, when they come within the jurisdiction of the court.

10. The court will, at any time, give the party alleged to be in contempt full opportunities to be heard.

In equity.

DRUMMOND, District Judge. The question argued is of considerable practical importance.

The practice in this district has been, when affidavits are presented charging a person with the violation of an order of the court or of an injunction, for a rule to show cause to issue, requiring him to appear in court and furnish some good reason why an attachment should not be issued against him. It has also been supposed to be within the power of the court to issue an attachment in the first instance without the necessity of a rule to show cause.

A bill was filed by Edward R. Fanshawe against the Chicago, Rock Island & Pacific Railway Company [John F. Tracy] and other parties, in March last, and, as the bill asked for an injunction among other things, some of the parties appeared in court, and the usual order was taken according to the practice of the court, that nothing should be done prejudicial to the rights of the plaintiff until the motion for an injunction should be heard.

This practice has been very commonly adopted where the plaintiff or the court is not ready to hear the motion, or to enable the defendant to prepare for the hearing, so as to protect the rights of the plaintiff. It has been supposed that in this way the rights of all parties would be protected; and, where special injunctions are asked, the act of congress (Stat. 334, § 5) and the rule of the court require that notice shall be given. In this way all parties have an opportunity of being heard before the injunction is issued. At the same time, it is apparent that irreparable injury might be done to the rights of the plaintiff, provided the order of the court which is entered in such case should be disregarded. Therefore it is that this practice has prevailed—a practice which I must think is a salutary one and calculated to promote justice.

After this order was made, a supplemental bill was filed. New parties were added and some new facts were stated. There were such circumstances stated in the supplemental bill, that, on application of the plaintiff, an attachment was issued

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against certain parties, and a rule to show cause issued as to others, for an alleged disobedience of an order of the court.

I do not propose at this time to go into the propriety of the order of the court then made. In point of fact, none of the parties against whom the attachment was directed have been arrested, and some of the parties against whom the rule to show cause was entered have appeared and filed affidavits. All of the parties, or nearly all, have appeared and have objected to the order of the court made at the time, on various grounds which I propose now to consider.

In the first place, it may be necessary for us to examine the ninetieth rule of the supreme court in cases of equity, because it is upon that rule that the parties rely, as showing that the practice adopted by the court in this case was irregular and improper and ought not to have been adopted.

That rule is as follows: "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local convenience where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

Of course the first question is: What was the rule in England in the high court of chancery?

Mr. Daniell says, "The remedy in the event of the breach of an injunction or restraining order is by committal." 2 Daniell, Ch. Pl. & Pr. 1683. "The order for committal is obtained upon motion, of which notice must have been duly served personally upon the person committing the contempt," and it is to be observed that "the terms of the notice of motion should be that the party 'may stand committed' * * * for breach of the injunction" (2 Daniell, Ch. Pl. & Pr. 1685), and not that he may show cause why he should not be committed.

Rather refined reasoning, it must be confessed. The notice must be that the party may stand committed, and not that he may show cause why he should not be committed. "The plaintiff may also, it seems, obtain an order ex parte, that the defendant may stand committed on a certain day unless he shows cause against it, which order must be personally served upon the party to be committed." Daniell, Ch. Pl. & Pr. So this is an addendum which has been made under the practice in England, according to this order, that the plaintiff may obtain an order ex parte that the defendant may stand committed on a certain day unless he shows cause against it; that is, the party may take a rule nisi.

It would seem that, so far as the defendant is concerned against whom the proceeding is sought, it is not really worthy of controversy, whether he is served with a notice that the motion will be made in court that he stand committed for a breach of the injunction, or is served with a rule to show cause why an attachment should not issue against him for the breach. If there is any difference, the latter is in his favor, being not so direct and peremptory as a notice of a motion that he be committed, because when that motion is heard, unless he gives a satisfactory reason, he is committed of course; whereas, in the other instance a rule to show cause might be asked in the first place, then an attachment be issued, and, when brought in under attachment, he has a right to purge his contempt. In the first place, then, the court may refuse to issue the attachment, and secondly, the court may refuse to commit when the attachment is returned.

In the last instance, different from what it is in the other, when the notice is given that he stand committed, the party may pay no attention to it; the court may not have absolute power over the offender; but where the attachment issues, and he is brought into court, if he does not purge himself of the contempt, then the court has control over him; and so concerning that rule there does not seem to be very much difference in the mode of practice.

Mr. Justice McLean has said (Worcester v. Truman [Case No. 18,043]), that a rule to show cause why an attachment should not issue for breach of an injunction, was not the mode of proceeding in that court, but that it should be a motion that the defendant stand committed for the breach of injunction and notice given of that motion, following in this respect a case decided by Lord Eldon which (Angerstein v. Hunt, 6 Ves. 488), however, seems to have been a modification of the old practice, because Mr. Daniell admits that the old practice was that the attachment might issue and not notice of the motion; that is, the attachment might issue in the first instance.

Mr. Justice Miller has also followed the decision of Lord Eldon and of Mr. Justice McLean in holding that there should be a notice of the motion that the party stand committed for the breach of the injunction. Gray v. Chicago, I. & N. R. Co. [Case No. 5,713].

As I have already said, there is a great deal of refinement in the distinction between the two cases.

The practice in this district for twenty years, and perhaps longer, has been for a rule to show cause to be entered in the first place; and the question is whether this comes so directly in collision with this 90th rule of the supreme court, that, after a rule to show cause has been issued, we are to abandon the whole proceedings, and quash them simply upon that ground.

I think that the case comes directly within the 90th rule of the supreme court, which is

that where the rules prescribed by "that court, or by the circuit court do not apply," the practice in the high court of chancery in England, is to apply. If there be a distinct rule of this court applicable to this case, it is within the exeception of the 90th rule, and the practice of the court, I think, is to all intents and purposes the rule of the court. Certainly the difference between the two is not so material, nor important, nor attended with such serious consequences, as to make it indispensable that the court should drop a practice which has been followed for so many years, and for the reason that I have already given. It is really a distinction without any substantial difference,—a notice of motion why the party should not stand committed for contempt, or a rule to show cause why an attachment should not issue. Whatever difference there is, is in favor of the defendant.

I do not, therefore, feel inclined, simply because a different practice has been followed in other districts, to abandon a practice which has been pursued for so many years in this district. I have no sort of objection, certainly, that the practice of the court should be in accordance with the practice adopted by Judge McLean in Ohio, and Judge Miller in Iowa. I submit the question to my brother judge, and if he thinks there is any material difference, and that it is desirable the practice throughout the districts should be uniform, I am perfectly willing that the practice in this district should conform to that of other districts. But still, it is simply a matter of practice, the courts reaching the same conclusion in a little different form, and in no essential particular jeopardy by the change of form the rights of the parties.

Besides, the language of the rule is express, that the practice of the high court of chancery of England is not to be regarded as positive rules, but as furnishing just analogies; so that it would be competent, I apprehend, for this court to adopt its own practice in relation to this matter. If it were a question de novo, coming up for the first time, it would still be competent for this court to make its own rule upon the subject, even under the express authority of this 90th rule in equity.

This being so as to the first point, the next question is, whether it is competent for the court to issue an attachment in the first instance, instead of a rule to show cause.

The practice has been very general to issue in the first instance a rule to show cause. At the same time, as I apprehend, it has not been doubted—and I do not feel inclined now to doubt, even after the argument of the counsel in this case—that the power exists in the court, under circumstances where in its opinion such an order is necessary, to issue an attachment in the first instance without issuing simply a rule to show cause. I think the practice in this state is quite common, in the courts of chancery, for an attachment to issue in the first instance. It certainly was familiar to me in my practice when I was at the bar, and some cases have been cited from the supreme court where it appears to have been done. Though it is not and ought not to be regularly done, I cannot doubt the right of the court to issue the writ, and it seems to me that there might be circumstances where the court would be shorn of its power to give remedial justice unless it possessed the authority to issue an attachment.

That being so, it is simply a question of discretion on the part of the court. Of course it is always competent for the parties to come in and ask the court to revise its judgment and opinion in a particular case, and it will always afford me pleasure to give counsel an opportunity of being heard in any such case.

Then, as to the effect of the supplemental bill which was filed: It is claimed that that was a waiver of the order of the court. I do not well understand how that could be true in this case, because after the order of court was made upon the filing of the original bill, the supplemental bill, containing allegations which appealed to the court for its remedial power over the parties, was filed for the purpose of compelling them to observe the order of the court already made. It would be a singular state of facts that an amendment to a bill in which the court was called upon to interpose its strong arm to enable a party to have redress in a particular case was to operate ipso facto to defeat the whole object sought. I concede that there may be cases of an amendment to a bill, or of a supplemental bill, where it would be a waiver of an order of the court or of an injunction, as in the case cited where the party was under an order to answer, and an amendment of the bill was made which would affect the answer. In such a case as that it would undoubtedly be a waiver of the order to answer, and if the party was in contempt it might be a waiver of the contempt. The true rule, I take it, is this; that, where the amendment to the bill or character of the supplemental bill affects substantially the order of the court, and brings up facts which are inconsistent with the action of the court, that would constitute a waiver of the contempt or of the injunction, but not otherwise.

Then, as to the third point: That point is, I apprehend, well taken. It was not the intention or the purpose of the court that this order should operate upon any other party or corporation than those within the jurisdiction of the court, and who had had notice of the proceedings in court. It was not intended to operate upon any foreign corporation.

Perhaps it may be proper for me to make a few remarks upon the general scope and effect of the proceedings for contempt, about which there seems to be some difference of opinion. As I understand it, a party against whom proceedings for contempt are instituted—a party who has conducted himself in

such a way as to justify the court in punishing him for contempt, or for the disobedience of its order—has committed an offense against the United States. The court is the mere instrument, or organ, of the government, in punishing the person for the offense which he has committed. As I said during the argument, if he is imprisoned by order of the court, it is the act of the United States. The United States is the custodian of his person. If he is fined by the court, the fine goes to the United States, and although it may be a proceeding growing out of a civil action, it is distinct in its character in many of its essential particulars. The parties may not have, do not have, absolute control over that proceeding. The United States is the party to the proceeding, and not the mere defendant or plaintiff upon the record. It is not a crime in one sense, but it partakes of the nature and character of a crime, and I do not see, with all due respect to some of my brother judges who differ from me, why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States.

The supreme court of Pennsylvania, in a case which was quite notorious at the time, —the Case of Williamson (26 Pa. St. 9), where the district court of the United States had imprisoned a party for a contempt of the district court,—says, on an application to release him from his imprisonment, "The commitment shows that he was tried, found guilty and sentenced for contempt of court and nothing else. He is now confined in execution of that sentence and for no other cause. This was a distinct and substantive offense against the authority and government of the United States." If it is not, what is it? What is the nature and character of the offense that the party has committed? Is it an offense against a party to the suit? Not so. It is true that the party to the suit may ask the punishment of the offender, with a view of promoting the civil remedy, but that is not the sole object sought in punishing the offender. That is not the meaning of the law of the United States which declares that a court can punish the offender by fine and imprisonment, and as to the law of 1831, which was referred to, the power of the court as to this is not changed by that law. The supreme court of Pennsylvania further says in the same case, "It must be remembered that contempt of court is a specific criminal offense." I do not go quite so far as that, but I say that it partakes of the nature of a criminal offense.

But the supreme court of the United States, in Ex parte Kearney, 7 Wheat. [20 U. S.] 38, speak of the punishment, not as a judgment in the case of a contempt, but as a conviction, as though the party were tried for crime. They say that the order of the court imprisoning or fining the party is a conviction, and that case is cited in the Case of Williamson, supra. That court says "the contempt may be connected with some particular cause," &c. But in point of fact the practice in this state always is, in case of contempt, a proceeding on the part of the people; and the practice has been in this court to treat it as a proceeding on the part of the United States.

Mr. Hoyne.—We can have those parties discharged who are not in court.

THE COURT.—There has never been an order against anybody not in court. The officers of a corporation are part of the corporation, and when a corporation is in court, the officers for certain purposes are also in court, but I do not understand that such officers are in court for the purpose of punishment for contempt unless they have knowledge of the action of the court upon the corporation, so that if any of the officers are in court simply from the fact that they are such officers, they are not legally in court to be punished for contempt unless they had notice of the order of the court. If there is service upon the corporation, and any of the officers, knowing of the order of the court, disobey the order, I think they are guilty of contempt and are punishable for the contempt, although there may be no personal service upon them, because the corporation is in court, and they are also in court for that purpose if they had notice.

Mr. Hoyne.—No further proceedings will be taken until they are advised, that they may make their showing without coming personally to court. Their business is such that it is inconvenient for them to come.

THE COURT.—Certainly. According to the opinion of the district judges of the southern district of New York and of Iowa, the parties who reside in those two districts cannot be reached in any way at present, as they think there is no authority, for various reasons (they differ, I believe, as to the reasons), to arrest them and transfer them to this district; but as the matter now stands, whenever these parties come within this district, I hold that it is competent for this court to arrest them and bring them before the court. Therefore, of course, it is desirable that they should understand the view of the court, and that it will always be competent hereafter to cause these parties, whenever they come within its jurisdiction, to be brought before this court.

Case No. 4,644.

In re FAREZ.

[7 Blatchf. 34.][1]

Circuit Court, S. D. New York. Nov. 17, 1869.

EXTRADITION — AUTHORITY OF COMMISSIONER TO ISSUE WARRANT — REQUISITION FROM FOREIGN GOVERNMENT — MANDATE FROM STATE DEPARTMENT—ARREST WHILE IN CUSTODY OF COURT.

1. A warrant issued by a United States commissioner, for the apprehension of a fugitive charged with crime, with a view to his being delivered up to a foreign government, under a treaty of extradition, is void, unless it shows, on its face, that the commissioner issuing it is a commissioner authorized by a court of the United States to issue it.

[Cited in Re Macdonnell, Case No. 8,771; Castro v. De Uriarte, 16 Fed. 95; Re Kelley, 25 Fed. 270; Ex parte McCabe, 46 Fed. 368.]

2. Such warrant is void, also, unless it shows, on its face, that a requisition has been made, under the authority of the foreign government, on the government of the United States, and the authority of the latter government obtained, to apprehend such fugitive.

[Cited in Re Kelley, Case No. 7,655; Re Thomas, Id. 13,887; Re Stupp, Id. 13,563.]

3. A mandate for the apprehension of such fugitive, purporting to be issued by the government of the United States, and issued under the hand of the secretary of state and the seal of the department of state, is a sufficient mandate.

[Cited in Ex parte Van Hoven, Case No. 16,859.]

4. Where a writ of habeas corpus is served on a marshal, commanding him to produce before this court the body of a person in his custody, such person is in the custody of this court, under such writ, from the time it is served on the marshal; and the marshal cannot lawfully arrest such person on a warrant, as a fugitive, in an extradition proceeding, until the proceedings on the writ of habeas corpus are terminated.

[Cited in Re Macdonnell, Case No. 8,772.]

5. It is not enough, in a complaint praying for the issuing of a warrant in an extradition case, to charge a crime generally, but the substance of the offence charged should be clearly set forth, so that the court can see that a crime for which an extradition can take place, has been committed.

[Cited in Re Roth, 15 Fed. 507.]

6. In a case of forgery, it is not enough to charge, in the complaint, the crime of forgery generally, but time and place, and the nature of the forgery and of the forged instrument, must be sufficiently specified.

[Cited in Davis' Case, 122 Mass. 330.]

7. The complaint must be as specific as in the case of an offence committed in the United States.

[Cited in Re Doo Woon, 18 Fed. 899.]

This was a writ of habeas corpus, in the case of [François Farez] a person who had been arrested for extradition, on the demand of the Swiss Confederation.

Francis R. Coudert, for petitioner.

Henry D. Lapaugh, for Swiss Confederation.

BLATCHFORD, District Judge. On the 6th of November, 1869, a writ of habeas corpus was allowed by me, directed to the marshal of the United States for this district, and returnable before this court on the 10th of November, 1869, at 11 o'clock a. m., commanding the marshal to produce the body of François Farez at that time before this court, together with the time and cause of his imprisonment and detention. This writ was issued on a petition, signed and verified by Farez, which sets forth that he has been, since the 15th of October, 1869, detained, and imprisoned and restrained of his liberty by the said marshal, on a warrant, a copy of which is annexed to the petition, issued by Charles W. Newton, Esq., described in said warrant as "a commissioner appointed by the circuit court of the United States for the southern district of New York, being a magistrate," under pretext of the provisions of the general convention of friendship, reciprocal establishments, commerce, and for the surrender of fugitive criminals, between the United States of America and the Swiss Confederation, concluded and signed at the city of Berne, on the 25th of November, 1850, against the petitioner, as a person charged with one or more of the offences named in the provisions of the said convention, having fled from the jurisdiction of the Swiss Confederation. The petition alleges that the imprisonment is illegal, for want of jurisdiction in the said commissioner over the person of the petitioner, or the subject-matter aforesaid.

The warrant referred to is dated on the 8th of October, 1869. It does not describe the official position of the commissioner issuing it, except as before stated, nor does it contain any statement that any requisition has been made, under the authority of the Swiss Confederation, upon the government of the United States, for the apprehension and committal of Farez, or that any authority has been given by the government of the United States for that purpose. The warrant recites that, in accordance with the said convention, complaint has been made, under oath, by the Honorable Louis Philippe de Luze, consul of the Swiss Confederation at New York, before the said commissioner, and by him, the said consul, presented to the said commissioner, charging Farez with having, in the course of the year 1869, or heretofore, and after the date of the said convention, committed, within the jurisdiction of the Swiss Confederation, the crimes of forgery, the emission of forged papers, and the utterance thereof; that said crimes, and each and every of them, are contrary to the laws of the said Swiss Confederation, and by such laws subject to infamous punishment and to punishment by imprisonment in the state prison; that the said Farez has,

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

since the commission of the said crimes, fled from the jurisdiction of the Swiss Confederation; that he is now within, and will be found within, the territories or limits of the United States of America; and that the said crimes, and each and every of them, are enumerated and provided for in the said convention. The warrant is directed to the marshals of the United States, respectively, for any district, and to their deputies, or to the deputies of any of said marshals, or to any of said deputies, and commands them, and each and every of them, in the name of the president of the United States, to apprehend the said Farez, and bring him forthwith before the said commissioner, at the city of New York, or before some other magistrate, to the end that the evidence of the criminality of the said Farez may be heard and considered, pursuant to the said convention, and the acts of congress in such case made and provided.

The marshal made a written return to the said writ at the time appointed, as follows: "In return to the within writ, I hereby produce the within named François Farez, and I hereby certify, that he is in my custody and detention by virtue of the two warrants issued by the commissioner, Charles W. Newton, and which are herewith also produced; and that the said Farez was arrested by me under one of the said warrants, dated October 8th, 1869, on the 15th of said October, and on the other warrant, dated November 9th, 1869, on the 10th of said November. November 10th, 1869, S. R. Harlow, U. S. Marshal."

The warrant dated November 9th, 1869, is issued, like the first one, in the name of the president, and is addressed in the same manner. It differs from the first warrant, in describing the commissioner issuing it, as "a commissioner appointed by the circuit court of the United States for the southern district of New York, being a magistrate and a commissioner specially appointed to execute the act of congress, entitled, 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders,' approved August 12th, 1848 [9 Stat. 302], and the act entitled, 'An act to amend an act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivery up of certain offenders,' approved June 22d, 1860" [12 Stat. 84]. It also recites, that the complaint made by the consul to the commissioner charges Farez with having committed the crimes in question, with intent to obtain gain for himself, and also with the intent to cheat, injure, and defraud the Swiss Confederation, and some person and persons to him, the said consul, unknown; that the forged papers emitted were forged commercial papers, and were to the amount of 30,000 francs, or thereabouts; and that, heretofore, pursuant to the 13th and 14th articles of the said convention, John Hitz, Esq., political agent and consul general of Switzerland, the Swiss Confederation, appointed and accredited to the government of the United States, made application to the said government for the arrest of said Farez, charged with the said crimes of forgery, the emission of forged commercial papers and the utterance thereof, committed within the jurisdiction of the Swiss Confederation, and an alleged fugitive from the justice of said Confederation, and who is believed to be within the jurisdiction of the United States, and that, upon the said application, the government of the United States did, on the 28th of October, 1869, issue under the hand of the secretary of state of the United States, and under the seal of the department of state affixed, a mandate directed to any justice of the supreme court of the United States, any judge of the district court of the United States in any district, any judge of the supreme or superior court in any state, or to any commissioner specially appointed to execute the acts of congress aforesaid, reciting, that it appears proper that the said Farez should be apprehended and the case examined in the mode provided by the acts of congress aforesaid, and authorizing the said officers, or any of them, to whom the same is directed, of whom the said commissioner is one, to cause the necessary proceedings to be had in pursuance of the said acts of congress, in order that the evidence of the criminality of the said Farez may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant may issue for his surrender, pursuant to the said convention. In all other respects the second warrant recites the complaint made before the commissioner, and the proceedings preliminary to the issuing of such warrant, in the same terms in which they are recited in the first warrant. The mandatory part of the second warrant is substantially the same as that of the first warrant.

The return of the marshal was traversed by the petitioner. The traverse avers, that the warrant of November 9th, 1869, was served on the petitioner while he was in custody under this writ of habeas corpus, and that such service was, therefore, void and of no effect. It also avers, that the said last-named warrant is void for the following reasons: (1) The magistrate had no jurisdiction to issue the warrant, because no sufficient complaint had been presented to him at the time the warrant was issued; (2) the complaint does not make out a case against Farez, giving jurisdiction to the commissioner; (3) the complaint is based entirely on a warrant, or pretended warrant, of arrest, issued by one Brossard, which last-named warrant is entirely insufficient in law to authorize any proceedings against Farez; (4) the said warrant of said Brossard shows that Farez has not been

charged with any of the offences enumerated in the convention, and it appears on the face of the said last-named warrant, that there was no charge made against him of having committed forgery, or any other offence for which he could be extradited; (5) there being no warrant of arrest issued against Farez in the country where the alleged crimes were committed, there was and is no jurisdiction on the part of the commissioner to issue the said warrants, or either of them, issued by him. The traverse further avers, that the only warrant issued against Farez in such country is the said warrant of said Brossard, and is the same warrant referred to by the Swiss consul in his complaint, and is now in the possession of the said consul, and is referred to as a part of the traverse, and the consul is called upon to produce the said warrant, and also the complaint on which the commissioner issued his two warrants.

To this traverse the Swiss consul made a written reply, denying, (1) that the warrant of November 9th was served on Farez while he was in custody under the writ of habeas corpus, or that the service of said warrant was void, or that the said warrant is void for any of the reasons averred in the traverse, or that the magistrate had no jurisdiction to issue the said warrant; (2) that the complaint does not make out a case against Farez, giving jurisdiction to the commissioner; (3) that the complaint is based entirely on a warrant of arrest issued by one Brossard, or that said warrant is insufficient in law to authorize any proceedings against Farez; (4) that the said warrant of said Brossard shows that Farez has not been charged with any of the offences enumerated in the treaty, or that it appears on the face of the warrant that there was no charge made against Farez of having committed forgery, or any other offence for which he could be extradited; (5) that there was no warrant of arrest issued against Farez in the country where the alleged crimes were committed, or that there was or is on that account no jurisdiction on the part of the commissioner to issue the two warrants issued by him, or either of them, or that the only order or warrant issued against Farez in said country is the said warrant of said Brossard. The reply avers, that a sufficient complaint was presented to the magistrate at the time the warrant of November 9th was issued; that one of the warrants issued against Farez is a warrant of said Brossard; and that said last-mentioned warrant is the warrant of arrest, or a warrant of arrest, referred to by the Swiss consul in his complaint, and is now in his possession.

Upon the issues thus raised testimony was taken before the court. The original warrant issued by the commissioner on the 8th of October, 1869, was put in evidence. By endorsements made on it by the commissioner, it appears that, on the 18th of October, 1869, Farez appeared before him, and the examination of the matter was adjourned to the 1st of November, 1869, and Farez was remanded in the mean time to the custody of the marshal; that Farez was again produced before the commissioner on the 1st of November, 1869, and the examination was adjourned until the 4th of November, 1869, and Farez was remanded in the mean time to the custody of the marshal; and that, on the 8th of November, 1869, the examination in the matter was adjourned to the 4th of December, 1869. No proceeding took place under the second warrant, except the arrest of Farez under it. The writ of habeas corpus was served upon the marshal before he arrested Farez under the second warrant. The warrant of arrest referred to in the traverse and the reply, as issued by one Brossard, was put in evidence. It is in French, and purports to have been issued by Justin Brossard, president of the tribunal of the district of Franches Montagnes, examining magistrate, on the 3d of October, 1869. It is headed: "Order of Arrest, and Demand of Extradition." It orders and requires all public officers to arrest and take to some prison in said district François Farez, farrier and hotel keeper, residing at Bois, whence he lately clandestinely departed, taking with him securities to a considerable amount, and then started for America, with the intention of going to New York by the vessel Atalanta, from Havre, on the 28th of September, 1869. It then avers that the said Farez is accused of fraudulent bankruptcy, "et de plusieurs faux en écriture de commerce," and has been declared bankrupt by decree of the tribunal of commerce of the 1st of October, 1869. It then says: "By virtue of the treaty of extradition between Switzerland and the United States of America, dated the 25th of November, 1850, and the 7th of January, 1856, we request the competent authorities to take the most urgent steps to arrest the accused Farez, who is accompanied by his wife and two children, before he sets foot on American territory, and, after his arrest, to safely keep all the securities which shall have been found in his possession, or in the possession of any one accompanying him. It is of great importance, in the interest of public policy, to have the accused brought before the undersigned judge, a great number of creditors claiming his immediate extradition." Considerable testimony was given before the court as to the meaning of the French words "faux en écriture de commerce." The counsel for the Swiss consul contended that the words mean forgery of commercial writings, including bills of exchange, promissory notes, bills of lading, and other written commercial instruments, as well as entries in books of account, in which records of commercial transactions are kept. The counsel for Farez contended that the words "faux en écriture de commerce" mean only falsifications of commercial writings, that

is, falsifications of entries in books in which records of commercial transactions are kept; and that a forgery of a bill of exchange, or a promissory note, or other written commercial instrument, is not a "faux en écriture de commerce," but comes under the head, in the Code Napoleon, which is the Swiss law, of a "faux en écriture privée." The complaint on which the second warrant was issued by the commissioner was also put in evidence. It is made by Mr. de Luze, consul of the Swiss Confederation at New York, and states that Farez is charged with having, in the course of the year 1869, or heretofore, and after the date of the said convention, committed, within the jurisdiction of the Swiss Confederation "the crimes of forgery, the emission of forged commercial papers, and the utterance thereof, to the amount of 30,000 francs, or thereabouts." It also states, that the complainant, as such consul, charges Farez with having committed, within the jurisdiction of the Swiss Confederation, those crimes to that amount; that those crimes, and each and every of them, are contrary to the laws of the Swiss Confederation, and by such laws subject to infamous punishment, and punishment by imprisonment in the state prison, and are enumerated and provided for in the said convention; that a warrant of arrest against the said Farez, on account of the said crimes, has been issued by the proper and competent judicial authority for the purpose, in the jurisdiction of the Swiss Confederation; and that said Farez has, since the commission of the said crimes, fled from the Swiss Confederation to the United States, and is within and is to be found within, the territories or limits of the United States. It then sets forth the application made to the government of the United States by the political agent and consul general of the Swiss Confederation, for the arrest of Farez, and the issuing by the government of the United States, on the 28th of October, 1869, of the mandate before referred to. It then states that the complainant, as such consul, applies for the extradition of the said Farez, in pursuance of the said convention, and that a warrant issue for his apprehension according to the said convention and the acts of congress in said case made and provided.

The convention in question, which bears date on the 25th of November, 1850, and the ratifications of which were exchanged on the 8th of November, 1855, provides as follows (11 Stat. 593): "Article 13. The United States of America, and the Swiss Confederation, on requisitions made in their name, through the agency of their respective diplomatic or consular agents, shall deliver up to justice persons who, being charged with the crimes enumerated in the following article, committed within the jurisdiction of the requiring party, shall seek asylum or shall be found within the territories of the other: provided, that this shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial if the crime had been committed in the country where the persons so accused shall be found." The 14th article provides, that forgery, or the emission of forged papers, (in the French version of the treaty, "le faux, y compris l'émission de faux papiers,) shall be among the crimes for which, when such crimes are subject to infamous punishment, a person who is charged with any of them shall be delivered up according to the provisions of the convention. The 15th article provides that, on the part of the United States, the surrender shall be made only by the authority of the executive thereof.

The act of August 12, 1848, section 1 (9 Stat. 302), provides "that, in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government, it shall and may be lawful for any of the justices of the supreme court, or judges of the several district courts of the United States, and the judges of the several state courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any state, district, or territory, with having committed, within the jurisdiction of any such foreign government, any of the crimes enumerated or provided for by any such treaty or convention, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge, under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of said judge or commissioner to issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until such surrender shall be made."

It was contended on the hearing, by the counsel for Farez:

(1) That the first warrant issued by the commissioner is void, because it does not show on its face, that the commissioner is an officer authorized to act as a commissioner under the act of August 12, 1848;

(2) That the first warrant is void, because it does not show that a requisition has been made in the name of the Swiss Confederation, through the medium of its proper diplomatic or consular agent, upon the United States, for

the arrest or delivery up of Farez, or that any authority has been given by the government of the United States for the apprehension or arrest of Farez;

(3) That the second warrant is void on its face, because it does not show that a mandate for the apprehension of Farez has been issued by the president of the United States, under the great seal of the United States, but only shows that the same has been issued by the government under the hand of the secretary of state and under the seal of the department of state;

(4) That the arrest of Farez by the marshal under the second warrant is void, and the second warrant is no authority for holding Farez under arrest, because it appears that he was arrested by the marshal under the second warrant after this writ of habeas corpus was served upon the marshal;

(5) That the complaint upon which the second warrant was issued does not contain sufficient facts to authorize the issuing of such warrant;

(6) That there is no sufficient description of any offence specified in the convention, in the warrant of arrest issued against Farez in the jurisdiction of the Swiss Confederation.

The first warrant issued against Farez is, in my judgment, void, because it does not show, on its face, that the commissioner issuing it is a commissioner authorized by a court of the United States to issue such warrant. The proceeding is a special proceeding, instituted under the convention and the act of August 12, 1848, and the fact that the commissioner who issues the warrant is, within the said act, a commissioner authorized so to do by a court of the United States, is a jurisdictional fact, and should be set forth on the face of the warrant.

It is the law of this circuit, that the judiciary possess no jurisdiction to entertain proceedings, under any treaty or convention between the United States and a foreign government for the apprehension and committal of any alleged fugitive from justice, whose extradition is demanded by such foreign government, without a previous requisition having been made, under the authority of the foreign government, upon the government of the United States, and the authority of the latter government obtained, to apprehend such fugitive. Ex parte Kaine [Case No. 7,597]; In re Henrich [Id. 6,369]. In the latter case, it is said: "It would seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the president be obtained, before the judiciary is called upon to act." As the proceeding is a special proceeding, I think it is necessary, not only that the complaint made to the commissioner, upon which the warrant is asked, should show that such a requisition has been made upon the government of the United States and such authority obtained from it, but that those facts should also be set forth on the face of the warrant. As the first warrant contained no such allegation it is not valid.

The mandate recited in the second warrant and in the complaint upon which the second warrant issued, as the authority from the government of the United States for the arrest of Farez, upon the application therefor made to it by the Swiss Confederation, is a sufficient mandate. The objection taken is, that the mandate is stated, in the complaint and the warrant, to have been issued by the government of the United States under the hand of the secretary of state and the seal of the department of state, and not under the hand of the president and the great seal of the United States. The executive authority of the United States, particularly in its intercourse with foreign powers and in matters which concern foreign relations, acts through the medium of the secretary of state and the seal of that department; and the allegation in the complaint and the warrant, that the government of the United States issued the mandate, under the hand of the secretary of state and the seal of the department of state, is a sufficient allegation that the mandate was issued by the executive authority. The point taken in the case of Ex parte Kaine, was, that the proceedings for the apprehension of the fugitive could not be initiated by the judicial department of the government, or by any department of the government except the executive. A mandate issued by the government under the hand of the secretary of state and the seal of the department of state, is issued by the executive department of the government. The practice of the executive department to act through the department of state in performing executive acts of the character of that in question, has been recognized throughout the history of the government from the earliest time. The 15th article of the convention in question provides, that the surrender of a fugitive on the part of the United States shall be made only by the authority of the executive thereof; and yet, the act of August 12, 1848, provides that, if the magistrate who issues the warrant deems the evidence which he takes under it sufficient to sustain the charge under the provisions of the proper convention, it shall be his duty to certify the same to the secretary of state, that a warrant may issue; and the third section of the same act provides, that it shall be lawful for the secretary of state, under his hand and seal of office, to order the fugitive to be delivered to the person authorized by the foreign government to receive him. This clearly shows the understanding of congress, that the executive department, in carrying out treaty stipulations between this government and foreign governments, for the apprehension and delivery up of alleged criminals, is to act through the instrumentality of the department of state; and, if the final order for extradition, upon

which the party is to be taken out of the United States into the territories of the foreign government, can be made by the executive authority of the United States through the instrumentality of the department of state, a fortiori, a preliminary mandate for the arrest of the party can be made by the executive authority of the United States through the medium of the same department.

The writ of habeas corpus having been issued on the 6th of November, commanding the marshal to produce the body of Farez on the 10th of November, at 11 o'clock a. m., Farez must be considered as being, under said writ, in the custody of the court, at least from the time the writ was served on the marshal, and the marshal had no right, after that time, during the pendency of the writ, to arrest Farez upon any new warrant, or upon any warrant not in his hands at the time the writ was served upon him. The return by the marshal, at the day and hour specified in the writ as the time for the return thereof, states that he arrested Farez on the 10th of November, under the warrant dated on the 9th of November. It appears in evidence, that the writ was served on the marshal prior to the time when he arrested Farez under the warrant of the 9th of November. Such arrest on the second warrant was, therefore, illegal. Farez was entitled to have the question determined as to the lawfulness of his imprisonment and detention by virtue of the process on which he was claimed to be held at the time the writ of habeas corpus was served on the marshal. The proceedings under the writ had relation to at least as early a period as that. When the question of the lawfulness of the detention under the first warrant should have been disposed of, then the marshal could properly proceed to execute the second warrant, but not before.

The complaint upon which the second warrant was issued is defective in its charge of crime against Farez; and the second warrant itself is equally defective in that particular. It is not enough, in the complaint, merely to charge the party with the crime named in the convention, that is, forgery. The complaint in this case contains nothing more than a naked general charge of forgery, without any sufficient specification of time or place, or of the nature of the forgery or of the forged instrument or document. It merely alleges, that Farez, in the year 1869, or after the 25th of November, 1850, with the intent to obtain gain for himself, and to cheat and defraud the Swiss Confederation and some person unknown, committed, within the jurisdiction of the Swiss Confederation, the crimes of forgery, the emission of forged commercial paper, and the utterance thereof, to the amount of 30,000 francs, or thereabouts. This is, under any system of criminal jurisprudence, a defective complaint.

In the case of In re Henrich [supra], this court say: "The complaint upon which a warrant of arrest is asked, should set forth clearly, but briefly, the substance of the offence charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed. The complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substantial, material features of the offence." No sufficient probable cause of arrest is shown by the complaint in this case. The consul of the Swiss Confederation, in the discharge of his duty, makes the charge against Farez in the complaint, but does not pretend that he has any personal knowledge in the premises, and does not specify the particulars of the crime to an extent sufficient to authorize any warrant of arrest to be issued. No citizen of the United States could be arrested or held upon a complaint so vague and general in its specifications, or, rather, so utterly devoid of specifications as the complaint in this case; and it certainly never could have been intended, by the treaty-making power, that an alleged fugitive should be arrested upon a complaint less specific than such as would be required in the case of an offence committed in the United States. The act of 1848, in saying that the magistrates named in it are vested with power, upon complaint made under oath or affirmation, charging a person with having committed, within the jurisdiction of a foreign government, a crime provided for by a treaty for extradition, to issue a warrant for the apprehension of such person, intends that the warrant shall be issued upon such complaint under oath as is generally recognized, in criminal law, as a proper and adequate complaint. The convention with the Swiss Confederation, in saying, in the 13th article, that the delivery up to justice of persons charged with the crimes enumerated in the 14th article, shall be done only when the fact of the commission of the crime shall be so established as to justify their apprehension and commitment for trial, if the crime had been committed in the country where the persons so accused shall be found, intends to say, not only that the person arrested in the United States shall not be delivered up, except on such evidence as would authorize his commitment for trial in the United States, if the crime charged had been committed in the United States, but, also, that he shall not be apprehended or arrested except upon such prima facie evidence as would justify his apprehension and arrest, if the crime charged had been committed in the United States. It never was intended that it should be sufficient, in order to authorize the arrest of a fugitive from justice, to state merely that the representative of the foreign government charges the party with having committed the crime named in the treaty. I must, therefore, hold the second warrant, and the

complaint on which it was issued, insufficient, in their specifications of the crime charged, to justify the holding of Farez under the second warrant.

The warrant of arrest named in the complaint as having been issued against Farez in the jurisdiction of the Swiss Confederation, was the only document presented to the commissioner in support of the complaint made to him, and is, for the purposes of this case, considered as a part of such complaint. Such warrant commands the arrest of Farez as being accused of fraudulent bankruptcy, and of "plusieurs faux en écriture de commerce." It is defective in not specifying the time and place of the commission of the alleged offences, and the character of the forgeries, or of the instruments or documents in respect of which the forgeries were committed; and, therefore, the complaint can derive no support from such document.

Whether the offence of "faux en écriture de commerce," charged in such foreign warrant, is a crime embraced within the 14th article of the convention, is a question not necessary to be considered in this case.

It results, therefore, that Farez must be discharged from custody upon both of the warrants named in the return of the marshal.

[NOTE. For subsequent proceedings in this case, see Cases Nos. 4,645 and 4,646.]

Case No. 4,645.

In re FAREZ.

[7 Blatchf. 345;[1] 2 Abb. U. S. 346; 40 How. Pr. 107.]

Circuit Court, S. D. New York. June 16, 1870.

EXTRADITION — VERIFICATION OF COMPLAINT BY FOREIGN CONSUL — ISSUANCE OF WARRANT ABROAD—AUTHORITY OF COMMISSIONER STATED IN COMPLAINT — TREATY WITH SWITZERLAND—DEPOSITIONS FROM ABROAD — IDENTITY OF OFFENSE—FORGERY—SUFFICIENCY OF EVIDENCE TO WARRANT COMMITMENT.

1. A complaint before a commissioner, in an extradition case, verified by the consul of a foreign government, in which he charges the offence properly, is sufficient if made by him officially, although he does not make the averments on his personal knowledge of the facts.

[Cited in Re MacDonnell, Case No. 8,772; Ex parte Van Hoven, Id. 16,859; Re Behrendt, 22 Fed. 700; Re M'Phun, 30 Fed. 59; Oteiza v. Jacobus, 136 U. S. 338, 10 Sup. Ct. 1034.]

2. It is not a necessary preliminary step to an investigation under an extradition treaty, to show that a warrant was issued abroad against the offender, and, therefore, the complaint need not state that fact.

3. The complaint need not show that the commissioner who issued the warrant for the arrest of the offender was authorized to issue that particular warrant; but it is sufficient for it to show that he was authorized to issue warrants in cases of extradition, embracing the one covered by such warrant.

[Cited in Re Macdonnell, Case No. 8,771; Ex parte Lane, 6 Fed. 36.]

4. Under the convention for extradition between the United States and Switzerland (11 Stat. 593), which provides for the delivery of persons charged with certain crimes "when these crimes are subject to infamous punishment," it is sufficient if the crime is subject to infamous punishment in the country where it was committed, without its being also subject to infamous punishment in the country from which the extradition is demanded.

[Cited in Re Roth, 15 Fed. 508; Re Wadge, Id. 866.]

5. The complaint before the commissioner being made by a foreign consul, and showing that he has no personal knowledge of the matters stated in it, the offender cannot claim the right to cross-examine the consul, on the investigation before the commissioner, before the prosecution gives any evidence under the complaint.

[Cited in Ex parte Lane, 6 Fed. 39.]

6. Where depositions from abroad are put in evidence in an extradition case, under the act of June 22, 1860 (12 Stat. 84), where the charge is forgery, and it appears by them that the forged papers were produced to and deposed to by the witnesses giving the depositions, it is not necessary that the forged papers should be produced here before the commissioner.

7. Sufficient identity of the offence charged in the complaint in this case with the offence set forth in the mandate of the president.

8. In order to render papers admissible in evidence under said act of 1860, it is not necessary that they should be papers on which a warrant of arrest was issued abroad.

9. What is a sufficient certificate of authentication of papers under said act of 1860.

10. Showing that forgery is punishable by imprisonment in the state prison by the laws of the canton of Berne, in Switzerland, in which canton the crime was committed, is showing that it is subject to infamous punishment in the country where it was committed, within the meaning of the said convention.

11. On an investigation before a commissioner, sitting in the state of New York, in an extradition case under said convention, the offender has a right to be examined as a witness on his own behalf.

[Cited in Re Dugan, Case No. 4,120.]

12. What is sufficient evidence to warrant a commitment with a view to extradition under said convention.

13. The commissioner was justified in not adjourning the case to allow time for the procuring by the prisoner of alleged evidence on his behalf from Switzerland.

14. The prisoner was discharged from custody under his final commitment by the commissioner, but was remanded to custody under the warrant of arrest, with a view to a new examination before the commissioner.

[Cited in Re Stupp, Case No. 13,563.]

[At law. Hearing upon writs of habeas corpus and certiorari.]

Francis R. Coudert, for prisoner.

Henry D. Lapaugh, for the Swiss government.

BLATCHFORD, District Judge. In this case a writ of habeas corpus and a writ of certiorari have been issued to review the proceedings which have taken place before

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

Kenneth G. White, Esquire, a United States commissioner, in reference to the application of the authorities of the Swiss Confederation for the extradition of the petitioner, François Farez. The proceedings which took place before the commissioner have been brought before me, and the questions involved have been fully discussed by the respective counsel.

It appears, by the record, that the proceedings went on before Commissioner White by consent, he not having been the commissioner who issued the warrant of arrest, and that, before the matter was proceeded with at all before Commissioner White, on the part of the prosecuting party, a motion was made before the said commissioner by the accused to dismiss the complaint and warrant on several grounds.

The first ground was, that the complaint was insufficient because it did not contain any thing more than an official statement on the part of the deponent or consul, &c., that the prisoner was charged with the crimes stated, and did not contain the express personal averment to that effect required by law. I do not think there is anything in that objection. Necessarily, in carrying out the provisions of extradition treaties, the complaint must, in many cases, be made by the representative of the foreign government; and all that can be required is, that it shall be sufficiently specific, clear and distinct in its averments, to enable the party accused to understand precisely what it is he is charged with. The complaint made in this case by the Swiss consul in his official capacity, he not pretending to any personal knowledge of the matters set forth in the complaint, contains all the necessary and proper averments, to enable the party accused to understand what offences he is charged with having committed; and there is no force in the objection that it does not contain anything but an official statement.

The second objection was, that it did not appear by the complaint by what magistrate abroad the warrant against the prisoner had been issued, so as to enable the commissioner to decide whether such magistrate had authority in the premises. The complaint states that a warrant of arrest against the prisoner, on account of the crimes specified in the complaint, has been issued by the proper and competent judicial authority for the purpose, in the jurisdiction of the Swiss Confederation. If the averment in question were a material averment, undoubtedly the one found in this complaint would be insufficient. But it is not a necessary preliminary step to an investigation, under an extradition treaty, that a warrant shall have been issued abroad. Therefore, the averment in question is surplusage.

The third objection was, that it did not appear by the warrant that the commissioner was appointed by the circuit court of the United States for the purpose of issuing the same. That objection was not urged on the hearing before me. The point involved in the objection is, that the warrant does not show that the commissioner was appointed by the circuit court to issue this particular warrant. That is true; but it is not necessary that it should so appear. It does appear, on the face of the warrant, that he was appointed to issue warrants in all cases of extradition falling under the provisions of the acts of congress of August 12, 1848, and June 22, 1860. The act of 1848 (9 Stat. 302) applies to any treaty or convention for extradition between the government of the United States and any foreign government, and gives the power to issue a warrant to any commissioner authorized so to do by any of the courts of the United States. This warrant avers that the commissioner who issues it is a commissioner appointed by the circuit court of the United States for the southern district of New York, and is a magistrate, and is a commissioner specially appointed to execute the act of August 12, 1848, and the act of June 22, 1860. That is sufficient.

The fourth objection was, that the com plaint did not allege that the crime in question was punishable by infamous punishment in the United States, and that it was necessary that the crimes should be so punishable to bring it under the treaty. The averment of the complaint in that respect is, that the crimes alleged are contrary to the laws of the Swiss Confederation, and are by such laws subject to infamous punishment, and to punishment by imprisonment in the state prison. There is no averment that they are subject to infamous punishment by the laws of the United States. The convention for extradition between the United States and Switzerland (11 Stat. 593, 594), says, that persons shall be delivered up according to the provisions of the convention, who shall be charged with the crimes therein specified, "when these crimes are subject to infamous punishment." My interpretation of this provision is, that when one of the specified crimes has been committed, and the extradition of the person who has committed it is demanded, it is sufficient if such crime is subject to infamous punishment in the country where it was committed, without its being necessary that it should be also subject to infamous punishment in the country from which the extradition of such person is demanded. The complaint is, therefore, sufficient in this respect, without regard to the question whether it is necessary to make any averment of the kind in the complaint, which, perhaps, may be doubtful.

The fifth objection was, that there was no evidence that the supreme power of the Swiss Confederation had made a demand on the government of the United States for the extradition of the prisoner. That objection of the prisoner was cured by the production afterwards of the mandate from the presi-

dent of the United States, which sufficiently showed that a demand for the extradition of the prisoner had been made by the only authority which the government of the United States is called upon to recognize as representing the Swiss Confederation.

The objections referred to were all of them properly overruled by the commissioner. He, also, properly overruled a motion, based upon those objections, to dismiss the proceedings. Then the case on the part of the prosecution was commenced, and the counsel for the prisoner claimed the right to cross-examine the complainant, before any other evidence should be offered on the part of the prosecution. That claim was overruled by the commissioner, and an exception to such ruling was taken. I see no objection whatever to that ruling. The prisoner had the right to call the Swiss consul, who was the complainant, as a witness, and examine him at any stage of the case, but he could not properly claim the right to cross-examine him before any other evidence was offered, when it appeared on the face of the complaint that the consul did not pretend to have any personal knowledge of the matters stated in the complaint.

Then the complaint, and the sworn depositions attached thereto, made before the judicial authorities in Switzerland, were offered in evidence before the commissioner. The counsel for the prisoner objected to their admission in evidence on several grounds: The first was, that the mandate issued from the state department had not been produced and put in evidence. The mandate was then produced by the counsel for the prosecution and given to the commissioner, and it is now before me. The return of the commissioner to the writ of certiorari does not state that the mandate was put in evidence, but, as the objection taken was that it had not been put in evidence, and as it was produced and given to the commissioner, it must be intended that it was put in evidence for all practical purposes. The record does not show that any objection was taken to the competency of the mandate as evidence, after it had so been given to the commissioner; and I regard the mandate as sufficient in form.

The second objection taken to the admissibility of the papers from Switzerland was, that, the charge being forgery, the alleged forged papers ought to be produced before any other evidence could be introduced. That objection is not well taken. The evident intention of congress, in the act of June 22, 1860 (12 Stat. 84), as was held by Mr. Justice Nelson, Judge Shipman and myself in the case of In re Henrich [Case No. 6,369], was to enlarge the field of evidence in these cases. As was stated by Judge Shipman in his opinion in that case, "the act of June 22, 1860, enlarges the class of documentary evidence which may be adduced in support of the charge of criminality." He further said, that, "in addition to the depositions upon which the foreign warrant of arrest may have issued, embraced in the second section of the act of August, 1848, it provides for the admission of any depositions, warrants or other papers, or copies of the same, which are so authenticated that the tribunal of the country where the offence was committed would receive them for the same purpose." It is, also, quite apparent, that where these depositions, authenticated in such a manner as to entitle them to be received for similar purposes by the tribunals of Switzerland, are received in evidence here, on the question of the criminality of the prisoner, as they are entitled to be, under the act of 1860, the judicial authorities here are bound to give to them the same effect as if the witnesses themselves were personally present testifying here. In the present case it appears, by the papers from Switzerland, that, on the occasion of the giving of testimony by the witnesses whose depositions were taken, copies of which are produced as evidence, the alleged forged instruments were produced and shown to them, and they examined them, and examined their signatures to them, and stated that they did not know such signatures. On this state of facts, it is quite clear, that there is nothing in the objection taken, because the depositions produced are the depositions of witnesses who had the alleged forged papers before them at the time of giving such depositions. The case now stands precisely as if the witnesses had been examined in person before the commissioner, and the alleged forged papers had been produced to them before him.

The third objection was, that the charge set forth in the complaint was subsequent in date to that set forth in the mandate of the president, and that, therefore, the charge before the commissioner was another and a different one from that set forth in such mandate. There is no force in this objection. The mandate was issued on the 9th of December, 1869. It alleges, that the political agent and consul general of Switzerland has made application to the government of the United States for the arrest of François Farez, charged with the crime of forgery and embezzlement, and alleged to be a fugitive from the justice of Switzerland, and believed to be within the jurisdiction of the United States. All that this language implies is, that, before the 9th of December, 1869, Farez had committed the crime of forgery and embezzlement in Switzerland, and had fled from there to the United States. The evidence that was placed before the president is something with which this court has nothing to do. This court cannot pass in any manner whatever, upon the discharge of the executive functions of the president. It is sufficient that the president, as is evidenced by a paper coming through the recognized authority of the government, the secretary of state, has come to the conclusion that satisfactory evidence has

been produced to him that Farez is charged with this crime. This court can in no manner examine into the question as to the evidence on which the president came to that conclusion. The papers put in evidence before the commissioner show that, although the complaints of the persons who made the charge before the magistrate in Switzerland were made on the 14th of December, 1869, and the magistrate proceeded to make further investigations in regard to the matter on the 21st of January, 1870, yet the offences to which all the papers relate were committed, if at all, when the forged instruments were passed away by Farez, namely, in August, 1869. Therefore, in no proper sense does the complaint set forth offences subsequent, in the date of their commission, to those set forth in the mandate. The complaint sets forth offences committed at sometime in August, 1869, and the mandate of the 9th of December, 1869, only refers to an offence previously committed. The mandate is indeed very general, but the complaint which was immediately put before the officer who issued the warrant is specific and clear, and there is nothing to show that the mandate and the complaint refer to different offences. The mandate authorizes an arrest for forgery, and the offence of forgery is the offence set forth in the complaint and the warrant of arrest.

The fourth objection to the documents was, that they were not properly legalized. That objection is very general. It does not state wherein the legalization was imperfect, but I have considered every question raised upon the legality of the papers.

It was held, in the case of In re Henrich, that papers of the character of those here presented are admissible under the act of 1860, when properly authenticated; and that that act intends to enlarge the class of documentary evidence which may be adduced in support of the charge of criminality, and, in addition to the depositions on which a foreign warrant of arrest may have issued, provides for the admission of any depositions, warrant, or other papers, or copies of the same, which are authenticated in a certain manner. Therefore, it is no objection to these papers, that they do not appear to have been papers on which a warrant of arrest was issued abroad against the prisoner. The only question is as to whether the papers are properly authenticated.

The act of 1860 provides, that the certificate of the principal diplomatic or consular officer of the United States, resident in Switzerland, shall be proof that any paper or other document, offered in evidence, is authenticated in the manner required by that act. The diplomatic or consular officer must state that the papers are authenticated, so as to entitle them to be received for similar purposes by the tribunals of Switzerland—that is, entitled to be received by the tribunals of Switzerland for similar purposes for which the papers mentioned in the second section of the act of 1848 are to be received, namely, for the purpose of being evidence of the criminality of the person apprehended.

The certificate, in this case, of the minister resident of the United States in Switzerland, Mr. Rublee, dated the 5th of February, 1870, certifies, that "the foregoing copies of the warrant, depositions and other papers are legally and properly authenticated, so as to entitle them to be received for similar purposes by the tribunals of the Swiss Confederation, and to be received by the said tribunals for the purposes and similar purposes mentioned in the second section of the act of congress entitled, 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders,' approved August 12th, 1848." This certificate follows the language of the act of 1860. The same objection that is made to this mode of certification was made to the certificate in the case of In re Henrich. The objection was there taken, that the certificate of the minister did not state explicitly that the paper was admissible by the tribunals of the foreign country in support of the charge of criminality, or as evidence of the criminality of the prisoner. From the report of that case it appears, that the certificate stated, as this one does, that the paper was receivable for "similar purposes." On that subject, the court, in that case, after referring to the act of 1848, as stating that the purposes for which the documentary evidence is made admissible are to support the charge of criminality, says, that the act of 1860 declares that the documentary evidence which it makes admissible is to be received for the same purposes mentioned in the second section of the act of 1848—that is, as evidence of the criminality of the prisoner. It further says: "The meaning of the certificate is perfectly obvious, when considered in reference to its object, and in connection with the certificates of the Prussian officials. The latter declare it to be a valid piece of evidence touching the charge of criminality, which it embraces and sets forth with particularity." In the present case, the certificate of the minister refers to the papers as being legally and properly authenticated, so as to entitle them to be received for similar purposes by the tribunals of the Swiss Confederation. The authentication which is thus referred to by the minister, is a certificate made by the chancellor of the Swiss Confederation. He certifies to the signature of the chief of the state chancery of the canton of Berne in Switzerland and to the authenticity of the seal of such state chancery. He adds: "I moreover certify, that Mr. Justin Brossard, president of the tribunal of the district of the Franches Montagnes, canton Berne, Switzerland, is, according to the conditions of the actual legislation of that canton of Switzerland, competent to institute penal examinations of the nature of the one which, con-

formably with the foregoing papers, was opened and carried on agreeably with the forms of legislation adopted in the canton Berne, against Francois Farez, blacksmith, burgher of Epiquerez, canton of Berne, and latterly established at Les Bois, as an innkeeper, in said canton of Berne, for forgery, and the uttering of papers forged by him; that, in particular, the aforesaid Mr. Justin Brossard, in his said capacity of president of the tribunal of the district of the Franches Montagnes, is legally authorized, and, in said district, the only judge competent, to admit complaints against crimes of the nature of those which Farez has committed, to issue warrants of arrest and to cause them to be executed, to hear witnesses, appoint experts and receive legal oaths; that, further, the interrogatories and opinions of experts here above reported by said Justin Brossard would be amply sufficient to warrant the arrest of Francois Ferez, and his committal for trial and judgment before the tribunals of the canton of Berne, if he were in Switzerland, for the crime of forgery and uttering false papers, of which he is accused." That is a certificate, in substance, that the interrogatories and opinions of experts contained in these papers, are receivable before the tribunals of the canton of Berne, in Switzerland, as evidence of the criminality of Ferez, because, it expressly states that they would be sufficient to warrant his arrest and committal for trial. If they are sufficient for that purpose, it necessarily follows that they must be receivable in evidence on the question of his criminality. Taking the certificate of the minister and the chancellor together, there is a substantial compliance with the act of 1860. And, even if the certificate of the chancellor is to be regarded as speaking only of the interrogatories and the opinions of experts as being sufficient to warrant the arrest of Farez and his committal for trial, and as not referring to the complaints and the depositions (which form part of the papers) of the parties whose names were forged, still the certificate of the minister, which covers, by name, "the warrant, depositions and other papers," covers the complaints, the depositions, the interrogatories, the opinions of the experts, and their report, and all the other documents. Therefore, on the certificate of the minister, by itself, there is a sufficient compliance with the act of 1860, irrespective of anything that is found in the certificate of the chancellor.

The further objection was taken, that each one of these papers ought to have been certified by itself. But I think that these papers form substantially one proceeding and one document. Each paper refers to the papers which precede it, and they are all as much connected together as are the papers which form the record in a suit in a court in the United States. All of them are proceedings before the same magistrate in the same tribunal and relate to the same transaction, and I think they are all properly certified as one paper, and were properly admitted in evidence.

The warrant of arrest issued against the prisoner in Switzerland, and translations of the foreign documents, and the statutes of the state of New York, were then put in evidence, without objection. It was then admitted by the counsel for the prisoner, that the prisoner was Francois Farez, and that he was a farrier and hotel keeper of Les Bois, Switzerland. The prosecution then rested, and the counsel for the prisoner moved to discharge the prisoner on several grounds. The first was, that it ought to be shown that the punishment for the offence charged was infamous, and that that had not been shown. I think that the proper construction of the 14th article of the convention with the Swiss Confederation is, that there can be no extradition of a person charged with any one of the crimes enumerated in that article, unless such crime is subject to infamous punishment in the country where the crime is committed. It was, therefore, necessary to show, in this case, that the crime with which Farez was charged, was subject to infamous punishment in Switzerland. That was, in my judgment, sufficiently shown. The offence charged was clearly, according to the papers, an offence against the laws of the canton of Berne, just as here it would have been an offence against the laws of the State of New York. The complaint and the warrant issued against the prisoner in Switzerland sufficiently show that the crimes charged are punishable there by imprisonment in the state prison, which must be held to be an infamous punishment.

The second ground was, that the charge before the commissioner was not the same as that set forth in the mandate. This objection has been already disposed of.

The third ground was, that the notes alleged to have been forged had not been produced. That objection, also, has been already passed upon.

The fourth ground was, that the evidence contained in the documents produced was not sufficient to warrant the holding of the accused. I think that it was sufficient.

The motion to discharge the prisoner was denied by the commissioner, in respect of each of the grounds stated. The counsel for the defence then called the prisoner as a witness, and the counsel for the prosecution objected to his being sworn and examined, on the ground that he was incompetent as a witness. The commissioner sustained the objection, and, in that respect, I think, he erred. He ought to have permitted the prisoner to be examined. The proceedings before a magistrate, in this district [in a case of extradition][2] must be conducted according to

[2] [From 2 Abb. (U. S.) 346.]

the laws of the state of New York, in the particulars in which such proceeedings are not specially regulated by a statute of the United States. By an act of the legislature of the state of New York, passed May 7th, 1869, (Sess. Laws N. Y. 1869, c. 678), it is provided, that, in all proceedings in the nature of criminal proceedings, in any and all courts, and before any and all officers and persons acting judicially, a person charged with the commission of a crime shall, at his own request, but not otherwise, be deemed a competent witness. In this case, the counsel for the defence called the prisoner himself as a witness. It must be intended, that this was done at the request of the prisoner, acting through his counsel. I think the prisoner had a right to make his statement as a witness. The 13th article of the convention in question provides, that the person charged with the crime shall be delivered up only when the fact of the commission of the crime shall be so established as to justify his apprehension and commitment for trial, if the crime had been committed in the country where such person shall be found. Applied to this case, this provision requires that, in order to warrant the commitment of the party for trial, the same evidence shall be required of the fact of the commission of the crime in Switzerland, as would be required of the fact of the commission of the like crime, if it had been committed here. The good sense of this provision requires, that the fact of the commission of the crime shall be established in such a manner and according to such forms of proceeding, as would be required if the crime had been committed in the country where the person shall be found. The word "country," necessarily, under our form of government, in carrying out the provisions of the convention, means the special political jurisdiction that has cognizance of the crime. In this case, the forms of proceeding that must be observed are those of the state of New York; and the prisoner must have an opportunity, if he desires, of making his own statement on oath. This view is confirmed by the analogous course of proceeding which exists in respect to the examination of offenders charged with crimes against the United States. It is provided by the 33d section of the judiciary act of 1789 [1 Stat. 73] that, for any crime or offence against the United States, the offender may, agreeably to the usual mode of process, that is, mode of procedure, against offenders in the state where such offender may be found, be arrested and imprisoned or bailed, as the case may be, for trial before the proper court of the United States.

It was urged, on the hearing, on the strength of an observation made by Mr. Justice Nelson, in the case of Ex parte Kaine [Case No. 7,597], that the evidence before commissioner must be so full as, in his judgment, if he were sitting on the final trial of the case, to warrant a conviction of the prisoner. While I always hesitate to differ with Mr. Justice Nelson in opinion, I am not prepared to adopt this view. It seems to me to be in conflict with the decision in the case of Aaron Burr. In that case Chief Justice Marshall sat as a committing magistrate, on the question as to whether Burr should be committed for trial for the crime of setting on foot an expedition against the territories of a nation at peace with the United States. The chief justice said (1 Burr's Tr. 11): "On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be, a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it." The chief justice acted upon that view, and committed Colonel Burr for trial. The convention, in the present case, says, that the fact of the commission of a crime must be so established as to justify the commitment of the accused for trial if the crime had been committed here. The question before Chief Justice Marshall in the case of Burr was merely the question whether Burr should be committed for trial, and the question as to the extent to which the fact of commission of the crime must be established. To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, be likely to work great injustice. The theory on which treaties for extradition are made is, that the place where a crime was committed is the proper place in which to try the person charged with having committed it; and nothing is required to warrant extradition, except that sufficient evidence of the fact of the commission of the crime shall be produced, to justify a commitment for trial for the crime. In acting under the 33d section of the judiciary act of 1789, in regard to offences against the United States, a committing magistrate acts on the principle, that, in substance, after an examination into the matter and a proper opportunity for the giving of testimony on both sides, there is reasonable ground to hold the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offence was committed, the country where the witnesses on both sides are presumptively to be found, but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties.

The record shows, that a motion was made

to the commissioner, on the part of the prisoner, to adjourn the further hearing of the case for a sufficient length of time to allow the prisoner to send for and obtain evidence from Switzerland, to be used on the examination, and that the prisoner be admitted to bail. This motion was denied, and properly, for no sufficient foundation had been laid for it at that time. Afterwards, the counsel for the prisoner renewed the motion for an adjournment for a sufficient length of time to allow the prisoner to send for and obtain evidence from Switzerland, and, in support of such motion, read the affidavits of the prisoner and of another person. The motion was denied, and properly; for the affidavits do not show that there is any evidence, either oral or documentary, on the part of the prisoner, that exists or is accessible or is likely to be obtained. No magistrate would, on such affidavits, have been justified in granting the motion. At the same time, if the prisoner desires to be examined himself, or to have any witnesses examined whom he shall produce, he ought to have the opportunity to examine them.

The counsel for the prisoner having stated that he had no other evidence to offer on the part of the defence, the commissioner held that the evidence produced was sufficient to sustain the charge made, and that the prisoner should stand committed to await the order of the proper executive authority of the United States. Under such commitment he is now held by the marshal.

I believe I have considered every question which has been raised in the case. I think that the only error which the commissioner made was the one which I have pointed out, of not permitting the prisoner to be examined as a witness for himself. Although, under the laws of the United States, a person on trial for a crime before a petit jury cannot be a witness for himself, yet the preliminary examination of an offender against the laws of the United States must be conducted according to the mode of procedure which prevails in the state where such offender is found; and a like rule is to be observed under a treaty of extradition like the one now under consideration.

The prisoner must be discharged from custody under the final commitment by the commissioner; but he is properly held under the warrant of arrest, and must be remanded to the custody of the marshal thereunder. The proper course will be to proceed with the examination before the commisioner de novo. Ordered accordingly.

NOTE [from 2 Abb. U. S. 346]. See In re Farez [Case No. 4,646], where this decision was reviewed by Woodruff, Circuit Judge, and approved; particularly upon the point that the petitioner was not, for the error in refusing to permit him to testify, entitled to an absolute discharge, but only to a discharge from the first commitment, leaving the examination to proceed anew.

See, also, other proceedings affecting the same petitioner [Case No. 4,644].

Case No. 4,646.

In re FAREZ.

[7 Blatchf. 491.] [1]

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

INTERNATIONAL EXTRADITION—MANDATE FROM U. S. GOVERNMENT—VALIDITY OF WARRANT—SETTING ASIDE COMMITMENT.

1. The decisions in the case of In re Farez [Case No. 4,645], as to the mandate of the government, the complaint before the commissioner, and the validity of the warrant issued by him, approved.

2. The warrant remains in force, notwithstanding the commitment of the prisoner under it was set aside for errors in the examination before the commissioner.

[Cited in Re Macdonnell, Cases Nos. 8,771 and 8,772; Re Stupp, Case No. 13,563.]

After the decision reported [Case No. 4,645], and while the commissioner was proceeding with the further examination of the prisoner [Francois] Farez, he made application, by petition, to Mr. Justice Nelson, for a writ of habeas corpus and for a writ of certiorari, which were refused. He then made the like application to the circuit judge, before whom it was insisted, on behalf of the prisoner, that the order made on the said decision, by which the commitment was reversed, entitled the prisoner to be discharged from further detention under the warrant of arrest, that such order, so far as it directed his further detention, or remanded him for further examination, was not warranted by law, and that his further detention was illegal.

[For a former decree of this court discharging the petitioner from the custody of the marshal, see Case No. 4,644.]

Francis R. Coudert, for prisoner.

Henry D. Lapaugh, for the Swiss government.

WOODRUFF, Circuit Judge (orally). (1.) I find before me, on this occasion, a proceeding lately had in this court, involving the precise questions now raised, and by the same petitioner, in which proceeding the court made an order which it deemed to be within its jurisdiction and according to law, on the facts then before it. The papers now produced are precisely those which were then before the court, and which were the basis of the order then made. No new facts whatever appear, save that the parties are proceeding in the execution of that order. I have also before me the additional circumstance, that the same petitions for a habeas corpus and for a writ of certiorari, to bring up these proceedings, which were presented to me, and under which the court is now acting, had, before they were brought to me, been presented to the associate justice of the supreme court assigned to this circuit, and that he refused to allow them.

I might content myself with saying that,

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

as nothing new has occurred to change the aspect of this proceeding since this court acted upon it and made such order as was then deemed proper, it is hardly fit that this same tribunal should review its own proceeding in the manner now attempted, because another judge is now sitting, even if the judge now present entertained a doubt as to the propriety of the order heretofore made. I think it would be a fitting exercise of my judicial functions to accept the judgment of the court heretofore given, and the opinion of Mr. Justice Nelson, as sufficient authority for remanding the prisoner.

(2.) I find, however, no reason for discharging this prisoner, as matter of my own independent judgment. Since the petitions were presented to me, I have made some examination of the questions which I supposed would arise and be presented for my consideration here, and I do not now find, on examination of the papers as produced, and hearing the argument, anything that I did not anticipate, or anything to change the impression which my previous examination produced.

1. The mandate issued from the department of state of the United States, shows that the government of the United States has been applied to, and the performance of the stipulations of the treaty between the United States and the Swiss confederation, of the 25th of November, 1850, by the extradition of the prisoner, charged with forgery, has been requested; and that the government of the United States has entertained the application and certified the fact, to the end that the evidence of the prisoner's criminality might be heard and examined, and, if found sufficient, might be certified, in order that a warrant for the surrender of the prisoner might be issued. So that we have not merely the sanction of the government, but, in a sense, the requirement of the government, and the requirement of the acts of congress, calling upon the officers who are charged with the duty of examining the proofs and of certifying them to the executive, to perform that duty in this case.

2. I find, also, that, pursuant to the acts of congress, a complaint has been made and presented to the commissioner, setting out the fact that our government has been so applied to, and has issued its mandate—a complaint charging the offence of forgery with great particularity, and declaring that it is punishable, under the laws of the Swiss confederacy, by infamous punishment, and not, (as seems to have been claimed on the argument,) resting that allegation upon the mere opinion of the complainant. but declaring what that punishment is, in point of fact, to wit, imprisonment in the state prison. This complaint must be regarded as sufficient. In every substantial particular it meets the requirements of our own laws. It seems to me, after a careful examination of it, that it does so with great fullness, if it does not even more than satisfy those requirements, as a complaint charging the prisoner with the offence of forgery.

3. That being so, there remained to the commissioner a plain duty—a duty which he could not avoid, namely, to issue his warrant bringing the prisoner before him, to the end that the proofs might be taken and examined, so that this government might be able to perform the stipulations of its treaty. Under that complaint, in compliance with the mandate of the government, and in obedience to the acts of congress, a warrant was issued by Commissioner Shields, who has full and express authority for that purpose, which the warrant recites, sufficiently for all the purposes of such a warrant, appropriately referring to the acts of congress in that behalf.

4. By virtue of that warrant the prisoner is now held, and the examination and taking of proofs are now pending before Commissioner White, before whom the prisoner has been brought for the taking of such proofs. I should set the acts of congress at naught, and nullify the treaty, if I were to discharge the prisoner from that proceeding, unless the error alleged to have been committed on a former examination is fatal, not only to the order declaring the crime sufficiently established, but to the entire proceeding; and this, I am clearly of opinion, is not so.

5. While the proceeding is to be conducted with a cautious regard to the rights of the prisoner, it is not required, either by any just construction of the acts of congress, by any needful application of the rules of the common law, or by any regard to the prisoner's rights, or his protection, that a rigid respect be paid to any special technical form. If, on the examination, error occurs, by the exclusion of testimony which was admissible, it may be that the proceeding in that respect can be reviewed on habeas corpus. Such was Judge Blatchford's opinion. But, if that be so, the error should not and does not extend beyond the immediate order which was based upon such examination, or rather the order depending upon that examination. The prisoner sought relief from an order based on an examination erroneously conducted, and he has obtained such relief. The relief goes back to the error, and places him in the same situation as if no error had occurred. The prisoner stands, therefore, under arrest as before, charged and held for examination, but not committed for surrender. I find nothing in the acts of congress, or in any rule of law with which I am familiar, which made it necessary that Judge Blatchford should go one step further than he did, if, indeed, it be true that a habeas corpus can be issued at all for any such purpose. While it is clear that there is, in fact, no order of any court, and no decision of any judge, that the prisoner is illegally held under the warrant which was issued upon the complaint in this case, so, on the other hand, under the

views which I have already expressed, I find no order of any court or judge declaring such arrest to be illegal or improper; and it is clear that there should be no such order.

The prisoner must be remanded.

Case No. 4,647.

In re FARISH.

[2 N. B. R. 168 (Quarto, 62).][1]

District Court, D. North Carolina. Sept. 30, 1868.

BANKRUPTCY — EXEMPTION UNDER STATE LAW — FAILURE TO COMPLY WITH REQUIREMENTS—SALE BY ASSIGNEE.

Where by the state law real property of a certain amount is exempted from levy and sale, provided the bankrupt complies with the requirements of the said law, and he fails so to comply, such property is not exempt from the operation of the bankrupt act [14 Stat. 517], and the assignee must sell the same for the benefit of creditors.

[Cited in Re Gainey, Case No. 5,181; Re Jackson, Id. 7,127.]

I, A. W. Shaffer, one of the registers in said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. John J. Jackson, who appeared for the bankrupt, and Mr. John Manning, Jr., who appeared for M. H. & John McCloor, executors of Evander McCloor, deceased, one of the creditors of said bankrupt, and agreed to the following statements of facts: On the 17th day of August, 1868, Wm. P. Gunter, the assignee of the aforesaid bankrupt, returned into this office a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property under the provisions of the fourteenth section of the bankrupt act, and after setting apart the personal property allowed by the state laws, and the personal property allowed by the bankrupt act, this last amount to the sum of four hundred and ninety-nine dollars and eighty cents, the assignee sets apart, to be retained by the bankrupt, a homestead of fifty acres of land, to include dwelling, outhouses, and spring, of the value of five hundred dollars, claiming the same under the act of the general assembly of North Carolina, passed at its session of 1858 and 1859, chapter thirty-eight, entitled an "Act to establish a freehold homestead," said bankrupt not having complied with the provisions of said act. It is insisted by the said M. H. & John McCloor, executors as aforesaid, that the bankrupt is not entitled to the benefit of the above recited "Act to establish a freehold homestead," not having complied with any of the provisions of said act, and that the said freehold homestead of fifty acres, valued at five hundred dollars, ought to be stricken from the schedule as exempted property filed by the assignee in this case, and the same be liable to the debts of the said bankrupt, and the said parties requested that the same should be certified to the judge for his opinion thereon.

Dated at Raleigh, N. C., on the 30th day of September, 1868.

A. W. Shaffer, Register.

BROOKS, District Judge. The question certified in this cause by Mr. Register Shaffer is: Is the bankrupt entitled to the homestead provided for by the act of assembly of North Carolina passed at the sessions of 1858–59, as an exemption—when the bankrupt has not filed his petition, nor had the property laid off to him according to the provisions of said act? I have no doubt as to the answer I must make to the question certified. The bankrupt is not entitled to the exemption of the homestead claimed by him. The language used in the fourteenth section of the bankrupt act is much more clear—less doubtful as to its meaning than that employed in many other sections of the act. The first part of this section, being the forty-sixth general clause of the act, makes a clear provision in regard to the character of the title which passes to the assignee in the bankrupt's property by the assignments, and as clearly provides that it shall embrace all his property, real and personal, except as thereinafter provided.

Now, do the exceptions provided for in the same section, forty-seventh general clause, embrace a homestead, under the circumstances of this case? I think it does not, and I am very clear of doubt in that opinion. It is by virtue of the latter part of the general clause last referred to, that this exemption is saved to the bankrupt, as he contends. That simply provides, that in addition to such exemptions as had been previously provided for, there should be exempted and excluded from the operations of the law, all such property as was exempted to a debtor, and not liable to execution, according to the provisions of the laws of the state, in force in 1864, in which the bankrupt resided. Now, if any creditor of this bankrupt, previous to his bankruptcy, had warranted or sued him, obtained his judgments and his executions, could not such creditor have levied upon and sold all the title of the defendants in such execution in the lands now claimed to be exempted as a homestead? If no other property could be found, would not the officer having such executions in hand have been bound to levy upon the homestead, and if he had failed to do so, would he not have been responsible to the creditor? I think he would. The act of 1858–59 provides that debtors may petition to court, have commissioners appointed, that such commissioners, after being sworn, shall examine the lands in which the reservation is desired, that they shall report, and that such report shall be recorded, and

[1] [Reprinted by permission.]

that the lands so valued and reported shall, after the proceedings have been registered, not be subject to be sold by creditors whose debts have been thereafter contracted. It follows, that for any debt contracted at any time prior to the conforming on the part of the debtor to all the requirements of that act, the homestead is not relieved, and if the debtor does not at any time comply with its provisions, as in this case, there can be no debts of his from which the homestead is relieved.

The objection taken by Mr. Jackson, counsel for the bankrupt, that the exceptions to the report of the assignee were not taken in apt time, cannot be sustained.

The question in this case is not whether too much or not enough has been assigned the bankrupt by the assignee, but whether, under the law, this property could be embraced in the list of exemptions, or whether the title of the same did not, by force of the law and the assignment, pass to the assignee, for the uses and purposes declared in the act. I think that all the title held by the bankrupt at the time of filing his petition did not pass to the assignee, and that the last named officer must now sell the same, and hold the proceeds to be distributed under the law.

FARLAN, The J. F. See Cases Nos. 7,313 and 7,314.

Case No. 4,648.

FARLEY v. NATIONAL STEAM-GAUGE CO.

[1 McA. Pat. Cas. 618.]

Circuit Court, District of Columbia. March 21, 1859.

PATENTS—PRIORITY OF INVENTION — KNOWLEDGE OF UTILITY—CONSTRUCTING MACHINE.

[1. The fact of invention, and not a knowledge of the degree of its utility, is the proper subject of inquiry; and although one omit to test the value of his invention, and fail to bring it into use, and himself remain ignorant of the extent of its value, yet, if the invention be the same with that of a subsequent inventor, he is entitled to a patent over the latter.]

[2. To constitute a perfected invention which will entitle the inventor to a patent, it is not necessary to construct a complete machine embodying it; but, if, having conceived a valuable idea, he has manifested it before the world in any form showing the completeness of the idea, so that one skilled in the particular art would be able to reproduce it, this is sufficient. Therefore, where the invention consisted in placing a new kind of spring in steam-gauges, the fact that the inventor did not combine it with an indicator was immaterial, such combination being a matter of every-day occurrence.]

[Appeal from the commissioner of patents.]

Interference.

Samuel Cooper, for appellant.

A. Pollok, for appellee.

MERRICK, Circuit Judge. Having carefully read over the immense mass of testimony in the cause, together with the voluminous arguments of the respective counsel, and also the carefully-prepared reports of the examiner in charge of the special branch of the office to which the claims in question appertain, I shall, without any extended analysis of the arguments or testimony, state the conclusions I have reached. The patent of Allen, issued on the 16th of October, 1857, (No. 18,526,) was for an improvement upon steam-gauges, consisting of the application of a volute spring, as set forth, which increases both in width and thickness from its centre to its circumference, in combination with a disc of rubber or other elastic material, substantially in the manner and for the purposes specified in detail in his specification. The application of Farley is for an improvement in steam-gauges, which consists of "the combination of a coiled spring, tapered regularly both in width and thickness from its periphery to its center, with a steam-tight, flexible diaphragm and an indicator, the whole constituting a pressure-gauge, operating substantially as set forth" in his specification. Forasmuch as steam pressure gauges, before the invention of either party, were well known, embracing the several parts of indicator, coupling box, elastic diaphragm of rubber or other material, and flat, round, coiled, and other-shaped springs, it is manifest that the only point of novelty in either application is the employment of the double-tapered spring in lieu of every other species of spring, and that by reason of its specially correct sensitiveness to the pressure of elastic fluids. It must also be remembered that the double-tapered spring was not the discovery of either of the contending parties, but was well known and used for other purposes, perhaps so nearly analogous that it may well be questioned whether its adaptation to a steam-pressure gauge was so far novel as to authorize a patent to anybody. But a patent having been granted to Allen, and not having any jurisdiction to vacate a patent once actually issued, upon an appeal like the present I shall not pursue that inquiry, but for the purposes of this case concede the patentability of his invention. It simply remains to inquire which of these two was the first to apply such a spring to steam-gauges.

Upon the evidence in the case, it is incontestible that Farley was the first to make a completed machine including double-tapered spring, elastic diaphragm, coupling box, and indicator, and that this was effected about the 4th of March, 1857. It is equally true from the testimony that Farley had not endeavored to apply this double-tapered spring to steam-gauges before the middle of February, 1857.

Although the testimony on the part of Allen is in many parts obscure, and its weight greatly impaired by his declarations and conduct subsequent to Farley's invention,

yet the credibility of his witnesses must not be overthrown by his mysterious declarations and conduct, however unenviable a light these may reflect upon himself. From the testimony of these witnesses, I have become satisfied that Allen had in 1855 and 1856 prepared double-tapered coiled springs, elastic diaphragms, and coupling boxes, substantially the same as Exhibits Nos. 1 and 2, for the purpose of applying them to steam-gauges, and had so declared his intention and explained his purpose to these witnesses. That he was not at that time, nor until after a careful examination of Farley's machines, aware of the full merits of the invention, is probable; but in the sense of the patent laws the fact of invention, and not a knowledge of the degree of its utility, is the proper subject of inquiry. If a party omit to test the value of his invention, and fail to bring it into use, and himself remain ignorant of the extent of its value, if it be the same with that of a subsequent discoverer, he is yet entitled to a patent over the latter. But the office seems to have supposed that the preparation of these double-tapered volute springs, combined with the elastic diaphragms and coupling boxes, and the declaration of the inventor that he purposed with them to make a steam-gauge which should supersede all those then in use, or, in his own phrase, "knock the other manufacturers of steam-gauges higher than a kite," was not enough, because he does not show that in fact he combined them with an indicator, so as to produce a complete machine, before the invention of Farley. It appears to me that in this position consists the error into which the office has fallen. To constitute a perfected invention which will entitle a party to a patent it is not necessary that he should have actually constructed the machine which is the subject of his invention. If, having conceived a valuable idea, he has manifested it before the world in any form which evidences the completeness of the idea, and which is sufficient, when communicated to others, to enable those skilled in the particular art to reproduce his invention, he has done enough to entitle himself to a patent, and this, whether such evidence consist of written description, drawing, models, or a complete machine. Now, it must be apparent that the steam-pressure gauge having an indicator being a well-known machine, and Allen himself, at the time referred to, having been engaged in the manufacture and sale of the article under several different modifications, when he placed the double-tapered volute spring, in combination with the elastic diaphragm, in a coupling box, fitted for union with an indicator, and declared that with this improvement he was about to construct a steam-pressure gauge which was superior to and would supersede all those in use, he had manifested enough of his invention to enable any one at all skilled in the particular manufacture to make a perfect steam-gauge according to his idea. There being no novelty in combining an indicator with a gauge, but that combination being of every-day occurrence, and the only novelty whatever in the matter, if any, being the substitution of the double-tapered volute spring for the common volute and all other forms of spring, the invention was complete whenever this substitution was plainly manifested, as was shown to have been done in this case. If I am correct in this view of the law, then the novelty of Farley's invention was anticipated by Allen, and the decision of the office must on that ground be reversed and a patent refused to H. W. Farley.

Should the conclusion I have reached be erroneous, I feel gratified to know that the party injured is not without further remedy, as the sixteenth section of the act of 1836 [5 Stat. 123], taken together with the tenth section of the act of 1839 [5 Stat. 354], open to him the courts of the circuit where the parties live; and there, where the witnesses are known, and every circumstance calculated to elicit the truth is accessible to both parties, ample justice may be obtained.

Now, therefore, I hereby certify to the honorable commissioner of patents that I have, after due notice to the parties, examined and considered the foregoing case, and that the decision of the office, awarding a patent as prayed, to Henry W. Farley, is reversed, and his application for a patent is rejected.

Case No. 4,649.

FARLOW v. LEA.

[2 Cin. Law Bul. 329.]

Circuit Court, N. D. Ohio. 1877.

COURTS—JURISDICTION—SUIT BY RECEIVER AS CITIZEN OF ANOTHER STATE.

A citizen of the state of Massachusetts, appointed a receiver of an Ohio corporation by the United States circuit court in the latter state, may maintain an action in said court for the recovery of the assets of such corporation wrongfully withheld.

On demurrer.

WELKER, District Judge. John H. Farlow, of the Cincinnati, Sandusky & Cleveland Railroad Company, sued the defendant, John D. Lea, to recover from him the tools, earnings and income collected by him as the earnings of the railroad company, whilst he wrongfully and unlawfully held possession of the same, from the 21st of April, 1867, to the 15th of June, 1877, amounting to some $80,000 which he refused to pay over to the plaintiff on demand. The plaintiff was appointed receiver on the 15th of May, 1877, in a certain cause pending on the chancery side of this court, wherein John C. Pratt and William T. Hart, as trustees of the bondholders, were complainants, and the Cincin-

nati, Sandusky & Cleveland Railroad Company et al. were defendants, and ordered to take possession of and run and manage said railroad, and fully authorized to collect assets of the railroad company, by suit or otherwise. The plaintiff is a citizen of the state of Massachusetts, and the defendant is a citizen of the state of Ohio. The railroad company is an Ohio corporation, and consequently a citizen of the state of Ohio.

The defendant files a demurrer, and alleges as grounds therefor: (1) That this court has no jurisdiction of this controversy between the parties; the railroad company and the defendant both being citizens of the state of Ohio. (2) That the real plaintiff is a citizen and corporation of the state of Ohio. (3) That this court has no jurisdiction of the subject manner of the suit.

The questions made by the demurrer are: (1) Is the plaintiff who describes himself receiver of the railroad company to be regarded as a citizen of the state in which the railroad is located, and under whose laws it was incorporated? (2) Being in fact a citizen of Massachusetts, and also acting as receiver under the orders of this court, he is not suing in his own name, but in his right as such officer of this court, and, being such citizen, has he a right to sue defendant in this court?

In deciding these questions it is necessary for us first to ascertain and define the character of a receiver, his status in reference to the property in his hands, as well as his relations to the court appointing him, and all the duties required of him. A receiver is appointed on the principle of justice for the benefit of all concerned. All kinds of property legally liable, or which in equity might be taken in execution, may be put in his possession, and in a case in equity his appointment is regarded as an equitable execution. He is, therefore, virtually a representative of the court, and of all the parties in interest in the litigation to which he is appointed. He is required to take possession of the property as directed, because it is deemed more in the interest of justice that he should do so than that the property should be in the possession of either of the parties to the litigation. He is not appointed for the benefit of either of the parties, but for the interest of all concerned. 1 Clem. Corp. Secur. 186; [Davis v. Gray] 16 Wall. [83 U. S.] 214. The complainants are the trustees of the holders of the bonds of the railroad company, and the defendant, the company itself which executed the bonds,—creditor and debtor both in court. The receiver, therefore, holds the property for the benefit of both parties. He is required to take possession of the property of the defendant, and manage and control it for the interest of both parties, and account to the court, whose officer he is for that purpose. [Milwaukee & M. R. Co. v. Soutter] 2 Wall. [69 U. S.] 519. He is also required to sue for and collect all assets belonging to the said railroad company, and to do so he is authorized to proceed to suit in the ordinary way. A receiver is an indifferent person between the parties to the cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it. He is not the agent or representative of either party to the action to the exclusion of the other, but is regarded as an officer of the court, exercising his functions in the interest of neither party, but for the common benefit of all parties in interest. He is regarded as the "hand of the court," as the executive officer of a court of chancery, in much the same sense as the marshal or sheriff is the executive officer of a court of law. See High, Rec. 2, 3.

It is claimed by the defendant that the real plaintiff is the railroad company, and not the receiver in his right as officer of this court. The above authorities defining the character of the receiver establish his legal status to be not the representative of the railroad company, nor that of the original complainant, but an indifferent person representing the court appointing him for the interests of all parties. How, then, can it be said the railroad company is the real plaintiff? It is true the railroad company may have earned the money sought to be recovered from the defendant, but the plaintiff claims the money in his right of receiver of the court, and not on behalf of the railroad company, and in that character sues. It follows from this that the plaintiff, having stated his non-citizenship, and amount of the claim being above $500, fully complies with the statutes of the United States in these jurisdictional averments, and gives this court jurisdiction on the ground of the citizenship of the plaintiff. In the case of Davis v. Gray, 16 Wall. [83 U. S.] 203, the supreme court entertained a suit by Gray, who was a citizen of the state of New York, appointed receiver by the circuit court of the district of Texas, and of a Texas railroad corporation, and in that respect precisely a case like this one. See, also, Rice v. Huston, 13 Wall. [80 U. S.] 67, where administrator had been appointed in Tennessee, and became a citizen of Kentucky, sues Rice, a citizen of Tennessee, in the circuit court of the United States for the district of Tennessee, and the suit was maintained. See, also, Susquehanna & W. V. R. & C. Co. v. Blatchford, 11 Wall. [78 U. S.] 172, and cases there cited.

It is also claimed by the plaintiff that, irrespective of citizenship, the receiver has a right to sue in this court, for the reason that this suit is merely auxiliary to the case in chancery to which he was appointed, and made necessary in order to carry out the object and purpose of his appointment as such receiver. It does not seem necessary to determine this claim, inasmuch as the jurisdiction is maintained on the ground of citizenship, but the claim is well founded in principle, and supported by authority and prac-

tice. [Michigan C. R. Co. v. Mineral Spring Manuf'g Co.] 16 Wall. [83 U. S.] 327. The demurrer is overruled.

Case No. 4,650.

In re FARMER et al.

Ex parte GRIFFIN.

[18 N. B. R. 207;[1] 10 Chi. Leg. News, 395.]

District Court, D. Massachusetts. Aug. 1, 1878.

BANKRUPTCY—ORAL EVIDENCE AS TO PARTNERSHIP PROPERTY IN A FACTORY.

Where there is an undoubted partnership, oral evidence is admissible to prove that the factory in which the partners carried on their business, and upon which they expended their money, was a part of the capital stock contributed by them; and where such evidence is clear and undisputed, and admitted to be true, the property in question is to be treated in bankruptcy as the property of the firm; if on no other ground, then clearly on that of part performance.

John P. Farmer, Edward H. Sherman, and Edward A. Beekman, co-partners, carried on the business of making and selling straw goods, under the firm name of Farmer, Sherman & Company, at Franklin, in Massachusetts, and of S. A. Beekman & Company, in New York. They became bankrupts in this district, and Henry M. Greene, the respondent, was duly appointed the assignee of their estate. They offered a composition to their creditors, which was accepted and recorded, and the respondent is engaged in carrying it into effect. The petitioner, Sarah Griffin, is a separate creditor of Sherman, and asks that the assignee be restrained from applying certain lands and buildings, being the factory in which the manufacture was carried on, and the lands connected therewith, to the payment of the joint debts, alleging that one undivided third thereof is the separate property of Sherman.

The case was submitted on agreed facts, by which it appeared: That Farmer and Sherman had formerly been partners in the same business with a person who retired and conveyed to them his interest in the factory. In January, 1876, an agreement of partnership was made between the persons now bankrupt, and articles were drawn up by which each partner was to contribute capital to the amount of twenty thousand dollars; how the contribution was to be made was not stated; but the oral agreement was that Farmer and Sherman were to put in the factory, and Beekman money. Beekman paid the money, and Farmer and Sherman conveyed to him one undivided third part of the land, but the deed did not say anything about the partnership. Beekman carried on the selling in New York, and Farmer and Sherman the manufacturing in Franklin. A small piece of land was added afterwards, and in the deed the parties were described as partners, though the habendum was to them as tenants in common. An account was opened in the firm books called "Factory," in which Farmer and Sherman were each credited with twenty thousand dollars, and to which account were carried several additions and improvements which were made to the machines and machinery, and paid for by the money of the firm. The books were kept in New York, and trial balances were drawn off from time to time by the bookkeeper, in which the balance of the factory account, and of the account of each partner, was shown. They were headed with the name of the firm, and were made out by a clerk duly authorized to make them. The joint property, without the factory, is not sufficient to pay the composition on the joint debts.

G. W. Wiggin, for petitioner.

The partners were seized in fee as tenants in common of this land. Goodwin v. Richardson, 11 Mass. 469; Burnside v. Merrick, 4 Metc. [Mass.] 537; Dyer v. Clark, 5 Metc. [Mass.] 562; Howard v. Priest, Id. 582; Whitman v. Boston & M. R. R., 3 Allen, 133; Wilcox v. Wilcox, 13 Allen, 252; Shearer v. Shearer, 98 Mass. 107. There can be no resulting or implied trust for the firm, because the money of the firm did not pay for the land. The conveyance to Beekman of one-third cannot affect the title to the remaining two-thirds. No trust can be raised by an oral agreement that the land should be partnership property. Gen. St. Mass. c. 100, § 19; Id. c. 105, § 1, pt. 4; Homer v. Homer, 107 Mass. 82; Smith v. Burnham [Case No. 13,019]; Parker v. Bowles, 57 N. H. 491; McCormick's Appeal, 57 Pa. St. 54; Lefevre's Appeal, 69 Pa. St. 122; Ebbert's Appeal, 70 Pa. St. 79. A resulting trust can only arise from the payment of the purchase money, and it must be contemporaneous with the purchase; lands already held by the supposed trustee cannot be charged with such a trust. Botsford v. Burr, 2 Johns. Ch. 405; Capen v. Richardson, 7 Gray, 364; Kendall v. Mann, 11 Allen, 15; Titcomb v. Morrill, 10 Allen, 15; Richards v. Manson, 101 Mass. 482; Barnard v. Jewett, 97 Mass. 87; Purcell v. Miner, 4 Wall. [71 U. S.] 513; Thompson v. Gould, 20 Pick. 134; Cook v. Doggett, 2 Allen, 439; Glass v. Hulbert, 102 Mass. 24; Blodgett v. Hildreth, 103 Mass. 484; Rogers v. Murray, 3 Paige, 390; Forsyth v. Clark, 3 Wend. 637.

J. D. Ball, for assignee.

The trial balances, and the entries in the books, are a sufficient note or memorandum to satisfy the statute of frauds. Hawkins v. Chace, 19 Pick. 502; Penniman v. Hartshorn, 13 Mass. 87; Salmon Falls Co. v. Goddard, 14 How. [55 U. S.] 446; Sanborn v. Flagler, 9 Allen, 474; Coddington v. Goddard, 16 Gray, 436; Morton v. Dean, 13 Metc.

[1] [Reprinted from 18 N. B. R. 207, by permission.]

[Mass.] 385; Gill v. Bicknell, 2 Cush. 355; Fessenden v. Mussey, 11 Cush. 127; Lerned v. Wannemacher, 9 Allen, 412; Tufts v. Plymouth Gold Min. Co., 14 Allen, 407; Johnson v. Trinity Church, 11 Allen, 123; Chase v. Lowell, 7 Gray, 33; Rhoades v. Castner, 12 Allen, 130; Browne, St. Frauds, 358. A partnership in lands is not within the statute of frauds. Land bought or used for the purposes of a partnership is, in equity, the property of the firm. Colly. Partn. § 148; 1 Lindl. Partn. 687; Story, Partn. § 93; Peck v. Fisher, 7 Cush. 386; Fall River Whaling Co. v. Borden, 10 Cush. 458; Richards v. Manson, 101 Mass. 482; Marrett v. Murphy [Case No. 9,103]; Hiscock v. Jaycox [Id. 6,531]; Johnson v. Rogers [Id. 7,408]; Thrall v. Crampton [Id. 14,008]; Pierce v. Trigg, 10 Leigh, 406; Lyman v. Lyman [Case No. 8,628]; Collumb v. Reed, 24 N. Y. 505; Tillinghast v. Champlin, 4 R. I. 173; Hoxie v. Carr [Case No. 6,802]; Philips v. Crammond [Id. 11,092]; Piatt v. Oliver [Id. 11,116]; McAlister v. Montgomery, 3 Hayw. [Tenn.] 94; Hunt v. Benson, 2 Humph. 459; Richardson v. Wyatt, 2 Desaus. Eq. 471; Greene v. Greene, 1 Ohio, 535; Sumner v. Hampson, 8 Ohio, 328; Ludlow v. Cooper, 4 Ohio St. 1; Buck v. Winn, 11 B. Mon. 320; Galbraith v. Gedge, 16 B. Mon. 631; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Hopkinson v. Dumas, 42 N. H. 296; Kramer v. Arthurs, 7 Barr [Pa. St.] 165; Dale v. Hamilton, 5 Hare, 369; Darby v. Darby, 3 Drew. 495; Forster v. Hale, 3 Ves. 696, 5 Ves. 308; Lake v. Craddock, 3 P. Wms. 158; Essex v. Essex, 20 Beav. 442.

LOWELL, District Judge. It is a familiar principle that real estate which is the property of a firm must, in equity, be applied to the payment of the debts of the firm, however the legal title may stand. The right to require this application subsists in each partner, or in his representatives, until the joint affairs are settled, and is superior to the rights of the widow, or heirs, or separate creditors of the several partners. Assignees in bankruptcy of the partners, or any of them, are bound by this rule, which indeed is, to a certain extent, expressed in the bankrupt act [of 1867 (14 Stat. 517)]. The petitioner admits all this, but contends that, under the statute of frauds of this commonwealth, there is no competent evidence that the factory of the bankrupts was co-partnership property, excepting that small part of the land which was bought after this firm was formed. He cites two provisions of the statute: One, that no action shall be brought upon a contract for the sale of land, unless the contract, or some note or memorandum thereof, is in writing, may be laid out of the case, because no question arises here concerning any such contract. The other provision is, that no trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or by his attorney. Gen. St. c. 180, § 19.

Whether the statute of frauds has any application to partnership affairs, has been seriously doubted. In 1800, the lord chancellor, in a case much cited since, said that a partnership may be proved by any appropriate evidence, and, when proved, the premises necessary for the purposes of the partnership are, by operation of law, held for the purposes of that partnership. Forster v. Hale, 5 Ves. 308. Again, in another celebrated case, an eminent vice-chancellor established a trust for the benefit of a plaintiff against the heirs of one who had bought lands upon an oral agreement to share profit and loss with the plaintiff as a partner. Dale v. Hamilton, 5 Hare, 369. These decisions have been mentioned with approval, or followed in several cases in the United States. Fall River Whaling Co. v. Borden, 10 Cush. 458; Frederick v. Cooper, 3 Iowa, 171; York v. Clemens, 41 Iowa, 95; Essex v. Essex, 20 Beav. 442; Chester v. Dickerson, 54 N. Y. 1.

It is to be observed, however, that when there has been no actual partnership business carried on by the parties, so that there is no part performance, and the plaintiff is seeking to obtain an interest in lands simply by oral evidence of an agreement on the part of the only person (the defendant) who has bought and paid for the lands, or had aught to do with them, that he will share profit and loss with the plaintiff, the case differs from any other case of trust only in the language attributed to the parties in the supposed oral agreement about the lands themselves. The distinction between an agreement to hold as a partner, and one to hold as joint owner, is certainly somewhat nice. This particular point is considered by some late writers not to be, as yet, definitively established. They point out that Dale v. Hamilton was affirmed by the lord chancellor on a different ground (2 Phil. Ch. 266), and that its authority is shaken by Caddick v. Skidmore, 2 De Gex & J. 52.

Several important decisions in this country are opposed to Dale v. Hamilton. See Story, Partn. § 93, and Mr. Gray's note in 6th Ed.; Lindl. Partn. (3d. Ed.) 90, 91; Smith v. Burnham [supra]; Henderson v. Hudson, 1 Munf. 510; Bird v. Morrison, 12 Wis. 138. Smith v. Burnham, ubi supra, is an authority here. Unless the courts of the state have construed their statute differently from that decision, or unless this case can be distinguished from that, I am inclined to think that both points might be maintained. No simple question of trust arises here. Where, by distinct and unimpeached evidence a partnership has been proved to exist, and to have carried on business for months or years, the question whether certain real es-

tate standing in the name of one or more of the partners is partnership property, has not usually been treated as a question arising under the statute of frauds.

The evidence has all been examined with a view to discover the intention of the parties. No doubt in a large number of the cases the land has been bought with the joint funds, which might raise a resulting trust. And the petitioner argues that it is only in such cases that the principle has been applied. But the doctrine of resulting trusts is not adequate to explain those decisions. If partners buy land with the joint funds, and cause them to be conveyed to themselves in the same proportions in which they are interested in the capital, the presumption is quite as strong that they intended a division of capital, as that they had merely changed an investment.

Everything depends on the circumstances of each case, or the actual agreement of the parties, if there was one, and Mr. Lindley says that no satisfactory distinction with reference to the question of conversion can be drawn between land bought with partnership moneys and land acquired in any other way, provided such land is in the proper sense of the expression an asset of the partnership (3d Ed. p. 690); and again: "Property which has been used and treated as partnership property cannot be presumed to belong to one partner simply because he paid for it, for the presumption in such a case is rather that the property in question was his contribution to the common stock" (page 665). In Bird v. Morrison, 12 Wis. 138, which agrees with the decision in Smith v. Burnham [supra], the learned judge who delivered the opinion of the court said: "Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the court will imply its partnership character, and such trusts as result therefrom." Per Paine, J., p. 155.

In the present case the bankrupts held this land as tenants in common; there is no such tenancy known in law or equity as co-partnership; but partners in equity hold as tenants in common. What occasion is there then for a declaration of trust? Though the partners may be called, in a certain sense, trustees or quasi trustees of the joint stock—that is, though they are bound to apply that stock to the payment of the joint debts, this agency or trust results or is implied from the connection between the parties, and is declared by the fact that they are partners.

The exact question is, whether one of the tenants in common has a lien on the share of his co-tenants for the payment of the joint debts and other dues arising out of the business; and the statute does not say that no lien shall arise or be operative between co-tenants unless declared in writing. See Lead. Cas. Eq. (5th Am. Ed.) 496. In this connection it is worthy of remark that the statute of frauds of this commonwealth in the next section to this, which I have already quoted, provides that no trust in lands, whether expressed in writing or implied by law, shall prevent a creditor having no notice of the trust from attaching or seizing the lands, as if there were no trust. Gen. St. c. 100, § 20. Now in several early cases, which were very carefully argued and considered, and in which the precise question of an equitable lien of this sort between partners who were tenants in common was decided in favor of the joint creditors, and against separate creditors who had levied, or who in bankruptcy stood like execution creditors, no notice was proved or even alluded to as having been given to the separate creditors, which shows that the counsel and the court were of opinion that the equity in question, though they sometimes speak of it as a trust, was not such in strictness of law, because if it were, then, whether it avoided the statute because it was a resulting or implied trust, or came within it as a direct trust, in either case it would not have availed against the separate creditors without notice to them. See Burnside v. Merrick, 4 Metc. [Mass.] 537; Dyer v. Clark, 5 Metc. [Mass.] 562; Howard v. Priest, Id. 582; Peck v. Fisher, 7 Cush. 386; Fall River Whaling Co. v. Borden, 10 Cush. 458. These cases were decided on general grounds of equity, taking for granted that the statute of frauds was out of the question.

However, I do not deem it essential to ascertain whether this equity is a trust concerning lands, because, if it is so, the facts disclose such a part performance as would, in equity, require the court to admit the oral evidence. The doctrine of part performance stands upon the fraud or hardship which would be operated by leaving the parties to an action at law for damage or the recovery of money, when their position has been so far changed that the judgment in such an action would furnish no adequate relief. See the terse statement of Grier, J., in Purcell v. Miner, 4 Wall. [71 U. S.] 513, 518. Where partners have gone on in business and contracted debts on the faith of a contribution of land by some of them, and of money by others, it would be the greatest hardship to leave the land liable to the separate debts of the several partners, and thus to leave the partner who furnished money to bear so much more than his just share of the deficiency.

This is very forcibly shown by Shaw, C. J., in his judgment in the leading case of Dyer v. Clark, 5 Metc. [Mass.] 562, and though that happened to be a case where the joint funds were used in the purchase, the argument is as well applicable to the point

of part performance. And when the land, as in this case, was used for the manufacture of the goods, there cannot be any question that notice to all the world would be presumed. It was on this ground of fraud or hardship that Judge Ware decided in favor of the joint creditors. In re Warren [Case No. 17,191]. He distinguished that case from Smith v. Burnham [supra], upon the rights of creditors as being beyond those of the partners. This is not a valid distinction. The rights of the creditors depend upon those of the partners, but the fundamental idea was sound. It would be a fraud, as he said, on the joint creditors, but it would be so because it would be one upon the partners themselves, which was not the case in Smith v. Burnham.

Whatever the argument may be, it is certain that the authorities are entirely decisive, that when there is an undoubted partnership, oral evidence may be received to prove what lands are the property of the partnership. I leave out all those very numerous cases in which the money of the partnership has been used in the purchase; although, as I have already observed, they cannot be fully explained on the theory of resulting trusts. See, in addition to cases above cited, Lake v. Craddock, 3 P. Wms. 158, and the note to that case in 1 Lead. Cas. Eq. (4th Am. Ed.) 265; Fereday v. Wightwick, 1 Russ. & M. 45; Hanff v. Howard, 3 Jones, Eq. 440; Meily v. Wood, 71 Pa. St. 488; 1 Am. Lead. Cas. (5th Ed.) 496; notes to Dyer v. Dyer; Jeffereys v. Small, 1 Vern. 217; Jackson v. Jackson, 9 Ves. 591; Crawshay v. Maule, 1 Swanst. Ch. 495.

One further remark may be added. The partners have never denied the trust, if trust it be. The assignee succeeds to their rights and duties, and if he finds property of theirs clothed with a trust which no one has ever disputed, it is by no means certain that the bankrupt law would forbid a declaration of the trust to be made after the beginning of the bankruptcy. It was held in one case in England, that a declaration of trust made by a bankrupt after he had committed an act of bankruptcy, that is to say, after the time to which his assignee's title would relate, corresponding to the petition in bankruptcy under our law, was valid if it could be clearly proved, though not by written evidence sufficient to satisfy the statute of frauds, that such a trust in fact existed. The reasoning was, that though a bankrupt cannot deal with his property or create new rights or obligations (excepting where he does it with innocent person having no notice), yet that a mere declaration to conform to the fact, and do actual justice, was not a dealing or conveyance which a court of equity could declare to be unauthorized. Gardner v. Rowe, 2 Sim. & S. 346.

I prefer to rest my decision upon the proposition that in a case of this kind oral evidence may be admitted to prove that the factory in which the partners carried on their business, and upon which they expended their money, was a part of the capital stock contributed by them, and that the oral evidence being clear and undisputed, and admitted to be true, the property in question is to be treated in bankruptcy as the property of the firm; if on no other ground, then clearly on that of part performance, and it must be applied accordingly.

Petition dismissed.

Case No. 4,651.

FARMER v. CALVERT LITHOGRAPHING, ETC., CO.

[1 Flip. 228; 5 Am. Law T. Rep. 168; 5 Chi. Leg. News, 1; 7 Am. Law Rev. 365; 4 Leg. Gaz. 333.] [1]

Circuit Court, E. D. Michigan. April 8, 1872.

PRELIMINARY INJUNCTION — AFFIDAVITS IN REBUTTAL—PRIOR ACTION AT LAW NOT NECESSARY —WAIVER OF PENALTIES — INFORMATION AND BELIEF—MAPS—TOWNSHIP BOUNDARIES.

1. Where this has been issued by consent, a motion to dissolve must be considered solely upon the questions raised by the answer.

2. On motion to dissolve, the complainant cannot read affidavits in rebuttal, in support of his title. As to that he must depend upon the affidavits filed with his bill.

3. On the question of infringement he may read affidavits in rebuttal.

4. The right to the patent and the infringement may be set up and adjudicated in a court of equity without a prior trial at law.

5. It is not a good ground of demurrer that the bill does not waive the forfeitures and penalties prescribed for the infringement.

6. Denials or allegations upon information and belief are not sufficient to dissolve an injunction.

7. New editions of maps are included in the copyright laws of congress.

8. Taking the boundaries of townships from another map without going to the common source of information is an infringement.

In equity. The motion was to dissolve an injunction—preliminary—issued upon a bill, which was filed [by Silas Farmer] to restrain defendant [the Calvert Lithographing, Engraving, & Map Publishing Company] from an infringement upon certain copyrights, as alleged, of maps of the states of Michigan and Wisconsin, and for an account. Answer having been filed, motion was made upon that and accompanying affidavits.

G. V. N. Lothrop and Robinson & Brooks, for complainant.

A. Russell, for defendant.

LONGYEAR, District Judge. The preliminary injunction in this case having been issued upon the bill of complaint, by consent, the court, in the absence of any pretense of fraud or mistake in the obtaining or giving of the consent, will not, upon the motion to

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 7 Am. Law Rev. 365, contains only a partial report.]

dissolve, consider any questions arising upon the bill alone, or the complainant's right to bring the suit; the parties, the subject matter, and the writ, appearing as they do to be within the jurisdiction of the court. 16 Stat. 215, § 106. The motion seems in fact to be based upon this idea, it being founded expressly upon the answer and accompanying affidavit. The complainant may, as was argued, have inserted in his bill prayers for specific relief to which he is not entitled in a court of equity. But with that we have nothing to do here, although it is a proper matter for consideration upon the final hearing. The only question now is, whether the injunction shall be continued until final hearing and decree. The right of the complainant to have the injunction issue upon the case as made by his bill, having been, as we have seen, conceded, the motion to dissolve must be considered solely upon the questions raised by the answer.

On the hearing of the motion, complainant's counsel offered to read affidavits for the purpose of rebutting certain averments of the answer as to complainant's title. Defendant's counsel objected. The court allowed the affidavits to be read subject to the objection, to be finally received or rejected as the court should decide.

The question of the reception of affidavits on motion for, or to dissolve, an injunction in copyright cases, for the purpose of rebutting averments in the answer as to complainant's title, has undergone much discussion in the courts. In England, it seems to be well settled that such affidavits will not be received, the complainant being left to depend upon the affidavits filed with his bill so far as the question of title is concerned. Norway v. Rowe, 19 Ves. 144, 151, 156, and cases there cited; Platt v. Button, Id. 447. In the United States, although a practice seems to have grown up in some localities to receive such affidavits, yet whenever the question has been raised and adjudicated the decisions of the courts with scarcely an exception, seem to have been quite to the contrary, and in conformity with the English practice.

Counsel referred the court to numerous authorities on the question of allowing complainant to read affidavits in rebuttal of the answer in injunction cases generally (see cases cited in Hil. Inj. at page 107), but they failed to refer the court to any authority or adjudicated case upon this particular question of allowing such affidavits to be read after answer, in support of complainant's title, with perhaps the single exception of the case of Poor v. Carleton [Case No. 11,272], which upon the face of it appears to be exceptional. With the limited time I have had to spare amidst the discharge of other duties, I have been able to find but few decisions in this country upon the point.

Justice Grier, in 1850, in a patent case (Parker v. Sears [Case No. 10,748]), held that the United States circuit courts were bound to follow the settled rules of practice of the English courts of equity in this respect, (there being no written rule of court to the contrary,) and refused to allow such affidavits to be read. In 1868, in another case (Goodyear v. Mullee [Id. 5,579]), the same learned judge allowed affidavits by way of rebuttal to be read, but they in no manner related to the question of title.

In the case of U. S. v. Parrott [Case No. 15,998], the United States circuit court for California, McAllister, J., after an able review and full consideration of the authorities, English and American, including the case of Poor v. Carleton [supra], held that affidavits as to the title after answer could not be read on a motion for injunction to stay waste.

In Brooks v. Bicknell [Case No. 1,944], Justice McLean quotes approvingly the language of the court in Morphett v. Jones, 19 Ves. 350, where it is said: "There are many cases of injunction where you may reply to the answer by affidavits, not on the question of title, but on mere facts, as in the instance of waste. On such questions of fact, though not on the title, affidavits in reply to the answer may be read." The learned judge then quotes from 1 Smith, Ch. Pr., where it is said: "If the plaintiff, instead of applying for the injunction upon affidavit, waits until the defendant has answered, he must rest his case upon the disclosures made by the answer, and he is not entitled, either for the purpose of obtaining or continuing an injunction, to read affidavits in support of his motion in opposition to the answer," and says: "But cases of waste, or of mischief analogous to waste, are an exception to this rule where the affidavits do not refer to title." That was a patent case, and, as the affidavits did not refer to title, they were allowed to be read.

The current of authority seems to be all one way, and opposed to the reception of the affidavits. So far, therefore, as the affidavits offered refer to complainant's title, they must be rejected. They are received, however, and will be used so far as they bear upon the question of infringement. The motion to dissolve the injunction must, therefore, be decided upon the answer and accompanying affidavit, so far as questions relating to complainant's title are concerned.

There is a demurrer, by way of answer, to the bill as an injunction bill, which must be first disposed of. It is claimed that complainant is not entitled to an injunction for the reason that it does not appear by the bill that he has settled his right at law, and obtained a verdict of a jury in his favor touching the alleged infringement. Such, no doubt, was formerly the law, and now, in some cases, the court will, no doubt, require that to be done. But it is now well settled that both the right and the infringement may be set up and adjudicated in a court of

equity without having been first determined at law. Phil. Pat. cc. 20–24; Hil. Inj. 391, 392; 2 Story, Eq. Jur. pp. 246–248; Stevens v. Gladding, 17 How. [58 U. S.] 447; Motte v. Bennett [Case No. 9,884]; Ogle v. Ege [Id. 10,462]. Suffice it to say, that under the authorities, and aside from the fact that the injunction was issued by consent, the present case is one in which the court will not send the parties to a court of law before proceeding to adjudicate upon the plaintiff's right to an injunction.

Another ground of demurrer is that the bill does not waive the forfeiture of the printed copies of defendant's map, and the penalty of one dollar for each copy, as provided by statute in such cases, but on the contrary prays that such forfeiture and penalty may be inflicted in addition to the relief by injunction and an accounting for profits. The proposition here is, that equity will not grant its assistance by way of injunction and an accounting as to the profits, unless complainant, as a condition of his prayer for such assistance, shall expressly waive the forfeitures and penalty. No reason, based upon principle, is advanced in support of the proposition, neither can I see that any exists. It is claimed, however, that the proposition is supported by authority, and several English cases are cited. Some of the cases by their looseness of expression and generality of statement would seem to do so, especially the case of Colburn v. Simms, 2 Hare, 554. But it will be found upon scrutiny that the cases cited are all based upon the decision in the leading case upon this question of Brand v. Cumming, cited in 22 Vin. Abr. 315, and that the rule deducible from them all goes to the following extent, and no further, viz.: That equity will not compel a discovery by a defendant when such discovery would subject him to forfeitures or penalties, unless such forfeitures or penalties are expressly waived by the bill; provided, the defendant takes the objection by demurrer to such discovery, or declines in his answer to make such discovery on that ground. Brand v. Cumming, cited in 22 Vin. Abr. 315; Williams v. Farrington, 3 Brown, Ch. 38; Mason v. Murray [2 Dick. 536], cited in last case, at page 40.

The defendant cannot submit to answer as to the discovery prayed, and at the same time insist upon the objection. In this case he has so submitted to answer. The objection, therefore, comes too late.

The further objection that the statutory forfeitures and penalty can be enforced only at law does not concern the present motion, although it will be a proper matter for consideration in another stage of the case.

This brings us directly to the merits of the question upon the bill and answer. The question is, as has been already remarked, does the answer so far disprove the case made by the bill as to entitle the defendant to a dissolution of the injunction?

1st—As to complainant's title. This is set up in the bill with great particularity, and an undisturbed use and enjoyment of the same for a long period of time by complainant and those under whom he claims, is alleged. The answer in the first paragraph ignores complainant's proprietorship of the copyrights of the twelve maps, as set up in the bill, and proceeds as follows: "But defendant says, as hereinafter particularly alleged, that complainant and his transferrers were never of right entitled to any such copyrights, and that the same, if existing, are null and void." What is referred to "as hereinafter particularly alleged," is found in paragraphs 50 and 51 of the answer, and consists in allegations wholly on information and belief, to the effect that complainant's maps were not themselves original, but were copies or piracies of the work and labors of other persons. The only other allegation or denial contained in the answer affecting complainant's title or right is the 16th paragraph, and is wholly on information and belief.

It is seen, therefore, that all the allegations and denials of the answer in any manner affecting complainant's title or right are founded on information and belief merely; and none of them are supported by affidavits of persons having any knowledge of the facts thus alleged. Denials and allegations merely on information and belief are not sufficient to entitle the defendant to a dissolution of an injunction. They must be upon personal knowledge or supported by the affidavit of some person or persons having personal knowledge. Poor v. Carleton [Case No. 11,272]; Nelson v. Robinson [Id. 10,114]; U. S. v. Samperyac [Id. 16,216a]; Conover v. Mers [Id. 3,123]. For the purposes of this motion, therefore, the title of complainant must stand as set up in his bill.

2d—As to infringement. The bill sets up copyrights of twelve different maps, and contains a general charge of infringement of them all, and especially of the first six; and also special charges of infringement as to certain of the maps, particularly the first, second and fourth. The map first set up, and with which we have principally to do so far as this motion is concerned, is a map of Wisconsin, embracing parts of Illinois, Michigan and Minnesota, alleged to have been made and published in 1865, and to have been entered for copyright May 11th of the same year. Of this map, it is alleged in an amendment to the bill, editions were published and dated in the years 1866 and 1867. Copies of the said alleged edition of 1867, and of two others of complainant's maps, and of the defendant's map, alleged to be an infringement of the same, are filed with the bill as exhibits.

The answer, in general terms, denies the general charge, and also the special charges of infringement, but admits the taking of the boundaries of all the towns in Wisconsin, containing more than thirty-six square miles, from the complainant's map of 1867.

In addition to what is stated above, the bill contains voluminous references to instances of similarity and identity, gathered from examinations and comparisons, such as errors in complainant's maps, peculiarities of spelling and location of names, etc., as evidence of infringement; and the answer contains equally voluminous statements by way of explanation and avoidance of the same. These are merely matters of evidence. They were as fully before the court by means of the maps made exhibits as they could be by any statements in the bill, and, being made matters of evidence, the statement of them in the bill was not only unnecessary, but in violation of a well settled rule of equity pleading. See Story, Eq. Pl. §§ 28, 252, note 1 to section 265a, and section 266. When it is necessary to bring such matters before the court for the purpose of moving for, or of sustaining an injunction, or it is deemed important to call the attention of the court to them in some authentic form, it should be done by affidavit and not by allegations in the bill.

I allude to this subject in this connection, not so much because it is to materially affect the question now under consideration (the defendant having submitted to answer), but to call attention to the pernicious and growing practice of stuffing and overloading pleadings in equity with superfluous allegations and redundant and unnecessary statements; and also, as it is expressed in one of the ordinances of the English court of chancery, "to the end, the ancient brevity and succinctness of bills and other pleadings may be restored and observed."

In order to avoid the effect of the admission in the answer of the taking by defendant in the preparation of its map of certain township boundaries from complainant's map of 1867, it is contended on behalf of defendant that the said map of 1867 is not covered by the copyright of the map of 1865, as being a new edition thereof, because: 1—The copyright laws of the United States contemplate and cover new editions of books only, and not of maps. Section 4 of the supplemental act of March 3, 1865 (13 Stat. 540), is referred to in support of this proposition. But that section is definitive merely of the word "book" as used in the act, and in no manner affects maps or any subject of copyright other than books, affirmatively or negatively. It will be seen, however, by an examination of section 5 of the act of February 3, 1831 (4 Stat. 437), in force at the time, and section 97 of the act of July 8, 1870 (16 Stat. 214), now in force, that subsequent editions of maps, as well as books, were then, and continue to be, clearly contemplated. 2—It is also contended that the map of 1867 is not entitled to the protection of the copyright of the map of 1865 as a new edition, because it differs from the latter materially in respect to its title, and also in numerous additions and alterations. The title of the map of 1865, as set up in the bill, and that of the map of 1867, as printed upon its face, are identical, so far as they are descriptive of the map. Appended to the descriptive statement are the following words and figures: "Published by S. Farmer & Co., Detroit and Milwaukee, 1865," the figures "1865" being changed to "1867" on the map of that date, and this is the only difference alleged or that can be found in relation to the title. The clause quoted, and in which the difference of date occurs, is no part of the description of the map, and is entirely unnecessary to an understanding of that to which the title relates, and I think it constitutes no part of the title. It could not truthfully constitute a part of the title for the purpose of copyright, because by express enactment the title was, as it still is, required to be entered and recorded before publication. 4 Stat. 437, § 4; 16 Stat. 213, § 90. All that is required in connection with the fact of publication is, the depositing of a copy or copies within certain specified times after publication. Id. There is no time prescribed within which actual publication shall commence. That is left entirely to the option of the proprietor. The map of 1867 has, moreover, printed upon its face in a prominent position, and in plain type, the notice of entry for copyright required by law, showing clearly and plainly that the date of such entry was in the year 1865. I think this sufficiently indicated that the map of 1867 was intended for the map, or an edition of the map, which had been so entered as specified in the notice, so that the date at the bottom of the title, even if it could be considered a part of the title, would in the light of the notice, indicate to any person of ordinary comprehension a map, or an edition of a map which had been copyrighted in 1865, and published in 1867. This case is very different from the cases cited by defendant's counsel (Baker v. Taylor [Case No. 782]; King v. Force [Id. 7,791]), in which there had been an omission or erroneous statement of the year in which the copyright was obtained, in the notice; also from the English case cited by him (Mathieson v. Harrod, Eng. Ch. 1868 [7 L. R. Eq. 270], 1 Chi. Leg. News, 99), which arose under an English statute very different from ours, requiring the date of the first publication to be given. Those cases, therefore, have no application. As to the alterations and additions alleged in the answer to have been made to the map of 1865 in the map of 1867, there are none specified except as to the railroad system of Wisconsin, and that is not alleged except inferentially, at least, by reference to the map itself. The edition of 1865, not having been made an exhibit, and not being before me, I am unable to determine whether any and what alterations and additions were made, and, of course, whether such alterations and additions are of

such a character in kind and extent as to make the map of 1867 an original map, and so deprive it of the protection of the copyright of the map of 1865. This can be dedetermined only after the proofs are all in. For the purposes of this motion, the map of 1867 must be deemed an edition of that of 1865, as alleged in the bill, and therefore protected by the copyright of the latter. 3—It is also contended that the notice of copyright is bad, because it describes the court in which the entry was made as "the district court for the eastern district of Michigan," instead of "the district court of the United States for," etc., as is the true title of the court. Suffice it to say that the statute prescribes the form of the notice (4 Stat. 437, § 5), and the notice in this case is in the exact form so prescribed. It must, therefore, be deemed sufficient.

The courts, in the interest of learning and science, have at all times and in all countries recognized the right of subsequent authors, compilers, and publishers to use the works of others to a certain extent, but the great difficulty has always been, and always must be, to determine where such use ceases to be legitimate, and becomes an invasion of the rights of others. The difficulty is greatest in cases of maps and the like, in which there is not, and cannot be, any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all. The following rule laid down by Mr. Copinger (Cop. Copyr. 91) comes as near to defining this right as anything I have been able to find or can invent. He says: "The rule appears not to be settled that the compiler of a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken, and subjects it to such revision and correction as to produce an original result; provided, that he does not deny the use made of such preceding works, and the alterations are not merely colorable."

To apply this rule to the present case: What mental labor did the defendant bestow upon those portions of the complainant's map, admitted to have been taken in the preparation of its own, viz.: the boundaries of the larger townships of Wisconsin? None whatever beyond the mere mechanical operation of reducing them from the larger scale of complainant's to the smaller scale of defendant's map. Neither does it appear that there was any revision whatever to ascertain if there were errors which needed correction, or for any other purpose. There is, in fact, nothing whatever to bring the case within the rule. So far as those boundaries are concerned, it is clearly a case of naked piracy.

But it is contended that boundaries of townships are not a legitimate subject of copyright—that they are fixed and defined by statute law, and that the marking of them down upon paper is but a transcription in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright—they are open to all. But no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper. The defendant, no doubt, had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map, (which of course it would have been if they were both correct). But he had no right to avail himself of this very labor on the part of complainant in order to avoid it himself. As appears by complainant's affidavit, these boundaries were fixed by the boards of supervisors of the respective counties, and not by legislative enactment, thus showing that the labor must have been much greater than it would have been if such boundaries could have been ascertained from the statutes of the state.

It is said the court looks at value more than quantity in these cases, and that in this case the value of what was taken is so small in comparison with the whole that the court will disregard it. The rule of law is correctly stated; but how is it as to the fact? The townships of which the boundaries are admitted to have been taken comprise nearly, if not quite, one-half of the state of Wisconsin. Most of the smaller townships of the state, those comprising no more than thirty-six square miles, are rectangular—nearly all of them square—in form, and therefore easily projected on a map, while the townships in question are nearly all irregular in form, and therefore more difficult to represent correctly on paper, requiring more, and a higher degree of mental labor and skill in the operation. Neither can it be said that this portion of the map is of less value because it represented the unsettled, or but sparsely settled portions of the state. There might be some force in the suggestion if the region in question were a desert waste, uninhabited and uninhabitable, and valueless and unsought after for any purpose whatever. But here the facts are directly the opposite. These lands are among the most valuable in the state for agricultural purposes, for timber, and to some extent for minerals; are largely sought after for actual settlement and for speculation, and are rapidly filling up with a fixed and permanent population. It is to maps that persons desiring to settle or invest go to a very large extent for information as to locality, topography, markets, railroads, etc., and it certainly cannot be said that the part of a map

representing this portion of the state is insignificant or of little value; nor, in my opinion, is it of any less value than that part of the map representing the settled portions of the state.

From these views it results that the injunction ought to be continued to the hearing without the necessity of entering into a particular consideration of other evidences of piracy gathered from a comparison of defendant's map with those of complainant, which were laid before me at the hearing. It must not be inferred from this, however, that that branch of the case has not received full consideration at my hands. Suffice it to say, that upon a careful and critical examination and comparison, I find evidence—some of which it has been attempted in the answer to explain and avoid, with what degree of success it is unnecessary to consider here, and all of which is open to such explanation as the defendant may hereafter offer—which strongly confirms me in the belief that defendant's piracy of complainant's copyrights extends far beyond what is admitted in the answer, thus placing it beyond all doubt, in my mind, that justice requires that the injunction should be continued to the hearing.

The motion to dissolve is denied.

FARMER OF SALEM, The (THACKAREY v.). See Case No. 13,852.

FARMERS' & CITIZENS' NAT. BANK (MANHATTAN LIFE INS. CO. v.). See Case No. 9,024.

Case No. 4,652.

FARMERS' & DROVERS' SAV. BANK v. KANSAS CITY PUB. CO.

[3 Dill. 287.][1]

Circuit Court, W. D. Missouri. 1876.

BANKRUPT ACT—EQUITABLE ASSIGNMENT OF DEBT DUE BY STOCKHOLDERS FOR SUBSCRIPTION TO STOCK.

The bankrupt company had, before bankruptcy, duly made calls upon its members for the payment of the balance due on their stock, which thus became a debt due by each of them to the company. The company wishing to make a loan of money of the bank, agreed in consideration of an advance by the bank that the bank should collect the calls and apply the amount collected from time to time on the debt created by the advance, and in pursuance of this agreement the company delivered to the bank a list of the stockholders and the amount due from each on the calls, and the bank collected a portion before the bankruptcy: *Held* that the transaction between the company and the bank amounted to an equitable assignment of the calls to the bank, which was not defeated by the subsequent bankruptcy of the company.

On an appeal from an order from the United States district court [case unreported], rejecting claim of appellant as a secured claim.

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

John K. Cravens, for appellant.

Lay & Belch, for appellee.

DILLON, Circuit Judge. The calls on the shareholders having been made before the transaction with the bank, the amount called for was a debt due the publishing company.

It is an established doctrine in equity that "any order, writing, or act, which makes an appropriation of a fund amounts to an equitable assignment of that fund," and also that "an assignment of a debt may be by parol as well as by deed." Here the bank advanced the money to the publishing company on the faith of the agreement made at the time, by the publishing company, that the bank should collect the calls and apply them on the debt created by the advance of the bank to the company, and in pursuance of this agreement delivered to the bank a list of the stockholders and the amount of the debts respectively due from them on the calls. A portion of these were collected by the bank before the bankruptcy. The transaction between the company and the bank amounted to an equitable assignment of the calls to the bank which was not defeated by the subsequent bankruptcy of the company. These views will be found fully supported by the following authorities: 2 Story, Eq. Jur. § 1047; Burn v. Carvalho, 2 Mylne & C. 690, 702; Clemson v. Davidson, 5 Bin. 392, 398; Heath v. Hall, 2 Rose, 271, 4 Taunt. 326, 328; In re Sankey Brook Coal Co., L. R. 9 Eq. Cas. 721; Gibbs & West's Case, L. R. 10 Eq. Cas. 312; Garnsey v. Gardner, 49 Me, 167; 1 Pars. Cont. 228.

The case as made is not within the Missouri statute of frauds. The order of the district court is reversed.

Reversed.

Case No. 4,653.

FARMERS' & MECHANICS' BANK et al. v. COVER et al.

[1 Hayw. & H. 177.][1]

Circuit Court, District of Columbia. April 11, 1844.

FIXTURES — MORTGAGED PREMISES — EFFECT OF SALE UNDER THE MORTGAGE—PERSONALTY.

Fixtures placed in a brewery by the owner of the premises, after mortgaging the premises to secure the payment of a debt, pass on the sale of the premises by the terms of the mortgage to the purchaser, and do not on the decease of the mortgagor go to his administrators as a part of the personal property of the deceased. Nor do they on an assignment of his property, real, personal, and mixed (including said fixtures), for the benefit of his creditors, go to the assignees.

[This was a bill by the Farmers' & Mechanics' Bank of Georgetown and Clement Cox, praying for an injunction against George Cover and Peres Packard, assignees, and

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

George Cover and Juliana Hayman, administrators of William Hayman, deceased.]

The object of this bill was to decide whether certain fixtures went with the freehold, or whether it was personal property to be administered by the representatives of the deceased. The deceased, on the 10th day of November, 1829, to secure certain indebtedness due by him to the bank, executed a deed of trust to Clement Cox, conveying all his right, title, interest and estate to four lots in square 4, "with the improvements, privileges, advantages, rights, ways, and appurtenances to the said lots, part of lot, piece or parcel of ground, or any of them belonging or in anywise appertaining." On the eleventh day of February, 1842, he assigned to George Cover and Peres Packard, for the benefit of his creditors, all his property, whether real, personal or mixed, describing the said lots in square 4, and other real estate and personal property, "together with all the other material, utensils, and apparatus belonging and appertaining to the business of brewing carried on by the said party of the first part." In compliance with the terms of the deed of trust, the said lots were advertised and sold, and at the said sale the trustee proclaimed that he undertook to sell and give a good title to the fixtures attached to and connected with the freehold, and the said lots were bid for by the bank.

The complainants state in their bill that the fixtures of apparatus and machinery are firmly attached to and connected with the freehold, and are expressly adapted and designed for a brewery, and pray that the defendants may be enjoined from molesting or disturbing their title to said fixtures.

The defendants, in their answer, claimed to be entitled, under the specific description and assignment contained in the deed to them, to the utensils, implements, apparatus and machinery referred to in the complainants' bill. That they, as administrators, claimed the same as a part of the personal estate and assets of the deceased. That when the deed was executed to secure said bank, the buildings were not completed and made fit for said utensils, &c. That said utensils, &c., were not placed on the said lots until after the date of said deed. That the said utensils, &c., are mere movable chattels placed within said buildings after they were erected. That the said utensils, &c., can be taken out of and removed from the said buildings without any injury or prejudice to the said buildings, and with very little injury to the utensils themselves, having been placed there for the purpose of trade.

The depositions of the witnesses were quite conflicting as to whether the utensils, &c., were attached to the buildings or could be moved without injury to the buildings.

Clement Cox, for complainants.

W. Redin, for defendants.

The cause having been heard and duly considered by THE COURT, it was ordered, adjudged and decreed that the defendants be, and they are, perpetually enjoined and restrained from molesting or disturbing the title of the complainants respectively to the fixtures set up on the premises described in complainants' bill.

Case No. 4,654.

FARMERS' & MECHANICS' BANK v. GAITHER.

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

Circuit Court, District of Columbia. Dec. Term, 1828.[2]

ACTION BY TRUSTEE—JUDGMENT OF NON-PROS.—CONSENT OF CESTUI QUE TRUST.

If the plaintiff be a trustee, the court will not permit him to become non-pros. without the consent of the cestui que trust, if the latter will give security to indemnify the plaintiff from costs.

[This was an action by the Farmers' & Mechanics' Bank of Georgetown against George R. Gaither on a promissory note made by defendant to W. W. Corcoran & Co.]

C. Cox, for plaintiffs, moved to strike off this suit; that is, to become non-pros.

Mr. Marbury, contra. The notes of Gaither had been indorsed to the plaintiffs by W. W. Corcoran & Co., as collateral security for their debt to the plaintiffs, and, having paid their debt to the plaintiffs, W. W. C. & Co. directed the plaintiffs to pay over the proceeds, when collected, to Thomas Corcoran; which they agreed to do. Thomas Corcoran, therefore, has an interest in the proceeds of this suit, as security for his responsibility for W. W. Corcoran & Co. The plaintiffs have no interest in the suit, except as to the costs.

Mr. Kay, contra.

THE COURT (MORSELL, Circuit Judge, not sitting in the cause) refused to permit the plaintiffs to strike off the suit, upon Mr. Thomas Corcoran's giving security to indemnify the plaintiffs against the costs.

[NOTE. The cause afterwards proceeded to trial, and judgment was entered for plaintiffs, whereupon the defendant Gaither took the case to the supreme court on writ of error. The judgment of the circuit court was reversed, and the cause remanded for a new trial. Gaither v. Farmers' & Mechanics' Bank, 1 Pet. (26 U. S.) 37. For the new trial, see Case No. 4,655.]

Case No. 4,655.

FARMERS' & MECHANICS' BANK v. GAITHER.

[3 Cranch, C. C. 440.][1]

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

USURY—WHAT CONSTITUTES.

If a bank discount a note for the indorser at six per cent., and give post-notes, having time

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

[2] [Reversed in 1 Pet. (26 U. S.) 37.]

to run and not bearing interest, the transaction is usurious, and the bank cannot recover upon the note through such an usurious indorsement, although the note itself, when given, was free from usury.

This cause now came before this court upon the venire de novo awarded, in pursuance of the mandate of the supreme court, at January term, 1828 (see [Gaither v. Farmers' & Mechanics' Bank] 1 Pet. [26 U. S.] 37); and, in the course of the trial (Morsell, J., not sitting), this court, at the prayer of Mr. Key, for the defendant, instructed the jury, in effect, that if they should be satisfied, by the evidence, that the defendant's note, upon which this suit was brought, was indorsed to the plaintiffs by W. W. Corcoran & Co., as collateral security for their note, discounted by the plaintiffs, at the usual rate of six per cent. per annum, under an agreement that they should take therefor post-notes, not bearing interest, and having time to run, without any rebate upon such post-notes for such time; then the plaintiff is not entitled to recover in this action.

Whereupon Mr. Coxe, for the plaintiffs, prayed the court to instruct the jury, that if they should be satisfied by the evidence, that on the 30th of June, 1823, Thomas Corcoran substituted his notes for those of W. W. Corcoran & Co., and they were no longer the debtors of the bank, and that this suit was originally brought at the instance and for the sole use of Thomas Corcoran, then the circumstances stated in the foregoing opinion of the Court are not sufficient to prevent the plaintiffs from recovering in this cause for the use of the said Thomas Corcoran. Mr. Coxe cited Parr v. Eliason, 1 East, 92.

But THE COURT refused to give such instruction.

Mr. Key cited Chit. Bills, 104.

THE COURT also rejected the set-off of the notes of W. W. Corcoran & Co., which were offered under the circumstances stated in this case before the supreme court. 1 Pet. [26 U. S.] 37.

Verdict for the defendant. Bills of exceptions were taken, but no new writ of error prosecuted.

Case No. 4,656.

FARMERS' & MECHANICS' BANK v. MELVIN et al.

[2 Cranch, C. C. 614.][1]

Circuit Court, District of Columbia. May Term, 1825.

TRUST-FUND—CLAIM ON JUDGMENT OF MORE THAN TWELVE YEARS' STANDING.

In allowing claims against a trust-fund, as between contending creditors, a claim upon a judgment of more than twelve years' standing must be rejected without pleading the statute of limitations, as there was no time when the debtor, or his administrator, could plead it.

[This action was brought by the Farmers' & Mechanics' Bank of Georgetown against James Melvin and others.]

Upon exception to the report of the auditor who had allowed a claim of Cruikshank upon a trust-fund, it appeared that the claim was upon a judgment of more than twelve years' standing.

J. Dunlop, for the other creditors, contended, that, by the Maryland statute of limitations of 1715 (chapter 23, § 6), this judgment cannot be given in evidence, and is prima facie of no effect.

Mr. Marbury, contra, contended that the creditors cannot take that exception, as non constat, that Mr. Melvin, the administrator of the debtor, would plead the statute; and the court has decided that it must be pleaded.

But THE COURT (MORSELL, Circuit Judge, not sitting) decided that as there was no time when the administrator could plead it, and as the act is peremptory, the judgment must be taken, prima facie, to be void; and rejected the claim.

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

Case No. 4,657.

FARMERS' & MECHANICS' BANK v. STICKNEY et al.

[Brunner, Col. Cas. 543;[1] 8 Law Rep. 161.]

Circuit Court, D. Massachusetts. May Term, 1845.

AGENCY—LIABILITY OF PRINCIPAL — DEBTOR AND CREDITOR—APPLICATION OF PAYMENTS.

1. A principal is liable for drafts drawn by an agent after the expiration of his authority, to pay for prior purchases, duly authorized.

2. Where an assignee of certain drafts, in trust for the payment of debts incurred thereon, recovers on some and not on others, the amount recovered should be applied pro rata to the several drafts.

This was an action of assumpsit on three bills of exchange, drawn by one Orkin Rood upon the defendants [William Stickney and others], in favor of Lewis Rood or order, November 22, 1838; one for $2,000 and one for $4,000, both payable in three months, and one for $4,000, payable in four months. The drafts were refused acceptance by the defendants; and this suit was brought by the plaintiffs as indorsees, to recover the amount of the bills of exchange, upon the ground that they were drawn by Rood for the benefit, and by the authority of the defendants, and were discounted by the plaintiffs upon the credit of the defendants. The declaration contained special counts upon a promise to accept the bills; and also the money counts as for money advanced and paid for the use of the defendants. The general issue was pleaded.

At the trial, it appeared, among other evidence, that Rood, the drawer, was employed by the defendants in the spring of 1836, to purchase upon their account large quantities

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

of butter and cheese, not exceeding certain prices, and that the agency was to end early in the month of November of the same year. Rood made purchases to a large amount under this agency, which he paid for in part by cash furnished by the defendants, and in part by the proceeds of drafts, drawn by him on the defendants, and discounted by the plaintiffs. All of these drafts were accepted and paid by the defendants, except the three upon which the present action was founded. The latter were drawn after the expiration of the agency, the extent of which, according to evidence in the case, was communicated to the president and one or more of the directors of the bank; but there was also evidence to show that the two drafts of $4,000 each were to pay for the purchases of butter and cheese, actually made before the agency expired. The draft of $2,000 was in fact specially authorized by the defendants, for the purpose of procuring money to be sent by Rood to the defendants for another purpose; but the letter containing this authority was not shown by Rood to the plaintiffs. He stated to them that the draft was required for payment of amounts due on old bills, for the purchases made under the agency, which, in fact, was untrue. Soon after dishonor of the drafts, Rood brought an action in the circuit court in Boston, against the defendants, for the supposed balance due him under the agency, and also for damages sustained by reason of the dishonor of the drafts, which suit was ultimately referred to arbitrators. On the 24th of December, 1836, Rood made an assignment to the plaintiffs, which, after reciting that he owed them $10,000 or thereabouts upon the three drafts, proceeded to assign to the bank the claims of Rood against the defendants, in trust, to apply the proceeds, after deducting expenses, "towards the payment and satisfaction of all moneys due or owing from the said Rood to the said Farmers' and Mechanics' Bank," and to pay the balance, if any, to Rood or his assigns. There was also a clause, giving authority to the bank to prosecute the suit, or any other suits to recover the demands assigned. The proceedings before the arbitrators were conducted by persons employed by the bank. In June, 1840, the arbitrators awarded the sum of $4,962.35, as due by the defendants to Rood. In the proceedings before the arbitrators, no credit was given to the defendants for the drafts so dishonored, and no credit was claimed by them therefor.

The defendants contended, (1) that the award and proceedings under the arbitration by the plaintiffs were an estoppel of their demands in the present suit; (2) that Rood had no authority to draw the drafts on the defendants now in controversy, so as to bind them to accept and pay the same; (3) that the bank did not discount the drafts on the credit of the defendants, but solely on the credit of Rood and the payee; (4) that the evidence did not establish that the drafts were drawn in order to pay for butter and cheese purchased for the defendants; (5) that the defendants, at all events, were not liable for the draft of $2,000, as the same was not drawn in pursuance of the authority given by the letter before referred to, but was drawn upon a false statement made by Rood.

The court after summing up the evidence applicable to these points, left the case to the jury upon the evidence, with the suggestion that upon the first three points the evidence seemed to preponderate in favor of the plaintiffs, and, as to the fifth point, that the defendants were not, upon the admitted facts, liable upon the $2,000 draft. Upon this suggestion, the counsel agreed that the jury should give a verdict for the plaintiffs in the sum of $10,000; and that it should be referred to an auditor to settle the exact amount, according to the suggestion of the court; and that the verdict should be amended accordingly.

The case was referred to George T. Curtis, as auditor, who, after hearing the parties, reported the amounts due upon the several drafts, and also the amount of the award, deducting the costs and expenses. The report stated further, that the plaintiffs' counsel claimed the right to appropriate the money received under the award, after deducting the charges, being $3,823.48, first to extinguish the draft for $2,000, and then to apply the balance towards the two drafts found by the verdict, as due from the defendants to the plaintiffs; and that, to show that the plaintiffs had never made any appropriation inconsistent with their present claim, the plaintiffs called several witnesses, who were objected to by the defendants. Their evidence was reported by the auditor, and was to the effect, that the president or directors had never directed any appropriation of the payments under the award, and that the entries were made by the cashier, without any authority from the other officers, simply to show how much was due to the bank. The case now came on to be heard upon the auditor's report.

Choate and Crowninshield, for plaintiffs.

C. G. Loring and S. Bartlett, for defendants.

STORY, Circuit Justice, afterwards delivered the opinion of the court. He said that, although the question respecting the correctness of the charge to the jury, upon which the draft of $2,000 was disallowed, was not open upon the present report, yet, if it were, he remained of the same opinion which he then expressed. The ground upon which the defendants were held liable for the two drafts of $4,000 each was, that they were drawn under the authority given to him by the defendants, for the payment of debts incurred in purchases for them, and advances made by the bank with a full knowledge of his authority. But at the time the

draft of $2,000 was given, the authority had expired, and the bank knew the fact. The new draft was not obligatory upon the defendants, unless drawn in conformity with some new authority. It was not drawn in pursuance of such new authority, for the letter of the defendants was never shown to the bank. The original authority was limited to the amount of purchases made before the expiration of the authority. This limitation was known to the bank, and they, consequently, could not bind the defendants by any discounts, after the original authority had expired, except so far as the same were necessary to pay for the purchases, made before the expiration thereof. The draft of $2,000 was not required for any such purchases so made, and the defendants ought not to be bound by it.

The remaining question was, how was the money received under the award to be appropriated? It was to be applied precisely as required by the terms of the assignment. The law made no appropriation different from the intention of the parties. By that assignment, the expenses were to be first deducted, and the balance only applied to the discharge of all the debts contemplated in the assignment, which were the three drafts now in suit. The balance must be applied to all the debts, and consequently must be applied pro rata. Four fifths were to be appropriated to the two drafts of $4,000, and one fifth to the draft of $2,000.

To the suggestion, that an actual appropriation was made by the cashier, there were two answers, either of which would be decisive against it. First. No such appropriation was authorized by the directors, and without their authority no such appropriation could be validly made by the cashier; and, in fact, the cashier testified that he himself never intended to make any appropriation. Second. Under the assignment, no such appropriation could be made, unless by the positive consent of both parties, dispensing with, and recalling the original appropriation made in the assignment.

The result of the opinion of the court was, that the defendants were liable upon the two drafts of $4,000 each, with interest from maturity, until the receipt of the money under the award. The expenses were then to be deducted from the award, and four fifths of the balance ($3,823.48), were to be credited against the amount of those drafts. Upon the balance of the two drafts, after such deduction, the plaintiffs were entitled to interest up to the time when the verdict was rendered.

FARMERS' & MERCHANTS' BANK OF BALTIMORE (BOWDEN v.). See Case No. 1,714.

FARMERS' & PLANTERS' BANK OF BALTIMORE (CITY BANK OF COLUMBUS v.). See Case No. 2,738.

FARMERS' BANK (ATKINSON v.). See Case No. 609.

Case No. 4,658.

FARMERS' BANK v. FOX.

[4 Cranch, C. C. 330.][1]

Circuit Court, District of Columbia. Oct. Term, 1833.

TAXATION OF BANKS—DISTRESS AND SALE OF GOODS.

The corporation of Alexandria, D. C., is authorized to tax the Farmers' Bank of Alexandria, and to collect the tax by distress and sale of the goods of the bank.

Trespass against [William Fox] the collector of corporation taxes for entering the plaintiffs' banking house and carrying away goods. Justification as collector, &c.

Mr. Taylor, for the defendant, referred to Act Va. 1779; Acts Cong. Feb. 25, 1804 (2 Stat. 255), and May 13, 1826 (4 Stat. 162); town revenue law of 1835, and for appointment of assessors and collectors; the appointment of assessors and their returns; the appointment of collector, and delivery to him of a list of taxes to be collected.

The cause was submitted to the court upon the following case: The defendant as collector of taxes for the southern district of the corporation of Alexandria, entered the banking-house of plaintiffs and seized the bank-notes as a distress for a tax of $200, alleged to be due to the corporation, and carried away the bank-notes which he seized, and they were lost to the plaintiffs. That the capital actually paid in, was $310,000; and the capital of the Mechanics' Bank actually paid in was $372,544. The capital of the Bank of Alexandria and Bank of Columbia, was each $500,000. That the corporation of Alexandria had laid a tax of $200 on each of the said banks, by an act of the corporation therein afterwards mentioned.

The defendant gave in evidence the act of Virginia incorporating the town of Alexandria, passed October 4, 1779; the act of congress of February 25, 1804, to amend the charter of Alexandria; the act of congress of May 13, 1826, further to amend the charter of Alexandria. That the defendant had been duly appointed, and was then collector, &c. The by-law of the corporation of Alexandria of the 20th of March, 1830, for raising a revenue, &c., for the year 1830. That the Farmers' Bank of Alexandria, was, at the time of passing the said by-law, and before and after, a bank established under the authority of the acts of congress of February 16, 1811 [2 Stat. 629], and March 2, 1821 [3 Stat. 618], and carrying on the banking business within the territorial limits and jurisdiction of the said common council. That he had duly demanded payment of the said tax, and that payment had been refused. That he was then required by the revenue laws of the common council to collect the taxes by distress and sale, &c., and that he took the said bank-notes as and for a distress

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

for the tax of $200. And it was agreed that, if upon that state of the case, the court should be of opinion that the said common council was not legally authorized and empowered to impose the said tax, judgment should be rendered for the plaintiffs for $200; but if, &c., the common council had the power, &c., then judgment should be rendered for the defendant.

Mr. Swann, for plaintiffs.
Mr. Taylor, for defendant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The original charter of the town of Alexandria, granted by Virginia on the 4th of October, 1779, gives the corporation power "to make by-laws and ordinances for the regulation and good government of the said town; provided such by-laws and ordinances shall not be repugnant to, nor inconsistent with the laws and constitution of the said commonwealth; and to assess the inhabitants for the charge of repairing the streets and highways; to be observed and performed by all manner of persons residing within the same, under reasonable penalties and forfeitures, to be levied by distress and sale of the goods of the offenders for the public benefit of the said town." The act of 1748, for erecting the town, did not give the trustees any power to assess taxes; nor did the acts of 1752, 1762, 1764, or 1772. The act of Virginia of 1796, authorized the corporation to recover the paving tax from non-resident proprietors of lots. By the 5th section of the act of congress of the 25th of February, 1804 (2 Stat. 255), amending the charter of Alexandria, it is enacted that "they" (the common council of Alexandria) "shall have power to raise money by taxes for the use and benefit of the said town; provided that their by-laws shall not be repugnant to, or inconsistent with, the laws and constitution of the United States." The act of congress of May 13, 1826 (4 Stat. 162), "further to amend the charter," provides for the sale of real estate for the taxes thereon; and "for the licensing, taxing, and regulating auctions, theatrical and other public shows and amusements." The power given to the corporation of Alexandria, by its amended charter, to raise taxes, is given in the most general terms, and without the least limitation as to the subject of taxation. The faculty to carry on the banking business seems to be as fair a subject of taxation as any other means by which money is to be acquired. It is the only mode by which the corporation can tax the stock of non-resident stockholders, who ought to contribute something to the expense of that protection of their property and their officers, which is afforded by the good regulations and sound police of the town. There is, in the tax, nothing inconsistent with the laws or constitution of the United States. The Farmers' Bank is not (like the Bank of the United States) necessary for the collection, safe-keeping, and transmission of the national revenues. The power to tax, and the charter of the bank, are given by the same authority; both emanate from the United States. If there should be danger that the corporation of Alexandria would abuse its power to the destruction of the bank, the power may be taken from them, or restrained by congress. We are of opinion, that the corporation of Alexandria has a right to tax the bank; and that the judgment, on the case stated, should be for the defendant, with costs.

Case No. 4,659.

FARMERS' BANK v. HOOFF et al.

[4 Cranch, C. C. 323.][1]

Circuit Court, District of Columbia. May Term, 1833.

WILLS — DEVISE TO WIFE "DURING HER WIDOWHOOD"—CONSTRUCTION.

A devise by the testator to his wife "during her widowhood, or in other words while she should bear his name; but in case she should choose to marry again, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter and her heirs forever," is a devise to the widow during widowhood, with a vested remainder to the daughter in fee.

[Cited in Kennard v. Kennard, 63 N. H. 310.]

This was a bill in equity [by the Farmers' Bank of Alexandria] to compel the execution of a trust to sell land of Mary Resler, after her death to pay her personal debt to the plaintiffs under a deed of trust in fee made by her to the defendant John Hooff and others. Her title was under the will of her husband, Jacob Resler, by which he devised to her "the whole of his estate both real and personal during her widowhood, or in other words while she should bear his name;" but, in case his wife "should choose to marry, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter Eve Resler, and her heirs forever." It was contended on behalf of the plaintiffs, that the widow took a conditional estate in fee, liable to be defeated by her marriage.

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

MORSELL, Circuit Judge. The complainants, in this case, seek to have the benefit of a deed from Mary Resler in trust to secure to them the payment of a debt due by her, and on her own account. The property conveyed is a lot of ground, of which her husband died seized, claimed to be held in fee-simple under the will of her husband. Whether she took such an estate, or an estate for life, depends on the true construction of the will, unassisted by any introductory declarations, or by circumstances to be

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

drawn from the context. Nothing is left us but the words of the devising part of the will. The rule, no doubt, is that the intention of the testator ought to prevail, unless inconsistent with the rules of law; and in case of contending intentions, the one which was most likely to have been the favorite intention of the testator. The objects in the mind of the testator requiring his provision, appearing on the face of the will, were three; the payment of his just debts and funeral expenses; a provision for his wife, and an only child, a daughter.

In most cases, the child is considered the principal object of the father's bounty; the presumptions of law, also, are strong in behalf of the heir. In this case the presumptions both of nature and law, unite in favor of the daughter; and there is nothing to deprive her of the benefit, unless from the whole will, taken together, the testator has plainly and clearly so intended himself to be understood. The words "I give and bequeathe unto my beloved wife Mary Resler, the whole of my estate both real and personal," if they stood alone, I admit, would, by legal construction, carry a fee; but they may be so explained as to show that they were intended either to describe the property only, or so qualified and limited in their extent as to give a less estate or interest. The words "during her widowhood, or in other words, while she bears my name," immediately follow; and if the clause had ended with these words, it would be equally clear, I suppose, that no greater interest than a life estate would have passed. In Co. Litt. 234, Lord Coke says: "This word, (durante,) is properly a word of limitation; as durante viduitate, or durante virginitate, or durante vitâ," &c.; and I believe all the books agree that an estate to a woman during her widowhood is an estate for life only. What effect ought, then, to be given to the subsequent words: "but in case my wife should choose to marry, it is my wish that the whole of my estate, both real and personal, be given to my beloved daughter Eve Resler and her heirs forever"? To say that by taking them in connection they so explain the preceding words as to change their operation from limiting an estate for life, to passing an estate in fee with condition subsequent, would be to change them from the peculiar use to which they are always devoted. We read frequently of words of condition being turned into words of limitation, but never e converso, that I remember. Such a construction would also produce the effect of enlarging the original words of limitation from a life-estate into an inheritance; but this is never done, unless indispensably necessary to support and sustain an estate in remainder, and in favor of him in remainder. 1 P. Wms. 149.

As to the argument, founded on the inference that the limitation over to the daughter could only take place upon the contingency of the widow's marrying again, and not on her death without marrying; and that unless the wife took such a conditional fee, the testator would have died intestate, as to the reversionary interest, which it is not to be supposed he intended to do; if this were not the case of an heir at law, and it were necessary for the purpose of maintaining a different construction, I think there would be authorities to bear me out; and that in cases of similar limitations the law has been settled, that upon the happening of either event, the remainder-man would take in possession.

The first case which will be mentioned is that of Brown v. Cutter, T. Raym. 428. The words of the will were, "I will that my wife shall have and enjoy all my houses, lands, &c., during her natural life, if she does not marry; but if she do marry, then I will that my son Humphrey, presently after his mother's marriage, enter and enjoy the said premises, to him and the heirs male of his body, and for default of such issue to my son Robert and the heirs male of his body," with remainders to his other sons, and so over to a stranger. The wife died without marrying. In that case it was determined that Humphrey, the son, took a vested remainder, to take effect, in possession, on the marriage or death of the wife. Brown, Parl. Cas. 260; I. S. gives all his personal estate to trustees, to pay the interest thereof to his wife, so long as she should continue his widow; but if she married again, then he directed his trustee to pay her an annuity of £110, and no more during her life; and in that case he gave the residue of his estate to his son P.; but made no disposition thereof in the event of his wife's not marrying again. The wife did not marry; and upon a question to whom this residue belonged, the court held that it belonged to the representatives of the son, who had attained the age of twenty-one, and died in his mother's lifetime; or in other words, that there was a vested remainder in the son which might take effect in possession in his representatives upon the marriage or death of his mother. Gordon v. Adolphus, Brown, Parl. Cas. 306, where a man bequeathed his estate to his wife so long as she should remain unmarried; but if she married, then to his daughter; and in case the daughter should die without leaving issue, then to I. S. The daughter died without issue, in the mother's lifetime, who still remained a widow. Held, that the reversionary interest belonged to I. S. after the death of the daughter, although the wife should die without marrying. There is one other case of a devise, in Amb. 209, in which the lord chancellor thus expresses himself: "When an estate is given during widowhood with remainder over, in that case she takes an estate for life determinable on her marrying, and the remainder takes effect on the determination of her estate either by death or marriage." In the present case, it

is given during widowhood with remainder over on her marrying again within a limited time, that is, in the lifetime of his daughter, and is by way of forfeiture; so that if it were necessary, for effecting the intention of the testator, I should be sustained, I think, in the position, that the remainder might take effect in possession, on the death of the mother. But I do not think it of importance, as the true question is, when did the estate of the wife end? The testator might have reflected that he had but one child, she an heir at law. That she would inherit it, whether he gave it to her, or not, expressly; that a limitation over to her, of such an interest, being nothing more than the law would have cast upon her, would have been void. It is no uncommon case, when a father intends to let his children have his property equally, to leave it to legal distribution, as it respects them. As to the wife, it is sometimes desirable to give her something more than her thirds, to which the law limits her, and to provide for it, of course, by will, as in this case. Those words in the latter part of the clause in the will first alluded to, are important to show in what event, even sooner than the death of the widow, the reversionary interest might take effect in possession, in the daughter; and as important to show in what sense the words, "the whole of my estate both real and personal," are to be taken.

Let it be observed, then, that the testator, in the gift to his daughter, uses the very same words, with the superadded words of inheritance, "to my beloved daughter Eve Resler and her heirs forever." It would appear, therefore, that when he intended to give an estate of inheritance, he understood the technical language by which it might be done, and used it, not choosing to use words of doubtful construction. This, I think, would be the plain, common-sense inference from such a circumstance; and I think it also sanctioned by legal adjudication; for which purpose I refer to Chester v. Painter, 2 P. Wms. 336. "One devises one third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son I. S. and his heirs;" the wife has but an estate for life in the third part of the real estate; the word "estate" being intended to describe the thing only; and when the testator intends to pass a fee, he adds the word "heirs" to the word "estate." S. P. Id. 335. I am aware of Lord Chancellor Talbot's decision in the case of Ibbetson v. Beckwith, Cas. t. Talb. 161. In that case the word "estate" had been repeatedly used, in the former part of the will, in connection with words which plainly and clearly showed an intention to pass an estate of inheritance. The chancellor's words are, "The clause whereby the estates are devised over to his mother and her heirs, in case Thomas should refuse to take his name, hath been argued as proof of his intending him but an estate for life; but that depends upon the construction of the word 'estate'; which will be clear from the sense he hath taken it in through all the other parts of his will, where, whensoever he hath used it, he has meant thereby to pass the inheritance. It hath been said, indeed, that in those clauses the fee doth not pass from the force of the words, but from the nature of the purposes, namely, that of paying debts, &c.; but still the words are an argument that he intended to pass the inheritance, though not the whole argument." I do not think it necessary to recite the whole of the chancellor's argument. The case can be referred to, if necessary to see it at large. There is, however, one other part that I will notice. When summing up his reasons, the chancellor said, "Another objection has been made, that if he intended him an estate of inheritance, he would have given it him in the same words as he has limited it over, upon his default of taking his name; but this wording is so incorrect that I think no stress can be laid upon it. What weighs with me is the intent plainly appearing to pass the inheritance, as is manifest from the other clauses of the will." It requires no very critical comparison of the two cases to discover the substantial differences in them; and that the rule as laid down in the case in P. Williams, is still good law, and may be applied to influence and govern this case.

If the testator had intended to give the whole of his estate in fee to his wife, believing that she would give it to the daughter in the event of her death, he would have expressed some such wish. It can hardly be supposed that when, by the mother's death, she might be deprived of any aid from her and left in the most need of his assistance, he should not even intimate a wish that she should be provided for. I think, therefore, that the prevailing intention of the testator, and the true construction of the will is, that his wife should have his property, real and personal, for her comfort and support during her life, if she remained unmarried; but if she preferred marrying, it would be probable she would not so much need his bounty. Also, in that event, it would not be desirable that his property should be under the control, directly or indirectly, (even during her life,) of such an after-taken husband; in such an event, therefore, the estate should immediately cease. By such construction, his will would liberally provide for his wife; and the only child and heir at law would not become disinherited, but take the reversionary interest; the testator would be made to look to two events, on the happening of either of which, the estate would become his child's; the one presently, if the widow thought proper to marry; the other more remotely, upon her death.

CRANCH, Chief Judge. The estate given to the wife by the will of Jacob Resler is

"during her widowhood, or, in other words, while she bears my name;" but in case she should choose to marry again, then it was his wish that the whole of his estate, both real and personal, should be given to his daughter, "and her heirs forever." The estate is expressly, during her widowhood; and at the termination of that estate, it is as expressly given to his daughter in fee. According to the literal construction of the will, the devise to the daughter was to take effect only upon the marriage of the widow; an event which might never happen; and if that strict construction could be given to the will, the remainder to the daughter would be contingent. But would such a construction be consistent with the intention of the testator? There is no reason to suppose that he intended to die intestate as to any part of his estate, which would be the case upon such a strict construction, if the widow should never marry again; unless the devise had been in such words as could be construed to carry the fee to the wife. But the testator has used as precise words of limitation, as could be used, to show that he intended to give her only an estate during widowhood; and it is a much less strained construction of the will to suppose that he intended to give the fee-simple to his daughter after the termination of the estate during widowhood, than that, (contrary to the express words of limitation,) he intended to give a fee-simple to his wife determinable upon her second marriage. It is evident that he knew the use of precise words of limitation. He has expressly, and by the most apt words, limited the quantity of estate given to his wife and to his daughter; that is, an estate during widowhood to the wife, with remainder in fee to the daughter.

The only question is, whether the remainder was contingent or vested. We think it was intended to be a vested remainder, to come into possession at the termination of the estate of the wife. The words, "but if my wife shall choose to marry, it is my wish that the whole of my estate, both real and personal, be given to my beloved daughter Eve Resler and her heirs forever," might have been used ex abundanti cautelâ, to show the intention more explicitly, that the daughter should come into possession of the whole estate, personal as well as real, upon the second marriage of the widow. Upon the question of construction we have been referred to Butler's edition of Fearne on Contingent Remainders, p. 241, c. 1, §§ 10, 4, and the cases there cited. Also to the following cases: Brown v. Cutter, T. Raym. 428; Gordon v. Adolphus, 3 Brown, Parl. Cas. 306; Chester v. Painter, 2 P. Wms. 336; Ibbetson v. Beckwith, Cas. t. Talb. 157; Bamfield v. Popham, 1 P. Wms. 55; Idle v. Cook, Id. 78; Tomlinson v. Dighton, Id. 154; Sheffield v. Lord Orrery, 3 Atk. 282, and the cases cited by Preston in his book on the Quantity of Estates. And upon the whole, we are of opinion that the widow took only an estate during widowhood: and that the daughter took a vested remainder in fee. Bill dismissed with costs.

[NOTE. An appeal was taken to the supreme court, but it was dismissed, the amount of the debt involved, with interest, being less than the amount required to confer jurisdiction. Farmers' Bank v. Hooff, 7 Pet. (32 U. S.) 168.]

Case No. 4,660.

FARMERS' BANK v. ROBBINS.

[2 Cranch. C. C. 471.][1]

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

JUDGMENT LIEN — EFFECT OF RELIEF UNDER INSOLVENT ACTS.

The judgment-lien upon the lands of an insolvent debtor is not destroyed by the 5th section of the insolvent act [of 1803 (2 Stat. 237)], although there is no process of execution thereupon, in the hands of the marshal, at the time of the debtor's application for relief, under the act.

Upon the motion of the Farmers' Bank of Alexandria, a rule was granted them against Isaac Robbins, trustee of Amos Alexander, an insolvent debtor, to show cause why he should not pay to that bank, out of the moneys arising from the sales of the real estate of the said Amos Alexander, in his hands, as trustee, the balance due to the bank upon a judgment obtained against him by the bank, and which was in full force and effect when he took the oath of insolvency. By the 5th section of the insolvent act of 1803, it is provided, "That the product of the insolvent's estate, after satisfying all incumbrances and liens, shall be divided among the creditors, in proportion to their respective claims; and that no process against the real or personal estate of the debtor, shall have any effect or operation, except process of execution and attachments in the nature of executions, which shall have been put into the hands of the marshal antecedent to the application, that is, the application for relief under the act."

Mr. Taylor, for the defendant, in showing cause, contended, that liens and incumbrances are of two kinds. 1st. Specific, attaching on certain designated portions of property, and arising from contract, either expressed or implied from the usage of trade known to the parties, and therefore still deriving their origin from contract; such are mortgages, deeds of trust, pledges or pawns of personal property, claims of workmen for

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

work done on personal property remaining in their hands, advances by factors or agents, &c. 2d. Liens, not forming a subject of stipulation or agreement between the parties, and not deriving their origin from express or implied contract, but given by law, as incidental to contracts under certain circumstances. These are mostly, if not always, general, affecting all a debtor's property, or all of a particular class. These are remedies to enforce the performance of a duty, and not strictly rights. As to the first class of liens, deriving their force from the voluntary and legal contract of the parties, it would, on principle, have been incorrect for congress to have interfered with them, so as to impair their obligation. But as to the second class, which were given by the legislature as a remedy, it was certainly competent for the legislature, when public expediency required it, to take them away, either wholly or partially, by a general, or partial repeal of the law by which they were given, as in its wisdom it might think right. The 5th section of the act seems to have done so in the case of insolvency and application for relief under that act. Although congress has not defined the liens and incumbrances which are to be paid, it has clearly defined those which shall not be paid. No process against the real or personal property of the debtor is to have any effect, &c. If there be no process to enforce the lien by judgment, there is an end of it. The liens which are protected by the act, are the specific liens arising directly from contract. The liens erected against the estate, generally, by judgment or execution, are lost by insolvency. Thellusson v. Smith, 2 Wheat. [15 U. S.] 396, 423; Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 121.

Mr. Swann, contra, contended that the 5th section of the act did not destroy the lien of judgments, and only modified the remedy by which the benefit of the lien is to be obtained, by substituting a sale by the trustee, in place of a sale by the marshal, under an execution, in all cases where there was not an execution in the hands of the marshal at the time of the insolvent's application for relief under the act. The trustee is to sell the whole property, and distribute the proceeds among the creditors, having respect to all liens and incumbrances.

THE COURT (nem. con.) was of opinion that the lien of the judgment was not destroyed; that the insolvent act only substituted the trustee for the marshal, as to the sale, and that, in the distribution of the proceeds of the sale of the real estate, he should have regard to the judgment, as a lien.

FARMERS' BANK (VEITCH v.). See Case No. 16,910.

Case No. 4,661.

FARMERS' BANK OF ALEXANDRIA v. LLOYD.

[2 Cranch, C. C. 411.][1]

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

PLEADING AND PROOF—VARIANCE.

If a note varies substantially from that described in the declaration it cannot be given in evidence upon a writ of inquiry.

Assumpsit, against [Edward Lloyd] the indorser of a promissory note. The note offered in evidence upon the writ of inquiry was made "payable at the Farmers' Bank of Alexandria." The declaration did not state it as a note so payable.

Mr. Fendall and Mr. Swann, for plaintiffs.
Mr. Hewitt, for defendant.

THE COURT (nem. con.) said that the note could not be given in evidence upon that declaration.

The jury found one cent damages.

FARMERS' BANK OF ALEXANDRIA (PATRIOTIC BANK OF WASHINGTON v.). See Case No. 10,811.

Case No. 4,662.

FARMERS' BANK OF VIRGINIA v. OWEN.

[5 Cranch, C. C. 504.][1]

Circuit Court, District of Columbia. Nov. Term, 1838.

BANKS—INDORSEMENT OF BILLS FOR COLLECTION—COLLECTING BANK AS AGENT OF PAYEE.

If the payee of an inland bill of exchange indorse and deliver it to a bank to be transmitted to another bank for collection, and it be duly so transmitted, the bank to whom it is thus transmitted becomes the agent of the payee, and answerable to him alone for any breach of its duty in relation to the bill.

Assumpsit against the payee, indorser of an inland bill drawn at Hampton Roads, January 8, 1837, by A. H. Gillespie on J. W. Reckless, Perth Amboy, New Jersey, payable to the order of the defendant, Edward Owen, at six months after sight, for $161.88, and indorsed "Edward Owen, by his agent and attorney, P. P. Mayo." Upon the trial, evidence was given to prove the following facts: That the bill drawn and indorsed as above stated, was by Mr. Mayo, the defendant's agent, delivered to the plaintiffs to be forwarded to some eastern or northern bank for collection. The plaintiffs sent it to the Union Bank of New York for that purpose, who transmitted it to a bank at Perth Amboy. The cashier of the Union Bank, supposing, by mistake, that the bill was payable six months after date, instead of

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

"sight," in which case it would have been payable on the 11th of July, and not hearing anything to the contrary, on the 9th of August gave notice to the plaintiffs that the draft had been paid, and passed to their credit, whereupon the plaintiffs remitted the net proceeds of the bill to the defendant by a draft on a bank in Baltimore. It afterwards appeared that the bill was not payable until the 14th–17th of August, when it was duly protested.

Z. C. Lee, for the defendant, contended that the Union Bank of New York was the agent of the plaintiffs, and if, by their mistake, the plaintiffs had paid the money to the defendant, they must look to the Union Bank and not to the defendant, and moved the court to instruct the jury to that effect; but

THE COURT (THRUSTON, Circuit Judge, absent,) overruled the motion, and, at the prayer of R. S. Coxe, for the plaintiffs, instructed the jury, that if they shall believe, from the evidence aforesaid, that the plaintiffs received the draft in question from the agent of the defendant, for the purpose of being transmitted to the north for collection, and the said plaintiffs did, in due time, transmit the draft for collection, the bank in New York, to whom the draft was thus transmitted, became the agent of the defendant, and is responsible to him alone for breach of its duty in relation to said draft, and such breach of duty constitutes no defence to this action.

Verdict for plaintiffs.

Case No. 4,663.

FARMERS' LOAN & TRUST CO. v. CENTRAL RAILROAD OF IOWA.

[4 Dill. 533;[1] 11 West. [illegible]. 428; 23 Int. Rev. Rec. 242; 5 Cen.. Law J. 56.]

Circuit Court, D. Iowa. March 12, 1877.

EXECUTION OF DECREE PENDING AN APPEAL.

This court heretofore rendered a decree of foreclosure of a railway mortgage in favor of the plaintiff, as the trustee for all the bondholders; certain bondholders, dissatisfied with the decree, appealed to the supreme court. 93 U. S. 412. The supreme court refused to dismiss the appeal, which is still pending in that court, but vacated the supersedeas; certain bondholders, in March, 1877, applied for an order to compel the trustee to sell, under the decree, pending the appeal, against its judgment of what was best for all the bondholders, and the court refused to interfere with the discretion of the trustee. The same bondholders then applied to the supreme court for a mandamus to compel the circuit court to order the trustee to sell, pending the appeal, which the supreme court (March 27, 1877) refused. The same bondholders now (May term, 1877) renew their application for an order to the trustee to cause the special master to execute the decree, notwithstanding the pending appeal and the protest of other bondholders: *Held*, that individual bondholders, not parties to the decree, had no legal right to have the decree executed, pending the appeal, against the judgment of the trustee as to what was for the best interests of all the bondholders; but that the trustee was at liberty to execute the decree or not, pending the appeal, as in its judgment was best for all the cestuis que trustent.

Mr. Alexander and certain bondholders not parties to the decree of foreclosure heretofore rendered in this cause in favor of the trustee, applied, at chambers, in March, 1877, and again to the court at this (May, 1877) term, for a peremptory order on the trustee to cause the property to be sold under the decree, notwithstanding a pending appeal from that decree, and the protest of other bondholders against such a sale.

The facts material to an understanding of said application are as follows:

1. The Central Railroad Company of Iowa made a first mortgage, or trust deed (July 15, 1869), upon its road and property, to the Farmers' Loan and Trust Company, trustee, to secure certain first mortgage bonds. This mortgage contained a condition, that, upon default in payment of interest, the whole debt should become due, and that, upon request of the holders of a majority of the bonds, the trustee should foreclose. It also contained a condition, that, in case of foreclosure sale, at a like request, the trustee should purchase the property for the benefit of the bondholders secured by said mortgage, pro rata.

2. Afterward two other mortgages, the second and third, were successively executed to the same trustee, upon the same property, and with like conditions.

3. Default was made in payment of interest, and some of the bondholders (not a majority) having requested the trustee to foreclose, which was declined, Charles Alexander and others, holders of some of the first mortgage bonds, brought their bill (June 2, 1874) in the United States circuit court for Iowa, to foreclose, making the trustee, the railroad company, and others, defendants. This foreclosure suit was resisted by the action of the officers of said railroad company, and the said company filed two demurrers to the bill of foreclosure, one in July, 1874, and the other in January, 1875, both sworn to by Mr. Pickering, the superintendent of the road, and which were overruled by the court. The ruling of the court on the first demurrer, at the October term, 1874, is reported in Alexander v. Central Railroad of Iowa [Case No. 166]. The second demurrer to the bill of the trustee was on the same ground, and was likewise overruled at the rules, and the defendant company was required to answer, which it did in March, 1875, and the time allowed by the equity rules for taking proofs not having expired at the May term, 1875, of the court, the cause went to the October term, 1875. The bill of foreclosure filed by Alexander and others was consolidated with the bill filed by the trustee, —Alexander v. Central Railroad of Iowa [Case No. 166],—and the issues were made on the bill of the trustee, and the cause pro-

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

ceeded thereafter in the name of the trustee alone. On January 7, 1875, a receiver was appointed, and took possession of the property, and operated the road.

4. Prior to the October term (1875) of the court, various efforts were made by the several sets of bondholders, the stockholders and creditors, to adjust their rights and differences so as to obtain an early and satisfactory decree. These efforts resulted in an agreement, by counsel representing several sets of bondholders, upon a decree, and the articles of incorporation to be adopted by the new company which should take the property from the trustee, when it should purchase the same at the sale, pursuant to the conditions and the terms of the decree. Messrs. Cowdrey, Sage, Buell, and other bondholders under the first mortgage, did not join in these arrangements, and requested, in writing, the solicitor of the trustee to present to the court their demand for an ordinary decree of foreclosure, for the payment of the bonds in the order of their priority, and if the request was not complied with, to take an appeal. [Sage v. Central R. Co. of Iowa] 93 U. S. 412. This request was presented, but no order was made in respect of it at that time.

5. On the 21st day of October, 1875, the court made uncontested orders for the amount due, and directing the receiver to pay certain creditors for materials and supplies furnished for, and services rendered to, the railroad company during its control by the receiver and prior to that, in effect giving to these claimants a priority over all the mortgages.

6. On the 22d day of October, 1875 (the next day), a final decree was rendered in the name of the trustee, without any actual hearing, adjudicating the amount due upon the several mortgages, directing the sale of the property by the master, and also directing the trustee to bid in the property for the amount due upon the first mortgage, as trustee, for the benefit of the first bondholders, but providing for an ultimate or contingent benefit to the second and third bondholders, general creditors, and stockholders. This decree is claimed by certain bondholders to have been a consent decree, which is denied by Cowdrey, Sage, et al. 93 U. S. 412.

7. On the 16th day of December, 1875, application in the name of the trustee, for the benefit of Sage, Buell, and Cowdrey, was made to the circuit judge, at his chambers in St. Paul, Minnesota, for the allowing of an appeal with supersedeas. This was denied by the judge, who stated, in writing, in connection with such denial, that since the October term had not ended but was adjourned to January 11, the persons for whose benefit the appeal was prayed could appear at that time and ask to be made parties and have the decree corrected. 93 U. S. 412.

8. Accordingly, Sage, Buell, and Cowdrey appeared at the adjourned term, in January, 1876, and moved for leave to intervene as complainants and to have the decree set aside. The motion to set aside the decree was overruled by the court (Dillon and Love, JJ.), but it was ordered that the petitioners be "permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the supreme court from the decree entered herein on 22d October, 1875." An appeal was allowed, bond fixed at $2,000, and if to operate as supersedeas $1,000,000, and in either case to be given in thirty days.

9. The parties did not file any bond within the thirty days; but after the expiration of that time, they presented a new petition to his honor, Mr. Justice Miller, for an allowance of appeal with supersedeas, and it was allowed February 16, 1876, and bond for supersedeas approved by him in penalty of $20,000.

10. The appeal was perfected, and at the October term, 1876, of the supreme court, on motion therefor, that court vacated the supersedeas (93 U. S. 412), but overruled the motion made by the same party to dismiss the appeal, and the cause is still pending in that court.

11. After the supersedeas was vacated, it was ascertained that "The Financier," one of the newspapers in which the decree directed the notice to be published, had changed its name to "The Public." This fact being shown to the circuit judge, he made an ex parte order at chambers (January 8, 1877), directing the notice of the sale to be published in "The Public," instead of "The Financier." This order was made at the instance of Mr. Alexander and the said committee. The supersedeas was vacated by the supreme court December 18, 1876, and a certified copy of its order was filed in the office of the clerk of the circuit court at Des Moines in vacation, in January, 1877. Thereupon, shortly afterwards, a certain committee of bondholders asked the trustee to order the special master to proceed with the execution of the decree, make sale of the road, etc. The trustee failing to do this, the committee, without the consent of the trustee, directed the master to sell, claiming the right so to direct under equity rules 8 and 10. This the master refused to do. Thereupon the trustee petitioned the court for advice in respect to ordering the sale; and a committee of bondholders moved for an order directing the trustee and master to execute the decree. This petition and motion were presented to the circuit judge, at his chambers in Davenport, in February, 1877, and the hearing fixed, at Davenport, for Saturday, March 3d, 1877, and Judge Love was requested by the circuit judge to be present, and all parties were notified by telegraph. Judge Love accidentally missed the train, and in consequence was not present at the hearing, and by consent of counsel the papers and arguments were sent to him by the

master, unaccompanied with any opinion of the circuit judge. Judge Love's opinion, which is given below, was transmitted to the circuit judge, who annexed thereto his opinion, also given below, and the same were filed March 12th, 1877. The trustee's counsel (Mr. Turner), in his printed argument, opposed the application of the committee, because of the protest of certain other bondholders, and because, in its judgment, the sale pending the appeal might lead to grave complications. The counsel for the committee opposed this contention, and insisted that any bondholder had the legal and absolute right to have the decree executed (equity rules 8, 10) against the will or judgment of the trustee.

H. B. Turner, for the trustee.

R. L. Ashhurst and C. C. Cole, for a committee of bondholders.

LOVE, District Judge. I have gone carefully over the papers, and given them the best consideration I could. I proceed to give my impressions as to the disposition which ought to be made of the case: I have a very decided opinion that the court ought not, at present, and upon the showing made by the majority of the bondholders, to order the trustee to execute the decree.

The case is a peculiar one. The circuit court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree. Now, it turns out that this assumption was not well founded, so far as the appellants (Cowdrey et al.), who are now resisting the execution, are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any court upon their rights and equities under the mortgage. If the court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I do not see that they would have any reason to complain, even though they could not, in the event of a reversal, be placed, as to their rights under the mortgage, in statu quo. But in the absence of any real adjudication by the court, and by virtue of a consent decree, to which they were not parties, to have the property in which they are interested disposed of, so that in the event of a reversal they cannot be awarded the very relief to which they would be entitled by the terms of the mortgage, would seem to me not at all in accordance with the principles of equity.

Again, it is impossible for us to know what the decision of the supreme court will be, and what complications may consequently arise from the execution of the decree in the meantime. Will the supreme court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control; or will it determine the controversy with reference to the state of the case and property at the time when the decree was entered below? I confess I do not see the way clear in the future, if the status quo of the trust property be changed, as required by the terms of the decree. On the contrary, it appears to me that no complications can possibly arise if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay. If the majority feel aggrieved by the refusal of the court to grant their present motion, I suppose they have their remedy; they can apply for a mandamus, and thus submit their case to the judgment of the supreme court, and if it be a matter of right in them, and not of discretion in the circuit court, they can thus obtain redress. If the circuit judge feels any embarrassment in regard to the matter, he might consider the propriety of reserving his determination till the regular term in May.

The circuit judge concurred, and annexed to the above opinion of Judge LOVE the following:

DILLON, Circuit Judge. 1. I am of opinion that individual bondholders, not parties to the record, and who are represented by the trustee, have no legal right to demand that the trustee shall order a sale under the decree and have the same executed, if the trustee is of opinion that the interest of all the bondholders would be best subserved by not having a sale made pending the appeal.

2. The question whether a sale should be made under the decree pending the appeal is one which primarily belongs to the trustee to determine, having in view the interest of all the cestuis que trustent. That question the trustee, by the petition, refers to the court. Under the circumstances, I am of opinion the court ought not to order the trustee to cause a sale to be made at the present time; such is also the opinion of Judge LOVE, hereto annexed, and in which I concur. An order can be made on the foregoing petitions in conformity with these views, and the special master will cause the order to be entered of record, and the respective counsel to be notified hereof. We decide the matter now, so as to enable the parties who desire a sale to apply to the supreme court, at this term, for a mandamus to compel the execution of this decree, if they shall so desire.

Afterward, and at the May term, 1877, the application was renewed by Alexander and others, original complainants and bondholders, and the following opinion was announced, reported by a short-hand reporter:

C. C. Cole, for the application.

Grant & Smith, contra.

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

DILLON, Circuit Judge, in orally denying the application to compel the trustee to sell the road under the decree, said:

Mr. Alexander and certain other bondholders apply here for an order on the trustee, the complainant in this case, in whose favor a decree was rendered, directing the trustee to sell the road under the decree of the court heretofore rendered. That matter has been very fully argued in favor of the application by Judge Cole, and the trustee appears by its attorneys of record and submits the matter on its part for the consideration of the court. This is in reality a renewal of a similar application which was made and considered by Judge LOVE and myself last winter, at chambers. At that time we denied the application, and decided it promptly, so as to enable the parties, if dissatisfied with our judgment in the premises, to apply to the supreme court for a mandamus directing us to execute that decree. The facts are these, in brief: Originally, Mr. Alexander and certain other bondholders commenced this action of foreclosure in their own names, making the trustee a party defendant, on the ground that the trustee had improperly refused to execute the trust. Subsequently the trustee came in and was made complainant, and the case of the individual bondholders was consolidated with that one, and thereafter the cause was prosecuted in the name of the trustee, taking no notice of the rights of Mr. Alexander, or the other individual bondholders.

Under a railway mortgage, where it is contemplated that bonds to a large number will be executed and negotiated, and where the holders of these bonds may be scattered over the whole face of the earth, it becomes very important to appoint a trustee, and the trust deed for that purpose usually prescribes the powers and duties of the trustee; and it is so in this case. Now, all the purchasers of these bonds must take under the rights which that instrument gives them; and the effect of this is that the trustee, while acting in the line of his duty, and within the scope of his powers, is a representative of all the bondholders, so that when the trustee in this case procured a decree of foreclosure, he procured it for the equal benefit of all. The court cannot entertain the application of specific bondholders, except where they come in and represent and make a case, showing that the trustee is guilty of a breach of trust or neglect of duty. Such proceedings were had that the court ordered a decree of foreclosure for the trustee, for the benefit of all the bondholders. Subsequently two or three of the bondholders—Sage, Cowdrey, and Buell—were allowed an appeal to the supreme court, and the appeal was directed by Mr. Justice Miller to operate as a supersedeas. 93 U. S. 412.

Afterwards, in the supreme court, the supersedeas was set aside, but the appeal was entertained, and is still pending in that court. While that appeal is pending, an application was made to order the special master to make a sale of the road, which was considered by Judge LOVE and myself. That application was refused. The parties went before the supreme court, on an application for a mandamus to compel us to execute the decree by a sale of the road under it, and that application was refused. We have not seen the opinion of the supreme court, if one was written, but Judge Miller states to us distinctly that it was refused, on the ground that this trustee was the representative of all the bondholders—that it was for him to determine whether the best interests of all concerned would be promoted by a sale of the road, and that no single bondholder nor any number of individual bondholders, had a legal right to insist upon an execution of the decree. And he says, furthermore, that the supreme court is very strongly of opinion that the individual bondholders ought not to be allowed to become parties to the record in railway foreclosure cases, unless upon strong and clear reasons, for good cause. Their number is legion. One may may want this done, another may want that done; and such is the case here. The majority of the bondholders want a sale of the road, but a very large number in amount oppose that sale. Now, it is for the trustee to determine whether that sale ought to be made. And Judge Miller also states that the supreme court is of opinion that, if these bondholders do not like the trustee, and are dissatisfied, their remedy is to apply to have him removed, under the provision in that behalf contained in the trust deed, and get a trustee to carry out their wishes, if they can.

So far as this case is concerned, we think that what the supreme court has decided is conclusive against the legal right of these parties now applying to have this decree executed; but at the same time we wish to say, for the guidance of the trustee, that there is no restraint in the decree, or in what has been decided in either court against its execution, and that the appeal does not supersede it, and that it is at perfect liberty, whenever it sees fit, to execute that decree. As far as the court is concerned, considering the trouble this road gives us by reason of the controversies and factions among the bondholders, we would be glad if the trustee could see its way clear to execute that decree, and would be glad if it could get the road out of court, and into the hands of parties who could control it to their satisfaction.

As far as the suggestion is made that the trustee incurs any personal liability in so doing, we think there is nothing in that. It comes to this—and we want the trustee to understand that—as far as we can see, it incurs no personal liability by executing the

decree. There is simply this question for the trustee to determine, viz., whether the interests of all the cestuis que trustent, or bondholders, would be best promoted by now executing the decree, or by allowing it to stand until the determination of the appeal.

We are, therefore, obliged, in conformity with what we heretofore decided, and for the reasons here stated, and in conformity with the opinion of the supreme court, as we understand it through Mr. Justice Miller, to refuse this application. I have directed the short-hand reporter to take down the substance of what I have said, and send it to the trustee.

There is an application here by certain bondholders to remove the trustee, and the court will entertain that and consider it, if they take the steps necessary to that end.

NOTE. Subsequently (August 31, 1877), Judge Love gave more at large the reasons for refusing to interfere with the discretion of the trustee, in respect to selling under the decree, pending the appeal in the supreme court. He said: "No one connected with the court has ever questioned the right of a party having a decree or judgment to have it enforced by execution; in other words, to have the fruits of his judgment or decree. Where the ordinary machinery of the court is sufficient to secure to a suitor the execution of his judgment, he has only to put that machinery in motion. Where the ordinary process of the court is inadequate to that end, the court, whether of law or equity, will undoubtedly give him the requisite assistance. But in the case now in question, it was perfectly competent for the complainant, the trustee, at any time after the vacation of the supersedeas granted by Judge Miller, to proceed with the execution of the decree without any action whatever by this court. This is unquestionable; and it is equally beyond question that neither this court, nor any judge of it, ever opposed the least obstacle to the execution of the decree by the complainant trustee. The court did refuse to order the trustee to proceed with the execution of the decree, but no order was necessary for that purpose. A thousand orders would not have added a scintilla of validity to the trustee's unquestioned right to execute the decree. No one ever denied or questioned its right to proceed. But when application was made to the court to order the execution of the decree, a very different question arose. The question then was, not whether the trustee had a legal right to proceed—which nobody questioned—but whether, under the then existing circumstances, the execution of the decree was a wise thing to be done? There was no necessity whatever for any order to have the decree executed. The bondholders, through their own chosen agents and trustees, had a decree which they could proceed to execute without the aid of the court. They had no right to ask the court to give them a power which they already possessed, in the most solemn form, by virtue of the decree itself. Nevertheless, the court might, by virtue of its power over all trusts and trustees, have ordered the complainants to proceed with the execution, though it would have been, in my judgment, an act of supererogation.

"But I have not the least hesitation in saying that, so far as I am concerned, I considered it unwise, under the circumstances of this case, to execute the decree pending the appeal in the supreme court. I am still of that opinion.

"I will briefly state the reasons which finally governed the court in refusing the application:

"Let it be remembered that the decree in this cause was not rendered upon the independent judgment of the court upon the rights and equities of the parties under the mortgage contracts. This court never did determine that the decree was one which the terms of the mortgage contracts warranted. The decree was presented to us as a compromise, to which all the counsel before the court, representing various bondholders, assented. As such, the court accepted it, and ordered it to be entered. We know that the parties themselves have a right to waive particular conditions in the mortgages, and, by consent, have a decree entered, which the court might not consider exactly consistent with the terms of the mortgages.

"But in time it came to the knowledge of the court that there were first mortgage bondholders to the amount of $200,000 or $300,000, who had not been represented in the litigation, and who did not assent to the terms of the decree. These dissenting bondholders asked and obtained leave to appeal to the supreme court of the United States, and they are now, with the express leave of that court, prosecuting their appeal. 93 U. S. 412.

"Who does not see that there is more than ordinary ground to apprehend that a decree so entered may possibly be reversed? I trust it will not be, because I regard it upon the whole as equitable, and calculated to promote the substantial interests of all parties. But since I cannot say that it was a decree which the mortgage contracts warranted, and since I know that the appellants were not heard in the court below, I cannot but apprehend that it may be reversed. Now, suppose the decree shall be reversed, and suppose in the meantime it shall have been executed by a sale and conveyance of the property to the complainants, who can foretell what complications may arise? It is proposed by the execution of this decree, not only to transfer the title of the mortgaged property to the complainants as execution purchasers, but to organize a new corporation to take the title, with power to issue a new mortgage and new stock, all based upon the title thus acquired. What will be the character of this title if the decree be reversed? Will the purchasers, who are none other than the very parties to the decree, take a good title as innocent purchasers, notwithstanding the reversal; or will they be held to be purchasers with notice? And, in this case, will their title be of any validity whatsoever, in the event of a reversal of the decree under which they have by their own acts obtained title.

"These are grave questions. It was not for us to decide them, when the application was made to us to enforce the execution of the decree. It is not for us to decide them now. But they were questions to be considered by us when it was our duty to determine whether it was a wise or unwise thing to order an execution of the decree by a reluctant trustee.

"It was certainly our duty, upon such an application, to consider what value capitalists would be likely to attach to the new securities, to be issued upon the basis of a title affected by the doubts suggested by the questions referred to. What credit would the new organization have, based upon this railroad property with a doubtful title? And would the end not be that the new organization, with the consent of the beneficiaries whom they represent, would, finally, in order to prevent a reversal, or avert the confusion and disorder which would result from it, be compelled to pay the appellants the amount of their bonds, with interest? In addition to those considerations, it occurred to me that no serious detriment could result to the bondholders by continuing the property in the hands of the receiver appointed by the court until the judgment of the supreme court could be obtained. It was within our own experience that all the roads which were under the control of receivers appointed by the court, had been operated and managed more economically, and

with decidedly better results, than they had previously been by the agents of the railroad companies. Whatever may have been the cause of this result, it was a fact which had been a matter of general observation and remark. And the court had no reason to suppose that the management of the Central Iowa would prove an exception, nor do we believe it has proved an exception.

"Such were the views which influenced my judgment, in the conclusion that the court ought not to take the responsibility of ordering an unwilling trustee to execute the decree. I proposed to place no obstacle in the way of the trustee, and to utter no word of discouragement; but to leave it, and the parties whom it represented, to take the responsibility which belonged to them. They had full legal right to proceed without the authorization of the court. I did not myself propose to order, or even advise, a step which I considered to be, in its consequences, hazardous and unwise.

"The fact that the trustee did finally proceed with the execution without any order of the court, shows that none was necessary, and that the trustee had been at perfect liberty so to proceed after the discharge of the supersedeas granted by Justice Miller."

Case No. 4,664.

FARMERS' LOAN & TRUST CO. v. CENTRAL RAILROAD OF IOWA.

[4 Dill. 546;[1] 5 Cent. Law J. 258.]

Circuit Court, D. Iowa. Aug. 31, 1877.

RAILWAY MORTGAGE FORECLOSURE—DECREE—SALE.

1. The pendency of an appeal from a final decree in equity, in which no supersedeas exists, does not deprive the court which rendered the decree from making proper orders to enable the party in whose favor the decree was rendered to have the same executed.

2. Construction of special provisions of deed of trust and decree as to re-organization of a new railroad company, where the trustee purchased the property of the former company under a foreclosure decree for the benefit of the bondholders.

3. Appeal from the order confirming sale granted, but supersedeas denied, under the facts of the particular case.

The cause came on on motion by the complainant to confirm the report of sale under the decree, by the special master, and upon exceptions by Mr. Cowdrey and others (93 U. S. 412) to that report; and upon motions for an order upon the trustee to convey the property to each of three competing companies, and upon the application of Cowdrey and others for an appeal from the order confirming the sale, and for a supersedeas.

[For history of previous proceedings, see Case No. 4,663, and note at end of the opinion below.]

Mr. Grant, Mr. Turner, and Mr. Cole, for plaintiff trustee.

Mr. Cowdrey, contra.

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

DILLON, Circuit Judge. We have considered the exceptions of Mr. Cowdrey and others to the master's report of sale, and are of opinion that they must be disallowed.

The plaintiff, notwithstanding the pending appeal, has a right to execute the decree—the supersedeas having been vacated. It was incidental to this right, which remains in this court, to make the order substituting "The Public" in the place of "The Financier"—more especially as the evidence produced before me when the order was made, showed the two newspapers to be the same—the change being one of name only. At all events, the object of the notice was publicity, and the rquirements of the decree in this respect have been substantially complied with.

The other exceptions are based upon supposed errors in the decree. But while that decree remains unreversed, it must be accepted and treated by this court as correct. The master, in making the sale, has followed the decree. The exceptions to his report are overruled, and the motion to confirm the sale is granted, and the master is directed to execute a deed to the trustee, pursuant to the terms of the decree.

Same Case.

DILLON, Circuit Judge. The several motions to order the property to be conveyed by the trustee to one or other of three new rival companies, must be denied, for the reason that, under the decree and the deed of trust, no evidence is before us "that the holders of a majority of the outstanding bonds secured by the first mortgage have, in writing, requested or directed," or assented to the articles of incorporation of either of said new companies. This written request or assent on the part of the present holders of said bonds to the articles of incorporation is expressly required by the deed of trust, and it is not changed by the decree. The decree and the deed of trust must be construed together. This written request or assent must be produced either to the trustee or to this court or to the master, before either the trustee or the court is authorized to convey the premises to the new corporation. Such is the express requirement of the deed of trust. If the parties desire, we will appoint the master to act in this matter in the place of the trustee, and direct him to proceed without delay to ascertain whether a majority of the present holders of bonds have assented or shall assent in writing to the articles of incorporation. When that fact is reported to us, we will direct the trustee to convey the premises to it.

It is for the bondholders, and not the court, to determine what corporation or company is or shall be entitled to the property.

We see no substantial objection to the scheme proposed in the order submitted to us providing for the receiver's debts, but as this is dependent upon a conveyance to the new company, no absolute order in this respect can be entered at this time. We

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

mention this now, so that the creditors and bondholders may be apprised of our views.

Same Case.

DILLON, Circuit Judge. We allow an appeal as prayed by Mr. Cowdrey et al., from the order confirming the sale, but are of opinion that this order cannot be superseded at this late day (the main decree of October, 1875, not being superseded), so as to prevent the master's deed from being executed and delivered.

NOTE. Mr. Cowdrey and the appellants (see [Sage v. Central R. Co.] 93 U. S. 412) subsequently applied to Mr. Justice Hunt, of the supreme court, who allowed the supersedeas which the circuit court here denied; and the parties who opposed this appeal moved the supreme court to dismiss the appeal allowed by the circuit court and to vacate the supersedeas allowed by Justice Hunt; both of which motions the supreme court subsequently, January 7, 1878, overruled. [Id., 96 U. S. 712. See, also, Id., 99 U. S. 334.]

As to previous appeal allowed to Cowdrey and others in this case, see 93 U. S. 412. Previous decisions and orders in the cause, see Alexander v. Central Railroad [Case No. 166]; Farmers' Loan & Trust Co. v. Central Railroad [Id. 4,663].

Case No. 4,665.

FARMERS' LOAN & TRUST CO. v. CHICAGO, P. & S. W. R. CO. et al.

[9 Biss. 133;[1] 12 Chi. Leg. News, 65; 25 Int. Rev. Rec. 360.]

Circuit Court, N. D. Illinois. Oct., 1879.

REMOVAL OF CAUSE — JURISDICTION — EFFECT OF APPEAL IN STATE COURT—VALIDITY OF BOND—ACTS OF 1867 AND 1875—REPEAL.

1. If there is a controversy between citizens of different states, and the statute, providing for the removal of causes from a state to the federal court, has been complied with so as to authorize a removal, then the removal takes the whole suit, notwithstanding there may be other controversies in it.

[Cited in Sheldon v. Keokuk N. L. P. Co., 1 Fed. 794.]

2. The fact that decrees have been made in the state court as to incidental questions involved in the suit, and from which appeals have been taken to the state appellate court, cannot interfere with the right of the parties to have the cause removed to the federal court.

3. It seems, that the decisions of the highest court of the state upon such incidental questions will be duly carried out by the federal court in the same manner as would have been done by the state court if the cause had remained there.

4. The application for removal of the cause was based upon the act of 1867 [14 Stat. 558]. A bond given in form as prescribed by the act of 1875 [18 Stat. 471] was *held* to be a proper bond.

[Cited in Deford v. Mehaffy, 13 Fed. 491.]

5. The act of 1875 does not wholly repeal the act of 1867.

In equity. Application by complainant to remove cause from state court.

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

G. W. Kretzinger and C. B. Lawrence, for complainant.

James L. High and McCoy & Pratt, for defendants.

DRUMMOND, Circuit Judge. A motion is made to docket this cause in this court, on the ground that the proper steps had been taken in the state court, where the case was originally brought, to give this court jurisdiction of the case. It is a very complicated case, so far as the question now before the court is concerned, in this: that after the case had been pending for some time in the state court, at the instance of one of the parties it was removed to this court, and then by consent, was returned to the state court; and again, on application of one of the parties, was brought to this court, and the question was made here, whether the court, under the circumstances, had jurisdiction of the case. On argument before the court at that time, it was decided that this court had jurisdiction on account of the citizenship of the parties, and the character of the controversy between them. After this decision had been made, some change took place in the views of the parties, and they came into court and asked in pursuance of a stipulation made between them, that the cause should be returned to the state court. I am not certain whether that point was argued before the court, but I recollect I had great doubt when the question was before me, whether it was competent for the court, as the proper steps had been taken in the state court to remove the cause, to return it to the state court even under the stipulation of the parties. However, after consideration, and some hesitation, I consented that the case might be returned to the state court, upon the condition that when it was returned, all the proceedings and acts done by which the cause was sought to be removed to this court, should be withdrawn from the state court, and it should stand without any petition or bond pending in court. I thought under the circumstances the state court could then take jurisdiction of the case. After this was done, it seems that the cause by consent was removed to another county, and various proceedings took place afterwards, and now, again, for the third time an application has been made, not by the same parties that made either of the previous applications, but by the plaintiff, to remove the cause under the act of 1875, and under the act of 1867, which last act authorizes a suit to be removed where an affidavit is filed, stating that from prejudice or local influence against the party, justice cannot be obtained. It will be seen, therefore, that upon the question of removal the case has become very much complicated, but still the question is, whether, under any act of congress the complainant had the right, at the time the application was made in the state court, to remove the cause. It

seems at the time this application was made the Chicago, Pekin & Southwestern Railroad Company, the principal defendant, had been defaulted, and the default had been set aside.

There were two deeds of trust given by the principal defendant to the plaintiff to secure certain bonds that were issued. The original bill was filed upon the first and older deed of trust, and afterwards, and before the application was made for removal, an amendment was allowed by the court, and an amended bill was filed which included the second deed of trust. Under the second deed of trust, authority was given to the trustee to sell the property upon due notice, and the property was advertised and sold, and two persons became purchasers under the sale. This was alleged in the amended bill, but it was claimed that the sale was invalid, and it was averred in the amended bill that it was so decided by the state court.

One of the purchasers only was made defendant, and as to him, the bill was dismissed before the application for removal was made. The question is, whether under this state of facts a removal can be had. It will be recollected that the act of 1875, requires that the petition for the removal must be filed before, or at the term at which the cause could be first tried. After the default, it is said, there was a reference to the master, and a stipulation to which the plaintiff was a party, that the case should be submitted to the court, and heard during vacation, which, however, I suppose could hardly be considered operative after the default had been set aside, there being at the time the application was made no issue before the court.

I am inclined to rest the application in this case on the act of 1867, incorporated in the third paragraph of the 639th section of the Revised Statutes, which authorizes a petition for removal to be filed when there is a suit pending in a state court between a citizen of the state in which it is brought, and a citizen of another state, whether the party making the application is plaintiff or defendant, if an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, is filed at any time before the trial or final hearing of the suit. It is not controverted that a proper affidavit was made in this case, and that being so, the questions are: Was there a suit in which there was a controversy between citizens of different states, and was there a petition filed, and a bond duly executed before the final trial or hearing of the case? The original controversy between the parties, and, it may be said, the main controversy was as to the foreclosure of the first mortgage or deed of trust. There had been no answer filed by the principal defendant to the bill. There had been an amendment made, under which the court was asked to foreclose the second deed of trust or mortgage. There had been no answer to that, and it is clear that one of the controversies, if not the main controversy, was as to the foreclosure of the second mortgage or deed of trust. It may be true that there was a controversy, and perhaps one of the principal controversies under the amended bill, whether the sale made by the trustee was a valid sale; but for the purpose of this application I think I must consider that question removed from the cause.

There may be another question which both the plaintiff and the principal defendant have a right to bring before this court; whether, under the circumstances, the purchasers are competent or necessary parties, it being claimed they have waived all equities under the purchase. It seems that if the question is as to the validity of that sale, and the purchasers insist upon its validity, they must be necessary parties to any question growing out of that. But that is only one of the questions in the case. There may be another not directly connected with that, and which affects the principal defendant in the cause, and as to which it has the right to be heard, and it joins the plaintiff in its present application to the court. There is very grave doubt whether the controversy which exists between citizens of different states must necessarily be the main controversy, or the principal controversy in the cause. The statute does not place it distinctly upon that ground.

It is true the courts, in deciding the questions which have arisen under the act of 1875, have in many instances said that the particular question which was involved and which constituted the controversy, was the main controversy in the cause; but that is not the language of the act of 1875, which is, "And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district." 18 Stat. 470. So that the statute, by its terms requires that there shall be a controversy; that the controversy shall be wholly between citizens of different states, and that that controversy can be fully determined as between them; and that one or more of the plaintiffs or defendants is interested in that controversy. It does not say that it shall be the main controversy in the cause, or the principal controversy, but only that there shall be a controversy. It has been decided, and I think it must be considered as the settled law under this statute, until the supreme court holds otherwise, that if there is a controversy between citizens of different states, and the statute has been complied with so as to au-

thorize a removal, then the removal takes the whole suit or cause, notwithstanding there may be other controversies in it; and so if a cause can be removed where there is a controversy, but not the principal controversy, the removal takes the principal controversy, and all other controversies in the cause from the state to the federal court.

The objection has been made that as to some incidental questions involved in litigation in this cause, while pending in the state court, and in which some of the parties litigating have been interested, decrees have been made in the state court, which have been taken to the appellate court of the state. While that circumstance gives an additional complication to the case, it cannot interfere with the legal right of any of the parties existing under any act of congress. These decrees will have to take their course through the appellate court of the state, and the affirmance or reversal of them by that court, or by the highest court of the state, will have to be taken by this court as a final adjudication of the controversy between those parties, and it is to be presumed that the action of the highest court of the state will be duly carried out by this court, in the same manner that it would have been by the state court if the cause had remained there.

The next question is, whether there was a proper bond executed in this case. The bond was given under the act of 1875, and not under the act of 1867. Under the latter act, there must be given "good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony and other proceedings in the suit." Under the act of 1875, there must be filed a bond "with good and sufficient surety for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if such court shall hold that such suit was wrongfully or improperly removed thereto," etc.

It will be observed that under the act of 1875, the bond required is for the payment of all costs that may be awarded by the said circuit court. It is different from that required under the act of 1867, and the question is whether, where an application is made under the act of 1867, a bond should be given as required by the act of 1875. There had been some doubt whether the act of 1867 was repealed by the act of 1875, in all its parts, by the general repealing clause of previous laws in conflict with the provisions of the act of 1875, at the end of the latter act. But I think the weight of authority is, that the act of 1867 still remains in force, so far as to allow an affidavit to be filed, as required by that act. It is a very nice question, whether that portion of the act of 1867, as to the form of the bond is repealed by the act of 1875. It has been so decided by some of the courts. McMurdy v. Connecticut Gen. Life Ins. Co. [Case No. 8,903]; Torrey v. Grant Locomotive Works [Id. 14,105]. I confess my first impression was, that those decisions were of questionable authority: but on further consideration, I am inclined to think that they are, perhaps, correct, on the ground that the act of 1875, does not wholly repeal the act of 1867. The act of 1875 mentions the various circumstances under which a cause can be removed, and it states that either party may remove the suit into the circuit court of the United States, and on the assumption that it left the act of 1867 in force as to the circumstances under which the removal might be made, then we must also assume that the act of 1875 referred as well to that cause of removal as to other causes, because it simply speaks of the controversy between citizens of different states, the sum or value in controversy, and then it declares either party may remove such suit into the circuit court of the United States, and then follows the last clause of the second section in the act of 1875, which I have already cited, and then the first words of the third section "whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section," etc. Now, if the "next preceding section" includes as well the cause of removal specified in the act of 1867, as the act of 1875, then it is within the language of the third section, and so declares what kind of a bond shall be given; and so the bond which was given in this case was a proper bond under the act of 1875, although the cause of removal was under the act of 1867, which, as to the form of the bond was repealed by the act of 1875.

It is with some hesitation that I have reached these conclusions, but on the whole I think the party was entitled to have the cause removed, and it will accordingly be docketed in this court.

See, also, Sheldon v. Keokuk N. L. P. Co., 1 Fed. 789, and the note thereto.

Case No. 4,666.

FARMERS' LOAN & TRUST CO. v. HENNING et al.

[17 Am. Law Reg. (N. S.) 266.]

Circuit Court, D. Kansas. 1878.

RAILROAD COMPANIES—ABANDONMENT OF ROAD—GRANT OF LAND IN CONSIDERATION OF CONSTRUCTION OF ROAD—OBLIGATION TO COMPLETE SAME.

1. Where a railroad company constructs and operates its road over its line, under the powers and privileges of its charter, it cannot thereafter abandon the same, even though its charter, in its inception, was merely permissive and not mandatory.

2. Where congress donates lands to a state to aid in building railroads, there is a beneficial interest therein, vested in the state, and where such lands are granted to a railroad company, by the state, in consideration that the company shall build its road, and such grant is duly accepted, a valid contract is created, which is obligatory on the company, to complete its road; and compliance with such charter duty, and contract obligation, can be enforced by mandamus.

[Cited in People v. Rome, W. & O. R. Co., 103 N. Y. 108, 8 N. E. 369.]

This was an application by the attorney-general of the state of Kansas for an order on [B. S. Henning] the receiver of the Leavenworth, Lawrence and Galveston Railroad Company to repair and operate said railroad to the city of Leavenworth, the initial point named in its charter. The railroad was in the hands of said receiver, who was appointed by this court in an action by the Farmers' Loan and Trust Company, trustee, to foreclose its mortgage against said railroad. The petition of the attorney-general recited the original and amended charters of said company, granted by the territory and state of Kansas respectively, and dated February 12th, 1858, and February 29th, 1864, by which said company was authorized to construct, maintain and operate a railroad from Leavenworth, by the way of Lawrence, to the southern line of the state. Also, the grant of lands by the general government to the state of Kansas, to aid in the construction of said railroad, dated March 3d, 1863; the act of the legislature accepting said grant by the state, and transferring the same to the said railroad company, dated February 13th, 1864, and the acceptance by the company of the congressional grant and of the provisions of the said legislative act, dated March 12th, 1864, the state grant of one hundred and twenty-five thousand acres of land, to aid in the construction of said railroad, dated February 23d, 1866, and the acceptance of the same by the company, dated May 16th, 1866. Also, an act of the legislature changing the name of said company from the Leavenworth, Lawrence and Fort Gibson Railroad Company to the Leavenworth, Lawrence and Galveston Railroad Company, approved February 24th, 1866.

And the said petition further alleged that said railroad company did, in pursuance of its charter and agreements, construct, and since the year 1872 did operate and maintain its road, from a point of junction with the Kansas Pacific Railroad, on the north side of the Kansas river, opposite the city of Lawrence, to the south line of the state, and did, under an agreement with the Kansas Pacific Company, run its cars and transport its freight and passengers over said last-named railroad, from its junction therewith to and from the city of Leavenworth, thus making a continuous line from said city, via Lawrence to the south line of the state. That said Henning was appointed receiver of said railroad by an order of this court on the 5th day of March, 1875, and that said receiver continued to operate and maintain said road, as aforesaid, until the 8th day of June, 1877. That since said last mentioned date said receiver has refused and neglected, and does still refuse and neglect, to operate said railroad from Lawrence to Leavenworth, or to run its cars for transporting freight and passengers to and from Leavenworth, under said agreement with the Kansas Pacific Company, and has abandoned said line of road, and refuses and neglects to maintain the bridge of said company across the Kansas river at Lawrence, and has permitted the same to remain unused and to go to decay, to the great damage of the commerce of the state, and especially of the cities of Leavenworth and Lawrence, and to the detriment of the travelling public; and praying for an order that said receiver be required to repair and maintain said railroad and bridge, and operate said road, as heretofore, from Leavenworth to Lawrence, and from thence to the southern line of the state, as provided by its said charter. To this petition the receiver filed a general demurrer.

Willard Davis, Atty. Gen., and H. B. Johnson, for the State.

Wallace Pratt and S. O. Thatcher, for respondent.

FOSTER, District Judge. The allegations of the petition standing confessed, and no question being made as to the form of the proceedings, the main question is to determine what obligations and duties the railroad company owes to the state, under its charter and the grants of land by the general government and the state, and the acceptance thereof by said company. And to these questions the arguments of counsel have been addressed, and have taken a wide range. It appears to be well supported by authority and reason that the powers and privileges granted by the charters of this company are permissive only, and not obligatory, and the company could elect whether it would proceed to exercise the franchises thereby granted, or whether it would not. And if it chose the latter course, the only penalty would be a forfeiture of the rights and privileges conferred. York & N. M. R. Co. v. The Queen, 1 El. & Bl. 858; State v. Southern Minnesota R. Co., 18 Minn. 40 [Gil. 21]; High, Extr. Leg. Rem. § 316. It was held by the court of exchequer chamber, in the case first above cited, that the mandamus would not lie to compel the company to exercise its franchises as to a part of the route named in its charter, and abandoned by the company when it had not actually proceeded to build or operate its road over the part abandoned, and no corrupt motives are imputed to the company in abandoning the line. But when the com-

pany has once built and operated its railroad between the points named in its charter, the case seems to stand on different grounds, and it seems the company may be compelled by mandamus to carry out the objects for which it was created, and to exercise its charter obligations. The following cases sustain and carry out this view: State v. Hartford & N. H. R. Co., 29 Conn. 538; King v. Severn & W. R. Co., 2 Barn. & Ald. 644; High, Extr. Leg. Rem. §§ 317, 319, 320; People v. Troy & B. R. Co., 37 How. Pr. 427; People v. Albany & V. R. Co., 24 N. Y. 261, 37 Barb. 216.

The case last cited has been referred to by defendants' counsel as a strong case in defendants' favor, and it is urged that the only remedy of the state is to take proceedings to annul and forfeit the franchises of the company. But upon examination of the case in 24 N. Y., it will be seen that the opposite doctrine is held by a majority of the judges. That proceeding was not by mandamus, but was a proceeding by the attorney-general for an injunction, and for the specific performance of the charter obligations of the company, and the main question to be decided was whether such a proceeding could be sustained. It is true Judge Wright, who delivered the opinion of the court, went farther, and not only argues that the action could not be maintained, but that by no proceeding could the company be compelled to keep up and operate its road, and that the only remedy the people had was indictment or proceedings to forfeit the franchise. But while all the judges concurred in the conclusion, i. e., that the judgment of the supreme court dismissing the bill should be affirmed, four out of the six judges sitting in the case "however were of the opinion that a corporation is under a legal obligation to exercise its franchises, and that it has not the option to discontinue a part of its road and forfeit its franchise. They agree that the remedy is not by action in equity for a specific performance, but by mandamus or indictment, or, at the election of the people, by proceeding to annul the existence of the corporation." So it is apparent this case is in point that the state may proceed, by mandamus, to compel the company to exercise its corporate powers when it has once constructed and operated its road. Having entered upon the exercise of its charter franchises it then owes a duty to the public which it may not, at its caprice, abandon. And in equity and good conscience the obligation is still greater where the company has been the recipient of land grants and subsidies to aid the construction of its road.

Having said this much as to the rights, privileges and duties of the company under its charter, I might rest this case here. But as the legal effect of the land grants made to and accepted by the company has been discussed by the counsel, I will briefly state the view in which that matter presents itself to my mind. Undoubtedly the ultimate object of the congress in granting lands to aid the construction of a railroad from Leavenworth via Lawrence, to the southern line of the state, was to secure the construction and operation of the road from the initial point named in the act of congress. This was a grant in praesenti to the state of Kansas, in trust to aid the construction of two designated lines of railroad, and the lands could not be diverted to any other purpose. It seems to be the settled doctrine of the supreme court of the United States that grants of this nature are not mere naked trusts, but vest a beneficial interest in the state. In the case of the United States against this same company, known as the Osage Land Case, 92 U. S. 748, the court, speaking of this act of congress [12 Stat. 772], uses this language: "The scope and effect of the act of 1863 cannot, in our opinion, be misunderstood. The different parts harmonize with each other and present in a clear light the scheme as an entirety. Kansas needed railroads to develop her resources, and congress was willing to aid her to build them, by a grant of a part of the national domain." * * *

In the case of Rice v. Minnesota & N. R. Co., 1 Black [66 U. S.] 378, 379, the supreme court had under consideration an act of congress of 1854 [10 Stat. 302], granting lands to the territory of Minnesota to aid in the construction of a railroad, which act contained these words: "No title shall vest in the territory of Minnesota." And the court held in that case, by reason of this provision in the act that no present beneficial interest passed to the territory, and that previous to any rights becoming vested under it, congress could revoke the grant. But it will be seen, at pages 378, 379, and 381, the court draws a distinction between grants like this one and the Minnesota grant, and refer to their decision in the case of Lessieur v. Price, 12 How. [53 U. S.] 76, and Justice Nelson, in his dissenting opinion, at page 382, again reiterates the same doctrine and says: "The grantee in all such cases takes a beneficial interest in the grant, as the representative of the persons for whose benefit it is made." The state of Kansas was interested in building railroads within her limits, and thus developing her resources and inducing immigration to the state, and surely had a particular interest in securing the purpose for which this grant was made. This grant was not made to the Leavenworth, Lawrence and Fort Gibson Railroad Company, or to any other company. The power was clearly vested in the state to select the company to build the road, and generally to direct and control the grant for the purposes named in the act of congress. And it is fair to assume that the state, as trustee, having an interest in the grant, could impose such proper terms and conditions, in executing the trust, as were not in conflict with the provisions of

the act, and were best calculated to secure the object contemplated; and the company having given its consent to such terms and conditions, and received the lands, was bound to comply with its agreement.

In section 2 of the act of the legislature, accepting the grant and transferring it to the railroad company, are these words: "In consideration that the Leavenworth, Lawrence and Fort Gibson Railroad and Telegraph Company shall construct a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence * * *, to the southern line of the state, in the direction of Galveston bay * * *, the state of Kansas hereby agrees to grant, bargain and sell to said company all that portion of lands granted to the state by the above-named act of congress, applicable to the construction of the above-described railroad." Said act further provided that the company should, within six months, file its acceptance of the provisions of this act with the secretary of state, and, in default thereof, all grants and provisions therein contained as to this company shall cease and be void. To this act the company filed the following acceptance of March 12th, 1864: "Resolved, by the president and board of directors of the Leavenworth, Lawrence and Fort Gibson Railroad Company, that said company hereby accept said grant of lands according to the stipulations of said act of the legislature of the state of Kansas and of the congress of the United States. Resolved, that the secretary be and he is hereby instructed to transmit to the office of the secretary of state of Kansas a copy of the above acceptance of said grant of land." It seems apparent to my mind that the first stipulation of the act was that the company should build its road from the city of Leavenworth, and that its acceptance, by the company, created an obligation on the part of the company by which it was bound to build its road from that point; and even if the state imposed a condition not contained in the grant, as it was acceded to by this company, it cannot now object, and it is bound by its agreement. Baker v. Gee, 1 Wall. [68 U. S.] 333. I am therefore of the opinion that the state has the right to require the said railroad company to exercise the franchises of its charter over the abandoned portion of its line, because: 1. Having constructed and maintained and operated its road over said line, under the powers and privileges of its charter, it cannot thereafter at its option, abandon the same. 2. The stipulation in the second section of the said act of the legislature, and the acceptance of said act by the company, created a contract, obligatory on the company, to build its railroad from the city of Leavenworth. The demurrer must be overruled.

FARMERS' LOAN & TRUST CO. (KETCHUM v.). See Case No. 7,736.

Case No. 4,667.

FARMERS' LOAN & TRUST CO. v. McKINNEY.

[6 McLean, 1.][1]

Circuit Court, D. Michigan. June Term, 1853.

REAL PROPERTY—QUITCLAIM—TITLE OF GRANTOR ACQUIRED AFTER EXECUTION BUT BEFORE ACKNOWLEDGMENT — RIGHT TO A PATENT — JUDGMENT WITHOUT NOTICE TO DEFENDANT — OTHER ERRORS GROUNDS FOR REVERSAL — VALIDITY OF DEED EXECUTED IN ANOTHER STATE — NEW TRIAL—GROUNDS.

1. If testimony be admitted without objection, and no motion is made to withdraw it from the jury, it will afford no ground for a new trial.

2. Under a law of Michigan, a conveyance of land within it is valid, if the deed be executed in any other state, according to the laws of such state.

3. Under a quit claim deed from one who has no title, a subsequently acquired title, will not enure to the benefit of the grantee. But under a warranty such a title would enure, by way of estoppel.

[Cited in Matlock v. Lee, 9 Ind. 301.]

4. A deed of quit claim made before, but acknowledged subsequently, to the date of the title of the grantor, would, under certain circumstances, be good. This, on the supposition that the transaction was bona-fide, the intention being to make a valid deed.

5. When the first deed was made, the land may be presumed to have been paid for, to the government, the patent only being necessary to give the legal title.

6. When the defendant against whom the judgment was entered, had no notice, and that appears from the proceeding, the judgment is a nullity.

7. But where there was due notice, or an appearance of the defendant, no other error in the proceedings can make the judgment a nullity. Any other error may be ground for a reversal of the judgment, but it is not void.

[This was an action of ejectment by the Farmers' Loan & Trust Company of New York, against Douglass McKinney to recover the possession of certain land.]

Mr. Clark, for plaintiff.

Mr. Howard, for defendant.

OPINION OF THE COURT. This is a motion to set aside the verdict of the jury on several points made at the trial, some of which were reserved. The action was an ejectment, to recover the possession of eighty acres of land in the state of Michigan. A patent for the land was issued the 5th of June, 1837, to Daniel Hudson. A quit claim deed was executed by Hudson to Samuel T. Gaines for the land, the 25th of September, 1836, which was acknowledged the 31st of December, 1852. And on the 28th of September, 1836, Hudson, by his attorney in fact J. Wright Gordon, conveyed the tract of land to Gaines by a deed of warranty. This deed was duly acknowledged on the same day it was signed, and recorded in the proper county, on the 17th of November following. The

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

power of attorney under which the above conveyance was made was executed by Hudson and wife, in the state of New York, on the 26th of August, 1836, and was acknowledged on the following day, before a supreme court commissioner of the said state. It was received for record in the proper county in Michigan, on the 26th of November, 1836, and was recorded by the register. A mortgage on the land was duly executed by Gaines, to secure the payment of a sum of money to Ketchum, who assigned the same, in the state of New York, to the plaintiff, a corporation under the laws of New York, and doing business in that state, to secure the payment of a loan of money to him by the plaintiff. The debt not being paid, a bill was filed by the bank to foreclose the mortgage, in the circuit court of the United States, within the district of Michigan; and by its decision, the foreclosure was decreed, and the land was sold to the bank, at public sale, by a master in chancery, who was directed to sell it, and a deed in due form was made by him to the bank. And this action is brought to recover the possession of the same.

The quit claim deed is objected to, as having been executed by Hudson, before he received the patent from the government, and that under such a deed, the subsequently acquired title by Hudson did not enure to the benefit of his grantee. It is true, where a deed of quit claim has been made for land, to which the grantor has no title, a subsequently acquired title cannot operate to make good the quit claim. Such a deed can only transfer the title of the grantor at the time it was executed. If the first deed had contained a warranty it would have operated by way of estoppel to make it effectual. But the quit claim deed was not wholly inoperative. It appears from the patent, that full payment had been made by Hudson to the United States for the land, under the acts of congress, so that he had at least an equitable right to the land, and that, by the quit claim deed, passed to the purchaser. That deed was acknowledged by Hudson long after he obtained the patent, and it may be a matter of doubt whether such an acknowledgment, after having parted with the equity, does not give effect to the deed from that time. But it appears that three days after the execution of the quit claim deed, the attorney in fact of Hudson, executed a deed of warranty for the land to Gaines, which was duly acknowledged and recorded. The objection to this deed is, that the power, under which it was made, was defectively executed, and consequently was not valid. The power had but one witness, and, it is insisted that the law of Michigan, under which it was executed, requires two. When this power was offered in evidence there was no objection made to its admission. Unless an objection be made to evidence when offered, it will be presumed to be admitted by consent. And if no motion is made to withdraw it from the jury, during the trial, the objection will not be heard on a motion for a new trial. But if this point were open on this motion, it could not be sustained. The territorial act of Michigan of the 12th of April, 1827 [Laws Mich. T. 1827, p. 258], provides that deeds for lands in the territory, when executed in any other territory or state, "shall be acknowledged and proved and certified, according to, and in conformity with, the laws and usages of the territory, state or country, in which such deeds or conveyances were acknowledged or proved," such deeds are declared valid in law, the same as if executed in the territory of Michigan in pursuance of its laws; which deeds shall be recorded, &c. The power of attorney objected to was executed in the state of New York in pursuance of its laws. Two witnesses are not required by the law of that state to a deed; and it was duly acknowledged before a commissioner, who has power to take such acknowledgments. Under the above statute this deed, as a part of the conveyance, has the same validity as if executed in Michigan, conformably to law. The power of attorney authorized Gordon to sell the lands of Hudson, in the state of Michigan, as was done in the above instance. The deed executed under the power contained a warranty which caused the title, subsequently acquired by Hudson, to enure to the benefit of his prior grantee. But it is objected that the plaintiff, being a corporation in the state of New York, cannot hold land in the state of Michigan. By the second section of the act of 1836, amendatory of the original charter, the plaintiff was authorized to take trusts, and to loan money on bonds and mortgages, &c.

As a general principle it is admitted, that no corporate functions can be communicated to an association of men, which they can claim a right to exercise, beyond the limits of the state in which their powers are given. But there are some things which a corporation may do in other states, as a matter of comity. In the Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 520, it is said: "It is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union." But this comity may be prohibited by a settled course of policy of the state or by statute. Until this shall be done, however, the comity is presumed to exist in the several states of the Union. By the common law an alien can take lands by purchase, though not by descent; in other words, he may take by the act of the party, but not by operation of law. Nor is there any distinction whether the alien claims by grant or devise. Co. Litt. 2, 6. It is said the alien has capacity to take, but not to hold lands, and that lands so taken may be seized into the hands of the sovereign.

But until the lands are so seized, the alien has complete dominion over them. He is a good tenant of the freehold in a precipe, on a common recovery. 4 Leon. 84; Goldes 6, 102; 10 Madd. 125. And the alien may convey to a purchaser. Sheaffe v. O'Neil, 1 Mass. 256. Co. Litt. 526, would seem to be contrary, but his meaning may be, that the alien may convey a defeasible estate, which may be devested on office found. Fairfax v. Hunter, 7 Cranch [11 U. S.] 603. This rule coincides with the Jus Gentium. Vatt. 6, 2, c. 8, §§ 112, 114; Grotius, lib. 2, c. 6, § 16.

It seems to be a settled principle, that a title acquired by an alien by purchase, is not devested until office found. The devestiture requires some notorious act from which it may appear that the free-hold is in another. 1 Bac. Abr. "Alien," 6, 133; Page's Case, 5 Coke, 52. Even after office found, the king is not adjudged in possession, unless the possession be vacant. He must enter or seize by his officer. In Doe v. Robertson, 11 Wheat. [24 U. S.] 332, it was held, that "an alien may take real property by grant, whether from the state or a private citizen, and may hold the same until his title is devested by an inquest of office, or some equivalent proceeding." By the act of 31st of March, 1827 [Laws Mich. T. 1827, p. 272], aliens were authorized to purchase lands in the territory of Michigan, the same as citizens. The reference to aliens, in this respect, was made, therefore, on the ground that there was some analogy between them and the corporations of other states. In Leazure v. Hillegas, 7 Serg. & R. 313; Baird v. Bank of Washington, 11 Serg. & R. 418; the case of an alien is considered as analogous to that of a corporation. By an act of the state of Pennsylvania, of the 6th of April, 1833 [Laws Pa. 1833–34, p. 132], relative to the escheats of lands held by corporations, without the license of the commonwealth, etc., it is declared that no corporation, either of this state or of any other state, though lawfully incorporated, can in any case purchase lands within this state, without incurring the forfeiture of said lands to the commonwealth, unless such purchase be sanctioned and authorized by an act of the legislature. By this act the corporations of other states, in regard to the purchase of lands in the state, are placed on the same footing as corporations of the state of Pennsylvania; and the supreme court of that state, in the case of Leazure v. Hillegas, 7 Serg. & R. 313, as to the right of the Bank of North America to purchase, hold, and convey the lands in question, held, "that the right of a corporation, in this respect, was like an alien, who has power to take, but not to hold lands: and that although the land thus held by an alien, may be subject to forfeiture after office found, yet until some act is done by the government, according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser; but he can convey no estate which is not defeasible by the commonwealth." And this doctrine was sanctioned by the supreme court of the United States, in the case of Runyan v. Coster, 14 Pet. [39 U. S.] 131. In Michigan no law or policy of the state is shown, which prohibits corporations from purchasing lands in the state, and it is presumed that no such law, as in the state of Pennsylvania, exists in Michigan. It would seem, therefore, that the corporation of another state, as the Farmers' Loan and Trust Company, which by its charter is authorized to loan money on mortgages, may take a mortgage on lands in Michigan, there being no prohibitory law or policy of that state on the subject. And if such a security may be taken legally, it may be made available in the ordinary legal mode in such cases

It would seem that the principle which applies to aliens, in regard to the purchase of lands, should more strongly apply to corporations. They are constituted by associations of citizens, who, for the convenience of business, assume a name which, under the sanction of law, is binding on the individuals concerned. This artificial being, to use technical language, possesses all the qualities of a natural person, so far as regards the object of the corporation. And that such a legal organization, having the right to loan money on mortgages, without restriction of territory, should have a right to take mortgages wherever its loans are made, would seem to be a matter of course. And this may be safely assumed, where there is no prohibition. And where there are no laws of escheat, it may well be doubted, whether the land may not be conveyed to a purchaser, by the corporation, by an indefeasible title. The argument is not used beyond the necessity of converting the mortgaged estate into money, to satisfy the debt. This would carry out the transaction of the loan by both parties, and thus far, we think, may be legally done, subject to the comity of the state. This is no more the exercise of corporate powers, than in bringing a suit and by due process securing the fruits of the judgment.

But it is contended that the decree, on the equity side of the court, for the foreclosure of the mortgage and sale of the premises, is a nullity, the court having no jurisdiction. In the case of Sheldon v. Sill, 8 How. [49 U. S.] 448, the court held that where the mortgagor, a citizen of Michigan, assigned the mortgage to a citizen of the state of New York, the court could not take jurisdiction on a bill filed to foreclose the mortgage, as the assignment was within the 11th section of the judiciary act, which prohibits the assignee from suing in the federal courts on an assigned instrument, where the assignor could not sue, in the same court. And it is alleged that from the face of the proceedings it appears in the case now before us, that the assignor of the mortgage was a citizen of Michigan, and therefore

that his assignee could not sue in the circuit court. And the case of Williamson v. Berry, 8 How. [49 U. S.] 541, is cited. That was a case involving the right of the chancellor, under the acts of New York, to make an order authorizing Clark to convey a part of certain devised premises, in satisfaction of his debts. That case turned upon a construction of the acts referred to, under the decisions of the state, and the supreme court held the chancellor had not the power. That decision, therefore, can have no direct application to the case under consideration. Mr. Justice Wayne, in giving the opinion of the court, referred to the decisions of the state, very properly, as having a bearing on the case; but it is supposed that some of those decisions have gone too far, in permitting a record to be contradicted on the question of jurisdiction. There can be no doubt, however, that where the party had no regular notice, against whom the judgment or decree was entered, and there was no waiver of notice, by an appearance, that the judgment may be treated as a nullity. But it by no means follows, that where a judgment is erroneous, and might be reversed on a writ of error, that it can be so treated. It is a matter in this case of some nicety, as in all others, where the question arises, between what is void and what is voidable, by an appropriate procedure. The principal difficulty arises from a want of precision in the language of judges who have acted on this question, where a judgment is brought collaterally before the court. In such a case there can be no doubt, if from the record it appears the defendant had no notice, the judgment entered against him is absolutely void.

The jurisdiction must always appear in the proceedings of inferior courts where jurisdiction is limited; but the jurisdiction will be presumed, in a case before a court, where jurisdiction is general. It is true that the circuit court of the United States exercises a limited jurisdiction, but still, it has been held by the supreme court, that it is not an inferior court, in the above sense, so as to make void its judgments, for want of jurisdiction, though they may be reversible. In the case of Kempe v. Kennedy, 5 Cranch [9 U. S.] 173, Chief Justice Marshall said: "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." And in the case of U. S. v. Nourse, 9 Pet. [34 U. S.] 28, the chief justice says: "It is a rule to which no exception is recollected, that the judgment of a court of competent jurisdiction, while unreversed, concludes the subject matter as between the same parties." In Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449, the court say: "The errors of the court, however apparent, can be examined only by an appellate power." And they say: "The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper." In Simms v. Slacum, 3 Cranch [7 U. S.] 300, the court say: "The judgments of a court of competent jurisdiction, though obtained by fraud, have never been considered absolutely void." In the case of McCormick v. Sullivant, 10 Wheat. [23 U. S.] 192, it is said: "The reason assigned by the replication, why that decree cannot operate as a bar, is that the proceedings in that suit do not show that the parties to it, plaintiffs and defendants, were citizens of different states, and that, consequently, the suit was coram non judice, and the decree void. But this reason," the court say, "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities." The above cases would seem to be conclusive on this point. If all judgments in the federal circuit courts were to be held as nullities, where the jurisdiction is not alleged, no one can tell the extent of mischief which might result. If they are nullities, no titles under such judgments, or other rights, would be available. A want of the proper allegation of citizenship of the parties, is often the result of inattention, in cases where no defences are made. The decisions above stated, are wise, as they protect substantial interests from a mere technicality.

Where the citizenship of the parties is not averred in the pleading, there is a want of jurisdiction as palpably as the face of the papers can present. No presumption can be drawn to supply the want of this averment. A court of errors on a writ of error, would necessarily reverse for want of jurisdiction in such a case. And if, as the counsel allege, it does appear that the assignment of the mortgage in the case under consideration, was made by a citizen of Michigan, that cannot affect the character of the decree. It may be reversed on error or appeal, but the judgment is not a nullity. The judgment of the circuit court may be treated as a nullity, when the party, against whom the judgment or decree was entered, had no notice of the suit. But the judgment or decree cannot be

so treated when the parties are before the court, on account of any omission or error on the face of the proceedings. This would seem to be the true distinction in such cases. If the proceedings could be examined, to ascertain when an error had intervened which would be fatal to the jurisdiction, all judgments would be declared a nullity, which might be reversed, for want of jurisdiction, on a writ of error or on appeal. No court can sanction such a principle of judicial action.

For the reasons above stated, the motion for a new trial is overruled, and judgment must be entered in the case.

Case No. 4,668.

FARMERS' LOAN & TRUST CO. v. MAQUILLAN.

[3 Dill. 379;[1] 8 West. Jur. 501; 1 Cent. Law J. 315.]

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

REMOVAL OF SUITS—ACT MARCH 2, 1867—CORPORATIONS.

1. Corporations are within the act of March 2, 1867 (14 Stat. 558), in respect to the removal of causes from state to federal courts, and on a petition, and the making by the proper officer of the corporation of the required affidavit, are entitled to the benefit of the act.

[2. Cited in Fisk v. Henarie, 32 Fed. 424, to the effect that controversies between citizens of different states are properly removed to the circuit court, although some of the parties plaintiff and defendant are citizens of the same state.]

The plaintiff is a New York corporation and commenced this suit in one of the state courts of Kansas, and afterwards made an application in the state court to remove the same to this court. The petition and affidavit for removal were made under the act of congress of March 2, 1867. The state court ordered the removal; and in this court the defendant [Samuel Maquillan] moves to remand the cause to the state court. The ground of the motion is that corporations are not within the act of March 2, 1867.

Doniphan & Reed, for plaintiff.

Nathan Price, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice (orally), in substance said:

I think this motion must be denied. A great proportion of causes in the federal courts are those in which corporations are parties, and which come by transfer from the state courts, and it was never before claimed to me that they were not within the acts of congress on that subject, or within the act of March 2, 1867. My impression in favor of the jurisdiction in this particular class of cases was so strong that I should have overruled the motion at once but for the circumstance that a decision of the court of appeals of New York, and a decision of the supreme court of Minnesota, were produced, the former doubtfully, the latter positively, denying to corporations the right to remove cases under the act of March 2, 1867 (14 Stat. 550).

I have considered the opinions in those cases, and with great respect for the courts whose judgments they pronounce, I think their views upon the subject are not sound, and that, not unnaturally, perhaps, they incline too much to narrow and cripple the federal jurisdiction. The history of the state court decisions on the subject of federal jurisdiction from the case of Cohens v. Virginia, 6 Wheat. [19 U. S.] 264, shows that, if the state courts could have defined the limits of that jurisdiction, the fabric of federal jurisprudence, as it exists to-day in this country, would have been shorn of its beauty and symmetry, and the system of its efficacy and usefulness.

I am not impressed with the soundness of the argument that because corporations cannot make an affidavit, except through the proper officers, they were not within the contemplation of congress. I think that the proper officers of corporations may make the necessary affidavit to procure the removal.

I do not join in the condemnation of the act of 1867. It does not allow the removal solely on the ground of citizenship. It requires the requisite citizenship to exist, and in addition thereto requires the existence of prejudice or local influence to be shown by affidavit. In this respect the policy of that act is not unlike that which prevails in perhaps all the states in regard to the change of venue from one county, or one judicial district, to another. Johnson v. Monell [Case No. 7,399]. The object in each case is to secure an impartial tribunal, and the federal courts are not courts for non-residents more than for residents, and no injustice is done to the latter to be compelled there to litigate controversies which they may have with citizens of other states. Motion denied.

NOTE. See Minnett v. Milwaukee & St. P. Ry. Co. [Id. 9,636].

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

Case No. 4,669.

FARMERS' LOAN & TRUST CO. v. ST. JOSEPH & D. C. RY. CO. et al.

[3 Dill. 412.] [1]

Circuit Court, D. Kansas. 1875.

RAILWAY MORTGAGE—ROLLING STOCK—WHETHER REALTY OR PERSONALTY.

1. Rolling stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly recorded as a mortgage of realty, need not be recorded also as a chattel mortgage.

2. But a different principle applies to coal, oil, and such personal property as may be used, or is commonly used, for other than railway purposes. Such property would be subject to execution if not held by a mortgage thereof, duly executed and recorded.

Bill to foreclose. The plaintiffs are trustees in a railway mortgage executed by the defendant company [the St. Joseph & Denver City Railway Co.] to secure bonds. The mortgage covers, inter alia, "the rolling stock and other property appertaining to said railroad." It was duly recorded as a real estate mortgage, but not as a chattel mortgage, as the latter, to be valid, are required to be recorded by the laws of Kansas (Gen. St. p. 584, § 9 et seq.). Certain judgment creditors of the mortgagor levied upon the rolling stock embraced in the mortgage; and the question was whether their rights were prior to those of the plaintiffs.

Ashbell Green and John Doniphan, for plaintiffs.

Nathan Price and W. D. B. Motter, for judgment creditors.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. After having taken time to consider the question involved in this case, my judgment is that it was not necessary, as to the rolling stock, to record the instrument as a chattel mortgage. As to this it is sufficient even as to creditors, that the mortgage was duly registered as a mortgage of real estate. In my opinion rolling stock and other property strictly and properly appurtenant to the road, is part of the road and covered by the mortgage in question, which in terms embraces rolling stock. The cases are conflicting upon the point as to the nature of rolling stock, but considering the peculiar character of a railroad, the true principle is the one above stated. Under the provisions of this mortgage a different principle would apply to fuel or other property personal in its nature and which is used. or is such as is commonly used, for other than railway purposes. Such property would be subject to the levy and not be held by the mortgage. Judgment accordingly.

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

FARMERS' LOAN & TRUST CO. (UNITED STATES v.). See Case No. 15,070.

FARMERS', MERCHANTS' & MANUFACTURERS' FIRE INS. CO. (DALLMEYER v.). See Case No. 3,546.

FARMERS' MUTUAL INS. CO. (NICHOLS v.). See Case No. 10,242.

Case No. 4,670.

FARMERS' TRUST & CANAL BANK v. KETCHUM et al.

[4 McLean, 120.] [1]

Circuit Court, D. Michigan. June Term, 1846.

ATTORNEY — AUTHORITY TO ENTER INTO STIPULATION.

A counsel has power to enter into a stipulation in a suit wherein he is employed. And there being no unfairness, or charge of impropriety, the court will not, on motion, set aside the agreement. The counsel not only appeared in the case, but made an affidavit that he was employed.

[The original bill in this suit was filed by the Farmers' Loan & Trust Company of New York against Ketchum and wife to foreclose a mortgage; the Farmers' Trust & Canal Bank, also of the state of New York, being made a codefendant in the suit.]

Mr. Barstow, for complainants.

Mr. Romeyn, for defendants.

OPINION OF THE COURT. By consent of parties, and on a stipulation made by the counsel on both sides, a decree was entered on which the mortgaged premises were sold. At a subsequent period, a bill of review was filed [Case No. 7,736], alleging, as ground of error, apparent on the face of the decree, that the court had not jurisdiction, as between the parties on the record, to wit, that one of the complainants, the Farmers' Loan and Trust Company, is of the same state as the president and directors of the company of the Canal Bank, who are made defendants. On this ground the decree was reversed and annulled; and the court gave leave to amend the bill, by making the Canal Company Bank a co-complainant, instead of defendant. And now a motion is made to set aside the former stipulation on the grounds, 1. That it was made before the reversal of the decree, when the parties to the record stood in a different relation to each other from the one they now bear, since the amendment. 2. Because Mr. Romeyn, the counsel for the Canal Bank, was not authorized to make the stipulation.

If Romeyn was counsel, he had power to make the stipulation. If set aside, it must be on the ground of unfairness or mistake, or on account of the changed relations of the parties.

The Canal Bank is now a co-complainant instead of being a co-defendant. This

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

change does not compromit or change the rights of the parties. If all the parties in interest are before the court, the court can decree in accordance with their interests. It is not unfrequent in such cases to decree that party defendants, or complainants, shall release or pay to each other, as their equities shall require. The rights, therefore, of the Canal Bank not being compromitted by the amendment of the bill, no reason is perceived on this ground to set aside the stipulation. Mr. Romeyn swears that he was counsel, and the court, under the circumstances, are bound to consider him as such. There is no allegation of unfairness, or professional impropriety in entering into the stipulation. The court will, therefore, overrule the motion. Afterward, another and somewhat different arrangement was made by the parties.

FARMVILLE INS. CO. (AMERICAN BASKET CO. v.). See Case No. 290.

FARMVILLE INS. & BANKING CO. (BANG v.). See Case No. 838.

FARMVILLE INS., ETC., CO. (WHITTLE v.). See Case No. 17,603.

Case No. 4,671.

FARNHAM et al. v. BANCROFT.

[3 Haz. Reg. U. S. 6.]

Circuit Court, D. Massachusetts. June 3, 1840.

CUSTOMS DUTIES—CONSTRUCTION OF STATUTE—CRUDE SALTPETRE.

Saltpetre which was known in commerce as "crude saltpetre" at the time the act of 1832 was passed, is entitled to free entry as such,—chapter 227, § 2 [4 Stat. 583],—although the customs officers may be of the opinion that it is partially manufactured.

This was an action of assumpsit to recover the sum of ninety-three dollars and thirty-six cents, alleged to have been illegally required to be paid to the defendant [George Bancroft], acting under instructions from the comptroller of the treasury, as collector of the ports of Boston and Charlestown as and for duties upon a certain quantity of saltpetre imported by the plaintiffs [Putnam J. Farnham and others].

The act of 1816, c. 107, § 1 [3 Stat. 310], imposes a duty of 7½ per cent. ad valorem on saltpetre. The act of 1824, c. 136, § 1 [4 Stat. 25], imposes a duty of 12½ per cent. ad valorem on all articles specified, and which then paid 7½ per cent. ad valorem; and the same act in the same section imposes a duty of 3 cents per pound on refined saltpetre. The act of 1832, c. 224, § 2 [supra], makes crude saltpetre free. The duties in this case were claimed upon the ground that the saltpetre in question was neither crude nor refined, and therefore among the unenumerated articles, and as such liable to a duty of 12½ per cent. ad valorem. The duties were paid under protest, and notice was given, that a suit would be brought to recover them back from the defendant.

The counsel for the plaintiffs stated the law that the collector was liable to refund duties illegally assessed, when paid under protest, and that the statute was to be construed according to the commercial sense in which the words "crude saltpetre" were used at the time of the passage of the act of 1832, and that it was a question of fact for the jury whether this were "crude saltpetre," in such commercial sense. The plaintiff then introduced several witnesses who examined a specimen of the saltpetre, and testified that it was the crude saltpetre of commerce. Mr. Degrand testified, that he had imported saltpetre before and since 1832. Had bought and sold a great deal, and had examined every lot that came into market. This was crude saltpetre. There was no question of it. He never knew any other kind but crude or refined. There was no intermediate quality. Mr. Wigglesworth testified, that he had imported the article twenty years. This was crude. He never knew any other kind but crude and refined. Mr. Charles Henshaw testified that he had been acquainted with the article twenty years. He had refined 3,000 tons within fifteen years. This is crude, and has always been known as such before and since 1832. Never knew any other name for it. It could not be called saltpetre until it was in this state. This is the first product from the earth containing saltpetre. Mr. Ozias Goodwin had been an importer of saltpetre twenty-five years. This is crude saltpetre, and was always called so. There was no other name for it, and there was no other kind but crude and refined. Mr. Charles Smith had bought a great deal of saltpetre for 15 or 20 years. This was crude. There was no other name for it. There was no other grade or class but crude and refined.

After this evidence was in, the United States district attorney said he had no witness to offer. The collector, in requiring duties upon this article, had acted in obedience to the circular of Mr. Baker, at Washington.

Dexter, Sprague & Gray, for plaintiffs.
Mr. Mills, for the United States.

STORY, Circuit Justice, thereupon informed the jury that the law was as stated by the counsel for the plaintiffs, and that, the evidence being all on one side, there could be no question as to what their verdict should be.

The jury then returned a verdict for the plaintiffs for the amount claimed without leaving their seats.

The judge remarked that, as the collector did not appear to have acted wantonly in following the instructions of the comptroller to assess these duties, no interest should be added; but if, after this trial, he should

continue to assess duties upon a similar article, the rate of damages might be different.

FARNHAM (UNITED STATES v.). See Case No. 15,071.

Case No. 4,672.

Ex parte FARNSWORTH.

In re WHITNEY et al.

[1 Lowell, 497.][1]

District Court, D. Massachusetts. 1870.

BANKRUPTCY — PROOF OF DEBT AGAINST BOTH PROMISOR AND INDORSER OF PROMISSORY NOTE —DIVIDENDS.

A bankrupt firm owed A. $5897 for which he held their note, and as collateral security, the notes of third persons indorsed by the bankrupts for about $7000. These persons had failed. *Held*, A. might surrender the note of the bankrupts and prove on their indorsements of the collateral notes for the amount of the debt of the bankrupts to him, and might prove for the full amount against the promisors on the collateral notes, receiving in dividends not more than the whole debt due him from the bankrupts.

[Cited in Re Jaycox, Case No. 7,240.]

In bankruptcy. The creditor Farnsworth offered for proof against the estate of Whitney & Crain, bankrupts, a debt of five thousand eight hundred and ninety-seven dollars. As security for this debt he held the note of the bankrupt firm, and collateral notes of third persons (business paper), indorsed to him by the firm before maturity for about seven thousand dollars, the makers of which collateral notes had now failed, and the paper was in his hands duly protested. The assignee objected that no proof could be made against the estate of these bankrupts until the collateral notes had been sold and the proceeds of sale credited; and that if sold, the indorsements of the bankrupt must be so changed that no recourse could be had against their estate, else the proof would be double.

W. P. Walley (H. W. Paine with him), for the creditor.

We admit that by § 20 property pledged by the bankrupt to secure a creditor must be sold before the debt can be proved, but it ought to be sold as it is, and not under any restrictions. We have not found any American cases which decide the precise question raised here, namely, what are the rights of the creditor whose security is by notes or bills bearing the bankrupt's indorsement. In England it is well settled that the creditor may prove against both estates. Ex parte Martin, 2 Rose, 87; Ex parte Reed, 3 Deac. & C. 481; Ex parte Bloxham, 6 Ves. 449; Ex parte Wildman, 1 Atk. 109. If it should be decided that a creditor who holds collateral paper indorsed by the bankrupt must sell it as unindorsed, a part of the security is lost; for if each party to the bill or note pays fifty per cent in dividends, the holder will get but seventy-five per cent, in all, by being obliged to deduct the value of one promise before he proves upon the other, while he has contracted for the credit of both.

B. F. Brooks, for the assignee, cited Ex parte Burn, 2 Rose, 55; Ex parte Rufford, 1 Glyn & J. 41.

LOWELL, District Judge. The industry of the learned counsel on either side has failed to discover decisions under any bankrupt or insolvent law of this country directly in point, and both have resorted to the English cases. As I have often observed the cases in either country and especially in England must be used with great care, because our statute is more or less different from all the others, and more widely from the English than from some of the American statutes. At the same time it is impossible to understand our bankrupt act [of 1867 (14 Stat. 517)] fully without some knowledge of the cases under those laws, because it has adopted into the body of the act many doctrines originally founded only in decisions, though with very important modifications. The doctrine that a creditor who holds collateral security upon the property of the bankrupt must first realize his security and then prove for the balance, has been adopted from the courts of equity. It is found in section twenty of our bankrupt law where it is enacted that "when a creditor has a mortgage or pledge of the real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement between him and the assignee, or by a sale thereof to be made in such manner as the court may direct." It has been assumed by both parties that commercial paper of third persons, deposited by the bankrupt as security for a debt, is personal property within this clause, and I see no reason to question the correctness of that assumption. Such has always been the law of England where a rule of court early established the practice which is part of our statute. If, therefore, the petitioner held as security notes or bills of third persons without the bankrupt's indorsement, but pledged by them, it is agreed that he must sell them or give credit for their value, and prove for the balance only after deducting such value. But if the collateral notes or bills contain the indorsements of the bankrupt there is more difficulty. A sale of such notes would give the buyer a right to prove for the whole

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

face of the paper, which is, in this instance, greater than the original debt, besides leaving to the present holder a right to prove for the deficiency, so that the other creditors would be put at a disadvantage by having a larger debt proved than the bankrupts owe to this petitioner. On the other hand if I order the creditor to restrict the indorsement so that the buyer cannot prove against Whitney & Crain, I am depriving the creditor of part of his security, for he holds the credit of both the parties to the bills for his whole debt, and by realizing on one of them first, and deducting what he obtains from him he loses a part of the credit of the other party.

These considerations show that the English doctrine, that if the bankrupt has indorsed the bills the holder may prove against both estates is sound, because then the creditor gets precisely the security he bargained for, and no one is injured. This rule has been long established by the court of chancery in England: Ex parte Twogood, 19 Ves. 229. It is understood, of course, that the proof against the bankrupts' estate can be only for the amount due from them to the creditor. They cannot by giving him a promise for more enable him to prove beyond the real debt, any more than he could, in any other court, obtain judgment for more. Against the promisors on the collateral notes he can prove for the full amount of the notes, because that was the very purpose of pledging them to him for a larger amount than his debt. But he can receive in dividends from both parties no more than his whole debt.

There is no technical difficulty in the way of this mode of dealing with the subject, because the creditor can surrender the note of the bankrupts and make his proof on the indorsements up to the amount of his debt against the bankrupt, and he will then have no security for his debt. This is strictly legal as well as equitable.

Proof to be admitted on the indorsements for $5897 on surrender of the original note of the bankrupts.

Case No. 4,673.

In re FARNSWORTH et al.

[5 Biss. 223;[1] 14 N. B. R. 148.]

District Court, N. D. Illinois. Jan. 1873.

BANKER'S LIEN.

A bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after filing of petition in bankruptcy, and can apply such proceeds upon the note.

[Cited in Robinson v. Wisconsin, M. & F. Ins. Co. Bank, Case No. 11,969.]

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

H. K. Whiton, for the Commercial National Bank, made the following points, citing the authorities in support of them:

I. The bank had a lien upon the drafts held for collection. Bank of Metropolis v. New England Bank, 1 How. [42 U. S.] 239; Russell v. Hadduck, 3 Gilman, 233; Rhoades v. Blackiston, 106 Mass. 336; Van Amee v. Bank of Troy, 8 Barb. 315; Davis v. Bowsher, 5 Term R. 488.

II. This was a case of mutual debts and credits, under the 20th section of the bankrupt act [of 1867 (14 Stat. 527)]. Rose v. Hart, 8 Taunt. 499; Naoroji v. Chartered Bank, 18 Law T. (N. S.) 358; Catlin v. Foster [Case No. 2,519]; Trader's Bank v. Campbell, 14 Wall. [81 U. S.] 97.

Cyrus Bentley, for assignee.

BLODGETT, District Judge. The facts in this case appear to be that on and up to the 18th of December, 1872, the firm of Farnsworth, Brown & Co. were wholesale merchants in the city of Chicago, and in good credit. They kept a bank account with the Commercial National Bank, of this city, and were in the practice of collecting bills against their country customers by drawing sight or time drafts which were indorsed to the bank and by the bank forwarded for collection to its correspondent nearest the residence of the drawee. When paid, the proceeds were passed to the credit of the firm in its general balance. The firm was indebted to the bank on a demand note for $5,000. On the 14th of December one of the members of the firm absconded, and the fact became publicly known, and known to the officers of the bank on the 18th of December, and on the 23rd day of December, 1872, a petition in bankruptcy was filed in this court against the firm, on which they were adjudicated bankrupts. Shortly before their failure, but while in good credit, the firm had handed to the bank a number of drafts for collection, on which the bank collected, after the filing of the petition in bankruptcy, the sum of $1,200,[2] and the point raised is, whether the money so collected can be applied by the bank toward the payment of the note held by the bank against the firm, or whether it must be turned over to the assignee for general distribution.

Although the question is not wholly free from difficulty, I think the weight of authority is in favor of the right of the bank to apply the money so collected, in liquidation, so far as it will go, of its own indebtedness.

It was evidently never intended that the bank should pay over to the firm the specific money collected. The legal title to the money called for by the drafts was vested in the bank, and the proceeds were to go to the credit of the firm It was a method of giving the firm credit with the bank, and was a transaction which could ripen into a debt

[2] [14 N. B. R. 148, gives $12,000.]

or demand in favor of the firm against the bank.

It is said by the attorney for the assignee that the bank was a mere agent of the firm for collecting this money, and that this agency was revoked by the adjudication of bankruptcy, and such revocation relates back to the filing of the petition. But I think that it was something more than a naked agency. It was an agency coupled with an interest and duty, and filing the petition in bankruptcy did not suspend or annul the obligation of the bank to use its diligence to collect the money due on those drafts. It does not seem to me that the right of the bank to receive the money on these drafts was suspended by what befell the firm, nor that the character in which they received it was changed.

This claim on the part of the bank, it appears to me, can be sustained on two grounds:

1. Because the law gives a banker a lien on any funds coming into his hands belonging to a debtor. Morse, Banks, 34 et seq.; 2 Kent, Comm. 624, note 2; 2 Story, Eq. Jur. § 1253a.

2. Because the transaction shows mutual debts and credits between the parties on which the balance is to be struck. Section 20, Bankrupt Act [supra].

NOTE. See further as to question of adjustment of mutual debts and credits, Hough v. First Nat. Bank [Case No. 6,721], and note thereto.

FARNSWORTH (BUTLER v.). See Case No. 2,240.

FARNSWORTH (UNITED STATES v.). See Case No. 15,072.

Case No. 4,674.

In re FARNUM et al.

[6 Law Rep. 21.]

District Court, D. Massachusetts. March, 1843.

BANKRUPTCY OF PARTNERSHIP AND THE INDIVIDUAL PARTNERS — DIVIDEND FROM BOTH ESTATES ON PARTNERSHIP NOTES INDORSED BY PARTNERS.

Where a partnership and the individual members thereof were declared bankrupts, it was *held*, that a creditor who presented a bill of exchange drawn by the firm and indorsed by one of the partners, was entitled to a dividend from the joint estate of the firm and the separate estate of the partner. Aliter, by the English law.

[Followed in Mead v. National Bank of Fayetteville, Case No. 9,366. Cited in Re Dunkerson, Id. 4,158; Re Bigelow, Id. 1,397; Re Howard, Id. 6,750; Re Bradley, Id. 1,772; Emery v. Canal Nat. Bank, Id. 4,446; Re Tesson, Id. 13,844; Re Foot, Id. 4,906; Re Thomas, Id. 13,886.]

[In bankruptcy. In the matter of Peter Farnum and others.]

The commissioner (P. W. Chandler) to whom this case was referred, to take an account of all the estate and assets of the bankrupt, and of all debts and other claims proved by creditors under the bankruptcy, and of all other matters and things which are proper for the consideration of the court in ordering and directing a dividend—presented his report, from which it appeared, that the bankrupts did business in several firms, all of which were bankrupt; that a portion of the creditors held bills of exchange which were drawn by one of the firms and indorsed by a member of the same firm. The commissioner submitted the following question to the court: When a creditor has a joint and separate security, either by the same instrument, or by different instruments, must he (1) elect whether he will proceed against the joint or separate estate in preference; or (2) may he prove his whole debt against both estates; or (3) must he prove his debt against one estate, and then, deducting from his debt what he there receives, prove the balance against the other estate?

The points were argued by Henry H. Fuller and Rejoice Newton for the assignee; and by William Gray and C. B. Goodrich for other parties in interest.

SPRAGUE, District Judge. Peter Farnum was a partner in five different firms. One of them consisted of Peter Farnum, Luther Wright, and Cladius B. Long, under the style of the Blackstone Woolen Company. All the members of that firm have, upon their own applications, been declared bankrupt. The Blackstone Bank hold a bill of exchange, drawn by the Blackstone Woolen Company and indorsed by Peter Farnum, and the question is, whether they can prove their debt both against the joint estate of the firm, and the separate estate of Farnum, or must be put to their election. There are many other creditors holding similar securities, and presenting the same question.

The English rule, it is admitted on all hands, excludes such double proof; and although it is not binding as authority here, yet, in a question concerning the rights and remedies on commercial paper, the rule adopted by able and enlightened judicial tribunals, in a country so highly commercial, would be adopted as a safe guide unless good reasons be presented for departing from it. The history of this rule is not a little singular. It commences with Ex parte Rowlandson, 3 P. Wms. 405, before Lord Talbot, in 1735, and ends with Ex parte Moult, before Lord Brougham, in 1832, Mont. & B. 28. The first case and those also of Ex parte Parminter, in 1736, Abington, in 1737, and Ex parte Bond, in 1743, 1 Atk. 98, and Ex parte Banks, Id. 106, were all cases of joint and several bonds. In the first case Lord Talbot "at first inclined to think that the petitioner being a joint and separate creditor ought to be at liberty to come under each of the commissions, provided he received but a single satis-

faction, but the next day his lordship held that at law when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly, and on the contrary if he sue them jointly he cannot sue them severally, but the one action may be pleaded in abatement of the other, so by the same reason the petitioner in the present case ought to be put to his election under which of the two commissions he would come." And on page 408 he expressly distinguishes it from a former case determined by Lord King in 1732, in which a creditor was allowed to prove against a firm, and also against one of the members on his separate bond for the same debt, and again relies on the rule at law which precludes a party from proceeding jointly and severally on the same bond at the same time.

In Ex parte Moult, George Geddes was a member of two firms, one of which was the drawer and the other the acceptors of a bill of exchange; and the creditor claimed to prove against both estates. It was decided, that although double remedies would exist at law, they shall not be allowed in bankruptcy; and this is in accordance with many preceding cases, all of which are there referred to and examined. Ex parte Moult was much discussed, and a strong effort was made to overthrow the rule. It first came before the court of review (Mont. Bankr. Cas. 321), and the four judges of that court were equally divided, two of them being opposed to the rule, as founded neither in law nor justice; and the lord chancellor finally decided solely on the ground that the rule, although arbitrary, having been acted upon for a length of time, had become the law of the court, whatever may have been its origin. Here we see, that the decision in Ex parte Rowlandson, founded avowedly on the course of proceedings at law, which prevents a creditor maintaining a joint and several suit at the same time on the same bond, has led to the establishment of an arbitrary rule, confessedly in violation of law when applied to double mercantile securities. It is not necessary to examine all the cases, and see by what steps this result has been reached —they will be found collected in Ex parte Moult.

I have not been able to discover any sound principle upon which this result rests. Indeed, it has been generally admitted, even by those who have enforced the rule, that it is as little consonant with justice as with the rules of law. Lord Eldon, in Ex parte Bevan, 10 Ves. 107, says, "The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and several security, should not go against both estates." Mr. Eden, in his treatise on Bankruptcy (chapter 11, § 4), says, "This doctrine, by refusing a creditor the benefit of the caution he has used in obtaining a joint and several security, has been justly reprobated, and is founded upon no sound principle or analogy whatever." And this is repeated in the same language in the last edition of his work, published in 1832, under his title of Lord Henley, p. 181. Eminent counsel, who have been called upon to sustain the rule, have shrunk from defending it on principle. Mr. Wigram, in Ex parte Moult, Mont. Bankr. Cas. 333, commences his argument by saying, "The rule is established by decision, and as the court has always treated it as a rule founded on convenience, and not upon principle, it must be considered as an arbitrary rule which this court is bound implicitly to follow." The chief judge, in delivering his opinion against the double proof in the court of review, in Ex parte Moult, Id. 334, says, "it is not denied that the case urged by the respondents, (for both proofs) is most in accordance with legal doctrines and rights; but it was said that the rule established by practice in bankruptcy is too firmly settled to be now shaken." And he does not attempt to defend the rule on principle. Sir A. Pell, in giving his opinion in the same case (page 337), says: "Does the rule correspond with the law? It is admitted it does not. Is it consonant with justice? It is almost admitted it is not. We are therefore called upon to give our assent to an arbitrary doctrine, not founded on law or justice." Again (page 340), "I cannot, as a common lawyer, understand the principle of this arbitrary rule." Sir Edward Sugden, in his argument before the lord chancellor, in Ex parte Moult, Mont. & B. 35, attempts to give the reason of the rule. He says, "Originally the rule might have seemed strange, because at law both estates, upon a joint and several security, might have been taken on execution. Why not so (it might have been argued) in bankruptcy? The reason is, that the fund of the debtor is no longer open to the diligence of the creditor. All litigation ceases, and the assets are to be distributed equitably among the creditors. The joint fund to those who have looked to it for security or satisfaction, and the separate to the creditors who have trusted the individual partner." The fund is no longer open to the diligence of the creditor. Be it so. But this creditor, while the race of diligence continued, acquired rights to come on the joint estate by one contract, and on the separate estate by another, both of them valid, and why should either of these vested rights be taken away because the fund is not now open to future diligence? Further, it is said, "The joint fund is to be distributed to those who have looked to it for security, and the separate to the creditors who have trusted the individual partner."

This reason has also been strenuously urged at the bar in the present case, and it is insisted that the exclusion of the bank from both funds is a necessary corollary from the rule which appropriates the joint

funds primarily to joint debts, and the separate funds to separate debts. But the answer is obvious. This creditor looked to the joint fund for security and satisfaction, and he also trusted the individual partner. Without two distinct contracts, giving him a right to come upon both funds he would never have parted with his property. If the joint fund is to pay joint debts, here is a joint debt. Can you exclude A? It is admitted that you cannot. You must allow the creditor to come against the joint estate, if he so elects. Neither can you exclude him from the separate estate, if he elect against that. The joint creditors cannot say, you shall not participate with us, because you have a separate security; nor the separate creditors exclude him because he has a joint security. Then certainly neither class is wronged by his participating with them, and how are they injured by his participating also with the others? The reason is unsatisfactory, and if Sir Edward Sugden could not defend it on principle, we may well conclude that it is indefensible.

I think it apparent that Sir Edward Sugden was not himself entirely satisfied with the reasons for the rule, for he subsequently, page 36, says, "It is argued that all learned judges, and Sir S. Romilly disapproved of the rule which compels a creditor, having a joint and several security, to elect upon which of them he will prove, and to abandon the other. If, notwithstanding that strong expression of disapprobation, the rule exists, the expression of disapprobation confirms the rule. It is like the canon of descents, which excludes the half blood: the rule is disapproved, but it must prevail till altered by legislation. The rule, it is true, deprives a creditor of part of his common law right, if bankruptcy happen." It is urged by the learned counsel for the assignee, in the present case, that our bankrupt law was made with reference to the English rule, and renders it obligatory. Our statute departs so widely from the English that, its constitutionality has been questioned on that ground. It established a system in most respects entirely new, and there it nothing in the statute to indicate that it was intended to render English decisions obligatory in its administration. In England the rule excluding proof against the joint and separate estates has been long established. Existing contracts have been made under its operation, and with reference to it. In this country it is otherwise. Existing contracts have been made under, and with reference to, the rule of law which gives to a party holding two valid obligations the benefit of both. This right, founded both in law and justice, I do not think myself bound or authorized to set aside on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognised in this country.

Where a dividend has been paid on one estate the amount thereof would be deducted, and a dividend only, on the balance allowed from the other. But here dividends on both estates are simultaneous, and the creditor is entitled to prove against both for the whole.

Case No. 4,675.

FARNUM et al. v. BLACKSTONE CANAL CORP.

[1 Sumn. 46.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1830.

CANALS—RIGHT TO CONSTRUCT DAM—MERGER OF CORPORATIONS INCORPORATED BY DIFFERENT STATES—CONSTRUCTION OF ACTS—SOVEREIGNTY OF GRANTING POWER.

1. The Blackstone Canal Company were authorized by their act of incorporation to construct a canal, &c.; and the manner pointed out in which they should locate the canal, &c. *Held*, that in order to entitle the company to raise a dam by which the water of the river should flow back to the injury of the riparian proprietors, the location of such dam and the intention to raise it must be made known and confirmed in the manner pointed out by the act of incorporation.

[Cited in Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (74 U. S.) 413.]

2. Where two corporations are created by adjacent states with the same name, to construct a canal in each of the states respectively, and afterwards their interests are united by subsequent acts of the states respectively, this does not merge the separate corporate existence of such corporations; but creates a unity of stock and interest only.

[Cited in Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 815; Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 375, 10 Sup. Ct. 1008.]

[Cited in Chase v. Sutton Manuf'g Co., 4 Cush. 164; Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 349.]

3. Every act of incorporation must be construed in such a manner, if possible, as not to exceed the sovereignty of the legislature granting it. It ought not therefore to be deemed to authorize any act to be done, which would exceed the jurisdictional power of the state, or interfere with the rights of other states, as to construct a canal, or raise a dam, in another state. See Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519; Runyan v. Coster, 14 Pet. [39 U. S.] 122.

[Cited in Holyoke Water-Power Co. v. Connecticut River Co., 20 Fed. 79.]

[Cited in City of Aurora v. West, 22 Ind. 510; Salisbury Mills v. Forsaith, 57 N. H. 131.]

4. Quaere, if the legislature of one state can authorize a dam locally in that state to be raised, so as to flow back a public river running into another state, to the injury of mill privileges locally situate in the latter state.

This was a bill in equity brought by the plaintiffs [W. and D. D. Farnum], the proprietors of a cotton mill situated in the town of Mendon, in the state of Massachusetts, against the defendants, the proprietors of the Blackstone canal, to compel them to reduce the height of a dam across the Black-

[1] [Reported by Charles Sumner, Esq.]

stone river, which had been raised by them, whereby the operations of the plaintiffs' mill were impeded; also, for a perpetual injunction against raising it in future, and for damages for the injury already sustained by the plaintiffs.

The material facts stated in the bill were as follows: That, in the summer of 1825, the plaintiffs built their dam across the Blackstone river in the town of Mendon and state of Massachusetts, and erected a woollen mill, to be carried by water taken from the pond flowed by said dam; the mill and dam of the plaintiffs being in the state of Massachusetts. In March, 1826, the plaintiffs began to dig a raceway for their cotton mill, south of the woollen mill and lower down the river, and in the course of the year 1826, the cotton mill was completed; the mill, and wheels, and part of the race being in the state of Massachusetts, and the remainder and mouth of the race being in the state of Rhode Island. In August, 1828, the plaintiffs built their grist mill still further down the river, and in the state of Rhode Island. In June, 1826, the plaintiffs and defendants entered into an indenture, by which, among other things, the plaintiffs agreed, that the Blackstone canal should cross their pond aforesaid, and pass over their land; and to release all damages therefor; and also to pay the defendants $500; and to support farm bridges across the canal, where the dam passed over their land; and not to draw down the water in their pond more than four inches below the cap log thereof. The defendants by the same indenture, for the considerations above cited, conveyed to the plaintiffs the right to draw water from the canal at any point of their land, and covenanted for the quiet enjoyment of this right. The Woonsocket dam, across the Blackstone river, is about one mile and three fourths below the plaintiffs' cotton mill. In August, 1828, the defendants raised this dam two feet, for the purpose of deepening the water in the Woonsocket pond, so as to render the same navigable as a part of the canal. The raising of this dam caused back-water on the wheels of the plaintiffs' mills, so as to materially obstruct their speed. The back-water was so great, that the plaintiffs had been obliged to build another mill, called the picker mill, for the purpose of removing into it the picker and some of the heaviest machinery from the cotton mill; the wheel of the cotton mill being unable, when clogged by back-water, to carry the machinery, though, before the dam was raised, it was fully able to carry all the machinery. The plaintiffs' investment in mills, other buildings, and lands, &c., was over $100,000, and the value of the property depended materially upon the reduction of the Woonsocket dam to the height it stood at before it was raised. The bill prayed, that the defendants might be decreed to reduce the dam to its former height, and for a perpetual injunction against raising it in future, and for an account of damages already sustained, to be taken by a master.

The plaintiffs, upon these facts, rested their case upon two grounds; first, as proprietors of mills lying in the state of Massachusetts; and second, upon the indenture; contending that the defendants, after having conveyed the right to draw the water from the canal, were estopped from so raising the Woonsocket dam. as to render the right to draw the water of no value. The answer of the defendants admitted, that they had raised the Woonsocket dam two feet, and contended, that they had a right to do so by virtue of their charter, and also by an agreement with the plaintiffs, who had released all damages. That by their incorporation by the Rhode Island legislature, and by subsequent acts, they were empowered to build a canal from Worcester to Providence, and to take land. &c., for that purpose, the damages to be appraised and reported to the court of common pleas. That in pursuance of this authority, in 1825, they, by their commissioners, located the route, and marked the level, &c., of the canal, by stakes and marks on the east side of the Blackstone canal, from above the plaintiffs' land, (which principally lay on the west side.) to the Woonsocket village; and that the route and level so marked out required that the Woonsocket dam should be raised four feet, in order to render the canal navigable. The commissioners made a report of this location on the east side, but, there being no court in session, it never was returned to the clerk's office of said court of common pleas. In the mean time, after the excavation had begun, plaintiffs entered into a negotiation with defendants, through the commissioners, to change the route of the canal at that point, from the east to the west side, in order to increase defendants' water power. This was agreed to, by means of which the plaintiffs realized great advantages, and were enabled to erect a cotton and grist mill. The answer alleged, that, at that time, it was publicly known the Woonsocket dam must be raised, and that in changing the location of the canal, the same level was preserved on the west, as had been marked out on the east side of the river. The location on the west side was made the 24th of February, 1826, the previous location to raise the Woonsocket dam having been made on the 10th of February, 1826. The defendants further set forth, that the Farnums were desirous of purchasing the Mowry land, below the land they then owned exclusively in Massachusetts, but could not effect the purchase from the Mowrys. That defendants did purchase this land to accommodate the Farnums, and conveyed the title to them for their benefit. It was also alleged, that before defendants began their race-way for their new cotton mill, they had notice that the Woonsocket

dam was to be raised, as otherwise boats could not enter the lock above, on the level marked out for the canal. The answer also alleged, that the raising of the dam did not cause the back-water on the plaintiffs' mills, but that it was caused by the race-way being too narrow to carry the water off, and in consequence of the plaintiffs having placed the apron of their cotton mill wheel lower than that of the woollen factory, and nearly on a level with the bed of the river, the plaintiffs' privilege having but little fall, and being what is termed a flat privilege. It was also averred, that one of the plaintiffs offered $1000 if the commissioners would not raise the Woonsocket dam; and also proposed to have flash-boards put on, instead of a permanent dam, so that they might be taken off in the winter. But nothing was done to that effect. The answer complained, that the Farnums had raised the water in their pond, so as to come up to the level of the banks of the canal, and in one instance overflow them, and cause the defendants to make repairs at their own expense. That the plaintiffs, sensible of the damage caused by keeping the water so high, proposed to have two gates erected at their expense, to carry the water from the canal, and that such gates were erected, and a new trench dug by plaintiffs below the gates. That subsequently the plaintiffs erected a grist mill below these gates, and entirely defeated the object for which they were erected. The answer also set forth at length, the contract between the parties, which it set up as a full release of all damages from overflowing, &c., and prayed that the defendants might be dismissed by the court, with their costs.

R. W. Greene and Daniel Webster, for plaintiffs.

J. L. Tillinghast and J. Whipple, for defendants.

STORY, Circuit Justice. Assuming for the present that the evidence makes out a case of real substantive damage to the plaintiffs' mills, by the raising of the Woonsocket dam, the next question is, whether the record presents any justification of the act of raising the Woonsocket dam on the part of the plaintiffs. And it is most important to the parties in this aspect of the case, to advert to some of the facts, which are indisputable. The plaintiffs, in the summer of 1825, built a dam across the Blackstone river in the town of Mendon in the state of Massachusetts, and erected a woollen mill in the same town, the water for which was drawn from the pond formed by this dam, which is called the Blackstone dam or pond. There is no doubt, that this was a legal exercise of the rights of the plaintiffs, as owners of the soil and riparian proprietors. The answer of the defendants does not attempt to impeach it. In March, 1826, the plaintiffs being the owners of the soil began to dig the race-way for their cotton mill, south of the woollen mill and lower down the river, and completed the cotton mill (which is within the boundary of Massachusetts) in the course of the same year. The land through which this race-way was laid, is known as the Mowry land, and the title to it was purchased by the plaintiffs on the 28th of February, 1826. The territorial line between Massachusetts and Rhode Island crosses the race-way just below the cotton mill. The dam at Woonsocket is in Rhode Island, and was not raised until August, 1828, and then, and not till then, did the gravamen complained of by the bill have an existence.

Now, I think, it cannot well be denied, that the acts of the plaintiffs in the erection of their cotton mill, and the use of the water from the canal and dam above it, were strictly legal. They had a right to the flow of the river in its then natural state along the banks of their land, and a right to empty the water from their race-way into the river according to its then natural current, without any obstruction by any subsequent artificial elevation or back-water, unless the canal corporation have acquired some legal right to displace this, which may be called the natural right, or water privilege, annexed to the proprietary interest in the adjacent soil and banks.

The defendants have thrown into their answer a great variety of incidental matters, many of which are not responsive to the bill, and some of which are not made out by any competent proofs. But, stripping the case of this complexity of circumstances, the defendants mainly rely upon two distinct grounds of defence; first, that the act of raising the Woonsocket dam is strictly justified by the authorities conferred upon the corporation by the various acts of the legislatures of Massachusetts and Rhode Island, which are referred to in the case; and, secondly, that, if not so justified, still the indenture of agreement between the parties of the 5th day of June, 1826, (which is also in the case,) furnishes a complete justification, from the manifest objects, which it had in view, and the known circumstances and intentions of the parties which accompanied it.

A good deal has been said, in the course of the argument, upon the point, that the plaintiffs, at and before the time of their purchase of the Mowry land, in February, 1826, had notice, that the location of the canal had been actually made up to Woonsocket dam, and that the level of the canal at that place required the dam to be raised two feet; and so the intent of the canal proprietors to raise it, and the legal appropriation of it for this purpose, must, as necessary presumptions, follow upon such notice. Indeed, it has been contended, that this does not rest upon mere legal inference; but that direct and positive notice to this effect, as matter of fact, is brought home to the plaintiffs. This, however, is strenuously denied on the other side;

and there is, (as we shall hereafter see,) great difficulty in maintaining the affirmative upon the actual posture of the evidence. The question of notice is not, however, of the slightest consequence, if the Woonsocket dam has been justifiably raised, under and in virtue of any authority conferred by any of the charters upon the canal corporation. For under such circumstances it binds the plaintiffs in point of right, whether they had notice of the intent to raise it or not. The only possible view, in which it strikes me, that the notice can be of any avail, is this. If it constituted an actual admitted ground or basis, upon which the agreement of June, 1826, was entered into between the parties, so that it would operate as a legal fraud upon that agreement to suffer the plaintiffs now to assert a right, which that agreement contemplated as extinct, or to be extinguished by its terms, it would be most material as a matter of equitable bar. In all other aspects it seems to me wholly immaterial. It can confer no right on the defendants ipso facto. It would be absurd to say, that notice of an intent to do a wrong amounted to an extinguishment of the plaintiffs' right to seek a remedy for such wrong; or that the plaintiffs, at the peril of losing their property, were bound to make proclamation of their intention to seek redress against wrong-doers. The argument of the defendants' counsel has not, as I comprehend it, attempted to sustain any such large position.

Let us then pass to the main grounds of the defence; and see, whether they are made out by the principles of law applied to the facts. And first, as to the justification under the charters and other acts of incorporation. In June, 1823, the legislature of Rhode Island incorporated a company by the name of the Blackstone Canal Company, and, after giving them the usual corporate powers, authorized them to locate, construct, and fully complete a navigable canal, with locks, tow-paths, basins, dams, wharves, embankments, toll-houses, and other necessary appendages, commencing at the dividing line between the states of Rhode Island and Massachusetts, and at that point, which should intersect and connect with a canal, contemplated to be made and constructed from or near the town of Worcester in Massachusetts, down the valley of the Blackstone river, to the aforesaid dividing line, and running into tide-water, in the town of Providence, in such place or places as might be deemed most convenient for the company; with further authority to employ certain ponds as reservoirs and feeders, &c. &c. Many other incidental provisions were made, which it is not necessary to particularize. It was further provided (by the 11th section of the act), that whenever the corporation should have located the said canal, or any part thereof, or the feeders or branches thereto, or any of them, they should make report thereof to the court of common pleas for the county of Providence, at any term thereof, wherein they should particularly describe the bearings of the intended route, or any section thereof, its width, including tow-paths, embankments, basins, wharves, excavations, the reservoirs intended to be constructed or used, and the names of the owners of the land, so far as the same could be ascertained; which report was to be placed on the files of the court, and notice given to the owner of the land, if known; and commissioners were to be appointed by the court to estimate all damages, which any persons, whose lands were described or mentioned in the report, should sustain, provided the canal or feeders, &c. be constructed thereon. The duties of the commissioners were then pointed out; the manner of making their report; the reservation of a right of trial by a jury to any party dissatisfied with the report; and the mode of compelling payment of the damages, which should be assessed by the commissioners or by a jury, if not voluntarily paid by the corporation within a limited period. The corporation were further authorized subsequently to make any alteration in the canal or feeders so located; and the proceedings in respect to the alterations and the damages occasioned thereby, were to be the same as upon an original location. And inasmuch as the legislature of Massachusetts had at their January session, in 1823, created a corporation, by the name of the Blackstone Canal Company, for the purpose of building and constructing a canal from the town of Worcester to the line between the states of Massachusetts and Rhode Island, and it might be convenient to unite their stocks, it was further provided (by the last section of the act), that the subscribers to the petition for the Rhode Island corporation, with the express assent in writing of the Massachusetts corporation, might authorize subscriptions to be opened for stock for the purpose of building a canal from Worcester to Providence; and that such subscribers should be deemed and taken to all intents and purposes as members of this (the Rhode Island) corporation. And that the money so raised, or raised by the sale of any future stock or shares, might be expended upon any part of said canal from Worcester to Providence, or any of its appendages. And all officers and committees chosen by said subscribers should be officers of this corporation; and all books and records kept under the authority and direction of such subscribers, and all meetings, regular or special, whether in Rhode Island or Massachusetts, should be deemed and taken to all intents and purposes to be legal proceedings by this corporation.

Amendatory acts were passed by the legislature of Rhode Island, in January, 1826, in May, 1827, and in June, 1827. By the act of January, 1826, it was provided, that the commissioners appointed under the 11th section of the former act, should be authorized,

whenever the canal together with its feeders and reservoirs should be completed, to give notice to all persons to file their claims for or on account of the detention, reservation, division, and use, by the said corporation, of the flood waters of the Moshassuck river, and of the Blackstone river, and their branches and tributary streams, and feeders; or on account of the retention, reservation, division, and use of the usual and natural run of said rivers, or of any of their branches and tributary streams or feeders, whenever the same is not wanted for the use of any mill or mills now erected, or hereafter to be erected on dams already built on said rivers, &c.; or by reason of the appropriation and use, by the corporation, of the lands of any person for boat basins or other necessary uses of the said corporation, according to the powers of the charter. And the commissioners were authorized to report the damages in such claims, and a final adjudication was to be made thereon in the manner pointed out by the act. And it was expressly provided, that so much of the former act as authorized the corporation to reserve and keep back the usual and natural run of the Blackstone river, &c., should be repealed; and that the corporation should be authorized to detain, reserve, interrupt, use, or divert any part of the usual run of said river, &c., provided they did not flow back on the wheel of any mill or any dam then built on the said river in the state of Rhode Island, only at such times when the same shall not be wanted for the use of any mill now erected or to be erected on any dam already built.

The act of May, 1827, declared that the stockholders in the Massachusetts Blackstone Canal Company should be stockholders in the Rhode Island company, as if they had originally subscribed thereto, if both corporations should before the first day of July next agree thereto; and that the books and proceedings of the original and associated stockholders should be deemed the books of both corporations. The act of June, 1827, extended the time for the Massachusetts corporation to signify its acceptance to one year from the passage of the act.

Such is the substance of the Rhode Island acts; and it was under those of June, 1823, and January, 1826, that the canal from Providence to Woonsocket dam was (as is suggested) laid out and located by the commissioners of the canal corporation; and the report thereof presented to the court of common pleas for the county of Providence at May term, 1826; and final proceedings had thereon according to the requirements of the Rhode Island acts. It might naturally be supposed, that as Woonsocket dam was within the territorial limits of Rhode Island, the authority to raise that dam would be derived from, and exercised under the acts of Rhode Island above mentioned. But this has been utterly disclaimed on the part of the defendants at the argument. On the contrary, they admit, that the state of Rhode Island possesses no legislative authority to authorize the raising of any dam locally within that state, whereby the waters of the river may be flowed back to the injury of a mill or mill privilege locally situated in Massachusetts. The court is thus spared the investigation of this delicate and important question of law, upon which it would certainly not be desirable to pass any judgment, except after the most ample discussion and investigation. Independently, however, of the admission of counsel, there would be extreme difficulty in maintaining, that there had been any valid or legal appropriation for the raising of Woonsocket dam, under the Rhode Island acts, however broad might be the authorities conferred by them. In the report made in May, 1826, and which alone, (after it was duly confirmed and acted upon,) would in law fix the location of the canal, not a syllable is to be found respecting the levels of the canal, or the raising of Woonsocket dam, or the intention to flow back the waters of the Blackstone river. Now, however ample may be the powers given by the Rhode Island acts to the canal corporation, to construct their canal, to raise dams, to form levels, and to flow back the waters of the river, those powers must be exercised in the manner pointed out by those acts, before there can be any legal appropriation or location for these purposes. Acts in pais indicating such an intention are not sufficient. They must assume a legal and permanent form. They must be reported to, and acted upon, by the proper judicial tribunals, in the manner pointed out in those acts. There being, then, no statement on the face of the report of January, 1826, that Woonsocket dam was to be raised or appropriated for that purpose, or that the waters of the Blackstone river were there to be flowed back, it is difficult to perceive, how any such appropriation can be made out arguendo, or by inference from matters and presumptions in pais. It seems to me, then, perfectly clear, that the report of May, 1826, could not justify the raising of Woonsocket dam. Indeed, the defendants manifestly so understood their own rights, in the report of August, 1827, made to the court of common pleas for Providence county; for that report expressly claims the right of raising Woonsocket dam two feet higher, for the purpose of obtaining a safe navigation in the mill-pond and river above, and obtaining a reservoir of water for the use of the canal, and requires the damages to be assessed by commissioners, which were thus sustained by the persons, owning the lands and dams specified in the report, (the plaintiffs' not being included,) viz. "all damages sustained by all other persons

than those above named, by flowage of land, to be hereafter located and appraised." It does not appear, that any application has since been made for the ascertainment of any such damages so occasioned by flowage to other persons. Indeed, the actual raising of Woonsocket dam not having taken place until August, 1828, it was indispensable for the defendants, if they meant to justify themselves, to have made report thereof according to the act of January, 1826, and to have had the damages by the flowing back of the water duly ascertained and finally liquidated. It does not appear, that they have ever so done. There is, too, a peculiarity in the act of January, 1826, which deserves notice. In the second section of the act, that part of the sixth section of the act of 1823, which authorized the canal corporation to reserve and keep back the usual and natural run of the Blackstone river, &c., is expressly repealed; and in lieu thereof authority is granted to detain, reserve, interrupt, use, or divert any part of the usual run of said river, &c., "provided they do not flow back on the wheel of any mill or any dam now built on said river in this state, &c., only at such times when the same shall not be wanted for the use of any mill or mills now erected, or hereafter to be erected on any dam already built."—An equally just solicitude might well be presumed to exist, on the part of the legislature of Rhode Island, not to allow any interference with the rights of the owners of mills or dams on the Blackstone river locally situate in Massachusetts.

These remarks have been simply to show, that the considerations growing out of them have not escaped the attention of the court. But, as has been already observed, no justification being attempted at the argument under Rhode Island acts, it is unnecessary to follow them out to their natural consequences. We may, then, turn to the Massachusetts acts of incorporation; and inquire, whether they justify the raising of Woonsocket dam, and the flowing back of the waters upon the plaintiffs' mill.—The original act of incorporation by Massachusetts, was passed in January, 1823; and it incorporated certain persons named therein, by the name of the Blackstone Canal Company, with the usual powers of bodies politic, authorizing them to construct a navigable canal, &c. &c., commencing in or near the village of Worcester, down the valley of the Blackstone river in a direction towards tide-waters, to the boundary line between the states of Rhode Island and Massachusetts. By the eighth section, the corporation were authorized, after location of the canal, or any part thereof, to report their doings to the court of sessions for Worcester county, describing the route, width, tow-paths, embankments, basins, wharves, excavations, and reservoirs, and the owners of the lands, so far as they could be ascertained. Notice thereof was to be given by the court, and commissioners were to be appointed by the court to assess the damages to the owners of the land, with a reservation of a right of trial by jury to all persons dissatisfied with the report of the commissioners, otherwise the report, upon being accepted by the court, to be conclusive. Remedy was also provided for cases of non-payment of the damages so assessed. Power was also given to alter the route or location of any part of the canal. The other provisions of the act are not material to be stated.

By an act passed on the 7th of February, 1824, the Massachusetts legislature further authorized the Massachusetts company to open books for subscriptions of stock to construct a canal from Worcester to tide-waters in the town of Providence in Rhode Island, and to create if necessary new stock for the purpose. And the new subscribers were declared to be members of the corporation, and the corporation were authorized to expend the funds raised by the new stock on any part of the canal. By an act of the 4th of March, 1826, the legislature of Massachusetts further authorized the commissioners appointed by the eighth section of the act of incorporation, "to appraise all damages accruing to any person or persons, corporation or corporations, by reason of flowing his, her, or their land by said canal company, for their use; also to appraise all damages accruing to any person or persons, corporation or corporations, by reason of the detention or diversion of any water from said person or persons, corporation or corporations, who may have a legal right to the same;" with a proviso, that the claim for damages should be filed in the court of sessions for Worcester county within one year from and after the flowing, detention, or diversion as aforesaid, otherwise they were to be barred. By an additional act, passed on the 20th day of February, 1827, it was enacted, that, after the first day of July then next, the stockholders in the Blackstone Canal Company in Rhode Island, and incorporated by that state, should be constituted stockholders in the Blackstone Canal Company created in Massachusetts, with the powers, rights, and privileges of original subscribers. Other auxiliary provisions were made; but the union of the two corporations was to take place only upon the acceptance of the provisions by each corporation under the authority of the respective legislative acts of each state. In pursuance of the legislative acts of each state, the two companies became thus united by an acceptance of the terms of those acts, the Rhode Island corporation having agreed thereto on the 25th of June, 1827, and the Massachusetts corporation on the 26th of December, 1827.

The union, then, not being complete until the last mentioned period, it follows, that all antecedent acts done must be deemed to have been done by the respective corporations under their respective and distinct acts of incorporation. This view of the matter would, therefore, exclude (if no other difficulty existed) all right to consider the acts done in virtue of the reports made to the court of common pleas of Providence county in May, 1826, and in August, 1827, as being of any validity, as acts of the Massachusetts corporation, or as done with the assent or co-operation of the latter.

Although, in virtue of these several acts, the corporations acquired a unity of interests, it by no means follows, that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective acts of incorporation. Neither could exercise the rights, powers, or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case, where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation.

Let us see, then, how far the raising of Woonsocket dam in Rhode Island was authorized by the Massachusetts acts of incorporation. Now, the general rule certainly is, that every legislative act ought to receive a reasonable construction; and it cannot be presumed, that a legislature authorizes any act to be done in a foreign territory, when that act is beyond the reach of its proper jurisdiction or sovereignty. Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty. Unless, then, there is on the face of the Massachusetts acts some plain clause authorizing the raising of this dam, it cannot be implied from the ordinary language of those acts. It cannot be presumed, that the Massachusetts legislature meant to exceed its legitimate authority. The original act of incorporation in 1823, is manifestly confined to objects and purposes connected with the construction of a canal from Worcester to the Rhode Island boundary line. The raising of Woonsocket dam was not included within the scope of that canal. It was not within the termini of it. The supplementary act of February, 1824, does not change or enlarge this purpose; but only authorizes the subscription and sale of new stock to be made, and the application of these new funds to the making of any part of the canal from Worcester to tide-water in Providence. It does not authorize the corporation to construct such a canal beyond the territorial limits of Massachusetts; but only provides that any application of its new funds, for such a purpose, shall not be deemed a maladministration or malappropriation of them. The subsequent union of the two corporations in point of interest and stock does not, as has been already stated, vary this result. The only reports of locations of the canal made to the court of sessions for Worcester county, under the authority of the Massachusetts acts, are as follows: First, a report made to the court at November term, 1825, and finally acted upon, with the proceedings thereon, at September term, 1826, by which "so much of the location and report as relates to a dam to be constructed on the top of a dam now belonging to the Blackstone Manufacturing Company, across the Blackstone river in the town of Mendon, and now used by the said company," was allowed, accepted, and recorded. This report does not in the slightest degree touch any question as to raising Woonsocket dam. Secondly, a report of locations made to the court at December term, 1826, and finally, with the proceedings thereon, acted upon at March term, 1827, by which, among other things, the canal was laid out and located through the defendants' land to the boundary line between Massachusetts and Rhode Island. And here, again, no mention occurs of any raising of Woonsocket dam, or of any damages for flowage to be estimated therefor.

So that in point of fact, supposing that under the Massachusetts acts Woonsocket dam might have been located and raised, and the compensation ascertained for any flowage occasioned thereby, in the manner pointed out by those acts, (which is admitted only for the sake of argument,) no such location has been made and confirmed, and no such compensation ascertained and fixed, as these acts require to give validity thereto. There is, then, a total failure of any one execution of the proper authorities, (supposing them to exist,) to justify the raising of Woonsocket dam by the defendants, under the Massachusetts acts. In fact, that dam was not, (as has been already stated,) raised until August, 1828; and even if the union of the two corporations in December, 1827, were as complete and perfect, as the defendants contend, so as to constitute thereafter a single corporation; still, there is no legal location thereof by the corporation, confirmed by any court of Massachusetts, either before or subsequent to that period, which gives any legal validity in point of property or right to the raising of Woonsocket dam.

It appears to me, then, upon this short view of this part of the case, that the defendants have not shown any justification under

the Massachusetts acts; and they pretend to none under the Rhode Island acts. Let us see, then, whether the indenture of agreement between the plaintiffs and the defendants of the 5th of June, 1826, furnishes any justification of the defendants, or any bar to the relief sought. At the time when this agreement was entered into, the canal had been laid, and staked out by the canal commissioners, (though not finally located by any judicial acceptance thereof,) from the pond of Woonsocket dam to the Blackstone Company's dam in Mendon on the east side of the Blackstone river. The plaintiffs were at that time the owners of the land on the west side of the river from and to the same termini, they having purchased the Mowry land in the preceding February. The principal object of the negotiations, which ended in the above agreement, were, to change the contemplated route of the canal from the east to the west side of the river, so as to pass through the plaintiffs' lands between the Woonsocket dam and the Blackstone Company's dam. Accordingly, at the time of the agreement, as is apparent from the recital, the route had been changed by the canal corporation to the west side, and staked out; and the main objects apparent upon the face of the agreement are to secure to each party equivalent advantages for the change of the route, and the benefit derivable therefrom. The plaintiffs agree to exonerate the defendants from building any bridge over their land, where the canal shall pass; to build and maintain a suitable bridge at their own expense; to pay the corporation $500 towards the building of a bridge across the Blackstone Company's pond; to build a bulkhead across their trench at its junction with the canal; to hoist their gates and stop their mill for a fortnight to enable the corporation to build their bridge and guard-gates; and further, not to draw down the water more than four inches below the cap-log of their dam, so that boats in the canal may not be impeded in the navigation, except in cases of necessary repairs. And finally, they agree to release to the corporation all damages for making and continuing the canal through their land, and all damages, which may arise from the flowing of land belonging to them on the west side of the east bank of the canal, and all damages which may arise from removing earth beyond necessary excavations to make embankments for the canal in their land. In consideration of these covenants, the corporation grant to the plaintiffs, and their heirs and assigns, the right to draw and use water from the canal for any purposes, and at any points on the land of the plaintiffs, provided they do not draw and use the water, so as to remove it at their dam more than four inches below the cap-log of the same dam; the plaintiffs agreeing to build and maintain a bridge across the tow-path of the canal at each point, where they draw the water from the canal through the tow-path thereof. Such is the substance of the indenture. And it is not a little remarkable, that though many things are minutely provided for, and especially a release of damages occasioned by flowage of the plaintiffs' land on the west side of the east bank of the canal, not the slightest allusion is made to the raising of Woonsocket dam, or to any damages to the plaintiffs consequent thereon. This omission is the more remarkable, because the plaintiffs in the preceding May had begun to dig the race-way for their cotton mill; so that the possible injury to that race-way and mill by the flowing back of the waters of the river could scarcely have escaped the observation of all the parties. It would seem almost incredible, that a very expensive mill should be about to be erected under such circumstances, without some solicitude being manifested on so important a subject. Be this as it may, it is very certain, that the indenture makes no provision on the subject of raising Woonsocket dam, or of a waiver of damages consequent thereon; and it is difficult, therefore, in a legal point of view, to perceive, what bearing it has, per se, upon the present controversy. As an agreement on another subject, it can have no legal tendency to bar or impair the plaintiffs' rights. If it is to operate as a bar, it must be from other collateral considerations; not from what it does contain; but from what it does not contain.

First, it is said by the counsel for the defendants, that, before this agreement was made, the plaintiffs had full notice of the intention of the canal corporation to raise Woonsocket dam; and that the agreement was entered into under that, as an implied term or condition of the change of the location of the canal from the east side to the west side of the river. It is said, that the canal was staked out, and its levels de facto marked out, so that they could not escape general notice; and that this notoriety is brought home to the plaintiffs. But, as has been already suggested, there is great difficulty in sustaining this position, as matter of fact. If the raising of Woonsocket dam was absolutely decided on, and fixed, in the autumn or winter of 1825; if there was then a positive location of Woonsocket dam for this purpose; how has it happened, that the report of May, 1826, makes no mention of such location? It was most material to be stated. It has been said, that the staking out of the route of the canal, and of the lands were, per se, acts of appropriation of the route and levels; and that all, that the law requires, is, that, within a reasonable time, the route and levels and locations should be reported to the proper judicial tribunal for confirmation and ulterior proceedings. But I am clearly of opinion, that though, by the staking out of the route and levels and location, an inchoate title may vest

in the corporation, if the ulterior judicial proceedings are pursued; yet, until these proceedings are had, and consummated, no complete title can vest in the corporation. They cannot take private property, or entitle themselves to do injury by flowage to the rights of third persons, until they have pursued and finished all the steps contemplated by law. Now, up to this very hour, no such ulterior proceedings have been had in respect to the flowage occasioned by the raising of Woonsocket dam. There has been no return made to any court of any location thereof, with a view to the question of damages by flowage to persons in general. It appears to me impossible, therefore, that there can have vested any title in the corporation by the mere staking out of any route, or lands. where there has been no judicial confirmation of their acts in pais, so as to bind the rights of parties in the manner contemplated by law. Notice, then, if it were proved, of an intention to do the act, would not (as has been already stated), if the act has not acquired a legal validity, justify it. Nor am I at all prepared to admit, that a marking out of the levels of the canal would have been, even if followed up by ulterior proceedings, equivalent to a location of Woonsocket dam.

But, to recur to the fact of notice, I am not persuaded, that it has been brought home to the plaintiffs. There is, to say the least of it, so much room to doubt it, that it is incumbent on those, who assert any legal rights under it, to establish it by some testimony more stringent and pressing, than any which has, as yet, been produced to the court. In a conflict of testimony, if notice be brought into reasonable doubt, that alone would justify the court in refusing to act upon it, as an established fact.

Then, in the next place, if the fact of notice were more clear than it is, did the other ingredient exist? Did the plaintiffs understand, and by implication admit, that Woonsocket dam should be raised, so that it was assumed as a basis of the indenture of June, 1826? Unless it was so assumed, and a departure from it would now operate as a virtual fraud upon the canal corporation, I do not perceive, how the fact of notice (as has been already suggested) can conclude any thing in the case. It appears to me, that the canal corporation have not, by any proper evidence, established this most important fact. It is true, that it is asserted with great strength and directness in their answer, not only that at the time of making the indenture there was an intention to raise Woonsocket dam by the canal corporation, but that it was then actually located and appropriated for this purpose; that the Mowry land had been purchased by their agent for the express purpose of avoiding any liability to pay damages for flowage upon that land; that the subsequent conveyance to the plaintiffs of the Mowry land was made under an implied notice or reservation to this effect; and that the raising of Woonsocket dam was fully known and understood by all the parties as the basis, upon which that indenture proceeded. But these statements, though found in the answer, not being responsive to any allegations in the bill, but matters set up in justification, are not, per se, evidence, because they are in the answer. They must be established by proofs, aliunde; and I am of opinion, that no sufficient proofs exist in the case for this purpose. It seems, indeed, admitted, that notice would not, per se, confer any right on the corporation. But it is said, that it will deprive the party of all claim for damages done to subsequent improvements made by them after such notice. It does not appear to me, that this proposition can be maintained consistently with the principles of law. Every man has a right to use and improve his own property according to his own pleasure, without let or obstruction; and notice of an intended injurious act, if unlawful, cannot narrow this right, and exempt the party from full responsibility in damages. It is at the party's own peril, that he assumes to do any illegal act, which consequentially or directly affects the property of another. No man by giving notice of an intention to obstruct a stream, and thereby to flow back the water upon the riparian proprietors, can exempt himself from damages to the full extent of all the injury done, when the obstruction is completed.

Then, again, it has been said, that the reason for the total silence of the indenture on the subject of raising Woonsocket dam is, that it was a part of the antecedent agreement, of which there was already a part-performance by the location of the levels of the canal, and the transfer of the route to the west side; and therefore it was unnecessary to stipulate respecting it. But no such antecedent agreement is established in point of fact, of which the indenture constituted an unexecuted fragment. On the contrary, the indenture proceeds upon the admitted fact, that the canal was already staked out on the west side of the river; and the whole scope of the covenants on each side is for reciprocal benefits and advantages consequent upon that fact. The covenants do not allude to it, as the consideration for the covenants of the plaintiffs; but these covenants are "in consideration of the covenants and grants herein contained to be performed and made by the corporation." And where there have been antecedent negotiations on a subject, which have ended in a written agreement, there is no small difficulty in considering them as still a subsisting part of the agreement. Many of the mischiefs growing out of the admission of parol evidence to explain, control, or add to written instruments, would be thus immeasurably extended. If there

are any cases, in which this may be done, they are cases of a peculiar character, where fraud, or some other equivalent ingredient, is presented to the consideration of a court of equity. Nothing short of the most clear and convincing proofs would justify the engrafting of such a parol contract upon the terms of a written instrument. The very silence of the present indenture is most significant against the presumption of such a parol contract and part-performance; since the very groundwork of the argument rests on the supposition, that it was the main consideration of entering into it. There could be no part-performance, until the dam was actually located and raised; or until there was some release of all claim to future damages therefor by the plaintiffs. Until some act of this sort was done on either side, with the assent of the other, the agreement must remain executory; and its fulfilment could be absolutely secured only by incorporating it into the very substance of the indenture. If, then, the written agreement does not touch the case; if notice cannot, per se, confer any right on the corporation, or bar any claim for damages by the plaintiffs; if no parol contract, operating to bind the plaintiffs, as a matter of fraud upon the corporation, is established, we are driven back upon the acts of incorporation for a justification; and these, as has been already shown, under the circumstances, furnish none. The consequence is, that the corporation have no right to do the act; and if the raising of Woonsocket dam has been injurious to the plaintiffs, by flowing back the water, to the obstruction of their mill wheels, they are entitled to relief.

The remaining inquiry then is, whether, as matter of fact, the injury, stated in the bill, has been occasioned by the raising of Woonsocket dam. And I am of opinion, that it is so established by a strong and decisive preponderance of the evidence. I do not go over the particulars. But the result is that which has been announced. What then is the relief, to which the plaintiffs are entitled? All claims for damages in this form of proceeding are expressly abandoned by the plaintiffs, and therefore need not be made matter of discussion. The relief must be specific. The nuisance, to the extent of the injury, must be abated, and a perpetual injunction award against any future raising of the dam, or keeping up its height to the injury of the plaintiffs. For this purpose, it will be necessary to refer it to a master, to ascertain how much the dam ought to be lowered, not exceeding the two feet, in order to remove the injury to the plaintiffs; and upon his report coming in, further proceedings must be had, to give full effect to the decree of the court. An interlocutory decree for this purpose will be accordingly entered.

FARNUM v. SICKEL. See Case No. 2,862.

Case No. 4,676.

FARQUHAR et al. v. FIDELITY INS., ETC., CO. et al.

[35 Leg. Int. 404; 13 Phila. 473; 18 Alb. Law J. 330; 6 Reporter, 676; 7 Cent. Law J. 334; 11 Chi. Leg. News, 49; 24 Int. Rev. Rec. 334; 26 Pittsb. Leg. J. 43.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 7, 1878.

BILLS AND NOTES—CONDITION DETERMINABLE ONLY BY EXTRINSIC EVIDENCE—NEGOTIABILITY.

1. It is an essential feature of a negotiable note that it should be "simple, certain, unconditional; not subject to any contingency."

2. Where a note contained a provision for the additional payment of "all taxes and charges in the nature thereof that may be levied upon this note or upon the indenture of mortgage accompanying it, or the principal or interest money thereby secured, immediately upon their assessment," *held*, that the amount of the addition being determinable only by extrinsic evidence, the note did not possess the character of negotiable paper.

[Cited in Merchants' Nat. Bank v. Sevier, 14 Fed. 663.]

In equity. [Motion for an injunction to restrain [the Fidelity Insurance, Trust & Safe-Deposit Co. and others from] the prosecution of foreclosure proceedings upon notes and mortgages given by [Huddell & Seitzinger] bankrupts, of whom plaintiffs [Fergus G. Farquhar and Jos. I. Doran] were assignees in bankruptcy. The notes contained an agreement to pay principal and interest, together with an attorney's commission of five per cent. for collection in case suit is instituted hereon, and "together with all taxes and charges in the nature thereof that may be levied upon this note or upon the indenture of mortgage accompanying the same, or the principal or interest moneys thereby secured, immediately upon their assessment."] [2]

McKENNAN, Circuit Judge. It is an essential feature of a negotiable note that it should be made transferable, so as to give the holder a right of action in his own name. Hence it has been held that the use of the ordinary terms "or order," "or bearer," are not indispensable to impress upon it this quality of transferability. Words of equivalent meaning, which clearly show the intention of the maker, are equally effectual. This is the import of most of the authorities referred to by the counsel for the respondents. They only determine that words in a bill or note, from which it can be inferred that the person making it intended it to be negotiable, will give it a transferable quality against that person; but they do not indicate that a bill or note is invested with the full attributes of commercial negotiability by being thus made transferable. It is just as essential to the peculiar nature of such an instrument that it should be "simple, certain, unconditional—not subject to any contin-

[1] [Reprinted from 35 Leg. Int. 404, by permission. 6 Reporter, 676, and 7 Cent. Law J. 334, contain only partial reports.]

[2] [From 11 Chi. Leg. News, 49.]

gency." Woods v. North [84 Pa. St. 407]; Story, Prom. Notes, 1. And although there may be reason for the difference of judicial decision which exists, as to the effect upon the commercial character of a note, of a provision for the additional payment of a fixed percentage for collection, which is expressed upon its face, yet there is no conflict of opinion as to the effect of such provision, where the amount of the addition is determinable only by extrinsic evidence. An indefinite obligation is obviously unadapted to the exigencies of commercial paper, which derives its peculiar qualities from the intended freedom and facility of its circulation, and the consequent necessity that it should carry upon its face unambiguous evidence of the maker's liability, and should denote, with precision, how much the maker is bound to pay and the holder is entitled to receive.

The notes, which are the subject of this litigation, are objectionable on this ground. They are secured by mortgage, are for $5000 each, payable to bearer in ten years, with interest semi-annually, "together with an attorney's commission of five per cent. for collection, in case suit be instituted hereon, and together with all taxes and charges in the nature thereof that may be levied upon this note or upon the indenture of mortgage accompanying the same, or the principal or interest moneys thereby secured, immediately upon their assessment." Overlooking the clause touching attorney's commission, how can it be said, that the notes are either unconditional or certain in amount, in view of the stipulation for the payment of taxes or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property and in the hands of the holders (and this is the import of the stipulation); in some places they would probably be free from this charge, while in others they may be subjected to indefinite and varying rates of taxation, so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances, and be dependent upon the domicil of the holder. And of these contemplated charges, or additions to the nominal consideration, the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consideration is thus fluctuating and indefinite, and which are laden with such embarrassments to their circulation, could not perform the functions, and therefore do not possess the character of negotiable paper.

This view of the nature of these securities renders it unnecessary to consider the other reasons urged in favor of the motion. While they are, therefore, generally subject to the equities set up in the bill as the ground of the relief prayed for, there is no impeachment of the title of the Fidelity Company to those of the notes held by it. Inasmuch, however, as the foreclosure proceedings were not commenced until some time after the adjudication in bankruptcy, and without the leave of the bankruptcy court to that end, and as the interests of all the creditors of the bankrupts will be best subserved by an administration and distribution of their assets under the direction of a single tribunal, an injunction is awarded against the further prosecution of the foreclosure proceedings until the further order of this court.

[NOTE. See In re Huddell, Case No. 6,825.]

FARR (BYAM v.). See Case No. 2,264.

Case No. 4,677.

The FARRAGUT.

[6 Blatchf. 207.][1]

Circuit Court, D. Connecticut. Oct. 8, 1868.

SHIPPING—INSPECTION LAWS—STEAM VESSELS ENGAGED IN INTERSTATE COMMERCE.

A steam tug, employed in towing, on the Connecticut river, between its mouth and the city of Hartford, and exclusively within the limits of the state of Connecticut, vessels engaged in commerce among the several states, such tug not being itself engaged otherwise in commerce, is not within the provisions of the 4th section of the act of June 8, 1864 (13 Stat. 120), in regard to inspection.

[Cited in The Oconto, Case No. 10,421.]

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

This was a libel of information, filed in the district court, in admiralty, by the United States, against the steam tug Farragut, claiming a forfeiture of the vessel, for the reason that she was employed in towing vessels engaged in commerce among the several states, from the mouth of the Connecticut river, to the city of Hartford, without having the license required by the act of June 8, 1864 (13 Stat. 120). The district court dismissed the libel [case unreported], and the United States appealed to this court.

NELSON, Circuit Justice. The tug is employed in towing vessels on the Connecticut river, between its mouth and the city of Hartford, exclusively within the limits of the state of Connecticut, and is not itself engaged otherwise in commerce. The 4th section of the act of June 8, 1864 (13 Stat. 120), declares, that the 42d section of the act of August 30, 1852 (10 Stat. 75), shall be so construed as to require the inspection, in the manner prescribed by the latter act, of every vessel propelled, in whole or in part, by steam, and engaged as a ferry-boat, tug or towing boat, or canal boat, in all cases where, under the laws of the United States, such vessels may be engaged in the commerce with foreign nations, or among the several states. The argument on the part of the government is,

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

that, by vessels engaged in the commerce with foreign nations, or among the several states, is meant vessels towed; and that, if they are engaged in such commerce, the tug engaged in moving them is also. But this is a very broad construction, and is not borne out by the language of the section. The language is—every vessel propelled, &c., and engaged as a ferry-boat, tug or towing boat, &c. Where, under the laws of the United States, such vessels are engaged in commerce, &c., they are required to be inspected and to take out the license. It is the ferry-boat, or the tug itself, that must be engaged in commerce under the laws, &c., in order to subject it to the penalties of the act. Within this explanation, the libel cannot be sustained. It would have been easy and natural to have said—every tug employed in towing vessels, which vessels are engaged in commerce, &c.—if the construction contended for had been intended.

Decree affirmed.

Case No. 4,678.

In re FARRAND.

[1 Abb. U. S. 140;[1] 2 Am. Law T. Rep. U. S. Cts. 4.]

District Court, D. Kentucky. Dec. Term, 1867.

HABEAS CORPUS—JURISDICTION OF STATE TRIBUNALS.

1. Where it appears by the return to a writ of habeas corpus, issued by a state tribunal, that the respondent holds the petitioner under authority, or color of authority from the United States, the state tribunal or officer has no jurisdiction to proceed further, but must discharge the writ.

2. The question whether such authority is valid cannot be examined in a state court; but is within the exclusive jurisdiction of the tribunals of the United States.

[Cited in Re Neagle, 39 Fed. 851.]

3. A commander in the army of the United States made return to a writ of habeas corpus issued by a state court, showing that he held the petitioner as a recruit in the army, and pursuant to laws of the United States regulating enlistments. The state court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him, and the state court committed the officer for contempt. *Held*, by the district court on a habeas corpus sued out by the commander, that the state court exceeded its jurisdiction in examining the validity of the enlistment; that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from the United States; and that the officer, in detaining the recruit notwithstanding the order of discharge by the state court, acted in pursuance of a law of the United States, and being imprisoned therefor by the state court was himself entitled to be discharged by virtue of the act of March 2, 1833 [4 Stat. 634].

[Cited in Re Neill, Case No. 10,089.]

Hearing upon a writ of habeas corpus.

B. H. Bristow, Dist. Atty., and T. R. Hallam, for petitioner.

John F. Fiske, for respondent.

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

BALLARD, District Judge. On December 9 the relator, Charles E. Farrand, presented to this court a petition showing that he was held in confinement by Thomas Fowler, marshal of the city of Newport, "for an act done or omitted to be done in pursuance of a law of the United States," and praying for a writ of habeas corpus. The petition, on its face, presenting a case which clearly entitled the relator to relief under the provisions of section 7 of the act of congress of March 2, 1833 [supra], and perhaps also under the act of February 5, 1867 [14 Stat. 385], the writ was issued, directed to the marshal of Newport.

In obedience to this writ the marshal produced in court the body of the relator, and made his return showing that he holds him by virtue of an order made by the mayor's court of Newport, in a regular proceeding before it. The marshal makes part of his return the proceedings had before the mayor's court, and has exhibited certified copies of them.

From these proceedings it appears that on November 7, 1867, on the petition of Jane Johnson, representing herself as the mother of Archibald Johnson, a writ of habeas corpus was issued by the mayor's court of Newport, directed to the commander of Newport barracks, commanding that officer to bring before it Archibald Johnson, illegally detained, as was alleged, together with the cause of his capture and detention. This writ being served on the relator, who was in temporary command of the barracks, he in due time made his return in substance as follows:

"I have the honor to make return to the within writ of habeas corpus that the within named man is a duly enlisted soldier in the army of the United States at Newport barracks.

"I also deny the jurisdiction of the mayor's court or any state court of the state of Kentucky, and recognize only the jurisdiction of the United States courts in cases of this kind.

"I do not intend any disrespect in the above return to the court of his honor Mayor Buchanan, but must respectfully decline obeying the writ through a sense of duty."

The relator also exhibited with his return a copy of the enlistment of the soldier, which shows that he was duly and regularly enlisted as a soldier in the army of the United States, April 22, 1867; that the oath required by law was administered to the recruit by an officer authorized to administer such oath; that the recruit was regularly examined by the surgeon appointed for that purpose; and that he made his declaration, to the truth of which he swore, in which he, among other things, states that "I am twenty-one years and nine months of age."

Notwithstanding this return and exhibit, the mayor's court proceeded with the case, and made an order to the effect, "it appear-

ing upon proper proof that said Archibald Johnson was enlisted when he was under age of seventeen years, without the consent of his mother, and that he has no guardian, he is discharged."

But the relator refused to obey this order, and continued to hold the recruit in the United States service by virtue of his enlistment. For this refusal the mayor's court proceeded against him by process of contempt, and it is under this process that he is now in confinement.

I have not set forth all the proceedings which took place in the mayor's court, but have stated all that are material.

The relator filed a paper in the nature of a traverse to the return of the marshal, in which he reiterates all the facts set forth in his return made to the writ issued from the mayor's court, and alleges that, though he is in confinement for an alleged contempt of an order of said court, he is really confined for detaining a soldier duly enlisted in the service of the United States, and for omitting to discharge him, as he was bound to do under the laws of the United States. He claims that he is confinement for an act done or omitted to be done in pursuance of a law of the United States.

Section 7 of the act of congress of March 2, 1833 (4 Stat. 634), provides, "That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner . . . in confinement when he . . . shall be committed or confined . . . . by any authority or law, for any act done or omitted to be done in pursuance of a law of the United States."

It is wholly immaterial whether the act of the relator is to be regarded as an act of commission in that he detained the recruit, or as an act of omission in that he refused to discharge him; for whether it is the one or the other it is equally within the terms of the act of congress, if it was "done in pursuance of a law of the United States."

The question then arises, had the relator a right, under the laws of the United States, to retain the recruit and refuse to discharge him?—and this presents the further question, had the mayor's court any jurisdiction to discharge him?

That the relator had the right and was required to detain the recruit as a regularly enlisted soldier in the army of the United States, unless the order of discharge made by the mayor's court annulled his right, is not questioned and is unquestionable. I proceed, therefore, at once to consider the question of the jurisdiction of the mayor's court, as the only question presented in the case; for it is hardly necessary to state that if the mayor's court, notwithstanding the return made to it showing that the soldier was held under the authority of the United States, had the jurisdiction to discharge him, then the relator is lawfully in confinement, and cannot be relieved by this court; but if that court had no such jurisdiction, then its order to discharge is void, not binding on the relator, and he is in confinement for detaining the soldier, as he was required to do by law,—that is, "for an act done in pursuance of a law of the United States."

The question thus presented is one of vast importance, and I have endeavored to bestow upon it that deliberation which its importance demands. It involves much more than the question whether the recruit, Johnson, shall remain in the army of the United States until his term of enlistment expires, or shall be at once discharged. It involves much more than the question whether the mayor's court of Newport has jurisdiction by habeas corpus to discharge a minor regularly enlisted in the army. It involves the further question whether any state court has jurisdiction, under such writ, to discharge the prisoner, when it is shown to it that he is held under authority of the United States; for if any state court has such right, I see not why it is not possessed by the mayor's court.

From the beginning of the government down to the decision of the supreme court of the United States in 1858, in the cases of Ableman v. Booth, and U. S. v. Booth, 21 How. [62 U. S.] 506, I suppose the very decided preponderance of authority in the state courts sustains the jurisdiction of those courts to discharge upon habeas corpus prisoners who, in their judgment, are illegally held, though held under the authority of the United States. The cases will be found collated in Hurd, Hab. Corp. 164–202. The jurisdiction, it is true, had been frequently disclaimed by able state judges; as by Chief Justice Lansing in 1799 (In re Husted, 1 Johns. Cas. 136); by Chief Justice Nicholson in 1809 (In re Roberts, 2 Hall, Law J. 192); and by Chief Justice Kent in 1812 (In re Ferguson, 9 Johns. 239). But, as I have said, down to the decision in the case of Ableman v. Booth, the preponderance of state decisions was the other way, though since that decision the weight of authority even in the State courts is against the jurisdiction. State v. Zulich (1862) 29 N. J. Law (5 Dutch.) 409; In re Spangler (1863) [11 Mich. 298]; In re Hopson (1863) 40 Barb. 43–59; In re Jordan (1863) 2 Am. Law Reg. (N. S.) 749. I have seen other decisions of state courts cited as supporting this view, but as they have not been accessible to me, I will simply enumerate them, that they may be consulted by those who shall have opportunity. State v. Janeway, opinion by E. Dayton Ogden, J., of the supreme court of New Jersey, reported in Newark Daily Advertiser, Dec. 15, 1862; In re Bully, in New York court of common pleas, opinion by Daly, J., reported in New York Tribune and Herald of March 19, 1867; In re O'Connor.

in New York supreme court, opinion by Ingraham, J. [48 Barb. 258]. And see 2 Abb. Nat. Dig. 609, note.

The decisions and opinions in the district and circuit courts of the United States, both before and since the decision in Ableman v. Booth, have denied the state jurisdiction. In re Keeler (1843) [Case No. 7,637]; Norris v. Newton (1850) [Id. 10,307]; In re Veremaitre (1851) U. S. Dist. Ct. S. D. N. Y. [Id. 16,915]; Charge to the grand jury by Nelson, J. (1851) 1 Blatchf. Append.; Ex parte Sifford (1857) U. S. Dist. Ct. S. D. Ohio [Case No. 12,848]; In re McDonald (1861) Dist. Ct. Mo. [Id. 8,751]; Conk. Pr. (4th Ed.) 583-585.

The current of opinions in the courts of the United States is, so far as I know, absolutely unbroken except by a single opinion recently rendered by the learned district judge for the northern district of New York, in Re Reynolds [Case No. 11,722], on habeas corpus. I have examined this opinion with great care, and while I assent, though not without some hesitation, to the decision made, I cannot but regard much that is said as not properly belonging to the case before the court. The prisoner, Reynolds, being in custody under color of authority of the United States, the learned judge sitting as a judge of the United States had unquestionable jurisdiction under the express terms of section 14 of the judiciary act of 1789 [1 Stat. 81], to inquire by habeas corpus into the cause of his detention, and to discharge him if he found the detention illegal; and when he decided that the previous refusal of a state judge to discharge the prisoner, no matter whether the state judge had jurisdiction or not, was no bar to his inquiry, I cannot see that anything he says respecting the jurisdiction of state courts to discharge upon habeas corpus persons held under color of authority of the United States, necessarily or properly belongs to the case. Moreover, this opinion is not only adverse to the current of opinions in the circuit and district courts of the United States, but is, I think, opposed to the opinion of the supreme court of the United States.

I might fortify my decision by copious extract from the opinions of federal and state judges, but the opinion of the supreme court is so conclusive, and I shall be obliged to quote from it so extensively, that I can not, without extending this opinion to an inordinate length, make any further reference to them than has already been made. I proceed, therefore, at once to the opinion of the supreme court, rendered in cases of Ableman v. Booth and U. S. v. Booth [21 How. (62 U. S.) 506].

In the first case it appears that Booth was arrested by the United States marshal upon a warrant issued by a commissioner under the fugitive slave act, charging him with the offense of aiding and abetting the escape of a fugitive slave, and that he was committed to prison. While thus held, a justice of the supreme court of Wisconsin issued a writ of habeas corpus directed to the marshal, requiring him to produce the body of the prisoner, with the cause of the detention. The marshal made a return that he was held by virtue of the warrant of the commissioner, a copy of which he annexed to his return.

Upon argument and a demurrer to the return, the judge held the detention to be illegal, and Booth was discharged from custody. Upon this decision the marshal sued out a certiorari, and removed the case to the supreme court, where, upon argument, the decision was affirmed. It proceeded upon the ground that the fugitive slave act was unconstitutional, and that, consequently, the marshal had no authority to make the arrest and hold the defendant in custody.

In the second case, Booth had been indicted for the same offense with which he had previously been charged before the commissioner, been tried and convicted in the United States district court for Wisconsin, and sentenced, and was in execution upon the judgment.

Thereupon another writ of habeas corpus was issued by the supreme court sitting in bank, upon a petition setting forth, among other things, that the conviction was illegal by reason of the invalidity of the act under which he was indicted, tried, and convicted. The return of the sheriff consisted of a transcript of the proceedings, judgment, and sentence of the district court, and stated that to be the authority and process by which the prisoner was held. The court heard the argument, and decided the imprisonment to be illegal, and ordered Booth to be at once discharged, which was accordingly done. Upon both these decisions writs of error were prosecuted to the supreme court of the United States.

The court, after recapitulating the facts, state the point presented by each as follows:

"It will be seen from the foregoing statement of facts that a judge of the supreme court of the state of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterward sanctioned and affirmed by the supreme court of the state.

"In the second case, the state court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by habeas corpus, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court."

The opinion proceeds: "No state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its own territorial limits to a certain extent, yet that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned."

The manifest import of this language is that a person held in custody under the authority of the United States is as far beyond the jurisdiction of a state court as if he were personally in a different state.

The court then, after enforcing in a masterly argument the position that the federal judiciary has jurisdiction of all cases arising under the constitution and laws of the United States, and that this jurisdiction of all cases arising under the laws must be exclusive in order to preserve harmony, say, "We do not question the authority of state court or judge, who is authorized by the laws of the state to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. But after the return is made, and the state judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other persons holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken before a state judge or court upon habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

The court do not mean that the state judge or court can proceed no further only when it is proven that the party is in custody under the lawful authority of the United States. If this be their meaning, surely it was not necessary to enforce the correctness of the proposition by any such labored argument as that in which they indulge, for it is undeniable that when it is shown and proven, in answer to a writ of habeas corpus, that a party is in custody under the lawful authority of the United States, the federal judge is as powerless to proceed further as the state judge.

No judge, state or national, can, under a habeas corpus, discharge a party who is in lawful custody. What the court obviously mean is, that when it is shown to the state judge, by the party's own petition or by the return to the writ, that the prisoner is in

custody under what purports to be the authority of the United States,—such as an enlistment of a recruit or a writ issued by a court, judge, or commissioner of the United States,—he can proceed no further. He can no more inquire whether the recruit was of age at the time of his enlistment, and subject to enlistment under the laws of the United States, than he can inquire whether the court, judge, or commissioner of the United States had jurisdiction to issue the writ under which the party is held. When the state judge is informed that the prisoner in whose behalf he has issued a writ is in custody as an enlisted soldier of the United States, or under process issued by one of their judges or commissioners, he knows "that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and the exclusive jurisdiction of the United States." . . . . "If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." It is the federal judiciary only which can release a party wrongfully imprisoned under authority of the United States; but, obviously a party wrongfully imprisoned is illegally imprisoned, and is not held under lawful authority; and if follows that if a state court can discharge a recruit because he was a minor, and enlisted without warrant of law,—that is, wrongfully,—it assumes the very jurisdiction which the supreme court deny to it.

"It is (say the court) the duty of the marshal, or other person holding him (prisoner) to make known, by a proper return, the authority under which he detains him;" but "it is at the same time imperatively his duty to obey the process of the United States, ... to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, or suffer him to be taken before a state judge or court upon a habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them." But if a state court, after it is informed by a proper return that the party in whose behalf it has issued a writ of habeas corpus is imprisoned under authority of the United States, cannot require him to be brought before it, that court can make no inquiry into the actual legality of the authority; for such an inquiry is of no value, and would be an idle ceremony without the presence of the prisoner.

The supreme court do not refer to the judgment which the state court should pronounce after hearing the whole case, when it appears that the prisoner is in legal custody under authority of the United States, in the strict sense of these terms. Its duty in such case is plain, and in no respect differs from that of a court of the United States. They refer to the duty of the state court to proceed no further because of its want of jurisdiction, and distinguish between its duty and that of a court of the United States, which latter court they say may discharge a prisoner "wrongfully imprisoned," though imprisoned under authority of the United States. If the state court can inquire into the legality of a custody held under authority of the United States, and depending for its validity upon the construction or constitutionality of an act of congress, then its judgment, though erroneous, is not void, and is as binding, until reversed by the proper court, as if it were correct, or as the judgment of any court of the United States; and all persons who should resist such judgment would be justly liable to punishment. But the supreme court say it is the duty of a person who holds a prisoner under authority of the United States, when he makes it known to the state court that he so holds him, to resist any order of that court discharging him, and this they could not have said if, in their opinion, the state court has jurisdiction to inquire into and pronounce upon the validity of his authority.

The term "authority of the United States," as employed by the court, obviously does not mean necessarily a "valid authority,"—that is, an authority in strict conformity to the laws of the United States,—but an authority whose validity is to be determined by those laws. It is employed in the same sense that the same term is used in section 14 of the judiciary act of 1789. This section, it will be remembered, provides that writs of habeas corpus issued by judges of the United States, shall extend to persons in custody "under authority of the United States," obviously meaning illegal authority, because the writ cannot be issued in behalf of one who appears to be in lawful custody. It is also employed in a sense similar to that in which the term "laws" is used in that clause of the constitution which declares that the judicial power of the United States shall extend to all cases arising under this constitution and the "laws" of the United States. Acts of congress which are unconstitutional, are not, in the strict sense, laws, but undoubtedly the judicial power extends to cases arising under unconstitutional acts of congress, as well as to such as arise under constitutional acts, and this is expressly affirmed by the supreme court in the opinion we have been considering [Ableman v. Booth and U. S. v. Booth] 21 How. [62 U. S.] 520.

What the return of the marshal or other person should contain in order to properly

inform the state court that the prisoner is in custody under authority of the United States, the supreme court do not say. The court may mean that a return simply stating such fact cannot be controverted in the state court. This was, I understand, the ancient rule in all courts, and is the rule to this day in the English courts, and in the courts of the United States when the proceeding is under the act of 1789. Hurd, Hab. Corp. 238, 264; 2 Hawk. P. C. c. 15, § 78; Ex parte Jenkins [Case No. 7,259]; Ex parte Sifford [Id. 12,848]. Or, they may mean that the authority, or a copy of it, should accompany the return, when the authority exists in such shape that it can be produced,—such as an enlistment of a recruit under an act of congress, or a process issued by a court, judge, or commissioner of the United States. But, whether they mean the one or the other, it is certain that the return made by the relator to the mayor's court of Newport conforms substantially to every requisition prescribed by them, and did, if their opinion is law, at once deprive that court of all authority and jurisdiction to proceed further. Nay, more, it then became, say the supreme court, substantially "the duty" of the relator "not to take the prisoner, nor suffer him to be taken, before the mayor's court, and if the state court attempted to control him in the custody of his prisoner it was his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of the United States against illegal interference."

Now, if it was the duty of the relator, by virtue of the laws of the United States, to retain his prisoner, notwithstanding the order of the mayor's court, then it is plain he is in confinement "for an act done in pursuance of a law of the United States," or "of the authority of the United States," as the supreme court expresses it, and must be discharged.

If the recruit was under the age of eighteen years when he was enlisted, it may be that neither this court nor any court can discharge him, if the United States shall allege that he was then of the legal age for recruiting, because of that provision in the act of congress of February 13, 1862 (12 Stat. 389), which repeals so much of the former acts as provided for the discharge of minors enlisted without the consent of their parents or guardians, and provides that "the oath of enlistment taken by the recruit shall be conclusive as to his age."[2] But, if he is still under eighteen, he is not without remedy. Section 5 of the act of July 4, 1864 (13 Stat. 380), requires the sec-

[2] I do not regard the act of 1862, or the act of 1864, as at all affecting the jurisdiction conferred by section 14 of the act of 1789 on judges of the United States to issue writs of habeas corpus. I think they still have the right to inquire into the cause of commitment of any one who is in custody under or by color of the authority of the United States. I regard the act of 1862 as simply furnishing a rule of evidence. I treat the "oath of enlistment" as nothing but evidence—conclusive evidence it is true, but still only evidence. Hence I held in Ex parte Ricketts [unreported] that where the officer did not, and would not, in his return to a writ of habeas corpus issued in behalf of a recruit, allege that the recruit was of lawful age when enlisted, he should not offer the "oath of enlistment" as evidence. It is a rule of universal application, in ordinary civil actions, that one will not be allowed to offer proof respecting what he does not allege, and I think this rule may well be applied to proceedings under a habeas corpus when the anomalous provision of the act of 1862 is invoked.

I characterize the provision of the act of 1862 as anomalous, because it makes the "oath of enlistment," which contains only promises respecting the future conduct of the recruit, and not one word in regard to his age, conclusive evidence of his age. It is quite as anomalous as if it had provided that the length of the foot of the recruit should be conclusive of his age. A provision so extraordinary, whilst it must be enforced because it is the law of the land, does not demand a liberal construction.

The whole provision is, "that hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age." It is as much a part of the provision that it is unlawful to enlist one under the age of eighteen, as it is that his oath of enlistment shall be conclusive as to his age, and I think that both requisitions of the statute are best met by holding the "oath of enlistment" to be conclusive evidence only when it is alleged in the return that the recruit is of the legal age. When such a return has been made I have frequently held the "oath of enlistment," whether it did or did not contain any statement of the age of the recruit, conclusive of his being of the lawful age; but, as before said, when the return contained no such allegation, I did in one case,—that is, in the Case of Ricketts [supra] hear proof respecting the age of the recruit, and refuse to allow the "oath of enlistment" to be read as evidence of age at all. I am still inclined to think this opinion correct, but cannot now more fully vindicate its correctness.

I am aware that a practice has recently grown up of sometimes swearing the recruit to his "declaration," and of sometimes inserting a statement of the age of the recruit in the "oath of enlistment," but this practice is not, so far as I know, authorized by any law, and, therefore, cannot avail for any legal purpose. There can be no oath in legal contemplation, which is not required to be taken by some law, and there is no law requiring a recruit to swear to his age.

The opinion here indicated is slightly different from those rendered by the learned judge of the southern district of New York in Re Cline [Case No. 2,896], and in Re Riley [Id. 11,834]. The difference between my opinion in the one case above referred to, and the opinion of Judge Blatchford in Re Cline, is of little practical importance; but I dissent from the opinion rendered in Re Riley, so far as it denies the jurisdiction of the federal courts and judges in cases of this kind.

His opinion is founded on the assumption that section 1 of the act of 1814 (3 Stat. 146) is still in force. I think the assumption unfounded. The act of 1814 was a war statute, and section 1 was, I think, superseded as early as 1815, that is, by section 7 of March 3, 1815, entitled, "An act fixing the military peace establishment of the United States." 3 Stat. 224. Section 1 of the act of 1814 has been assumed to be repealed in numerous judicial decisions, and by the war department in all the "army regulations." B.

retary of war to discharge minors who are under eighteen at the time of their application, and who are in service without the consent, either express or implied, of their parents or guardians.

Let no one apprehend that, as a consequence of this opinion, the liberty of the citizen will be seriously jeoparded. This court, and the judge thereof, will, I trust, be ever ready to hear the complaints of all persons wrongfully confined under authority or color of authority of the United States, and to give speedy relief. The communication between the judge's residence and all parts of the state where such confinement is likely to occur, is so easy and rapid that no serious delay can ensue, and if partial evil may result, it were better that this should be endured than that the peace of society should be disturbed by any attempt of state tribunals to interfere with the proper jurisdiction of the national courts, or with officers acting in the line of their duty under the authority of the United States.

Let the relator be discharged.

Case No. 4,679.

FARRAR v. WALKER et al.

[13 N. B. R. 82;[1] 3 Dill. 506, note; 1 N. Y. Wkly. Dig. 229; 2 Cent. Law J. 670.]

Circuit Court, E. D. Missouri. Oct. 15, 1875.

CORPORATIONS—CONTRACT FOR THE PURCHASE OF STOCK—FRAUDULENT REPRESENTATIONS—NOTE GIVEN FOR STOCK HELD AS ASSET OF CORPORATION FOR TWO YEARS—LACHES.

1. A contract to take stock in a corporation, induced by fraudulent representations on the part of the directors and officers of the corporation, is not void, but only voidable at the option of the stockholder.

[Cited in Florida Land & Imp. Co. v. Merrill, 2 C. C. A. 629, 52 Fed. 80; Merrill v. Florida Land & Imp. Co., 8 C. C. A. 444, 60 Fed. 21.]

2. Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation to take stock in the corporation two years before its bankruptcy, for which he gave in payment his note secured by deed of trust on real estate, and during that period made no inquiry as to the true condition of the corporation, but suffered his note to be held out to the public as an asset of the corporation—the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the note.

[Cited in Hurd v. Kelly, 78 N. Y. 597; Best v. Thiel, 79 N. Y. 18.]

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

John Farrar, the complainant and appellant herein, brought his bill in the district court to enjoin the defendants [William R. Walker and Joseph T. Reister], who are respectively the assignee in bankruptcy of the North Missouri Insurance Company, and the trustee in the deed of trust hereinafter mentioned, from selling certain realty described in the bill, and to have a certain deed of trust executed by the complainant, on said realty, for the purpose of securing his note for one thousand dollars, canceled and set aside. Said note and deed of trust were executed and delivered on the 30th of December, 1871, by complainant to said insurance company, which was a joint-stock corporation, in payment of the price of the shares of the capital stock of that company, each of the par value of one hundred dollars, which complainant at that time purchased of said company. The company was, on the 8th of November, 1873, adjudged bankrupt upon a creditor's petition filed on the 2d of October, 1873. The claim for the relief sought by the complainant was based on two grounds, viz.: First. On the ground of false and fraudulent representations concerning the financial condition of the company, alleged to have been made by the directors, officers, and agents of the company, at and before the time when said note and deed of trust were given, whereby complainant was induced to take stock in said company, and to give the note and deed of trust aforesaid in exchange therefor, and subsequent false and fraudulent representations made by said directors, etc., whereby complainant continued to be deceived as to the true character and financial condition of the company; and Second. On the ground that complainant received no certificate of stock, and that, consequently, the consideration for the note and deed of trust fell. To complainant's bill, defendants interposed a demurrer, which the court below sustained, and a decree was entered dismissing the bill. [Case unreported.] From this decree complainant appealed to this court.

On the part of complainant the following points were made: 1. Fraudulent representations made by the authorized agents of a corporation, and by the company, in regard to material matters, constitute a good defense to an action for the subscription to stock made on the faith of such representations. Waldo v. Chicago, St. P. & F. du L. R. Co., 14 Wis. 575; Crump v. United States Min. Co., 7 Grat. 352; Wert v. Crawfordsville & A. T. Co., 19 Ind. 242; Crossman v. Penrose Ferry Bridge Co., 26 Pa. St. 69; Custar v. Titusville Gas & W. Co., 63 Pa. St. 381; Cunningham v. Edgefield & K. R. Co., 2 Head, 23; Sandford v. Handy, 23 Wend. 260. 2. The questions, of negligence or estoppel by some act of subscribers, have frequently been decided by the courts, and generally it is some extraneous circumstance showing acquiescence in the fraud, or a long lapse of time where the rights of others have intervened, which governs the cases where the contrary doctrine is laid down. Most of defendants' authorities are of these classes. 3. The question of completion of the contract in the bill is stated as follows: "That the

[1] [Reprinted from 13 N. B. R. 82, by permission.]

company refused to deliver the stock to complainant, and never did complete the contract on their part." The assignee seeks to hold the complainant to a contract never executed by the company. If the company was still doing business, complainant might compel the issue of the stock, but the assignee cannot issue it. Complainant received no value or consideration for his money, and in equity ought not to be held to pay. Ang. & A. Corp. § 564. 4. The company could only contract by its president and secretary. 1 Wag. St. 764, §§ 21, 22. Therefore it could not be held on this contract at law. A bill in equity would have to be filed by complainant to get his stock. There is no mutuality of contract here, and complainant had a right to rescind. 5. There are cases where it has been held that absence of a stock certificate does not affect the stockholder's right to his stock, but the reason given is that the issue can be compelled. Not so in this case. 6. If complainant was guilty of laches, and for that reason ought to pay, it should be set up in an answer, so that a reply might be had. The bill on its face does not show laches. Therefore the demurrer should have been overruled. 7. The assignee takes the bankrupt's estate with its burdens, and can enforce no contract that the company could not enforce, unless there are circumstances which estop complainant from setting up the fraud, such as laches, lapse of time, acquiescence or participation in the organization or transactions of the company after knowing the fraud. No such state of facts exists in this case, so far as the record shows. 3 Ves. 288; 12 Ves. 349.

For the defendants it was urged: 1. The contract between complainant and the company to take stock, was not void by reason of the fraud alleged, but voidable only at the option of the party defrauded. Oakes v. Turquand, L. R. 2 H. L. 325, 344, in cases there decided; Reese River S. M. Co. v. Smith, L. R. 4 H. L. 64, 2 Ch. App. 604; Upton v. Englehart [Case No. 16,800]; Clarke v. Dickson, El., Bl. & El. 148, and cases there cited. 2. The bill not showing any disaffirmance prior to the company's bankruptcy of the contract to take stock, and not showing that complainant used reasonable diligence in discovering the alleged fraud, or made any inquiry whatever as to the truth of the alleged representations, or that he was not otherwise guilty of laches, said contract cannot be avoided as against the company's creditors. Upton v. Englehart, supra, and cases there cited; Upton v. Hansbrough [Case No. 16,801]; Clarke v. Dickson, supra. 3. The alleged misrepresentations, although they might constitute a good defense as against the company itself, constitute no defense as against the creditors of the company, represented by its assignee in bankruptcy. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Upton v. Hansbrough, supra; Oakes v. Turquand, supra; Clarke v. Dickson, supra. 4. It is not essential, in order to constitute a person a stockholder in a joint-stock corporation, that a certificate should be issued to him. Agricultural Bank v. Burr, 24 Me. 256; Same v. Wilson, Id. 273; Ellis v. Essex Merrimack Bridge, 19 Mass. [2 Pick.] 243; Chester Glass Co. v. Dewey, 16 Mass. 94; Hoagland v. Bell, 36 Barb. 57; Thorp v. Woodhull, 1 Sandf. Ch. 411; Commercial Bank v. Kortright, 22 Wend. 348; Ang. & A. Corp. (9th Ed.) 563, 564. In the course of the argument, the court expressed the opinion that the want of a certificate of stock was immaterial.

Henderson & Shields, for complainant.
Wm. R. Walker, for defendants.

MILLER, Circuit Justice. This is a suit brought by the plaintiff, who was a stockholder in the North Missouri Insurance Company, to get rid of the payment of a note for one thousand dollars, which he had given in the purchase of stock. Mr. Farrar took stock in the company, and gave this note in payment for that stock, secured by deed of trust on real estate. Two years after the giving of the note, the North Missouri Insurance Company failed, and was put in bankruptcy, and Mr. Walker was appointed assignee of the company, and being about to enforce that obligation for the benefit of the creditors, Mr. Farrar files his bill in the district court in chancery, seeking to enjoin the sale of the mortgaged property, or rather the property conveyed by the deed of trust, which was about to be foreclosed. In that way he brings the proceeding into court to declare the note null and void, and he makes on his bill undoubtedly a case of fraudulent conduct on the part of the board of directors, or the officers of the insurance company—the whole of them—in publishing and representing to him very fraudulently and very falsely, that the insurance company was on its feet, in a prosperous condition; had a large amount of valuable assets beyond its liabilities, and that it was a good thing to take its stock; whereas he alleges that was false, and that the company was then insolvent, that these men knew it, and that he was defrauded in becoming a stockholder. We may say at the beginning, and the authorities on this point are clear, that if the corporation was still in existence, and was solvent and doing business, and suit was brought upon that instrument, Mr. Farrar could have pleaded these things in avoidance of that conveyance, and they could not have enforced it against him. But things are changed; the corporation has become bankrupt; it has no interest whatever in this conveyance, because, whether enforced or not, the corporation is dead, will not exist as an entity again, and will never receive a dollar of this money. It is now a question between the creditors of that corporation who are represented by Mr. Walker, the assignee, and a

stockholder, who is indebted to the corporation for its stock, and while my first impressions were pretty strong against the idea that this liability could be enforced under such circumstances, and I was very much inclined to overrule the demurrer, and require the parties to answer and let all the facts be shown on a final hearing, due consideration has changed my mind on the subject, and compels me to the conclusion that the bill must be dismissed, and that is this: That the paper, as it stands, admitting the fraud and everything, is not of that class of paper which is absolutely void, but is a paper, or contract, or obligation, which was voidable at the option of Mr. Farrar. He could, notwithstanding the fraud, hold on to the stock and take the chances of its becoming valuable; or he could say, if he chose, "I don't think it is worth the trouble to go into a fight to avoid this obligation." In other words, it was his option to avoid that contract or stand by its legal results, and if this failure had occurred within two, three, or even four months after he took the stock and became a stockholder in the company, I should be inclined to say that he had not had a reasonable time in which to examine into the affairs of the company, and see whether he had been defrauded; and that he had still remaining his option, even after the bankruptcy of the company and the appointment of an assignee, to move to set aside that conveyance, if he could show that it was fraudulent. But the business of these corporations is so managed in this country, that justice requires, at all events, that if one of its stockholders should make this paper and obligation, secured by real estate, which goes into the hands of the officers as so much assets of the corporation, and is paraded before the public as an asset, and he stands up for two years and lets that note and obligation of his, secured by real estate, be counted every year, or in every semi-annual statement that is made to the public, as so much cash, which the creditors of that company may look to to cover their losses—then it is too late, the lapse is too long to allow the fraud to be pleaded. Mr. Farrar was for two years a stockholder in that corporation; he had a right to access to all its books, and to vote for its directors; it was his duty to interest himself in its management so far as to see that what it said was true; that its directors were honest; that he should use his influence to get honest men in, and yet during these two years he stands up and does nothing, makes no inquiry, no investigation. It is too late when the creditors pursue the corporation into bankruptcy, and the assignee pursues him for his note, to turn around and say, "I find out that I was swindled; I was there two years and I might have found it out and not let everybody trade on my note deposited there, but I was cheated, and I now rescind this contract." On that ground alone the bill comes too late, and the demurrer to the bill was properly sustained in the district court.

The judgment of the district court is affirmed.

Case No. 4,680.

In re FARRELL.

[5 N. B. R. 125.][1]

District Court, D. New Jersey. June 20, 1871.

PRACTICE IN BANKRUPTCY—REFUSAL OF DISCHARGE FOR DELAY IN MAKING APPLICATION — EFFECT ON NEW PETITION.

The debtor, on voluntary petition, was adjudged a bankrupt on the seventeenth of February, eighteen hundred and sixty-eight, but neglected to make application for final discharge, until the third of May, eighteen hundred and sixty-nine. It appearing to the court that no assets had come to the hands of the assignee, and that the application for discharge was not made within one year from the date of adjudication, his discharge was refused. The debtor afterwards filed a new petition in bankruptcy and was adjudged a bankrupt, and on motion of the creditors to vacate the adjudication and strike the petition from the file, *held*, that the refusal of the court to grant a discharge upon that ground, was no bar to the new proceedings.

[Cited in Re Drisko, Case No. 4,090; Re Brockway, 12 Fed. 71, 23 Fed. 585.]

In bankruptcy.

NIXON, District Judge. This is an application to vacate the adjudication of bankruptcy made in the case, and to strike the petition from the files of the court. The grounds alleged in support of the application are, that J. W. Farrell had filed his petition in this court on the tenth of February, eighteen hundred and sixty-eight, for a discharge from his debts under the bankrupt law; that the case regularly proceeded until the seventeenth of November and the twenty-second of December, eighteen hundred and sixty-nine, on which date specifications were filed opposing his final discharge upon various grounds; that on the twenty-eighth day of December, eighteen hundred and sixty-nine, after argument by counsel, the court gave a decision denying the bankrupt's right to a discharge, and refusing to grant the same; and that this refusal is a bar to any new application by the bankrupt debtor for the benefit of the act.

The counsel for the bankrupt resists the application, for the reason that the court did not refuse the discharge for any matters of substance affecting the conduct of the bankrupt, but upon a mere matter of form, arising from his neglect to apply for his final discharge within the time limited by the law; and that he ought not to be precluded from filing a second petition when his discharge has been refused, upon any ground except those specifically defined in the twenty-ninth section of the bankrupt act [of 1867 (14 Stat. 517)].

[1] [Reprinted by permission.]

It appears that in the former proceedings Farrell was adjudged a bankrupt on the seventeenth day of February, eighteen hundred and sixty-eight; that no assets came to the hands of the assignee, and that the bankrupt filed an application for a discharge from his debts on the third of May, eighteen hundred and sixty-nine; more than one year after the adjudication. Ten specifications were filed by the opposing creditor against the bankrupt's discharge, all of which, except the last two, are mentioned in the twenty-ninth section as valid reasons for withholding a discharge. The ninth and tenth had reference only to the time within which he was permitted to make his application; and his honor, the late Judge Field, declined to hear any argument upon the other specifications as a useless waste of time, holding that the proper construction of the first clause of the twenty-ninth section required the bankrupt to apply for his discharge within one year of the date of adjudication, in all cases where there were debts proved, or no assets had come to the hands of the assignee.

The case then presents the question whether a bankrupt, after his discharge has been refused for any cause, may again apply to the court for the benefit of the bankrupt law? This question can be best answered by considering the nature and character of these bankruptcy proceedings. They have been held to be, and are, in the nature of a suit in which the bankrupt appears as plaintiff and the creditors are defendants; the plaintiff asking the court for a judgment against all and each of the defendants, discharging him from his indebtedness to them. The defendants have their day in court, are entitled to be heard at all stages of the proceedings; and when the bankrupt files his application for a discharge from the payment of his debts, any single creditor may make opposition thereto, by entering his appearance and putting on file specifications against the discharge. These reasons may be for some unlawful or fraudulent act committed by the bankrupt himself, antecedent to, or during the course of, the proceeding, such, for instance, as are enumerated in the twenty-ninth section as proper grounds for withholding a discharge, or they may be for some irregularity in the proceedings, or want of diligence on the part of the bankrupt, or want of jurisdiction on the part of the court.

The ground for refusing the discharge in the present case, was that the bankrupt did not apply for it within one year after the date of adjudication of bankruptcy, as the twenty-ninth section, fairly interpreted, demands. It did not involve the merits of the issue between the bankrupt and his creditors; but it was simply a question of statutory construction as to whether the court had the power of making a decision upon the merits, after such a delay on the part of the bankrupt in bringing the matter before it. This question was raised by the creditor in the ninth and tenth specifications, and it was rightly held that the court had no such power, the result being in principle the same as where the plaintiff, in a suit at law, is nonprossed for not bringing on his case for trial at the next term after the issue joined. He has the costs of the first proceedings to pay, but is allowed to commence again and to continue until he reaches a judgment upon the merits of his case.

The counsel for the petitioner contends that such a construction of the statute is a hardship to the creditor, as it subjects him to the trouble and expense of resisting a discharge a second time upon the new application. But the same objection exists to a non-suit at law, or to a dismissal of a bill in equity, upon technical grounds. He may ordinarily avoid such hardship by waiving all specifications that do not touch the merits of the question of discharge, and may have the judgment of the court solely upon the merits. If he does not choose to rely upon these he ought not to complain if the court allows such new proceedings as may be requisite to reach its judgment upon the real issue between the bankrupt and his creditors. In the present case, proceedings de novo are necessary; and the application to dismiss the petition must be refused.

Case No. 4,681.

FARRELL v. CAMPBELL.

[3 Ben. 8.][1]

District Court, S. D. New York. Nov., 1868.

SEAMAN'S WAGES—DESERTION — CONTRADICTORY OATHS—AGENT LIABLE AS PRINCIPAL—DEFAULT.

1. Where it appeared that the defendant had made contradictory oaths: *Held*, that that one must be taken as true which bore most strongly against himself.

2. Where an engineer was hired to serve on board of a steamboat by a man who appeared to have full control of her other business, and who did not state that he was an agent: *Held*, that the engineer had the right to regard him as principal, and could hold him personally for his wages.

3. Any loss sustained by the vessel or her owners in consequence of the engineer's leaving the boat, could not be set up by such hirer as a defence against a suit for wages.

This suit was brought [by James Farrell against Charles H. Campbell] to recover wages for services rendered on board of the steamboat Sylph. A default having been taken in the cause, the respondent moved to open it, offering in support of it his own deposition.

Beebe, Donohue & Cooke, for libellant.
Hawkins & Cothren, for respondent.

BLATCHFORD, District Judge. The motion to open the default is denied. The depo-

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

sition of the respondent taken in the case on the 12th of November, 1868, shows clearly that he has no defence. The respondent, in his answer, swears that he never hired Farrell to serve as chief engineer, or in any other capacity, on board of the Sylph; whereas, in the deposition referred to, he says: "I hired the libellant Farrell; I, acting as agent for the owner, hired him. He was hired as chief engineer." These contradictions show how reckless the respondent is in regard to what he swears to. As a choice must be made between his oaths, that one must be taken as true which bears most strongly in favor of the libellant. It is not pretended by the respondent, in his deposition, that Farrell did not, in pursuance of such hiring, serve on board of the vessel, and do his duties well and faithfully so long as he remained. The defence set up in the answer is that the respondent did not own the vessel, but was merely an agent for her owners to attend to certain portions of their financial business, and that his character as agent was well known to Farrell at the time Farrell was hired on board of the vessel, and that the respondent never acted in any other capacity than as agent, in respect to the vessel, and not as principal; and that Farrell deserted the vessel after being a short time in service on board of her. The respondent, in his deposition, says that he was agent for the owner of the vessel, and as such had charge of the business of the vessel at the place where Farrell was hired, but he does not swear that Farrell knew or was informed, at the time of the hiring, of the fact of the respondent's agency. On the contrary, Farrell swears that the business of the boat was managed by the respondent, that he appeared to have full control of the vessel and her business, and that he did not tell him (Farrell), when he hired him, that he (the respondent) was agent. Under these circumstances, the respondent's agency not being disclosed, and he managing and controlling the boat, and her business, and hiring Farrell, Farrell had a right to regard him as a principal, and can hold him personally liable for wages. Although the respondent may, in fact, have acted as agent for an undisclosed principal, so as to make such principal liable over to him, the respondent, or even liable to Farrell, yet quoad Farrell, for the purposes of this suit, the respondent was principal and not agent. As regards desertion, Farrell swears that he was hired at the rate of $125 a month, but for no fixed time; that he remained one day less than two months; that he did not agree to get a satisfactory substitute before leaving; and that he does not recollect that anything was said about giving notice before leaving the vessel. These statements are in no way contradicted by the respondent, in his deposition. All that he says on the subject is, that when Farrell said he was going to leave the vessel, he, the respondent, told him he must not do so, and that if he did he would forfeit all his pay, under the terms of the agreement made when, he, the respondent, hired him. The respondent does not testify that there were any terms other than naked hiring, nor does he state what the terms were to which he refers. Any loss or damage which the vessel or her owners may have suffered by reason of Farrell's having left when and as he did, if it can be laid to the account of Farrell, cannot be set up by the respondent. It can only be availed of by the owners when they are sued in personam, or the vessel is sued in rem. Besides, the answer sets up no such loss or damage. As to any adjudication by the military authorities at Hilton Head, nothing of the kind is set up in the answer, and it would be no defence if it were. On every ground the motion must be denied, with costs.

[NOTE. Reference was made to a commissioner to ascertain the amount of damages, and a final decree was entered, from which the respondent appealed to the circuit court. The libellant then moved to dismiss the appeal (Case No. 4,682), but his motion was denied.]

Case No. 4,682.

FARRELL v. CAMPBELL.

[7 Blatchf. 158.][1]

Circuit Court, S. D. New York. Feb. 8, 1870.

PRACTICE IN ADMIRALTY—DECREE BY DEFAULT—DISMISSAL OF APPEAL.

Where, in a suit in personam in admiralty, after answer, a decree was taken by default for the libellant at the hearing in the district court, and a reference was made to a commissioner to take proof of damages, and the respondent appeared before the commissioner and contested the amount of damages, and the commissioner made a report, to which no exception was taken, and a final decree was entered, from which the respondent appealed to this court, and the libellant then moved this court to dismiss the appeal: *Held*, that the motion must be denied, and the case be heard in the usual way, on the call of the calendar.

[Cited in The Saunders, 23 Fed. 304; The Delaware, 33 Fed. 589; Re Hawkins, 147 U. S. 486; 13 Sup. Ct. 512.]

This was a motion on the part of the libellant [James Farrell] in a suit in admiralty, to dismiss an appeal taken by the respondent [Charles Campbell] to this court from a decree of the district court. An answer was put in in the district court; but, when the hearing took place, the respondent, on the court's refusing to postpone the same, declined to appear, and a default was entered, and a reference was made to a commissioner to take proof of damages. [For the hearing on a motion of the respondent to open the default, see Case No. 4,681.] The respondent appeared before the commissioner and contested the amount of damages. The commissioner made a report, to which no exception was taken. A final decree for the

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

amount was entered, from which an appeal was taken by the respondent to this court. The libellant now moved to dismiss such appeal.

Charles Donohue, for libellant.
Dexter A. Hawkins, for respondent.

NELSON, Circuit Justice. It is admitted that the appeal is, in form, regular. I agree that the merits were concluded by the default, and cannot be heard over again in this court. That would be hearing an original case, of which this court has no jurisdiction. But the respondent appeared before the commissioner and contested the damages; and, although he took no exception to the report, and will not be able to avail himself of any errors in the same, yet I am not prepared to say that the proper remedy of the libellant is by a motion to dismiss. The case stands on the footing of an appeal in admiralty, where the merits have been contested, and a decree has been entered for the libellant, and an appeal has been taken. Although no errors may have been committed by the court below, and, on a motion to dismiss, this court would so hold, such a remedy could not be applied. The case must be heard in the usual way in which appeals are heard, upon a call of the calendar. In the present case, the respondent had a right to appeal, and to review the decree as to the question of damages, and, hence, it must be heard in the usual way. The motion is denied, but without costs.

Case No. 4,683.

FARRELL et al. v. FRENCH.

[1 Blatchf. & H. 275.][1]

District Court, S. D. New York. June 15, 1831.

SEAMEN LEFT AT INTERMEDIATE PORT—DAMAGES—OTHER EMPLOYMENT—BURDEN OF PROOF.

1. If a master neglects, before leaving an intermediate port, to inquire at the hospital for seamen who have gone there from his vessel, and who, there is reason to suppose, might be able to rejoin him, and sails without them, he is liable to an action by them for damages for the loss of wages.

[Cited in Worth v. The Lioness No. 2, 3 Fed. 925; The Frank and Willie, 45 Fed. 489.]

2. The measure of damages, in an action by a seaman for being wrongfully discharged or left at an intermediate port, is governed by the equities of the case, and is usually the wages for the voyage, and an allowance for expenses, unless the seaman has been engaged in other profitable employment; and the burden is on the master to show such employment, and the amount earned therein, by way of abatement.

In admiralty. The libellants [Michael Farrell and John Campbell] were seamen upon the ship Great Britain, of which the respondent [Francis French] was master, and, in the course of the voyage to this port, obtained leave, on account of sickness, to go on shore to the hospital at Savannah. The respondent shipped other men, and afterwards, when ready for sea, heard that the libellants had recovered and had been seen in the streets of Savannah, but he made no inquiries for them at the hospital, and sailed without them. The present action is for damages for the loss of wages.

Edwin Burr and Erastus C. Benedict, for libellants.
Charles O'Conor, for respondent.

BETTS, District Judge. This action may be sustainable upon the principal that, by the misconduct of the master of the vessel, the libellants have been prevented from performing their contract and earning the wages stipulated to be paid them. It is not to be treated as a suit for wages, but as one for damages for the loss of wages to the libellants by the fault of the respondent; and I think the proofs make out a case of that character. In estimating the damages in such a case, a court of admiralty is governed by the equities connected with the transaction.

Farrell, on his examination as a witness for his colibellant, testifies that the shipping notary told them the day they left the hospital, that the ship had dropped down to go to sea, and that the master had several days before shipped the men he wanted. It is satisfactorily proved, by other evidence, that the master shipped six or seven men the day after the libellants went to the hospital, and that, on the day they left there, the ship dropped down a mile, with intent to go to sea. There was, therefore, a plain manifestation of intention, on the part of the master, to go to sea without regard to these men; and, whether they were actually out of the hospital before or after the time when the vessel got under weigh, cannot vary the equities of the case in respect to them. The master was not expecting or endeavoring to reclaim or employ them.

Where the dismissal or abandonment of a seaman has occurred in a foreign port, not only are wages decreed for the whole voyage agreed, but, by the French law, an allowance is made to him for the expenses of return. This provision is approved by one of our most learned jurists in this branch of the law. Emerson v. Howland [Case No. 4,441]. The cardinal object is, to secure an indemnity to the sailor; and it is, therefore, well doubted, whether the rule laid down by Abbott (Ed. 1829, p. 442) can be supported, if it is intended as an unqualified proposition that the wages earned by the seaman in other employment shall be deducted. If no positive loss is sustained, there would still be a measure of injury which equity would not overlook, resulting from throwing a man

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

out of the employment he had agreed for, and imposing upon him the necessity of seeking another and a different one. The degree of this injury may not always be very accurately expressed in damages, yet there is a fair foundation for some compensation, and one which should correspond somewhat to the nature of the wrong and loss. A wanton wrong inflicted upon a sailor, and attended with serious personal inconvenience to him, should be differently regarded from an inadvertent or well-intentioned non-observance of the contract on the part of the master.

In the present case, it was clearly the duty of the master to have sought the libellants, at least at the hospital, before making sail. It is most probable, upon the proofs, that both of them would have been found; and then the respondent should have seen that they had the means of transport to his ship, or to their home port. That he wanted more men than he was able to hire at Savannah, affords evidence that he did not design leaving the libellants. But, if he did not wish or intend to depart without them, he certainly gave too ready credit to a loose rumor that they had left the hospital, and did not mean to continue the voyage. The slightest diligence on his part would have obviated such misapprehension; and, as it was his duty to make the inquiry, he must bear the consequences of having neglected it.

Some time after the respondent sailed, the libellants shipped for northern ports. Campbell received $12 per month, and, on his arrival at New-York, re-shipped for Savannah, It does not appear what Farrell received or whether he obtained further employment on his return home. The Great Britain completed her voyage, and returned to New-York on the 7th of June, being three months from the day of her leaving Savannah. The libellants had each received $12 in advance, and there was nearly another month's wages due when the vessel sailed from Savannah. It was incumbent on the master to show that the libellants had been in equally profitable employment, or an amount they had earned, in order to entitle himself to an abatement on account of their earnings. But, inasmuch as nothing but circumstantial evidence can well be expected upon this point, and as there was a demand for seamen, at increased wages, at Savannah, I am disposed to consider the evidence before me as establishing, that the libellants had other and profitable employment, and that an allowance of two months' wages to each of them, will fairly cover the loss of time and expenses they may have incurred in Savannah and the northern ports, before they found such employment, and also that the wages they gained, while employed, were at least equal to those they were to receive on board the Great Britain. Accordingly, I decree the payment of $24 to each of the libellants, with costs.

Case No. 4,684.

FARRELL v. KNAPP.

[1 Cranch, C. C. 131.][1]

Circuit Court, District of Columbia. July Term, 1803.

INDEBITATUS ASSUMPSIT — EXPRESS PROMISE TO PAY CERTAIN SUM—OATH OF PLAINTIFF.

1. The plaintiff's own oath is not evidence in any case, unless made within one year from the date of the articles charged.

2. Upon general indebitatus assumpsit for two hundred dollars, for work and labor, there must be evidence of an express promise to pay a certain sum.

3. A special agreement to do the work, at certain prices, cannot be given in evidence, on a general indebitatus assumpsit.

Mr. Woodward having, as he supposed, proved all the plaintiff's account for work and labor, except a sum of £3. 3s. 6d. for work done by the plaintiff himself, moved the court to instruct the jury that the plaintiff's own oath should be taken as evidence of the sum of £3. 3s. 6d. The oath was made this day. The account did not state when the work was done, but the cause has been depending in court more than a year. The whole account amounted to £94.

THE COURT refused to give the instruction.

Mr. Mason then moved the court to instruct the jury that the evidence which tended to prove that a special agreement had been made as to the prices, did not support the general count of indebitatus assumpsit, for work and materials. The testimony was, that it had been agreed between the plaintiff and defendant that the price of laying the bricks should be twenty-one shillings a thousand, and the arches at a certain price.

THE COURT were of opinion, that upon this count for two hundred dollars for work and labor, the plaintiff must prove an express assumpsit for a certain sum; and that there being no count on the special agreement, it cannot be given in evidence in this action.

Case No. 4,685.

FARRELL et al. v. MAYERS et al.

[Hoff. Op. 445.]

District Court, N. D. California. April 22, 1859.

ACTIONS FOR SEAMEN'S WAGES — DEFENSES — STANDARD OF SEAWORTHINESS—LOSS OF VESSEL ON HOMEWARD VOYAGE.

[1. Voluntary stranding for the purpose of repairs, and subsequent capture by Indians, resulting in loss of the vessel, are good defenses to suits for seamen's wages.]

[2. The standard of seaworthiness, with respect to liability for seamen's wages after a wreck, varies with the character of the voyage and the nature of the cargo. Under some circumstances, such as a short voyage with a

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

cargo of lumber, a leaky vessel may be seaworthy.]

[3. When a vessel is lost on the homeward voyage, and has or might have earned freight on the outward voyage, seamen's wages are due for the outward voyage and for one-half the time spent in the port of destination. The Lady Durham, 3 Hagg. Adm. 196, distinguished.]

[This was a libel for seamen's wages by J. S. Farrell and others, seamen of the brig Swiss Boy, against Robert Mayers and others.

E. H. Hodges, for libellants.

T. R. Wise, for respondents.

HOFFMAN, District Judge. The libel in this case has been filed in personam to recover wages due the libellants as seamen. The libellants were duly shipped in the Swiss Boy, on a voyage from this port to Port Orchard and back. The vessel safely arrived at Port Orchard, but was voluntarily stranded and lost on the return voyage. It is claimed that this loss was the consequence of the unseaworthiness of the vessel, and that therefore the men are entitled to wages for the whole voyage, or until their return to this city. It is contended on the part of the respondents that no wages are due, the vessel and freight having been totally lost. What would be the legal effect of loss of the vessel in consequence of her own unseaworthiness, by fault of the owners, it is unnecessary to consider, for it has not appeared to me that the proofs are sufficient to sustain the allegation. That the vessel was leaky is undoubted. But the libellants seem to have been aware of her condition before or when they shipped, and the voyage on which she was bound and the nature of her proposed cargo rendered the use of such a vessel proper, when under [other] circumstances it might have been clearly the reverse. The leaks which induced the master to strand his vessel, seem to have arisen in part at least from the violence of the elements and the proximate cause of the loss of the vessel was the capture by the Indians and not the stranding—which was done for the purpose of repairing her. The captain expresses the opinion that had it not been for the capture, he could have caulked and repaired his vessel, and there seems much reason to believe that with a cargo of lumber she might have been put in a condition to make the short voyage contemplated with safety. But I think it clear on the other hand that the libellants are entitled to their wages on the outward voyage, and for half the time spent at the port of destination.

The general principle is that where the vessel is lost on the homeward voyage wages are due for the outward voyage and one-half the time spent at the port of delivery—provided freight was or might have been earned on the outward voyage. The wages for the outward voyage are earned by the arrival at the port of delivery of the outward cargo, and the port of destination is in general to be deemed a port of delivery as respects wages, though the vessel may have gone there in ballast. 3 Kent, Comm. M. p. 190; Giles v. The Cynthia [Case No. 5,424]; The Two Catherines [Id. 14,288]; Thompson v. Faussat [Id. 13,954]; Pitman v. Hooper [Id. 11,186]. In The Cynthia, Judge Peters says: "There can be no distinction in reason or law, whether the freight or hire be actually paid by one for the use or chartering of the vessel of another; or whether he sends his own vessel for or with a cargo to a designated port, which cargo is to be obtained by funds and credit there, goods, money, and bills sent in with the ship. The services of the seamen entitle them to their wages for the portion of the voyage they have so far completed. A port of destination it will be seen is, in this respect, the same as a port of actual delivery. And it matters not that the vessel did not carry thither any goods, but went in ballast. She earns her freight, and the wages are due out of it, as much in legal contemplation as if she had been fully laden." "There can be no difference in principle whether the vessel go empty to a destined port for a cargo, or return under disappointment without one." Id. This decision seems precisely applicable to the case at bar.

The vessel left this port for Port Orchard to obtain a cargo of lumber, she in fact took no cargo and was paid no freight for her outward voyage, but she might have done so; and it appeared in proof that she and other vessels in the trade were in the habit of taking such outward freight as may be offered, and that sometimes they carried as much as twelve or fifteen tons. She reached her port of destination in good safety and the seamen's right to wages is not to be affected by the circumstance, that for the few articles carried in her, no freight was asked; nor by the accident that no cargo was offered. The rule, as we have seen, affirms the right of the seamen to their wages even when the vessel goes in ballast, a portion ought by that right to be maintained in the present case, when it appears that the vessel did carry some articles "out of courtesy" upon which freight might have been charged. The case of The Lady Durham, 3 Hagg. Adm. 196, is relied on by the advocate for the respondents to maintain his position. But in that case the vessel was bound "on a trading voyage to the coast of Africa and back to Liverpool." She was lost in the course of this voyage, and wages were refused. But in this case, the voyage was from its nature and objects entire; the [no?] port of destination was mentioned, and the court regards it "as one transaction, quite as much as a Greenland fishery voyage." But the distinction between such voyages and that in the case at bar is adverted to by Judge Peters in The

Cynthia, already cited. "Whaling and sealing voyages, and those on coasts where the cargo is to be obtained in a similar way, and not at a port of usual entry, as an article of traffic or purchase, are to be considered in a similar predicament. Possibly a voyage to cut wood and reclaim it from a state of nature, might be compared in its principles to the case in Burrows." Hernaman v. Bawden, 3 Burrows, 1844. In the case at bar the vessel clears for a specified port, with the intention of thence obtaining a cargo. She arrives in safety. She would have carried cargo, had any offered. She might have demanded freight for several articles actually carried and delivered. The outward and homeward voyages are, as relates to wages, clearly divisible, and I am unable to discover on what ground I could refuse wages in this case, without denying it in every instance where the vessel goes empty or in ballast to an outward port—whether she does so by the will of the owner, or by being accidentally disappointed in obtaining a cargo. A decree must be entered for wages during the outward voyage, and for one half the time spent at the port of destination.

FARRELL (UNITED STATES v.). See Cases Nos. 15,073 and 15,074.

FARRELL, The GEORGE. See Case No. 5,332.

Case No. 4,686.

FARRIN v. CRAWFORD et al.

[2 N. B. R. 602 (Quarto, 181); 1 Chi. Leg. News, 342.][1]

Circuit Court, S. D. Ohio. 1869.

BANKRUPTCY — PRIOR ASSIGNMENT FOR BENEFIT OF CREDITORS UNDER STATE LAW—GOOD FAITH —EXEMPTIONS—PREFERENCES.

1. A debtor knowing himself to be insolvent, made a general assignment for the benefit of his creditors, under the laws of Ohio, in December, 1868, before proceedings in bankruptcy. *Held*, such an assignment, when made in good faith, is not necessarily an act of bankruptcy, but it must be entirely clear from taint of fraud.

[Cited in Smith v. Teutonia Ins. Co., Case No. 13,115; Re Marter, Id. 9,143. Cited contra in Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

2. Where it appeared that the debtor did not turn over to the assignee money to an amount exceeding the limit of the authorized exemptions, *held*, that the assignment was fraudulent and an act of bankruptcy.

[Cited in Martin v. Toof, Case No. 9 167.]

3. Where the debtor, being insolvent, paid a freight debt in full by procuring an order from the railroad for and furnishing lumber, *held*, that the payment was a preference of a creditor, and an act of bankruptcy.

[Cited in Clark v. Binninger, 38 How. Pr. 341; Driggs v. Moore, Case No. 4,083; Re Gregg, Id. 5,797.]

[Petition for review of the order of the district court of the United States for the southern district of Ohio.]

In January last the creditors of Mr. Farrin, lumber-dealer, commenced proceedings against him in bankruptcy, alleging in their petition, the following specific acts done by him: First. Making a general assignment, December 4th, 1868, for benefit of creditors, in the probate court, under insolvent laws of Ohio, to John K. Green, intending thereby to hinder and delay them in collecting their debts, &c., and prevent the operation of the bankrupt act. Second. Paying to John K. Green, a creditor, being insolvent, the sum of two thousand two hundred and thirty-four dollars, with intent to prefer him. Third. In paying to the Cincinnati, Hamilton, and Dayton Railroad Company, one of his creditors, being insolvent, half a million feet of lumber, with intent to prefer. Fourth. In paying to sundry persons, when insolvent, the amount of their claims, with intent to prefer them. The case was referred to Register Ball, who took a large amount of testimony, and reported the same to the district court, with his findings, viz.: that Farrin committed an act of bankruptcy in making the assignment in probate court, when insolvent, without passing upon the other points raised.

Judge Leavitt, in the district court, heard the case upon the same testimony and arguments of counsel, and decided, as had the register, upon the question of assignment in favor of Farrin upon charge two, and declined to pass upon the others. [Case unreported.] Thereupon each party excepted, an order of adjudication of bankruptcy was entered, and the marshal being about to take possession of the property held by Green, as assignee under probate court, Farrin filed his bill in equity in this court, to review and reverse the proceedings in the district court, and obtained an injunction against the creditors and marshal proceeding any further in the court below. The creditors then moved to dissolve the injunction, on the ground that under the bankrupt law [of 1867 (14 Stat. 517)], § 39. an assignment of all a debtor's property, even for the benefit of all his creditors and under the provisions of a state law on insolvency, is ipso facto an act of bankruptcy—in other words, that during the time the bankrupt law was in operation, all state laws on insolvency conflicting with it, either as to persons or property, are suspended, and it alone has jurisdiction. This court, however, held the contrary doctrine—viz., that a general assignment made in good faith under the state laws, for benefit of creditors, was valid, and must prevail even against the bankrupt act when made prior to filing a

[1] [Reprinted from 2 N. B. R. 602 (Quarto, 181), by permission. 1 Chi. Leg. News, 342, contains only a partial report.]

petition in bankruptcy, and refused to dissolve Farrin's injunction. The creditors thereupon filed their answer, denying that the assignment was made in good faith, and also setting up the specifications before alluded to, upon which the district court refused to pass, as well as the one they decided in Farrin's favor, and prayed for a review of the whole case and a general adjudication of bankruptcy against Farrin.

E. P. Bradstreet and L. French, for creditors.

Judge Coffin, for Farrin and assignee.

SWAYNE, Circuit Justice, having heard the whole case anew, announced an elaborate opinion, of which the following is an abstract:

T. W. Farrin was for several years an extensive lumber-dealer in Cincinnati, and was also, to a large extent, engaged in various outside speculations. His legitimate business prospered as late as February, 1868, and he made a large amout of money therein, while his outside operations were uniformly disastrous. He kept a very full set of books in his lumber business, under a competent book-keeper, trained to that calling by himself, and had trial balances made out every sixty days, and annual balance sheets, all of which he was in the habit of examining when made out. He also kept a private memorandum book of a portion of his outstanding paper, not all. In November, 1868, he became much embarrassed, and about the middle of the same month was compelled to allow a note of over two thousand dollars to go unpaid, and which remains so, although he paid a small part of it at maturity. The Cincinnati, Hamilton & Dayton Railroad Company was in the habit of buying their lumber from him, and he, in turn, had most of his lumber brought to town over their road, paying the freight bills at the end of each month. November 1st he paid thus, in cash, four thousand five hundred dollars. But on the 24th or 25th of same month they presented their bills again for amount then due, about three thousand eight hundred dollars, being in advance of the end of the month. Farrin did not pay, but made vigorous efforts to obtain a special order for lumber for building cars, promised some months previously—with which to offset the freight-bills—which, meantime, ran on to about six thousand dollars, at the end of the month. He obtained the verbal order, November 30th, and the written approval of it, December 1st, 1868, the transaction being closed upon the 2d, and lumber delivered on that and one or two following days, to the amount of fifteen hundred dollars more than his freight-bills, he receiving that difference in cash. On Friday, December 4th, he made his assignment to Green, signing it in the morning and leaving it with his attorney for delivery. He had consulted with the assignee about making it early in that same week, he (Green) being his creditor without security, for over thirty thousand dollars. At the time of making the assignment he had the books of his lumber business before him, but not a full statement of its condition, and made "a rough estimate" that he had a surplus of from twelve to twenty thousand dollars over his liabilities in the lumber business; he knew he had debts from seventy-five to ninety thousand dollars, but estimated his assets at one hundred and two thousand dollars. It would seem that he did not include, in this estimate of liabilities, all his outside obligations, and swears he did not include the endorsements for Whately & Co., not then supposing he would have to pay them. On December 4th, after executing the assignment, he collected from a debtor, through the agency of his assignee, twelve hundred and eighty-eight dollars cash, and used it for family and other expenses. He left town the same evening, and was absent three weeks—going for his family—and testifies that it was only on his return here that he learned he was insolvent—thirty thousand dollars short of solvency. But he admits that the statement, which showed this, was made up by his book-keeper from the books of his lumber business. The evidence does not show what he did with the fifteen hundred dollars received from the Cincinnati, Hamilton & Dayton Railroad Company just before the 4th of December, except that four hundred dollars was found by the assignee in the safe, which may be presumed to have formed a part of it; while it is also a certain presumption that he either paid some debts with the balance, or used it for his private purposes. It did not go to the assignee—thus making certainly two thousand three hundred and eighty-eight dollars cash received and retained by the assignor at the very time he makes an assignment purporting to be of all his property for the benefit of his creditors.

Now, while I have held, and still emphatically hold that an assignment, such as this purports to be, is valid and proper when made in good faith, it is yet to be subjected to the sharpest scrutiny, and any badge of fraud that attaches itself in the light of extraneous circumstances will, unless fully and satisfactorily explained, be fatal to its validity, and the arm of the bankrupt law will sweep it away, and subject the person and estate to its own provisions. In this respect I consider all assignments by debtors to be subject to the general rule contained in the statute of Elizabeth, exemplified in Twyne's Case and the many other subsequent decisions following it, all of which render void as to creditors all assignments at all tainted with fraud.

Testing this transaction by that standard, it cannot be upheld. It does not do that which it purports to, but on the contrary, the assignor, through the agency of the assignee himself, retains a portion of the estate and

converts it to his own use—to an amount much greater than he could hold under the exemption laws. I do not mean to impute any intention to defraud or do any wrong to either party, but here are the facts, and the legal result is inevitable. On this ground, therefore, while differing from the district judge as to the effect of the assignment ipso facto, I must sustain his decision as to the same, when viewed in the light of the testimony adduced relative to it, and hold it to be an act of bankruptcy.

But in addition to this, a clear case of preference has been made out, as to the Hamilton and Dayton Railroad freight-bills. The testimony shows clearly, and it is admitted, that Farrin was insolvent, largely and hopelessly, in the month of November, 1868; but he says he did not know it till after the assignment. But he knew his paper was under protest since the middle of November, and remained unpaid; that he owed at least from seventy-five to ninety thousand dollars, against which he could count up only one hundred and two thousand dollars assets, and this by "a rough estimate." And he admits himself that the statement afterwards made up, showing him to be twenty to thirty thousand dollars insolvent, was made from his lumber-business books by his own bookkeeper; and this does not include his "outside operations." Making all possible allowances, the conclusion is irresistible that he either knew he was insolvent when he thus paid the railroad bills, or else wilfully and purposely refuses to know, by shutting his eyes to the facts before him, for, as before remarked, he was an accomplished bookkeeper himself. In either case the result arrived at is the same—in the one a fact, in the other an unavoidable legal inference, equally fatal.

Assuming, then, that he was insolvent and knew it, it follows at once that any payments then made by Farrin to any creditor in full, were made with the intent to prefer, and therefore acts of bankruptcy within the meaning of section thirty-nine. But aside from this, the circumstances under which this payment was made, show a real purpose to pay in preference—an active and successful effort on Farrin's part to obtain the order for lumber from the railroad company, for the express purpose of paying their freight-bill, commencing with the presentation of the bill, November 24, and continued until the order was given, just before the assignment was made.

Upon the whole case the creditors are entitled to a decree of bankruptcy against Farrin, as prayed for by them, as well for the first as the second reasons above given, and the same is granted, and complainant's bill dismissed. But I will allow the costs of his bill to be paid out of the estate.

FARRING (UNITED STATES v.). See Case No. 15,075.

Case No. 4,687.

FARRINGTON et al. v. BOARD OF WATER COM'RS OF DETROIT.

[4 Fish. Pat. Cas. 216.] [1]

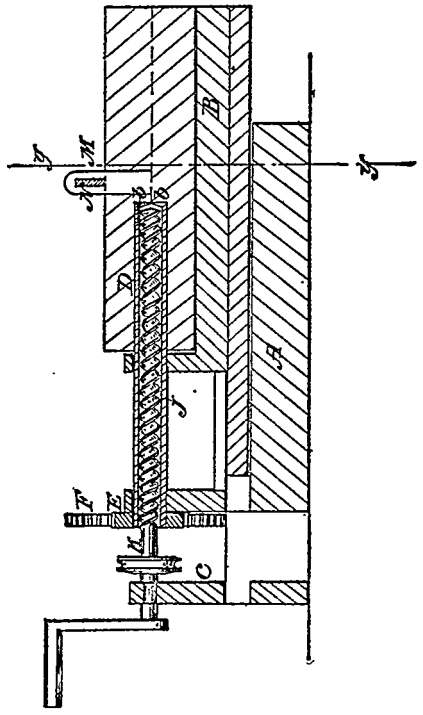
Circuit Court, E. D. Michigan. Sept., 1870.

PATENT FOR PART OF MACHINE—SALE OF ENTIRE MACHINE — RIGHT TO REPLACE PARTS — USE AFTER EXTENSION OF PATENT — ACT OF JULY 4, 1836.

1. Where the thing patented was part only of a machine, but was of such a character as to be soon destroyed or irreparable: *Held*, that the sale of an entire machine carried with it the right to replace the parts, which, in their relation to the whole structure, were temporary in their nature, although such parts might be the valuable or novel thing covered by the claim of the patent.

2. The right to use the specific machine, after an extension, is guarantied by section 18 of the act of July 4, 1836 [5 Stat. 125], and the right to replace such parts as are temporary depends upon the right to use the machine. Such parts may therefore be replaced after an extension of the patent.

In equity. This was a motion [by Thomas B. Farrington and others] for a provisional injunction to restrain the defendants from infringing letters patent [No. 13,606] for an "improved boring machine," granted to Arcolaus Wyckoff and E. R. Morrison, September 25, 1855, assigned and reissued to Wyckoff, October 14, 1856 [No. 404], extended to the original patentees for seven years from September 25, 1869, and assigned to complainants.



[Drawings of patent No. 13,606, published from the records of the United States patent office.]

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

The bill charged the defendants with infringing the patent:

1. By using the machine, especially the tubular or hollow auger or bit, described in the patent.

2. By putting new bits into a machine which they had purchased before the extension, such bits constituting the valuable and novel thing patented.

An abstract of the specification and the claims of the reissued patent will be found in the opinion.

A. Russell, for complainants.

A. D. Frazer and Moore & Griffin, for defendants.

LONGYEAR, District Judge. On the argument, the first point was abandoned, and it was conceded that, by the provisions of section 18, act of July 4, 1836 (5 Stat. 125), the extension of the patent inured to the benefit of the defendants, as purchasers of a machine, and conferred upon them the right to continue the use of the same.

But the second point is insisted on, and it is claimed, on the part of complainants, that the right of defendants to continue the use of the machine in use by them at the time of the extension of the patent, includes the right to repair merely, and does not include the right to renew any portion of the machine, or any of its parts, especially the tubular or hollow auger or bit, used in the machine, for the reason that it constitutes the valuable or novel thing patented.

The thing patented is described and defined in the specifications, as follows: "A new and improved machine, intended chiefly for boring pump logs. * * * The nature of my invention consists in, first, the employment or use of a tubular or hollow auger or bit, constructed and arranged as will be presently shown; and also in the combination of the tubular or hollow auger or bit, with a screw or worm-rod, arranged and operating, as will be hereafter described. * * * The bits or cutting portion (b) of the auger are attached to its outer end, and are placed over the bore of the auger, the points of the bits just passing the center of the bore, so as to cut a clear hole without leaving a core. * * * I do not use any screw on the end of my bit, or auger, as I find that a screw has a tendency to follow the grain of the wood. * * * Within the hollow or tubular auger D, there is placed a screw or worm-rod J. This screw or worm-rod represents the screw portion of an ordinary screw auger, and extends the whole length of the auger D, its outer end nearly touching the bits, C, of the auger. * * * The auger or bit and worm, J, are detached, and revolve independent of each other, by which means I am able to run the worm, J, at a much greater speed than the bit or auger, and which serves to clear the chips from the bit as fast as they are made, and prevents the same from choking. * * * I am aware that the tubular or hollow auger, as such, is not new; nor do I claim it as new, but what I claim as new, and desire to secure by letters patent, is:

"1. The tubular or hollow auger or bit D, as constructed having the lips of the bits approach the centre, and yet separated from each other, doing without the use of a screw on the end of the bit, for the purpose of preventing the bit from following the grain of the wood.

"2. I claim the worm J, operating on its own axle, and independent of the revolutions of the auger or bits D, for the purpose of clearing away the chips as set forth."

As appears by affidavits, presented on behalf of defendants in opposition to the motion for a temporary injunction, these lips of the auger or bit will wear out by constant use in about forty days, so that they can not be longer repaired or made of any use whatever for the purpose intended, and unless replaced by new ones the machine could not be longer used. It is the replacing of such old worn-out lips by new ones that is complained of as an infringement, and to restrain which an injunction is asked.

It further appeared, upon the hearing of the motion, that for convenience in taking off and putting on these lips of the auger or bit, for the purpose of sharpening or repairing, the auger or bit is so constructed that a small portion of the outer end of it to which the lips are attached may be screwed off and on at pleasure, and it is by this means that the new lips are attached in place of the old ones. Although this device for taking off and putting on the lips is no part of the invention, yet it is a circumstance necessary to be stated in order to a full understanding of the questions presented.

The questions presented are:

1. Did the purchase of the defendants of the right to the use of the machine in question, invest them with the right to supply new lips to the hollow auger or bit whenever the old ones should become useless and irreparable by ordinary wear or by breaking?

2. How did the renewal of the patent after the purchase affect that right?

First. It is clear, from the specification above quoted, that the patent covers the following items:

1. The lips of the auger or bit, in question.

2. The combination of the hollow auger or bit with the new lips attached, with the screw or worm for removing the chips as fast as made, as described.

The "lips," and the "combination," are the only things that were new, or claimed as new, and of course were the only things patented. The "combination" included the "lips," and it is the combination, together with the ordinary machinery for giving its different parts the requisite motion, that constitutes the "machine," as a whole, which is mentioned in the first sentence of the specifications above quoted, which was covered by

the patent, which was sold to the defendants, and which they had the right to use. In this combination, the lips of the auger or bit constitute the effective element; but the inventor has so arranged them in the combination that the machine could not be continued in use without a complete renewal of them at short intervals. From the nature of the case, these lips could be but temporary in their relations to the use of the whole machine, and it must have been so understood by the inventor in selling and the purchaser in buying the machine. It has been held, by the supreme court, that in such a case the purchaser has the right to replace such temporary parts. See Wilson v. Simpson, 9 How. [50 U. S.] 109. This case is so nearly analogous to that one, that I quote from it at large. The question there was as to the right of an assignee of a Woodworth patent planing machine to replace the cutter knives when worn out or broken, and Mr. Justice Wayne, in delivering the opinion of the court, at page 125, says: "The right of the assignee to replace the cutter knives is not because they are of perishable materials, but because the inventor of the machine has so arranged them as a part of its combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced the invention would have been of but little use to the inventor or to others. The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions they are put into the structure—so it is understood by a purchaser, and beyond the duration of them the purchaser of a machine has not a longer use. But if another constituent part of a combination is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last so long as the other parts of the combination, its inventor can not complain if he sells the use of his machine, that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used. Such replacement of temporary parts does not alter the identity of the machine, but preserves it, though there may not be in it every part of its original material."

I think the case of Wilson v. Simpson clearly decides this one. It matters not that in that case the cutter knives were not a part of the invention, and that in this case the lips of the auger or bit are. The only question is, are they, from the nature of things, temporary. in their relation to the use of the whole combination? Being such, the right to replace them clearly exists.

Second. The extension of the patent does not in any manner affect or impair the right. The right to replace, as has been seen, depends upon the right to use the machine. The continued right to use the machine is clearly guarantied by section 18 of the act of July 4, 1836, above cited, and was conceded upon the argument.

The motion for a preliminary injunction is denied.

[NOTE. For another case involving this patent, see Farrington v. Gregory, Case No. 4,688.]

Case No. 4,688.

FARRINGTON et al. v. GREGORY.

[4 Fish. Pat. Cas. 221.][1]

Circuit Court, E. D. Michigan. Sept., 1870.

PATENTS—ASSIGNMENT OR LICENSE—RECORDING—SALE UNDER LICENSE—EXTENSION OF PATENT.

1. If an instrument vests in the grantee the exclusive right, either of the whole country or for a particular district, of making and using the thing patented, and of granting that right to others, it is an assignment. Any conveyance short of this is a license.

2. A grant to use and sell or dispose of machines made according to letters patent, within a specified territory, is not an assignment nor a grant to "make and use" the thing patented. It is a mere license.

3. Licenses merely need not be recorded, and are available against subsequent purchasers whether recorded or not.

4. The sale of a machine, by virtue of a license to use and sell, carries with it the right to use, by implication, and such machine may be again conveyed without words of assignment.

5. Such a machine may be used after the extension of the patent, without liability to the patentee or his assignee.

In equity. This was a motion [by Thomas B. Farrington and others] for a provisional injunction to restrain the defendant [Milton K. Gregory] from infringing letters patent [No. 13,606], for an "improved boring machine," granted to Arcolaus Wyckoff and E. R. Morrison, September 25, 1855, assigned and reissued to Wyckoff, October 14, 1856 [No. 404], extended to the original patentees for seven years from September 25, 1869, and assigned to complainants.

The defendant asserted his right to use the patented machine under a conveyance from the original patentees to one I. J. Merritt and certain mesne conveyances from Merritt down to the defendant. It appeared, however, that none of these conveyances, except that to Merritt, had been recorded in the patent office at the time when the complainants became the assignees of the patent, for a valuable consid-

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

eration, in good faith, and without notice of any such conveyances.

A. Russell, for complainants.
Levi L. Barbour, for defendant.

LONGYEAR, District Judge. By the showing made at the hearing of the motion, it appears that before the extension of the patent, Merritt, the assignee of Wyckoff, by an instrument in writing, granted to one Arnold the right to use and sell machines in Calhoun and Kalamazoo counties, in the state of Michigan, and that a machine was constructed for said Arnold in pursuance of such grant, and under the supervision of said Merritt, and that the said machine was transferred, together with a like grant, by said Arnold to other parties and by said other parties to this defendant, and that it is the use of that same machine by defendant that constitutes the cause of complaint and which the court is now asked to enjoin. It further appears that none of the said grants from Merritt down to the defendant had been recorded at the time of the assignment to complainants.

By section 11 of the act of July 4, 1836 (5 Stat. 121), it is provided that every "assignment, and also every grant and conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified portion of the United States, shall be recorded in the patent office within three months from the execution thereof." If, therefore, the grants or conveyances under which defendant claims are included in the above provision, they were required to be recorded, and not having been recorded within the time specified, and the complainants having purchased before the same were recorded, they can not be made available against the complainants' rights under their assignment. The converse of this proposition is, however, no doubt equally true, viz.: If the said grants or conveyances are not included in the above provision, then they were not required to be recorded, and they are available against the complainants' rights, whether recorded or not.

The grants in question are all precisely alike as to what is granted, and in this respect are in the following language: "All the right, title, and interest which I have to use or sell machines made according to said invention, * * * having the full and entire right to use or dispose of the said improved boring machines," in the counties of Calhoun and Kalamazoo. This clearly is not a grant to "make and use" the thing patented. It is a mere license to use and sell or dispose of. Neither is it an assignment. "The test is this: If the instrument vests in the grantee the exclusive right, either of the whole country, or for a particular district, of making and using the thing patented, and of granting that right to others, it is an assignment. Any conveyance short of this is a license." Curt. Pat. (3d Ed.) § 212. See, also, Gayler v. Wilder, 10 How. [51 U. S.] 477; Brooks v. Byam [Case No. 1,948].

By this test the grants in question are clearly licenses merely, and as such need not be recorded, and they are therefore available to defendant as against complainants' rights, although not recorded. See Curt. Pat. (3d Ed.) §§ 181, 211.

The defendant having acquired his grant, however, before the extension of the patent, his rights under it are limited, by section 18 of the act of July 4, 1836, above cited, to the use merely of the particular machine he had in use at the time of the extension, which right seems to be all he claims, and the exercise of which is all that is complained of in this case.

It was contended on the argument of the motion, on behalf of complainants, that because the grant from Merritt to Allen is not in terms to Allen and her assigns, that Allen could not transfer the right to use, etc., to others, and that, therefore, defendant can claim nothing under said grant. The right granted to Allen, as we have seen, was to "use and sell" or "dispose of." I think this is sufficient to confer the right to dispose of the right to use to others, because the purchase of a patented thing always carries with it the right to use the thing purchased by implication, and that is all that is claimed by the defendant in this case. The objection, therefore, is not well founded.

The motion for a temporary injunction is denied.

[NOTE. For another case involving this patent, see Farrington v. Board of Water Com'rs, Case No. 4,687.]

FARRINGTON (MATTOCKS v.). See Case No. 9,298.

FARRON, The JOHN. See Cases Nos. 7,340 and 7,341.

Case No. 4,689.

FARROW v. BROWN.

[Cited in Brook v. Brown, Case No. 1,931. Nowhere reported; opinion not now accessible.]

FARWELL (BARNARD v.). See Case No. 1,002.

FARWELL (BRADLEY v.). See Case No. 1,779.

Case No. 4,690.

FARWELL et al. v. CURTIS.

[7 Biss. 160; 22 Int. Rev. Rec. 161; 2 N. Y. Wkly. Dig. 499; 8 Chi. Leg. News, 267; 3 Cent. Law J. 352.] [1]

Circuit Court, W D. Wisconsin. April, 1876.

BANK CHECKS—DUTY OF HOLDER—PRESENTATION BY MAIL.

1. If payment of a check is not regularly demanded, and the bank fails after the time it should have been demanded, the loss falls on the holder. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him.

2. The holder of a check cannot extend the time for which the drawer would be liable.

3. The drawer had a right to have his check paid on the day presented, if there are funds to meet it, and it is the duty of the holder to see that it was so paid, or protested; and if the holder accepts the check or draft of the bank in payment, in lieu of money, he must present and collect it the same day, or he is chargeable with laches.

4. If the payee sends a check by mail to the drawee for collection and return, he makes the drawee his agent, and must bear any loss arising after the time when the check could have been presented by express or other usual method.

[Cited in First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. 186, 56 Fed. 969.]

At law. Action to recover the price of certain goods sold by plaintiffs [John V. Farwell and others] to the defendant [C. D. Curtis] in April, 1875. The defense was payment, and the issue was tried by the court.

Tenneys, Flower & Abercrombie, for plaintiffs.

Vilas & Bryant, for defendant.

HOPKINS, District Judge. The real point of the defense is, whether a check given by defendant on the 5th of April, 1875, for $800, was and is to be held as a payment. The parties have stipulated the facts to be as follows: That on the 5th day of April, 1875, the defendant, a resident of New Lisbon, in this state, purchased goods of plaintiffs in Chicago, their place of business, to the amount of $800 and over, and on that day gave his check to the plaintiffs for the sum of $800, upon the Bank of New Lisbon, a banking house doing business in that place, to apply as payment towards the goods so purchased by him to that amount; that the plaintiffs on the same day sent the check per mail to the bank, the drawees, with instructions to collect and return; that there is a daily mail between Chicago and New Lisbon; and the check was received at the Bank of New Lisbon on the morning of the 7th of April, and was paid out of the defendant's funds on deposit in the bank, there being sufficient for that purpose, and charged to his account; that the bank on the 7th of April, sent to the plaintiffs, through the mail, a draft for the amount of the check on the Union National Bank, Chicago, which was received by them on the morning of the 9th, which they on that day deposited in the Bank of Montreal, of Chicago, for collection, which was on the 10th of April presented to the Union National Bank for payment, and not paid, and was returned on the same day to the plaintiffs, who, on the same day, wrote the New Lisbon Bank that the check would go to protest if not paid on Monday, and to defendant that it was not paid, and asking him "to poke up the bank on the matter." Not being paid, it was protested on Monday, the 12th, of which defendant was notified per mail.

It is further stipulated that the Bank of New Lisbon could have paid said check in money up to the 10th day of April; but that on the close of the day's business on that day it stopped payment, having up to that time paid all checks presented for payment; that the bank had not the funds in the Union National Bank to meet the draft when they drew it, nor authority to draw it without funds.

These are the material facts established by the evidence, and the question is, whether the plaintiffs were guilty of such negligence in presenting the check and demanding payment, as to discharge the drawer.

The practice of sending checks by mail to the drawee I think is not usual, and has not received much judicial consideration, and not any direct sanction that I can find. In Morse, Banks, p. 334, he says it is a good presentment, and cites for his authority, Bailey v. Bodenham, 10 Law T. (N. S.) 422. I have examined that case, and it gives some countenance to his assertion, but I think the point is not absolutely decided.

In these days when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object. In this case there is a daily mail, by railroad between Chicago and New Lisbon, and a daily express also, with route agents and local agents, which furnished ample opportunities for presentation at the bank counters, as early as the morning of the 7th of April, and probably on the morning of the 6th, if it had been sent by the first opportunity. But if sent by the last train on the 6th, it would have reached New Lisbon on the morning of the 7th, and could have been collected and returned so as to have reached the plaintiff by the morning of the 8th of April. To send by mail to the drawees with instructions to collect and return, under such circumstances, is hardly equivalent to a demand at the counter for payment. The bank could not have paid the currency if it had it, there was no one to pay it to. The admission is that the bank was paying and had the money to pay up to and including the 10th, so that if the money

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 2 N. Y. Wkly. Dig. 499, contains only a partial report.]

had been asked on the 7th, it would have been paid. Now, as the plaintiff adopted another course than the one which the exercise of ordinary care and diligence would have dictated, and loss has resulted by reason of it, they should stand it. But it may not be necessary to settle this point, as Morse, who says a presentation by mail is good, as well as the case cited by him to support the assertion, says, also, that when the holder sends by mail to the drawee directly, if the money does not come back by the return mail, notice of dishonor should be given. Adopting this rule would not relieve these plaintiffs, for they did not comply with it, the money did not come back by the next mail, nor was the check protested as required. But instead of the money, on the 9th, four days after the receipt of the check, a draft came back on the Union National Bank, but that was not presented until the 10th for payment, and was not protested until the 12th, so that conceding that the presentation by mail was sufficient, the plaintiff was guilty of laches in not presenting the draft before the 10th. This delay is inexcusable according to any rule of diligence that I know of, so that assuming that Mr. Morse states a safe and satisfactory rule, it does not exonerate these plaintiffs from laches. But I think if the time is extended beyond what it would have been if sent by the usual and ordinary modes, that is, by express, or to some party to present, and beyond the period established by law as reasonable for presentation, and a loss happens by reason of the failure of the drawee, the payee of the check is alone chargeable unto it.

For instance, in this case, it is admitted that the bank had the money to pay the check up to and including the 10th, so that if payment had been demanded in the usual way, it would have been paid, and if the parties chose to make the drawee their agent, and the drawee as their agent sent a worthless draft instead of the money, which he would have paid to any party presenting the check at the counter, and charged the check to the drawer, the same as if paid in money, so that he had no right to enforce his claim or power to protect himself; the payee instead of the drawer, should incur the loss that ensued by the subsequent failure. The charge to defendant's account was made on the 7th of April, in the morning, and the check marked paid, and what was done after that time was done by the bank at plaintiff's request, and as their agent, and whether in good or bad faith on the part of the banker, the defendant is not to blame or chargeable therewith, or for any loss resulting therefrom.

The common or commercial law has fixed certain times within which checks must be presented to the drawees for payment, and when it appears that the bank was paying during that time, and the drawer's account was good for the same, and the refusal or failure to obtain payment after, was by reason of the failure of the bank occurring subsequent thereto, the loss has to be borne by the payee or holder of the check. That rule is, in cases where the parties all reside in the same place, that it must be presented for payment before the close of business on the day following its date or delivery to the payee; and in cases where it is drawn upon a bank at another place, it must be sent at the fartherest, by the last mail on the next day after it is received, and be presented by the party receiving it on the day following the reception by him. Smith v. Janes, 20 Wend. 192; Story, Prom. Notes, 493.

If not thus regularly demanded, and the bank or bankers should fail after those times, the loss will be the loss of the holder, who is considered as having made the check his own by his laches. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him. Now, in this case, it is plain that the plaintiffs did not observe these rules. They sent the check in time, and if the presentation by letter was a good demand, it was presented on the 7th in the morning; then it should have been paid on the 7th, and if not, the drawer should have been notified of its non-payment. But instead of being paid in money it was paid by draft on Chicago, and it is claimed that the plaintiffs had time to present that, to see whether it would be paid, and that if not paid, they could then protest the check. This is not the law. The holder of a check cannot in that way extend the time for which the drawer would be liable. The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see to it that it was so paid, or if not, protested, and if the holder accepts the check or draft of the bank in payment in lieu of money, he must present and collect it the same day, or else he is chargeable with laches. He cannot, as in this case, keep it for three days and then go back upon the drawer of the check if it is not paid, as by so doing he would extend the drawer's liability for two days beyond the time fixed by the law. Alexander v. Burchfield, 7 Man. & G. 1061.

This point is directly decided in Smith v. Miller, 43 N. Y. 171. In that case the check of the drawee was taken and presented at the bank on the following day—but before its presentation the drawers of the check had failed. The party accepting the payment thereupon protested the draft which they received it in payment of, and brought suit to recover the amount of the draft, claiming that as the check was presented on the next day after its date, it was duly presented, and if not paid, the draft for which it was given was not paid.

On the contrary it was claimed that as the drawers of the check were paying all of the day on which it was given, and that

if it had been presented on that day it would have been paid, and that as it was taken in lieu of the money, it should have been presented on that day, that the party could not have the whole of the next day to present a check taken under such circumstances, which was sustained by the court, which said:

"It was the duty of the plaintiffs to present the check at the bank, at least during the day on which they received it, and obtain either the money or a certificate, or cause the same to be protested for non-payment, and not having done so, they were chargeable with negligence and the consequent loss."

Here, even giving the plaintiffs the benefit of the time allowed when sent by mail, as in other cases, and they are guilty of negligence, they received the banker's check on the 9th, but delayed presenting it for payment to the Union National Bank until the 10th. Certainly such negligence cannot be tolerated in treating with paper that they had taken in lieu of money, without the consent or knowledge of defendant. The plaintiffs cannot hold the defendant liable on his check during the time they were thus experimenting with the check they received from the bankers, in payment of his check to them.

The bankers may have, and probably did, practice a fraud upon the plaintiffs when they sent this draft on the Union National Bank. But the defendant is not chargeable with that. He can say to the plaintiffs: "If you had sent the check to a party here to present in the usual way it would have been paid, and I have a right to require you to pursue the ordinary course in such case, and if you depart therefrom, and are defrauded by your agent, which in this case was the banker, it is your loss, and you alone are liable, as you brought it unnecessarily upon yourself."

Under the evidence, the defendant must therefore have judgment.

NOTE. Acceptance of certification of a check instead of payment releases the drawer, and renders the collecting bank responsible. Essex Co. Nat. Bank v. Bank of Montreal [Case No. 4,532].

FARWELL (DONALDSON v.). See Case No. 3,983.

FARWELL v. KINKEAD. See Case No. 7,824.

FARWELL, The L. J. See Case No. 8,426.

FASHION, The. See Case No. 9,772.

FASHION, The (CLARKE v.). See Case No. 2,851.

FASHION, The (DEVOE v.). See Case No. 3,844.

FASHION, The (NEWBERRY v.). See Case No. 10,143.

FASHION, The (WARD v.). See Cases Nos. 17,154 and 17,155.

FASSMAN (JOHNSEN v.). See Case No. 7,365.

FAULBREE (UNITED STATES v.). See Case No. 15,076.

Case No. 4,691.

FAUNTLEROY v. HANNIBAL.

[1 Dill. 118.][1]

Circuit Court, E. D. Missouri. 1870.

MUNICIPAL CHARTERS JUDICIALLY NOTICED.

The courts will judicially notice powers of a public nature conferred upon a municipal corporation, created by legislative act, though the act is not in terms declared to be public.

[Cited in Cluck v. State, 40 Ind. 273.]

At law.

Dryden & Dryden and Grant & Smith, for plaintiff.

Carr & Wilson, for defendant.

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

DILLON, Circuit Judge. This is an action on certain coupons attached to bonds issued by the city of Hannibal to the Pike County Railroad Company of Illinois, in 1858, to aid in the construction of that railroad. The defendant demurred to the declaration on the ground that the act amending the charter of the city of Hannibal and authorizing it to subscribe to the capital stock of the company, was not set forth in the declaration; also that as neither that act nor the charter of the city were declared to be public acts, the courts could not take judicial notice of them.

The court, upon consideration, is of opinion that the act is in its nature public, though relating only to the powers of a single municipal or public corporation; and consequently, that it can judicially notice it, without a declaration therein that it is a public act. Charters for the government of cities and towns are, in this country, public in their nature, and not special or private acts. Demurrer overruled.

NOTE. Courts will judicially notice the charter of a municipal corporation without being pleaded, not only where it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect; but the ordinances thereof are not public, and must be pleaded. State v. Mayor, &c., 11 Humph. 217; Alderman, etc., v. Finley, 5 Eng. (Ark.) 423, 516; Beatty v. Knowler, 4 Pet. [29 U. S.] 152, 157; West v. Blake, 4 Blackf. 234; Briggs v. Whipple, 7 Vt. 15, 18; Case v. Mayor of Mobile, 30 Ala. 538; Young v. Bank, 4 Cranch [8 U. S.] 384.

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

Case No. 4,692.

FAUNTLEROY v. HANNIBAL.

[5 Dill. 219.][1]

Circuit Court, E. D. Missouri. 1879.[2]

BONDS—COUPONS—JUDGMENT—INTEREST.

On matured bonds and coupons of a Missouri municipal corporation, interest is allowable upon bonds payable in New York calling for ten per cent until payment, in accordance with the terms of the contract at ten per cent, and under the Missouri statute so much of the judgment as relates to the principal of the bonds and accrued interest thereon must continue to bear interest at that rate; upon coupons payable in New York and expressing no rate of interest, the statute of Missouri governs, and only six per cent is allowable, and so much of the judgment as relates to such coupons and accrued interest thereon must continue to bear that rate of interest.

This is an action on matured bonds and attached interest coupons, issued by the city of Hannibal, in the state of Missouri, of the following form:

"No. 6. State of Missouri. $1,000. Bond of the City of Hannibal, Issued to Pay Calls on Subscription for Stock in the Pike County Railroad, Illinois. Twenty years after date the city of Hannibal promises to pay to the order of A. O. Nash, auditor of said city, or bearer, at the American Exchange Bank, New York, one thousand dollars, for value received, without defalcation, with interest on the same at the rate of ten per cent per annum, and payable semi-annually at the same place—that is to say, fifty dollars on the 1st day of October, and a like sum on the 1st day of April, in each year—upon the presentation of the coupons severally hereto annexed, until the payment is well and truly made of the said principal sum of one thousand dollars. In witness whereof, I, the mayor of said city, hereto subscribe my name and cause the seal of said city to be affixed, and the auditor of the said city countersigned the same, at the city aforesaid, this 1st day of April, A. D. 1858. (Signed.) Geo. W. Shields, Mayor. (Signed.) A. O. Nash, Auditor."

Coupon.—"$50. Cashier of the American Exchange Bank, New York, pay the bearer fifty dollars on the 1st day of October, 1877, for one-half year's interest on bond issued by the city of Hannibal in aid of the construction of the Pike County Railroad, Illinois. No. 39, B. 6. (Signed.) A. O. Nash, Auditor."

After trial on the merits the court decided for the plaintiff,[2] and in liquidating the amount of the judgment the questions arose how interest should be calculated upon the securities, and what rate of interest the judgment should bear. The rate of interest in New York, where the instruments sued on are by their terms made payable, is seven per cent. The statute of Missouri, the state where the contract was entered into, and in which the suit is brought, contains, inter alia, the following provisions as to interest (1 Wag. St. p. 782): "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts." "The parties may agree, in writing, for the payment of interest not exceeding ten per cent per annum, on money due or to become due upon any contract." "Interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord, or sale of property; all of such judgments and orders for money upon contracts bearing more than six per cent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear six per centum per annum until satisfaction made as aforesaid."

Plaintiff claimed in argument:

1. Ten per cent on the principal of the bonds up to liquidation.

2. Ten per cent on so much of the judgment as related to the principal of the bonds and accrued interest thereon since maturity.

3. Seven per cent on the coupons to the date of judgment.

4. Seven per cent on so much of the judgment as related to the coupons and accrued interest thereon since maturity.

As to the principal, and also as to the portion of the judgment based on the principal and interest accrued thereon since maturity, under the Missouri statutes the terms of the contract expressed in the bonds govern.

As to the coupons:

1. Interest is allowable from maturity. Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 206; Aurora v. West, 7 Wall. [74 U. S.] 82; Town of Genoa v. Woodruff, 92 U. S. 502.

2. The law of the place of payment governs, viz., New York. The contract was made by the parties with reference to place of performance, and the law of that place controls. Neither the law of the place where the contract was made, nor where now sought to be enforced, applies Making the coupons payable in New York was, in law, equivalent to saying that they should bear seven per cent after maturity; if this be so, the portion of the judgment relating thereto should continue to bear the same rate. Bank of Louisville v. Young, 37 Mo. 407; 2 Pars. Cont. 585; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 206; Miller v. Tiffany, Id. 310; Goddard v. Foster, 17 Wall. [84 U. S.] 143; City of Jeffersonville v. Patterson, 26 Ind. 16.

The United States supreme court, in Gelpcke v. Dubuque (per Clifford, J.), says: "Municipal bonds, with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on coupons is entitled to the amount of them, with interest and exchange at the place where by their terms they were made payable."

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

[2] [Affirmed in Hannibal v. Fauntleroy, 105 U. S. 408.]

3. The cases of Rogers v. Lee Co. [Case No. 12,013] and Cromwell v. Sac Co., 96 U. S. 51, do not control this case, because based on Iowa statutes, as follows: "The rate of interest shall be six cents on the hundred by the year on money due by express contract, unless a different rate be expressed in writing." "Parties may agree, in writing, for the payment of interest not exceeding ten cents on the hundred by the year." "Interest shall be allowed on all money due on judgments and decrees at the rate of six per cent per annum, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, but no judgment or decree shall draw more than ten per cent per annum, which rate must be expressed in the judgment or decree." Revision Iowa, 1860, §§ 1787, 1788, 1789.

In the Lee County Case interest was allowed on the coupons at seven per cent to liquidation, and the rate was lowered to six when judgment was entered. Under the Missouri statute, supra, the judgment continues to bear the same interest borne by such contracts.

The Sac County Case related to coupons by their terms expressly made payable either in New York or in the state of Iowa. Hence the United States supreme court applied thereto the statute law of Iowa, which was also lex fori. The decision is to be limited in its application to the very case in hand. It cannot be extended to this case to the subversion of the well established principles of commercial law.

Grant & Grant and Joseph Shippen, for plaintiff.

Krum & Krum, for defendant.

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

DILLON, Circuit Judge. The Missouri statutes on the subject of interest must govern. The contracts were made in this state and are sought to be enforced here. No substantial difference as to the points here involved exists between the statutes of Missouri and those of Iowa, which have received judicial construction, both by the United States circuit court for Iowa and by the United States supreme court. Applying those rulings to this case, we hold that the plaintiff is entitled to ten per cent interest upon the principal of his bonds from their maturity to date of judgment, and that thereafter so much of the judgment as relates thereto must continue to bear the same rate. This is because the Missouri statute allowed the parties to so contract, and they by the terms of the bonds did so contract. And we further hold that the plaintiff is entitled to but six per cent upon the coupons, as there is no rate of interest expressed therein, and that thereafter the portion of the judgment relating to the coupons and accrued interest thereon must continue to bear the same rate. Rogers v. Lee Co. [Case No. 12,013]; Cromwell v. Sac Co., 96 U. S. 51.

Let judgment be entered accordingly.

Judgment accordingly.

[NOTE. On writ of error by defendant, the judgment at the trial on the merits was affirmed. Hannibal v. Fauntleroy, 105 U. S. 408.]

FAUQUIER & ALEXANDRIA TURNPIKE CO. (HOLBROOK v.). See Case No. 6,591.

FAUSSAT (THOMPSON v.). See Case No. 13,954.

FAUSSATT (SNELL v.). See Case No. 13,138.

FAUST, The DAVID. See Case No. 3,595.

Case No. 4,693.

The FAVORITA.

[1 Ben. 30.] [1]

District Court, E. D. New York. Feb. 1866.[2]

COLLISION IN EAST RIVER—STEAMERS CROSSING—FERRY-BOAT IN FAULT FOR NOT KEEPING HER COURSE—STATE LAW—EVIDENCE—WHISTLES—APPORTIONMENT OF DAMAGES.

1. Where a ferry-boat crossing from Brooklyn to New York, after getting out of her slip, saw a steamship coming up the river which had already sheered to starboard to go under the ferry-boat's stern, and instead of keeping on, stopped and backed, her pilot then blowing two whistles, but the steamship, though stopping and backing, could not then avoid the collision, but struck the ferry-boat in the side at right angles: *Held*, that the ferry-boat was in fault in not keeping on her course.

[Cited in The Britannia, 34 Fed. 552, 558. Cited contra in dissenting opinion in The Britannia, 153 U. S. 155, 14 Sup. Ct. 804.]

2. The two whistles blown after the pilot of the ferry-boat had stopped and backed, amounted only to a notification of what he had done, and gave to the steamship no opportunity of assenting or dissenting; and dissent on the part of the steamship by whistles then, would have availed nothing.

3. The ferry-boat was in fault in going out of her slip at full speed, without keeping a careful look-out for approaching vessels.

4. The steamship was also in fault in not complying with the state law in regard to the navigation of the East river, and going as near the middle of it as practicable.

[Cited in The Monticello, 15 Fed. 476; McFarland v. Selby Smelting & Lead Co., 17 Fed. 256.]

5. Both vessels being in fault, the damages must be apportioned.

[Distinguished in Coffin v. The Osceola, 34 Fed. 921.]

6. Evidence from persons on the bows of the steamship, not concerned in her navigation, but acquainted with the harbor and the capacities of vessels, is entitled to great weight on the question whether the collision would have been avoided, if the ferry-boat had kept her course.

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

[2] [Reversed in Case No. 4,695.]

The facts in this case sufficiently appear in the opinion of the court. The libel did not charge upon the steamship as a fault that she was not navigated in the middle of the East river, as required by the state law.

B. D. Silliman, for libellants.
Benedict, Burr & Benedict, for claimants.

BENEDICT, District Judge. This action is brought by the Union Ferry Co., owners of the ferry-boat Manhasset, against the steamship Favorita, to recover damages for injuries sustained by their ferry-boat in a collision with the steamship, which occurred on the afternoon of the 14th of April, 1865.

At the time of the collision the weather was clear, with a fresh breeze from the S. S. W.; and the tide was ebb. The steamship was proceeding up the East river to her berth at 12th street, New York, and the ferry-boat was on a trip from her Main St. slip on the Brooklyn side, to the Catharine St. slip on the New York side. The time of the collision was between three and four o'clock in the afternoon. The place of collision was off the Main St. slip.

The allegations of the libel filed in behalf of the ferry company are, that the ferry-boat was detached from her fastenings, and proceeded to the mouth of the slip, when the pilot and those in charge perceived the steamship proceeding up the river on a line across the front of said slip, and at about right-angles with the course of the ferry-boat, near to the Brooklyn shore, and at such a distance therefrom and from the ferry-boat, that it would not be practicable for said ferry-boat to cross the bows of the steamship, but to avoid a collision it became necessary that the ferry-boat should pass to the left of the steamship, and between her and the Brooklyn shore. That the pilot of the ferry-boat, immediately on discovering the steamship, reversed his engines, and also gave two blasts of his whistle, "to notify said steamship that said ferry-boat would so pass to the left of said steamship, and between her and the Brooklyn shore, and that said steamship should pass to the left of the Manhasset." That it thereupon became the duty of the steamship to sheer toward the New York shore; but the steamship disregarding the signal, and making no response thereto, sheered toward the Brooklyn shore, making it impossible for the ferry-boat to pass between the steamship and the Brooklyn shore; and by reason of her paying no attention to the signal, and of her being sheered toward the Brooklyn shore, she collided with the ferry-boat, striking her just forward of the port wheel.

This statement of the movements of the ferry-boat challenges attention at the outset, as involving a departure on the part of the ferry-boat from the general rule which requires that when steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, and the other shall keep her course. Regulations of 1864, arts. 14–18. According to this rule, it was the duty of the ferry-boat to keep her course, and the responsibility of avoiding her devolved upon the steamship. But according to the libel, the persons in charge of the ferry-boat, immediately upon discovering the steamship, assumed to determine the method by which collision was to be avoided, and stopped and backed, with the design of passing the steamship to the left, and between her and the Brooklyn shore. Under this libel, the burden must be considered to be upon the ferry-boat to justify her action, and to show that the course she so marked out for the two vessels was the proper one, and necessary to avoid immediate danger. This burden has been assumed, and in support of the averments in the libel, the persons in charge of the ferry-boat, together with pilots from other ferry-boats in the neighborhood at the time of the collision, have been produced, who concur in expressing the opinion that the action of the ferry-boat in stopping and backing was proper, and apparently necessary to avoid collision with the steamship as she was coming. It is to be noticed, however, that some of these witnesses produced by the libellants, put forth this opinion with little confidence. Thus the pilot of the ferry-boat himself says, "had we kept on, and the Favorita not changed her course, there would have been a collision the same—can't tell whether the Favorita could have sheered enough to Brooklyn to clear me—don't think she could at the speed she was going." Conklin, a passenger on the ferry-boat, and who saw the movements of both vessels, is not asked on this point; while Cole, a pilot called by the libellant, who was on a ferry-boat bound to the Fulton Ferry slip, says, "Don't hardly think the ferry-boat could have cleared her by going on."

As against these opinions, and in favor of the allegation of the answer, that the ferry-boat could have and would have passed in safety had she kept her course, the claimants produce the persons in charge of the navigation of the steamship, and also three persons who were standing on the forward part of the steamship from the time the ferry-boat appeared. These three witnesses, Mr. Erastus W. Smith, Mr. T. F. Secor, and Mr. Daniel D. Westervelt, are persons acquainted with the harbor and with the capacities of vessels. They were in no way responsible for the management of the steamship, and they were watching the movements of the two vessels with care. The statements of such witnesses upon a question like this, seem to me to be entitled to great weight. All these persons concur with the master, pilot, and mate of the steamship, in a positive opinion that it was not necessary for the ferry-boat to stop to avoid danger; but on the contrary, that the steamship could have

passed under her stern in safety had the ferry-boat kept on, and that her failure to keep on was the cause of the accident. The statement of Mr. Secor is emphatic; he says, "I say, and did say at the time, that had the ferry-boat kept on we would have gone clear under her stern—no doubt of that;" and several other of the witnesses are equally positive. The weight of opinion, therefore, of those who saw the occurrence, seems to me to be strongly against the ferry-boat upon this point.

This opinion is confirmed by facts proved in the cause relative to the manner in which the two vessels came together. The ferry-boat, as it appears, was struck not over eighty feet from the Brooklyn end of the boat, and when struck she had stopped her headway, and was moving back. How far she had backed is not clear from the evidence. The pilot estimates the distance as not over ten feet. Mr. Westervelt thinks she backed one or two lengths. Mr. Smith says more than half a length; but whether the distance she backed be ten or three hundred feet, it is manifest that the time necessarily occupied in stopping and backing and getting sternway, was sufficient to have enabled her, had she kept on, to have passed more than eighty feet further to west, and so to have been beyond the track of the steamship. This is still more manifest if the position of the steamship at the time the ferry-boat stopped is correctly given by the pilot of the ferry-boat. He places the steamship at that time off the bulkhead next above the Fulton Ferry slip, and while the steamship, endeavoring to stop as she was, would pass from this point to the place of collision off Main St. slip, the ferry-boat would certainly have passed more than eighty feet, and beyond all possibility of contact with the steamship.

From the weight of opinion of persons competent to judge, and who were present, as well as from the position of the vessels and the manner of the blow, I conclude, therefore, that if the ferry-boat had kept on her course, the steamship would have avoided her, and that she must be held guilty of fault in determining to pass to the left, and in stopping and backing when she did.

It was urged in argument on behalf of the ferry-boat, that even if the position of the two vessels was such that the steamship could have passed astern of the ferry-boat without danger had the ferry-boat kept her course, yet the ferry-boat having proposed to pass to the left by giving two whistles, and the steamship having concurred by giving no dissenting whistle, the steamship must be held exclusively responsible for the manoeuvre; but an answer to this is found in the fact clearly proved by the libellant's witnesses, that the determination of the ferry-boat to pass to the left was made and acted upon by her before she blew her whistle. She gave the steamship no opportunity before she took her course, either to assent or dissent, and her whistles, blown after she had stopped and reversed, amounted under the circumstances to a mere notification of what had been already seen by those in charge of the steamship, that she was stopping and backing. Dissent by whistles at that time would have availed nothing, for it was too late for the steamship to break her sheer and attempt to pass to the left.

The fault of the ferry-boat in stopping and backing as she did is more apparent when it is considered that she moved out of her slip at full speed, and passed a sufficient distance into the open river, before she stopped, to fairly warrant the persons on the steamship in concluding that she intended to keep her course, and that when the pilot stopped and commenced the movement of passing to the left, or perhaps more strictly prepared to commence a movement to the left,—for there is no evidence that he did more than stop and back,—the steamship had already ported her helm, and was then sheering towards Brooklyn to pass under the stern of the ferry-boat. That this is so, appears by testimony furnished by the libellant. Conklin, a passenger on the ferry-boat, states that after going out of the slip he left the main-deck and proceeded to the centre of the boat, and then passed up to the upper deck on his way to the pilot-house; that after he reached the upper deck the pilot rang his bell; that then, when he for the first time saw the steamship, she had "a pretty rank sheer in shore." Thomas, the lookout on the bow of the ferry-boat, states that he did not see the steamship, although in plain sight from the time he reached the mouth of the slip, until the stern of the ferry-boat had passed fifty feet beyond the slip, and that the ferry-boat "went out about half a minute more before the pilot rang the bell," and the steamship, he says, was then sheering in towards the Brooklyn shore. Cole, a pilot also called by the libellant, thinks the ferry-boat when struck was outside of the eddy. Of the witnesses called by the respondent, Mr. Secor is very clear upon this point. He says he saw the ferry-boat as she appeared coming out of the slip; that she continued to come out for some little space; that he stepped to larboard to satisfy himself that the engine of the steamship was working back, and saw that it was; that he then went to the bow, and when he got there the ferry-boat was still on her course, and a second or two afterwards she stopped. According to the evidence, then, I think it cannot be doubted that stopping the ferry-boat when he did was a manifest mistake on the part of the pilot of the ferry-boat. If the proximity of the steamship was such as to render it necessary to disregard the general rule which required him to keep on, the time to depart from the rule was when the steam-

ship first came in sight. Had the man, who was stationed on the bow as a lookout, reported the presence of the steamship as soon as the bow of the ferry-boat passed the mouth of the slip, and the ferry-boat been then stopped and backed, all danger would have been avoided. If the steamship was then seen, the action of the pilot in moving on his course and out into the river shows that he then determined that a departure from the rule was not necessary to avoid danger. If the steamship was not then seen by the pilot, there was great carelessness on the part of the ferry-boat in not keeping a better lookout. The tide was low, and the slips and vessels at her lower pier prevented her pilot from seeing below the slips until the boat reached nearly or quite to the end of the piers. Great caution was therefore required in passing out. The boat should have been well in hand and a careful watch kept, so that the presence of a vessel in the river below would be seen at the earliest possible moment, and then if proceeding on her course would involve danger, she should have been at once stopped and backed. Instead of pursuing this cautious course, the ferry-boat, as her own witness proves, passed out of the slip at full speed, and was fairly on her course and in the river before the lookout discovered the steamship; and then, apparently not noticing that the steamship had already taken a sheer to pass under her stern, her pilot, without warning by whistles or otherwise, stopped and reversed his engine. The safety of the persons who are compelled to cross these ferries, requires that such lack of care should be condemned.

There remains to consider whether the steamship was guilty of fault. Two faults are charged: first, that she did not stop and back in time; second, that she disregarded the law of the state which requires all vessels navigating the East river to keep in the middle of the stream. As to the first-mentioned fault, I do not think that it is made out. The evidence shows beyond controversy that the steamship stopped and reversed as soon as, if not before, the ferry-boat was seen to stop, and the requirements of article 16 of the regulations of 1864 would be fulfilled by stopping then, for not till then was there any serious danger of a collision. Indeed, the testimony of Mr. Secor before alluded to, is strong evidence that the steamship stopped before the ferry-boat did, and as soon as the ferry-boat appeared at the mouth of the slip. I have no difficulty, therefore, in holding that the Favorita was free from fault in this respect. As to the remaining fault charged, that the Favorita was being navigated too near the Brooklyn shore, there is perhaps room for doubt; but after full examination of the evidence, I am satisfied that she must be held guilty of fault in this particular. I fully agree with the counsel for the claimants, that where the steamship was, below the Fulton Ferry slip, is of no consequence, and I am moreover satisfied that owing to the fact that at the Fulton Ferry slip the river turns, and above that slip the shore bends rapidly to the eastward—even. if it be conceded that the steamship when she passed the Fulton Ferry slip was within two hundred feet of it, as claimed by the libellant, and that without excuse—still she could not for that reason be considered guilty of a fault which conduced to the collision, because the course she was then on as she came up to the bend, if maintained, would carry her, when she had passed the bend, away from the Brooklyn shore and towards the middle of the river, and would have given time and space to pass on either side, and without risk of collision of a ferry-boat coming out of the Main St. slip. But a consideration of all the evidence satisfies me that the steamship, tempted doubtless by the eddy, instead of taking a straight course from off the De Forest dock, and so bearing toward the middle of the river, as for all that appears here she could have done, followed the trend of the river after passing the Fulton Ferry slip and before she ported to avoid the ferry-boat, which, according to the testimony of her pilot, as well as that of Mr. Smith and Mr. Secor, was when she was half way between the Fulton Ferry slip and the Main St. slip. The testimony of many witnesses, some called by the libellants and others by the claimants, shows that when the ferry-boat appeared at the mouth of the slip, the steamship was much nearer to her than she could have been had she kept as far out as a straight course from the Fulton Ferry slip would have carried her. They were then so near each other that the engine of the steamship had only time to make one turn back before the blow. The estimated distance given by some of the witnesses for the libellant tends to confirm this conclusion. Thus McGinn, the pilot of the steamship, puts his vessel at three hundred feet out from the Fulton Ferry slip when he passed that point, while Mr. Secor places her when half way between the Fulton Ferry and Main St. slip at two hundred or two hundred and fifty feet off the piers. These distances, if they are to be relied on, would indicate clearly that the steamer had followed the trend of the shore. That this was so seems further to be indicated by the manner of the blow, which was nearly at right angles. If the steamship when she ported her helm to avoid the ferry-boat had been any great distance out, she would, before reaching the point where she struck the ferry-boat, have swung so far as to make the blow much more oblique than it was. This conclusion, it should be noticed, is not in conflict with any evidence given by those in charge of the steamship as to the course followed by that vessel after passing the Fulton Ferry. They give estimates of distance which would indicate no turning of

the bend, but they do not say that they kept a straight course, and give no reason for not heading towards the middle of the river after passing the Fulton Ferry slip. After seeing the ferry-boat, the steamship properly ported and then rapidly neared the Brooklyn shore; but before she saw the ferry-boat, and while passing from the Fulton Ferry to the point where she saw the ferry-boat, she must have kept along instead of away from that shore, and so found herself in close proximity to the ferry-boat when it first appeared. This proximity may well have tended to confuse the pilot of the ferry-boat and so have conduced to the error he made. It certainly gave no opportunity to make even a slight allowance for any difference of opinion as to distance, or for any error of judgment on either side. Such a sudden approach to a vessel coming out of the piers is precisely what the statute was intended to prevent. The safety of the navigation in this crowded port requires that the statute be rigidly enforced, and that every vessel which meets with a collision while navigating in violation of it, should be required to show satisfactorily that such violation was not a cause of the accident. The respondents have failed to do this, and the steamship must therefore be held in fault as well as the ferry-boat.

The damages will accordingly be apportioned, and a decree entered to that effect.

[NOTE. Upon the coming in of the commissioner's report, both parties excepted to the amount awarded. The case was heard upon these exceptions (Case No. 4,694), and the report of the commissioner was confirmed. An appeal was taken to the circuit court (Case No. 4,695), where the steamship alone was held in fault, and a decree entered for the libellants for the whole amount.]

Case No. 4,694.

The FAVORITA.

[4 Ben. 132.][1]

District Court, E. D. New York. April, 1870.

COLLISION—DAMAGES — COSTS — DEMURRAGE OF FERRY-BOAT—PERMANENT DEPRECIATION.

1. Where in a collision case both vessels had been held in fault, and the owners of the injured vessel sought to recover as part of their damages, the costs and expenses paid by them, in defending a suit brought against them, by the owner of a tug, for services rendered in pumping and keeping their vessel afloat after the collision: *Held*, that the item was not recoverable.

2. Where a ferry-boat was injured in a collision, and her owners supplied her place by a spare boat, and it appeared that the receipts of the ferry were not diminished by the loss of the injured boat: *Held*, that her owners could nevertheless recover such sum as the use of the boat was worth while undergoing repairs.

[Cited in The Mary Steele, Case No. 9,226; Johanssen v. The Eloina, 4 Fed. 574.]

3. Finding of a commissioner on the question of permanent depreciation sustained, the evidence being contradictory.

4. The ordinary practice where both vessels are found in fault, is to refuse costs to either.

[Cited in The Mary Patten, Case No. 9,223; The City of Hartford, Id. 2,750; Vanderbilt v. Reynolds, Id. 16,839; The Pennsylvania, 15 Fed. 817.]

[A libel was filed in this court by the owners of the ferry-boat Manhasset to recover for damages resulting from a collision with the steamship Favorita. Both vessels were held in fault (Case No. 4,693), and the damages were apportioned.]

B. D. Silliman, for libellant.

Benedict & Benedict, for claimants.

BENEDICT, District Judge. This case comes before the court, upon exceptions taken by both parties to the commissioner's report of the amount of the loss sustained by the Union Ferry Company, by reason of a collision between the ferry-boat Manhasset, and the steamship Favorita. On the part of the libellants, objection is taken to the disallowance by the commissioner of the amount of a bill of costs, incurred by the libellants in defending an action brought against them, to recover an exorbitant demand for the use of a tug-boat, in keeping the Manhasset afloat, when she was hurt. The exception to the report upon this ground cannot be sustained. It was the misfortune of the libellants, that they were compelled to resort to law, as their only means of avoiding an unjust demand, and the expense, thereby entailed, cannot be recovered in this action, as part of the damages resulting from the collision in question.

An exception is taken on the part of the claimant, to the item of demurrage allowed by the commissioner, upon which point the evidence is that the libellant's ferry-boat was detained from her regular employment, for the space of ten days, and that the value of the use of such a boat is $75 per day. In addition, it is proved that the libellants at once replaced the boat, upon the ferry, by a spare boat of their own, kept for the purpose of relieving ferry-boats from duty, when necessary; and it is also shown that the receipts of the ferry were not diminished by the absence of the Manhasset from her place upon the ferry. These circumstances do not however preclude the libellants from recovering the real value of the use of the Manhasset, for the period she was laid up. The libellants are entitled to be made good, for all which they lost by reason of the collision. It is conceded that they lost the use of the Manhasset, for a period of ten days, and the value of that use, they have proved to be $75 per day. I see no reason why they should not recover that loss, as part of their damages, notwithstanding the fact, that they took another boat of their own, to replace the injured boat, instead of hiring a boat of a third party.

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

This question is substantially the same, as that decided by this court, in the case of The Cayuga [Case No. 2,535], and until further instructed, I adhere to the rule there laid down. The first exception on the part of the claimant is therefore overruled.

Both sides have excepted to the allowance of $1,000, as the amount of permanent injury caused to the Manhasset, by the collision, and I have duly considered the evidence bearing upon the subject.

It appears clearly proved, that some permanent depreciation of the value of the boat did result from the collision, but the amount of that depreciation is not so clear. Upon the evidence I certainly could not consider that amount to have been shown to exceed the sum awarded, and have no hesitation in disallowing the exception taken by the libellants upon that ground. I am not very well satisfied with the evidence as showing it to have equalled the sum awarded, but, upon the whole, I conclude not to disturb the finding of the commissioner upon the point. The exceptions of both sides, are accordingly overruled, and the report confirmed as it stands.

I have been asked, at this time, to determine also the question of costs, which was not determined in the interlocutory decree. The case is one of mutual fault, and although I entertain no doubt as to the propriety, in a proper case, of mitigating the effect of the rule of equal division of loss, in cases of mutual fault, by awarding full costs to either party, I do not consider that the present case calls for any deviation from the practice, which is to refuse costs to both parties, when both are equally in fault.

[NOTE. Subsequently, an appeal was taken to the circuit court (Case No. 4,695), where the decree of the district court, adjudging both vessels to be in fault (Case No. 4,693), was reversed, and the steamship alone held liable.]

Case No. 4,695.

The FAVORITA.

[8 Blatchf. 539.][1]

Circuit Court, E. D. New York. Aug. 21, 1871.[2]

COLLISION BETWEEN STEAMERS — GOOD FAITH OF PILOT—ERRONEOUS JUDGMENT—IMMINENT JEOPARDY BY FAULT OF ANOTHER — STEAMER PASSING FERRY SLIPS—DAMAGES.

1. A ferry boat, just as she cleared her slip at Brooklyn on her way to New York, saw a steamer coming up the river, near to the Brooklyn side. Seeing danger of collision, the ferry boat stopped and backed, and blew two whistles. A collision ensued between the two vessels: *Held*, that the steamer was wholly in fault.

[Cited in The Sunnyside, Case No. 13,620; The Britannia, 34 Fed. 558.]

[See note at end of case.]

2. The pilot of the ferry boat having acted in good faith, in a situation of great peril, ought not to be considered in fault, even if his judgment was erroneous, in stopping instead of advancing.

[Cited in The Britannia, 153 U. S. 155, 14 Sup. Ct. 804.]

3. When a vessel is placed in imminent jeopardy by the fault of another, the discretion which her mariners are called upon instantly to exercise, is not to be closely criticised, nor their conduct to be condemned, unless very plainly neglectful or unskilful.

[Cited in The Britannia, 34 Fed. 559.]

4. It is a gross fault in a steamer to pass along the mouths of the ferry slips in the East river, in close proximity thereto, at a speed at which all efforts to stop her, when danger of collision with a ferry boat coming out of her slip appears, are ineffectual.

[Cited in The Monticello, 15 Fed. 476; McFarland v. Selby Smelting & Lead Co., 17 Fed. 256; The John S. Darcey, 29 Fed. 647; The Columbia, Id. 719; The Britannia, 34 Fed. 552; The Eider, 37 Fed. 905; The Amos C. Barstow, 50 Fed. 623.]

5. The proper rules stated, for ascertaining the amount of damages to be awarded, in case of loss or damage by collision.

6. The alleged depreciation in the market, which is said to result from the mere fact that a vessel has once been injured and repaired, depending upon prejudice or apprehension, when the intrinsic value of the vessel is made good, is too indefinite and variable to be allowed as damages.

[Cited in Petty v. Merrill, Case No. 11,050; New Haven Steam-Boat Co. v. Mayor, 36 Fed. 718.]

7. The loss of the use of a ferry boat while undergoing repairs, may be allowed to her owners as damages, even though they own a spare boat which is used to supply the place of the disabled one while she is being repaired.

[Cited in The Mary Steele, Case No. 9,226.]

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

[This was a libel by the Union Ferry Co., owners of the ferry-boat Manhasset, against the steamship Favorita for damages sustained by a collision. The district court held both vessels responsible (Case No. 4,693), and both parties appealed to this court.

[For a hearing upon exceptions to the report of the commissioner as to the amount of damages, see Case No. 4,694.]

Benjamin D. Silliman, for libellants.

Benedict & Benedict, for claimants.

WOODRUFF, Circuit Judge. In the afternoon of the 14th of April, 1865, the steam ferry boat Manhassett, the property of the libellants, was running on the ferry between the foot of Main street, Brooklyn, and the foot of Catharine street, New York. On one of her trips, she came out of the Main street slip, and, when she had advanced into the river sufficiently to enable her pilot to see towards the south-west, past the adjacent pier and the vessels lying thereat, the steamship Favorita was seen coming up the river, within such distance from the Brooklyn side as to suggest danger of collision. The pilot of the Manhassett, believing that he could not

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

[2] [Reversing Case No. 4,693. Decree of the circuit court affirmed in 18 Wall. (85 U. S.) 598.]

escape by going ahead, instantly rang to stop and then to back, and blew two whistles, to indicate to the Favorita his wish that she should sheer to the left, while he endeavored, by a pressing signal to his engineer to "back her strong," to draw the Manhassett again into her slip. The signal, if heard, was not regarded and was not responded to; and the Favorita was, (if, after she was seen from the Manhassett, her course was at all changed,) sheered more to the right. A collision ensued. The Manhassett was struck just forward of her port wheel-house, and was greatly damaged. For this injury the libellants, her owners, brought this suit, and, by the decree of the district court,—The Favorita [Case No. 4,693],—both vessels were adjudged in fault, the Favorita in passing up the river on the right side, so near the Brooklyn shore, across the mouth of the libellants' and other ferry slips, and the Manhassett in not keeping her course, instead of stopping and backing, as she did.

There is some conflict of testimony on the question whether the Manhassett could, by continuing to advance, have cleared the steamship. The result of her advancing instead of stopping is, upon all the evidence, at least, doubtful. The pilot was acting in good faith, in a situation of great peril, and, an opinion formed after the event, which should pronounce his judgment erroneous, ought not to be decisive of fault on his part, casting upon the libellants the loss. It is a familiar and well settled rule, that, when a vessel is placed in imminent jeopardy by the fault of another, the discretion which her mariners are called upon instantly, and in the very jaws of the peril, to exercise, to effect deliverance, is not to be closely criticised, nor their conduct to be condemned, unless very plainly negligent or unskilful. Sudden danger and unavoidable alarm, in a degree, disqualify for the exercise of that calm weighing of chances, and a deliberate choice of the best possible mode of escape, which may, in other circumstances, be required; and if, therefore, I should conclude, that, had the Manhassett continued to advance into the river, she would have cleared the Favorita, (which I greatly doubt,) that would not be decisive. I think the case is clearly within the rule I have stated. The Favorita, coming at a speed of from eight to ten miles an hour, was almost upon her, before it was possible for the Manhassett to discover her approach. Advancing at from 600 to 800 feet in a minute, and hardly that distance removed when seen by the pilot, there was no time for deliberation, and, in my judgment, upon the whole case, no fault can be imputed to him, in what he did.

The whole fault was on the part of the Favorita, in putting the Manhassett in such peril. On that point, I deem it wholly unnecessary to rest the case upon any statute of the state of New York (Act April 12, 1848, Laws 1848, c. 321), or to affirm or deny the validity of that statute, in application to a case like the present. Nor do I hold here that ferry boats have any exclusive or prior right to which other vessels must yield. But, the exigencies of business, and the necessities of the public, and the resulting condition of a great thoroughfare like the East river, are to be recognized and respected by all who navigate its waters. The Favorita, or those in her management, knew or were bound to know this, and it ought to be accounted a gross fault to pass along the mouths of the numerous ferry-slips, in such proximity thereto as in the present case, when going at a speed at which all the efforts made to stop her, when danger of collision appeared, were ineffectual. The reasons upon which the statute requiring her to keep as near the middle of the river as possible is founded, are reasons of ordinary prudence and obviously tending to safety of navigation, whether the statute is or is not of binding force, as a statute.

Had the Favorita kept suitably distant from the shore, her speed was, no doubt, unobjectionable, and it is, therefore, her path, and not her speed, which condemns her; and, if any circumstances of convenience, whether the avoidance of other vessels, or the like, invited her to run near to the piers, she was bound to conform to the exigencies of that situation, and make her advance such as not to imperil other vessels pursuing their ordinary, accustomed, well known business, with which those in the management of the Favorita must be taken to have been familiar. This view of the fault of the Favorita is, I think, intensified by the fact, not before mentioned, that, when the Manhassett began to move out of her slip, when the Favorita could not be seen from the Manhassett, the smoke stack of the latter could be seen, and was seen, from the Favorita, moving out. There was then time for the Favorita to slow, stop, go out towards the centre of the river, or do whatever was requisite to avoid her, without involving her in the condition of danger from which she made her ineffectual endeavor to escape. I am constrained, by the convictions produced by the testimony, to hold that the consequences of this collision should be wholly borne by the Favorita.

In relation to the appellants' claim to be allowed a larger sum as damages, by reason of a depreciation in the value of the ferry boat, notwithstanding such repairs as were made, there ought to be no misapprehension of the rule governing this court. It aims at making the aggrieved party good for his loss, not by giving heed to speculative, fanciful or capricious estimates, but by clear and safe tests, which involve no danger of injustice to the party who is liable. The owner of the injured vessel may recover the cost of repairing her. If the cost of such repairs can be clearly and reliably shown, he may have such recovery, whether the repairs have

been actually made or not. He may repair his vessel fully, so that she shall be actually as good as she was before the injury, and be indemnified by his recovery. If his vessel be wholly lost, or so injured that she cannot be repaired except at a cost greater than her value, he may recover her value; and there may, possibly, be a case in which complete repairs cannot be made, in which intrinsic and inevitable diminution of value could be estimated safely and allowed. But that alleged depreciation in the market, which is said to result from the mere fact that a vessel has once been injured and repaired, depending upon prejudice or apprehension, when, in truth, the intrinsic value of the vessel is made good, is indefinite, uncertain and variable. The estimate thereof will depend upon the fears or caprices of proposed purchasers, and will fluctuate according to the fancy or imagination of witnesses.

In the present case, one thousand dollars was allowed for damages not fully repaired. The proof shows that it would cost at least that sum to make the repairs complete. This was properly allowed. There is testimony that the depreciation was greater, and that the vessel was not worth so much by two thousand dollars, and the libellants insist that two thousand dollars instead of one should have been allowed; but I think it clear, upon the whole testimony of the experienced ship builder by whom the estimate of two thousand dollars was made, that he has, in this, taken into view the effect upon the market value of the ferry boat, without confining himself to what it would cost to make her intrinsically as good as she was before. The allowance made must stand.

In regard to the allowance for the loss of the use of the ferry boat while undergoing repairs, I have in a former case (The Cayuga [Case No. 2,537]), expressed myself fully, to the effect that it is proper; and the circumstance that the libellants had a "spare boat," with which to perform her accustomed service, does not deprive them of the fair value of such use. To hold otherwise is, in effect, to hold that, when the defendants, in order that their ferry may be run without interruption, and, as they are doubtless bound to run it, that the public may be accommodated, provide, at large expense, more boats than are ordinarily required, this enures to the benefit of a tort-feasor, and he, on an estimate of damages, may claim, in effect, to be allowed the use of such surplus boats. They are provided, in part, with a view to just such interruptions, and with a knowledge that, in case of a wrongful injury to one boat, the libellants will legally obtain some compensation, at least, by way of indemnity for their expenditure.

The libellants must have a decree for the whole amount of the damages ascertained in the district court, with their costs.

[NOTE. On appeal of the claimants of the steamship Favorita, the decree of the circuit court was affirmed, Mr. Justice Davis delivering the opinion of the supreme court, in which it was held that "if the Favorita had been where good navigation required her to be, or had she slackened her speed so as to be able to stop as soon as she discovered the Manhasset, the danger would not have existed, nor the accident happened. She is, therefore, in our opinion, chargeable with all the consequences that flow from this collision." The Favorita, 18 Wall. (85 U. S.) 598.]

Case No. 4,696.

The FAVORITE.

[1 Biss. 525.] [1]

District Court, D. Wisconsin. Sept. Term, 1866.

LIBEL—WHEN TOO LATE—RELEASE UNDER BOND—LIEN NOT INDEFEASIBLE—DELAY.

1. A libel for loss of goods filed two years and ten months after the loss, and after a bona fide assignee of the shipper's bill of lading had seized the boat, cannot be maintained.

[Cited in The Hercules, Case No. 6,400; The Artisan, Id. 567; Southard v. Brady, 36 Fed. 561.]

2. The fact that the boat had been released on bond in the prior suit does not alter the case,—the sureties have a right to look to the boat for their indemnity, and the power of the court over it still continues.

3. Admiralty or maritime contracts do not create an indefeasible lien on a vessel. A lien created by the shipment and loss of goods vests no absolute, indefeasible interest in the ship or vessel.

4. Courts of admiralty are chancery courts for the seas, and dispose of marine demands against vessels upon principles of equity.

5. Outstanding claims should not be enforced to the embarrassment of commerce, and the prejudice of other creditors and subsequent bona fide purchasers.

6. Charges in rem must be enforced with reasonable diligence, and delay amounts to a waiver in favor of other creditors.

In admiralty. This was a libel by Emery D. Chapin and Noah G. Nash against the steamboat Favorite, to recover the value of 420 sacks of wheat shipped by this steamer, but lost in a storm.

E. Mariner, for libellants.

J. W. Cary, for respondent.

MILLER, District Judge. Prior to the 23d of October, 1862, libellants were partners, doing business in Milwaukee. D. R. Reynolds had been engaged in business as a dealer in grain, buying in St. Paul, and consigning and shipping to libellants at Milwaukee, transmitting bills of lading, and drawing on them. Being the owner of four hundred and twenty sacks of wheat, of the value of one thousand and seventy-five dollars, on the aforesaid day, at St. Paul, in the state of Minnesota, they made a contract with the captain of the steamboat Favorite, to carry on board from that port to La Crosse, on the Mississippi river, the said bags of wheat, and there to deliver

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

them to an agent of the La Crosse and Milwaukee Railroad Company, to be forwarded to libellants in Milwaukee. The wheat was delivered to the captain of the boat, who gave to the shipper bills of lading. Reynolds transmitted one of the bills to libellants, and drew on them for one thousand dollars, which they paid.

The wheat was not put on board the steamer, but on a barge; and the steamer having the barge in tow, encountered rough weather on Lake Pepin, which caused the barge to sink. The loss was a total loss; and it is alleged that the boat is liable, as the carrier did not, in the bill of lading, reserve the right to lighter, or convey on barges. Subsequent shipments by Reynolds to libellants reduced the balance against him to about eight hundred and seventy-five dollars on the first of November, 1862. The loss occurred on the 27th day of October, of that year, and this libel was brought August 18th, 1865.

It is pleaded in the answer, that the said D. R. Reynolds, in the month of December, 1862, for a valuable consideration, assigned and transferred all his interest in the wheat, and all his claim of damages for its loss, to J. S. Reynolds, who, in April, 1863, commenced a suit by attachment in his own name, against the steamboat Favorite, in a court of the state of Minnesota, under the laws of that state, and that said cause is pending. The record of that suit shows that the boat had been discharged upon bail, according to the state law.

It is unnecessary to enter upon the subject of libellants' right to bring this libel, as consignees of the wheat, until that matter of the answer is disposed of. This libel is brought upon the bill of lading forwarded to libellants. The attachment suit is founded on the bill retained by the shipper.

The lien created by the shipment and loss of goods, is not in any manner a lien of record, or by possession. Admiralty or marine contracts do not create an indefeasible lien on the ship. Such lien vests no absolute, indefeasible interest in the ship or vessel. There is no statute of limitations in regard to such contracts, nor any fixed time for liens to expire. Demands against boats or vessels should not be delayed, as they may become inequitable. The preferred lien of seamen is not to be delayed after the termination of the voyage on the high seas, unless proceedings against the vessel have been interrupted by her sudden departure, or by some fraud or device. Courts of admiralty are chancery courts for the seas, and dispose of marine demands against vessels upon principles of equity. And it is considered inequitable to enforce outstanding claims, to the embarrassment of commerce, and to the prejudice of other creditors, or subsequent bona fide purchasers of vessels. Such claims or demands are charges in rem, having priority to contracts on shore, and are to be seasonably enforced, or else great fraud may be worked on the community. See Fland. Shipp. pp. 340, 341, and note. Marine contracts become stale and void by omission to enforce them within a reasonable time. Delay amounts to a waiver in favor of other creditors. A claim arising upon a contract of affreightment is not a preferred lien in admiralty. It is secondary to seamen's wages, or bottomry bonds; hence the greater necessity for prompt proceedings in rem. The holder of a bottomry bond, having suffered the ship to make several voyages, without asserting his lien, executions being levied upon the ship by other creditors, loses his lien as against those executions, which were served prior to the monition issued upon the libel brought to enforce the collection of the bond. Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328.

Libellants delayed proceedings upon their alleged claim, from October, 1862, to August, 1865,—two years and ten months. There should be no condemnation of the boat, under the circumstances, on this libel, after this long delay—and subsequent shipments between the parties reducing the claim of libellants. This libel is subsequent to the attachment suit, and is not entitled to be preferred on the principle that libellants became first the assignees of the bill of lading upon which they made advances.

It is contended, that the release of the bond from the attachment, by the sheriff upon bail, according to the law of the state of Minnesota, should open the way for the service of the monition in this case. Whether the boat was discharged from all further arrest on the part of plaintiff in the case, or of the sureties to the sheriff's bond, is not to be here determined. Those sureties have a right to look to the boat for their indemnity, and probably they may hold some written security or pledge to that effect.

When the property is delivered on bond, it is too much to contend, that the rights of the court over it can be increased or diminished by that circumstance. Every person so bailing the property is considered as holding it subject to all legal dispositions of the court. Rex v. Holland, 4 Term R. 457; The Harmony [Case No. 6,081]; Newell v. Norton, 3 Wall. [70 U. S.] 257–266.

Suffice it, that libellants having delayed proceedings in rem for two years and ten months, and until a bona fide assignee of the shipper's bill of lading had seized the boat in a lawful proceeding, this libel must be dismissed.

That courts of admiralty, follow the principles of a court of equity, see The Sarah Ann [Case No. 12,342]; Brown v. Lull [Id. 2,018]. As to delay in bringing libel on claim, consult 2 Pars. Shipp. & Adm. 361; 3 Kent, Comm. 196.

Case No. 4,697.

The FAVORITE.

[2 Biss. 502.][1]

District Court, E. D. Wisconsin. April, 1871.

EXCEPTION OF DANGERS OF THE RIVER.

The exception in a bill of lading of unavoidable dangers of the river, relieves the carrier from liability for loss of the contents of a barge broken into by a sunken log or stump, concealed from view and not even marked by a ripple in the water, the steamboat and barge in tow pursuing the usual and proper course, no obstruction at that point being known to river pilots, and there being no proof of negligence or unskillfulness on the part of the master or crew, nor of any unseaworthiness of the steamboat or barge.

[Cited in Hostetter v. Gray, 11 Fed. 188; Hostetter v. Park, 137 U. S. 40, 11 Sup. Ct. 4.]

In admiralty. This was a libel by Joseph Reynolds and Jerome G. Swart, against the steamer Favorite, for the value of 6,661 bushels of wheat shipped by them at Minneiska, Minn., on a barge in tow of the Favorite, to be delivered at La Crosse, Wis. In the bill of lading the exception was of "unavoidable dangers of the river and fire only."

N. J. Emmons, for libellants.

J. W. Cary, for respondent.

MILLER, District Judge. The libellants charge that, through the unskillfulness, carelessness and negligence of the master and crew of the steamboat, the wheat was wetted and lost.

The answer sets forth, that the barge, in tow of the steamboat, at a point in the Mississippi river known as the crossing to the head of Argo island, and while proceeding down the river, struck on an obstruction in the river, supposed to be a sunken log or a trunk of a tree, hidden from view and below the surface of the water; that thereby the barge was injured and caused to leak, and immediately filled with water and sunk in about three feet ten inches of water, whereby the wheat in the barge became wetted and damaged. And the charge of unskillfulness and negligence is denied.

There is no proof of negligence or unskillfulness on the part of the officers and crew. Nor is there any complaint of want of care of the cargo after the accident, or of unseaworthiness in any respect of the steamboat or barge.

The accident happened about 12 o'clock on a clear day in the month of October. The steamboat, with two barges in tow laden with wheat, was crossing the Mississippi river, quartering, from the Wisconsin to the Minnesota shore, above the head of Argo island, at the rate of about six or seven miles an hour. The larboard barge struck a hidden obstruction in from three feet six inches to four feet of water. The fleet was pursuing the usual course of steamboats at that time, in the middle of the channel, about midway between the two shores. The obstruction did not make any break or visible ripple in the water. The collision with the obstruction, supposed to be a log or a stump, rounded to the boat and barges. And upon having straightened up and headed down stream, slivers and chips came to the surface from the stern of the larboard barge. In the afternoon, while the men were at work on the barge endeavoring to secure from damage as much of the wheat as possible, the two pilots, in a light skiff, went above the place of the accident and dropped down with the current, sounding the bottom with a pole as they floated down. They discovered something solid, supposed to be a stump with roots at one end, down stream. The pilot is of the opinion that the stump could not have been there very long, as it had not been known to pilots—and he had run over that ground—and other boats, drawing more water than the Favorite or barges, had been daily passing there, which might have struck the stump, if it had been there any great length of time.

The exceptions in the bill of lading are "the unavoidable dangers of the river and fire." The answer states that "the barge struck an obstruction in the river, supposed to be a sunken log or trunk of a tree, hidden from view and below the surface of the river."

There is no essential difference between an exception in a bill of lading, of unavoidable dangers of the river, and of dangers of the river; for the carrier must use all reasonable caution in the navigation of his boat or vessel to avoid accidents. These must include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence, and which no ordinary skill could anticipate or evade. Those words exonerate the carrier for liability for a loss arising from a collision, in the absence of fault on the part of the master and crew, and from hidden and unknown obstructions in a river, such as logs or stumps.

On full examination and consideration of the pleadings and proofs, I conclude that the claimant has brought itself within the exception on the bill of lading of "unavoidable dangers of the river," and that the libel should be dismissed.

Striking on a snag or rock not known to the master, nor generally known, is prima facie an inevitable accident. Williams v. Grant, 1 Conn. 487; Pennewill v. Cullen, 5 Har. [Del.] 238.

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

Case No. 4,698.

The FAVORITE.

[2 Flip. 86;[1] 25 Int. Rev. Rec. 202.]

District Court, E. D. Michigan. Oct. 15, 1877.

PRACTICE IN ADMIRALTY—ACCEPTANCE OF STIPULATION BY MISTAKE—RE-ARREST OF VESSEL.

The court has power to order the re-arrest of a vessel if the stipulation to answer a judgment has been accepted by mistake or fraud and the sureties were never bound.

[Cited in The Haytian Republic, 154 U. S. 126, 14 Sup. Ct. 994.]

Motion for re-arrest of vessel, on the ground that she had been improvidently discharged from custody. It appeared that a stipulation had been accepted—the only surety upon which was a married woman who had no interest in the vessel.

F. H. Canfield, for libellant.

H. C. Wisner, for respondent.

BROWN, District Judge. That the surety in this case, being a married woman and having no interest in the vessel, is not bound by her stipulation, is too clear for argument, and in fact is conceded by counsel. De Vries v. Conklin, 22 Mich. 255; West v. Laraway, 28 Mich. 468.

It is claimed, however, that the vessel having once been released from custody is forever discharged of the lien, and the court has no power to order her re-arrest. The Union [Case No. 14,346]; The White Squall [Id. 17,570]; The Kalamazoo, 9 Eng. Law & Eq. 587; The Old Concord [Case No. 10,482]. In none of these cases, however, was there any mistake or fraud at the time the stipulation was signed. In The Union and The Kalamazoo the amount of damages claimed in the libel was increased. In The White Squall the vessel was returned to custody by the consent of the parties, against the protest of a person having an interest in the vessel; and in The Old Concord the sureties had become insolvent. Conceding that the court has no power to order the re-arrest of a vessel once fairly discharged upon a binding stipulation or for any cause not existing at the time the stipulation was accepted, I am clearly of the opinion that this power exists, whenever through mistake or fraud a stipulation has been accepted which was not binding upon the parties signing it.

An order will be made for the re-arrest of the vessel.

Case No. 4,699.

The FAVORITE.

[3 Sawy. 405;[2] 7 Chi. Leg. News, 395; 23 Pittsb. Leg. J. 18; 7 Leg. Gaz. 289.]

District Court, D. Oregon. Aug. 12, 1875.

PROCEEDS OF VESSEL — EFFECT OF MORTGAGE ON VESSEL — PRIORITY OF LIEN — LIEN FOR SUPPLIES.

1. A person having an agreement for a mortgage upon a vessel has no such interest in the thing as will entitle him to claim the proceeds of her sale in the registry of the court.

2. Section 4192 of the Revised Statutes does not declare the effect of a mortgage absolutely or relatively, with reference to any other lien thereon.

[Cited in The Canada, 7 Fed. 734.]

3. The lien of a mortgage given for labor in the construction of a vessel is not preferred to the lien of a material-man prior in date to the mortgage.

4. The lien of a claim for supplies furnished a vessel in the course of navigation is preferred to that of a material-man or mortgagee.

[Cited in The Albany, Case No. 131; The General Burnside, 3 Fed. 232; The Canada, 7 Fed. 735; The Guiding Star, 9 Fed. 524.]

Joseph N. Dolph and Joseph Simon, for the Oregon Iron Works.

W. W. Upton and Charles Upton, for E. Spedden and others.

H. Y. Thompson and George Durham, for Smith Bros. & Co.

A. C. Gibbs, for Northrup & Thompson.

Benton Killen, for Bulger and others.

DEADY, District Judge. In pursuance of a decree of this court made in the suit of Thomas Merril et al. for wages, against the steam-tug Favorite, said tug was, on May 8, 1875, sold for the sum of $2,900. After satisfying the decree, there remained in the registry of the court $2,075.91 of the proceeds of the sale. Pending the suit, persons intervening for their interests libelled the vessel for various sums.

Among others, Eugene Spedden et al. filed a libel for the sum of $5,297.60, the value of certain engines, machinery and materials, which, it was alleged, had been furnished by them to J. C. Fox, the owner of said vessel, for the purpose of building and equipping her.

Upon exceptions to this libel it was dismissed, because it appeared therefrom that the intervenors had taken a conveyance of three-fourths of the vessel in satisfaction of the claim, or that they had waived their lien, by an agreement giving Fox until May 1, 1876, to pay for the materials—more than a year from the time of their delivery.

The other intervenors were twelve in number, and their claims amounted in the aggregate to $1,707. Four were for supplies furnished the tug while engaged in navigating the waters of this state, but elsewhere than at this port, where she was enrolled and her owner resided; while the remaining eight were for labor and materials furnished at this port, in the latter part of the year 1874, for the purpose of building and equipping the vessel.

On May 14, the Oregon Iron Works, a corporation existing under the laws of Oregon, filed a petition under the admiralty rule 43, for the payment to it of the sum of $1,443.75 out of said proceeds, alleging that it held a mortgage, duly recorded in the custom house at Astoria, on November 19, 1873, upon the tug Sedalia, which was destroyed

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

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

by fire in June, 1874, for the sum of $1,500, the price of the boiler and machinery therein; and that afterwards the owners of said tug Sedalia, Eugene Spedden et al., aforesaid, sold said boiler and machinery to said Fox, who placed the same in the tug Favorite, with the knowledge and consent of the petitioner, said Fox at the same time agreeing in writing with petitioner that as soon as said boiler and machinery were placed in the Favorite, he would give it a mortgage on the vessel to secure the payment of the sum due from Eugene Spedden et al., on account of said boiler and machinery, to which agreement said Spedden et al. then and there assented; and that said Fox failed to execute such mortgage to petitioner, but did, on November 9, 1874, give Thomas A. Bulger a mortgage upon said vessel, to secure the payment of a note made by said Fox to said Bulger on October 31, 1874, for the sum of $1,317, with interest at the rate of one per centum per month, which mortgage was recorded in the custom house at Portland, on November 10, 1874; and that said Bulger "had actual and legal notice" of petitioner's mortgage upon the Sedalia and "full knowledge" of the agreement aforesaid. The petition prays that the sum due on the note of said Spedden et al. to petitioner for said boiler and machinery, namely, $1,443.75, be first paid to petitioner out of said proceeds.

On July 13, Thomas J. Bulger filed a petition under said admiralty rule for the payment to him out of said proceeds of the sum due on the note and mortgage aforesaid, for $1,317; alleging that said note was given to petitioner by said Fox on account of certain debts then due "petitioner and others for labor as shipwrights in the construction of the steam-tug Favorite." Exceptions were filed to these petitions and libels, and the whole were heard and submitted together.

It is too plain for argument that the iron works acquired no interest in the Favorite, and therefore is not entitled to any portion of these proceeds, by virtue of the agreement for a mortgage with Fox. It is not enough that it had an agreement for an interest; it must have had a definite legal interest in the thing at the time of the sale. Neither had it the lien of a material-man. The boiler and machinery were furnished to the Favorite not by the iron works, but by Spedden et al., who were the owners of the same. As has been stated, so far as they are concerned, the claim for the materials has been satisfied by a conveyance of three-fourths of the vessel, or the lien discharged by extending the credit to Fox beyond the year during which the local law gave them a lien. The mortgage of the iron works was upon the Sedalia, and if upon her destruction it still had a lien upon her boiler and machinery into whomsoevers' hands they might come, it certainly waived it when it consented that they might be sold to Fox by the mortgagors, to be used in the construction of the Favorite. The fact that the corporation made this arrangement or consented to this transaction, relying upon the agreement with Fox for a mortgage upon the Favorite, does not affect the question. If Fox has failed to keep his agreement in this respect, that is a matter which cannot be remedied here. This court cannot enforce specific performance of this contract, but must distribute the proceeds among those who appear to have had an interest in the vessel, without reference to the unperformed agreements between them or any of them and third persons.

But suppose Fox had complied with his agreement, the result would be the same. The claims of the laborers and material-men, including that of Bulger's, will more than absorb the proceeds. The mortgage of the iron works, if it had one, being not to secure a debt for materials furnished by it to the Favorite, but a debt due it from Spedden et al., would be postponed to these claims.

In this view of the matter, it is unnecessary to consider the intensified allegation in the corporation's petition—that Bulger had "full knowledge" of its agreement with Fox. Certainly the agreement for a mortgage can have no greater effect than the mortgage itself would. Besides, Bulger being a creditor of the owner for labor performed upon the vessel, and having by statute a lien upon her for the debt, I do not see why he had not a perfect right to take a mortgage upon the vessel for the same, even if he had actual notice of the agreement with the corporation for one. No injury would be thereby done to the iron works, because Bulger's claim, both on the grounds of date and cause, would be preferred to it, without the aid of a mortgage. Nor is it admitted, apart from any question of fraudulent preference, but that Bulger might have taken a mortgage upon this vessel to secure any debt due him from the owner, although he knew at the time that the iron works had an agreement with such owner for a mortgage to secure a debt due it.

Bulger claims that he is entitled to be paid before the intervenors, upon the ground that the lien of a mortgage, duly recorded in the custom house under section 4192 of the Revised Statutes, which provides: "No bill of sale, mortgage, hypothecation or conveyance of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section,"—is to be preferred to that of

a material-man, particularly one whose lien arises under the laws of the state.

In support of this position counsel for Bulger cites The Grace Greenwood [Case No. 5,652]. In that case it was held that the liens of the material-men were not available under the state law (Illinois); and if they were, that being subsequent in point of time to the mortgage, it was to be preferred to them. See The Skylark [Id. 12,928]. But in this case the claims of the material-men are prior in point of time to the mortgage, with the exception of a few items of small value in one of the accounts.

What effect is to be given to a mortgage under this section as against liens arising under the maritime or state law, for materials or supplies furnished in the construction or navigation of the vessel, has not been considered by the supreme court; and the rulings of the lower courts have not been uniform upon the subject

In Aldrich v. Aetna Ins. Co., 8 Wall. [75 U. S.] 496, the court said that in the Case of White's Bank, 7 Wall. [74 U. S.] 646, "It was held that the recording of the first mortgage in the collector's office, under the act of congress, protected the interest of the mortgagee against subsequent purchasers or mortgagees by its own force irrespective of any state law on the subject." There is nothing in the language of the section that indicates an intention to enlarge the operation of a mortgage on a vessel, or place the lien of it in any better condition, with reference to other liens, than it was before. The act from which the section was taken July 29, 1850 [9 Stat. 440], provides for the registration of conveyances and mortgages of vessels of the United States at the port of enrollment, so that all persons dealing in such property may conveniently ascertain the ownership of it, and then, as a sanction to this provision and as a means of enforcing obedience to it, section 4192 declares that any conveyance or mortgage, not so recorded, shall be invalid as to third persons not having actual notice thereof.

So far nothing is said about the effect of a mortgage when registered, and but for the proviso excepting "the lien by bottomry" from the operation of the section, it is not apparent how it could ever be construed as preferring or deferring any lien to another. But on account of this proviso it seems to have been inferred that as "the lien by bottomry" is the only one expressly excepted from the operation of the section, therefore all others are within its purview, and thereby made subordinate to that of a mortgage. But this conclusion assumes that the section without the proviso would give a mortgage a preference over a "lien by bottomry." Yet there is not a word in the section on the subject of liens, or that in any way prescribes the effect of a mortgage as against any other lien under any circumstances. The section simply declares that a mortgage upon a vessel of the United States shall not be valid unless registered as therein prescribed; but as to the effect of a valid mortgage, absolutely or relatively, I think it must be held to leave it where it found it. In short, the proviso suggests a scope to the section which its language cannot possibly support. It is therefore superfluous and unnecessary, and, as has often happened in legislation, was probably inserted out of abundance of caution or dearth of knowledge.

My impression is that Bulger gained no right as against the prior liens by taking and recording his mortgage under this section.

But, on the other hand, the material-men claim that under the law of the state (Code Or. p. 657, § 18), their claims are preferred to those of a mere mortgagee. It is not necessary to consider the objection, that it is not in the power of the state to prefer the lien of a material-man to that of a mortgagee, though I have not heard any good reason why it cannot—at least in the case of liens not given by the maritime law, and until congress prescribes a different rule upon the subject. Bulger is not a mere mortgagee. His claim is for labor bestowed upon the vessel in its construction by himself and others whose interests he either represents or owns, it is immaterial which. By taking a mortgage he did not change the nature of his claim, whatever effect it may have had upon the security. The cause and date of his lien place it among the most favored by the state law, and he is entitled to share equally in the distribution with the eight intervenors whose claims are for materials furnished for the construction of the Favorite.

But the other four intervenors, namely, McLean, Gray, Corno, and the Oregon Trading Co., whose claims in the aggregate amount to $284.96, are entitled to be first paid out of the proceeds. These claims are for supplies furnished to the vessel to enable her to be navigated, subsequent to the date of the mortgage. True, they were furnished within the state, but they were not furnished at the home port, in my judgment. Under the ruling of the Lottawana, lately decided by the supreme court (21 Wall. [88 U. S.] 558), what constitutes a home port is yet an open question. But I think upon reason and convenience, the home port ought to be the one where the vessel is enrolled. Away from that place, whether in or out of the state in which her owner resides, she is supposed to be in itinere, and therefore relying upon her credit for the purchase of the necessary supplies to complete her voyage.

Assuming, then, that these supplies were not furnished at the home port, the debts due therefor are such as the general admiralty law gives a lien for. This lien is preferred to one given by the local law in favor

of a material-man. The Grapeshot [Case No. 5,702]. And as against a prior mortgagee, such liens should be preferred, upon the obvious consideration that the mortgagee of a vessel which is left in the possession of the mortgagor, impliedly authorizes the latter to pledge her for supplies obtained upon her credit and necessary to her navigation.

The fund will be distributed as follows: 1. The four claims for supplies will each be paid in full, with legal interest from the date of the filing of the respective libels therefor. 2. The remainder of the proceeds will be divided pro rata between the eight claims for materials and the claim of Bulger, legal interest being allowed on the claims of the material-men from the respective dates of their intervention and upon the claim of Bulger, from October 31, 1874, the date of the note therefor, at the rate therein specified.

The matter will be referred to the clerk to ascertain the sum payable to each of the intervenors according to the rule herein announced, and upon the coming in of his report, a final decree will be entered accordingly.

Case No. 4,700.

The FAVORITE.

[5 Sawy. 226.]

District Court, D. California. Aug. 13, 1878.

COLLISION—TOW AND VESSEL AT WHARF—LIABILITY OF TUG.

[A tug towing with a hawser 50 or 60 fathoms long is liable for damage caused by the tow sheering and striking a vessel moored at the wharf, when it appears that, knowing the tow to be steering wildly and sheering from side to side, she persisted in following a course probably less than half a hawser's length from the wharf, although there was ample sea room farther out.]

In admiralty.

McAllisters & Bergin, for libellants.
Milton Andros, for claimants.

HOFFMAN, District Judge. On the seventh of August, 1876, as the steam tug Favorite was engaged in towing the schooner Corsair from the old slip at Oakland wharf to this city, the schooner came into collision with a vessel moored on the northerly side of the wharf not far from its westerly end. It is plain from the proofs that the accident was caused by the negligence or unskillfulness of the persons in charge of the tug, or of those in charge of the schooner, or by the fault of both. The service was performed in the middle of the day in clear weather, and under the ordinary conditions of wind and tide. The general course of the vessels, in order to reach their destination, was parallel or nearly parallel to the wharf, but no obstacle whatever existed to their laying this course at any distance to the northward of the wharf necessary to render a collision with it or with vessels moored along side of it, impossible. The occurrence of the collision is therefore proof of inexcusable mismanagement, and the fault must, prima facie, be attributed to the tug, as she furnished the motion power for both vessels, and the movements of the tow were controlled by her. The duty of the latter was merely to keep in the wake of the tug, and it appears to be the understanding of persons in the business that the tow is under the orders of the tug, or as one of the witnesses expressed himself, that the property is in charge of the master of the tug.

It appears that when the vessels were approaching the end of the wharf, and at a distance from it, probably not far from one hundred feet, the schooner sheered to port, and before the sheer could be checked or "broken," the collision occurred. On the part of the tug it is contended that the tow was in fault in not seasonably putting her helm to port, and thus breaking the sheer. It is even suggested that the helm of the tow was to starboard. But this suggestion or conjecture is positively repelled by the mate and second mate of the schooner, the former of whom was stationed on her forecastle, and the latter at the wheel. They both testify that when the schooner sheered, her helm was put promptly to port, and a signal was made to the tug to do the like. I see no reason for discrediting these witnesses and it is a familiar rule that the testimony of witnesses as to what they did, or saw occur, on board their own vessel is entitled to more weight than the evidence of persons of equal credibility as to what they saw from another vessel. Moreover, the claimant's witnesses do not pretend to have observed the position of the schooner's helm. They merely suppose or "conclude" it must have been to starboard, for the reason that otherwise the accident would not have occurred. The master of the tug admits that the hawser by which he was towing was from fifty to sixty fathoms in length. He also states that at the time of the collision the tug was about one hundred and fifty feet from the English vessel against which the schooner struck. Captain Siner, a witness for the claimants, and a guest on board the tug, states that at the time the order to port the helm of the tug was given, and which was but a few moments before the collision, the tug was about one hundred feet from the inner vessel at the wharf. When the tug ported her helm, her captain gave the same order to the tow, but Captain Siner states that "It would not have made any difference if the schooner had put her helm hard a port when the captain sung out." Captain Ross, the master of the tug, is very emphatic in his description of the steering of the schooner. He states that she sheered first to starboard

and then to port, sometimes at an angle of thirty degrees to forty-five degrees. That she "steered widely," and was "sheering to starboard and port all the way down." He considered it "rough steering," and that he noticed it "shortly after he started." He was at first inclined to attribute this to the schooner's taking bottom, when on sounding the next day he found sixteen feet of water, he "concluded" that the schooner's helm must have been to starboard instead of port. We have seen that this conclusion is disproved by the evidence of the schooner's officers.

The foregoing summary of the facts of the case indicates unmistakably the solution of the question to be decided. The tug with a tow line fifty to sixty fathoms in length pursues a course not more, and probably considerably less, than half a hawser's length from the line of the wharf. This she does without the slightest necessity and with ample sea room to the northward to permit her to insure beyond peradventure the safety of the vessel in her charge. She persists in this course notwithstanding that she is apprised, that the tow is steering widely and sheering from side to side. She even omits to order the tow to port her helm until so late, that as Captain Siner says, obedience to the order "would have made no difference" in the results. The experts who have been examined differ somewhat as to proper length of hawser to be used in such a service as the one in question. But they very generally concur in the obvious and rational conclusion that if, under similar circumstances, they should find that the tow was steering badly they would haul off from the wharf to at least the length of the tow line, so as to render a collision with it impossible. In not having done so I consider the tug was clearly in fault.

FAVORITE, The (BRITISH CONSUL v.). See Case No. 1,896.

Case No. 4,701.

FAW v. DAVY.

[1 Cranch, C. C. 440.][1]

Circuit Court, District of Columbia. July Term, 1807.[2]

EVIDENCE—EXPLANATION OF WRITTEN SUBMISSION BY PAROL—ARBITRATION.

1. Parol evidence may be given to explain the expression "certain controversies and accounts" in a written submission.

2. An award made upon part only of the subjects submitted. will be set aside.

[See note at end of case.]

THE COURT heretofore [in April term, 1802 (Case No. 3,663)] had admitted parol evidence in this case to explain the expression "certain controversies and accounts," in the written submission, and now being satisfied, by the evidence, that certain flour accounts were intended to have been submitted, and that the arbitrators had not considered those accounts, but made an award upon only part of the subjects submitted, set aside the award and ordered an account to be taken by a master; the cause having been set for hearing by consent.

[NOTE. On appeal to the supreme court the decree of the circuit court was reversed, Mr. Chief Justice Marshall delivering the opinion. In reference to the objection that the arbitrators had only settled part of the subjects submitted, it was held that the defendant had not shown that he was injured by the omission, and it was unnecessary to decide whether, had he been injured, a court of equity could or could not have afforded relief. Davy v. Faw, 7 Cranch (11 U. S.) 171.]

FAW (DAVY v.). See Case No. 3,663.

Case No. 4,702.

FAW v. MARSTELLER.

[See Case No. 9,137.]

FAW (UNITED STATES v.). See Cases Nos. 15,077–15,079.

Case No. 4,703.

FAWCETT v. The NATCHEZ.

[3 Woods, 16.][1]

Circuit Court, D. Louisiana. Nov. Term, 1876.

SHIPPING—MISSISSIPPI RIVER NAVIGATION—RIGHT TO FOLLOW CHANNEL—CRAFT MOORED TO BANKS—SWELL OF PASSING STEAMER.

1. Steamers and other water-craft navigating the Mississippi river have the right to follow the usual channels.

2. It is incumbent on those who have rafts, barges or other craft moored to the banks, to foresee and provide against accidents liable to be caused by the swell of passing steamers.

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

The libel alleged that the libelant [Thomas Fawcett] was the owner of a barge loaded with 8,239 barrels of Pittsburgh coal, which was safely, securely and properly moored to the bank of the Mississippi river, at Willow Grove landing, in the upper part of the city of New Orleans; that the barge was well furnished with pumps and securely and properly braced from the bank, so as to prevent her being driven on shore by the swell raised by passing boats, and that she was manned with a competent and sufficient crew. That on the 8th of April, 1871, the steamer Natchez passed up the river and ran

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

[2] [Reversed in 7 Cranch (11 U. S.) 171.]

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

so near to said barge, that the swell she raised drove libelant's barge violently against the shore and against a sunken spar, which was forced through the side of the barge, making a large hole in her hull several feet below the water line, in consequence of which she sank in a few minutes. and with her cargo worth $4,144.88, was entirely lost to libelant, and for that sum he asked a decree. The answer alleged that when the Natchez passed the barge, she was in the usual channel for ascending steamers, where she had the right to be; that the coal barge was not properly and securely moored and fastened and properly braced from the bank, and that she was not moored at a safe and proper place, and that it was by reason of the careless and negligent manner in which the barge was moored and braced, and the improper place where she was moored, that she was driven upon the sunken spar and so broken as to sink, and that claimants were in no manner to blame for the injury and damage.

B. Egan, for libelant.

C. B. Singleton and R. H. Browne, for claimants.

WOODS, Circuit Judge. The evidence satisfies me that if due and usual diligence had been used in mooring the barge and bracing her from the bank, the accident which caused the loss of the barge could not have happened. It appears to be necessary, in order to keep barges moored at the bank from being violently driven on shore by the swell of passing boats, to brace them off from the bank with spars, and it is the invariable custom to do this.

It appears from the evidence of Charles Walker, one of libelant's witnesses, that before the Natchez passed up the river the coal-barge had, at the time of the passage of a small stern-wheel steamer, the Lessie Taylor, tripped one of her spars. and while the spar was in that condition the Natchez passed. The effect of the passing of the Natchez was to make a swell and swing the barge against the bank. This evidence is corroborated by the testimony of Charles Walker, also a witness for libelant.

Small stern-wheel steamers like the Taylor do not make sufficient commotion in the water to disturb the coal barges, if they are properly moored and braced. The bracing of the barge must have been defective or the spar would not have tripped and become useless by reason of the passing of the Taylor. Had the barge been skillfully and properly braced, her spars could not have been displaced, and the damage that was caused by the passing of the Natchez could not have occurred.

The Mississippi river is a public highway, open and free for the passage of all classes and sizes of water-craft. They have the right to follow the usual channels, and it is incumbent on those who have rafts, barges or other water-craft moored to the banks to foresee and provide against accidents liable to result from the swell of passing steamers. Williams v. Wilcox, 8 Adol. & E. 314; Morrison v. Thurman, 17 B. Mon. 249; Sherlock v. Bainbridge, 41 Ind. 35. The Natchez was in the usual channel for ascending steamers. The proximate cause of the injury and damage was the carelessness and unskillfulness of those in charge of the mooring and bracing of the barge. The steamer was where she had the right to be. She did not transcend her own rights or invade those of others, and she cannot be held responsible for the injury. Libel dismissed.

Case No. 4,704.

Ex parte FAXON.

In re LAURIE et al.

[1 Lowell 404;[1] 4 N. B. R. 32 (Quarto, 7).]

District Court, D. Massachusetts. 1869.

BANKRUPTCY—LIABILITY OF ASSIGNEE FOR RENT.

1. If the assignee of a bankrupt elects to take a term belonging to the bankrupt under a lease, he must take with the burden of the accruing rent, and not merely with the obligation to pay from the time he begins to occupy.

[Cited in Re Dunham, Case No. 4,145; Re Hufnagel, Id. 6,837; Re McKenna, 9 Fed. 34.]

[Cited in Com. v. Franklin Ins. Co., 115 Mass. 282.]

2. Where a petition in invitum was filed by the creditors of a firm January 8, 1869, and they were adjudged bankrupts March 26, 1869, and the assignees occupied their store and paid rent therefor, for two or three months from that date, without any express stipulation concerning the quarter's rent which came due April 1, 1869; *held*, the assignees were bound to pay that quarter's rent in full.

The bankrupts [Laurie, Blood & Hammond] hired a large and valuable shop of the petitioners, and paid the quarter's rent, which fell due January 1, 1869. On the eighth of that month a petition was filed against them in bankruptcy, but was not pressed to an early trial, and the adjudication took place March 26, 1869. The assignees occupied the store for two or three months, and paid rent from March 26, but no arrangement was made between them and the petitioners concerning the rent from January 8 to that day, and the petitioners now applied to have it paid in full by the assignees. The case was submitted on facts agreed.

E. Avery & G. M. Hobbs, for petitioners.

B. F. Brooks, for assignees.

LOWELL, District Judge. An assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a

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

term, as he finds most beneficial for the creditors, and may take a reasonable time to decide the question. If he takes the lease he makes himself liable, on behalf of the estate, for the rent, including at least that of the current quarter, and this he must consider in determining whether to adopt the lease. The petitioners would have done more wisely, perhaps, to insist on this at the time, but I see no ground for saying they have waived any of their rights. In theory of law, the assignees have been in possession ever since the petition was filed, and not only from the date of the adjudication, which is merely a finding that the petition is well founded. If the quarter-day had come round pending the petition, the bankrupt would have been authorized, if he found it necessary for the best interests of his creditors, to pay the rent in order to save an ejectment. I have more than once permitted this to be done. And the assignees, by the course they have taken, affirm this to be a case in which such a course was prudent and proper.

The only reported case which I have seen is very short, and gives no reasons or arguments, but the decision agrees with my opinion. There the assignees were required to pay rent from the date of the petition. In re Merrifield [Case No. 9,465]. I do not know that any question was raised in that case, to distinguish the date of the petition from that of the adjudication; but if an assignee is to pay only for his own occupancy, he must be charged from the date of the assignment. There is no argument which will make him liable from the adjudication that does not apply to the date of the petition, which is the true beginning of the proceedings, and the controlling date in all these matters. Petition granted.

Case No. 4,705.

FAXON et al. v. DYSON'S ADM'RS.

[1 Cranch, C. C. 441.][1]

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

EXECUTORS AND ADMINISTRATORS — JUDGMENT DE BONIS TESTATORIS.

A promise by an administrator to pay in consideration of assets, will support a judgment de bonis testatoris.

The declaration stated that, in consideration of assets, the defendants promised to pay as administrators, &c. General demurrer.

Mr. Youngs, for defendants, contended that the undertaking was personal, and ought not to be charged as made by them as administrators. The judgment will not bind the estate of the intestate. The judgment in this case must be of the defendants' own goods. No admission or promise of an administrator can bind the estate, so that judgment can go against the goods of the intestate.

E. J. Lee, for plaintiffs [Faxon & Co.], cited Atkins v. Hill, Cowp. 284, and Hawkins v. Saunders, 1 H. Bl. 102, 103, 112.

Demurrer overruled. Judgment for the plaintiffs, de bonis testatoris.

[NOTE. See Gilpin v. Crandell, Case No. 5,449.]

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

Case No. 4,706.

FAXON v. RUSSELL.

[See 154 U. S. 644, 14 Sup. Ct. 1201.]

Case No. 4,707.

FAXON v. RUSSELL.

[22 Int. Rev. Rec. 375.]

Circuit Court, D. Massachusetts. Sept. 6, 1876.

CUSTOMS DUTIES—MANUFACTURE OF RUBBER—REDUCTION PROVIDED FOR BY ACT OF JUNE 8, 1872.

1. Webbing made of india rubber, silk, and cotton is taxable as a manufacture of india rubber, silk, and other articles, by section 8, St. July 14, 1866 (12 Stat. 552), and not as webbing composed wholly or in part of india rubber, not otherwise provided for under section 13 of the same act.

2. An article is provided for in a revenue law, when it is aptly described as well as when it is named.

3. The act of June, 1872 (17 Stat. 232), which makes a reduction of 10 per cent. on all manufactures of india rubber, gutta percha, and straw, means articles composed wholly of those materials.

At law.

C. L. Woodbury and F. W. Hurd, for plaintiffs.

G. P. Sanger, Dist. Atty., and P. Cummings, Asst. Dist. Atty., for defendant.

LOWELL, District Judge. By the agreed facts signed and filed in the case it appears that the plaintiffs, in the autumn of 1873, made several importations from Liverpool into the port of Boston, of a certain cloth, variously styled in the invoices as "Union Gusset," "Union Webb," and "Union Elastic Webb." It was intended to be used for making the gores or gussets of congress boots, and was a manufacture of india rubber, silk and cotton, and was webbing. The collector assessed upon this merchandise a duty of fifty per cent. ad valorem, under section 8 of the act of July 14, 1862 (12 Stat. 552), as a manufacture of india rubber, silk, and other materials. The plaintiffs claimed: 1st. That it should be assessed under section 13 of the same act (12 Stat. 556), which imposes a duty of 30 per cent. on "braces, suspenders, webbing, or other fabrics composed wholly or in part of india rubber, not otherwise provided for;" and, 2d. That this tax should be reduced under section 2 of the act of June, 1872 (17 Stat. 232), which makes a reduction of 10 per cent. on "all manufactures of india rubber, gutta percha, or straw,

and on oil cloth of all descriptions." The collector insisted upon his construction of the statutes, and the higher duty was paid under protest, and this action is brought to recover the excess.

I understand it to be agreed that this article is described in both the sections referred to; that is to say, it is a manufacture of silk, india rubber, and other articles; and it is webbing; and further, that, on the one hand, there is webbing composed wholly or in part of india rubber which has no silk in its composition; and on the other, that there are manufactures of india rubber, silk, and other articles, which are not webbing. It would seem that there is no necessary repugnance between the two sections; because when it is admitted that section 8 describes this article, it is excepted out of section 13, as being otherwise provided for. But the plaintiffs contend that when an article is specially designated in the revenue laws, it is taken permanently out of any general description which might otherwise include it. Thus where almonds had been mentioned in several statutes and classed differently from fruits, an amendment which reduced the duty on all fruits, did not apply to almonds. Homer v. The Collector, 1 Wall. [68 U. S.] 490; and so where birds had been for a long time placed in a separate list from other animals, a duty imposed on horses, mules, cattle, sheep, hogs, and other live animals, was held not to include canary birds. Reiche v. Smythe, 13 Wall. [80 U. S.] 162. So, where sheep-skins with the wool on them, had been specially mentioned in several acts, and there separated from hides and skins, they were held not to be included in the general description of hides or skins in a new statute. De Forest v. Lawrence, 13 How. [54 U. S.] 274.

The doctrine of these cases is, that when articles have been specially dealt with and classified, apart from a larger class which might have included them, and a new statute changes the duty on the larger class and is silent as to the smaller, it is not to be considered as intending to change the duty on the latter. But here the very question is whether webbing is intended to be dealt with separately from manufactures of india rubber and silk; these two descriptions being found together for the first time in the act of 1862, and the 13th section having annexed to it the qualification, "not otherwise provided for." It is said that this phrase means not provided for among the enumerated articles. It is impossible to admit any such rule of interpretation. It is argued that the specific always overrides the general description. This is a sound rule. But the specification in this instance has annexed to it the qualification "not otherwise provided for," and this webbing, being a manufacture of india rubber, silk, and other materials, is otherwise provided for. To meet this last objection a quotation is given from the opinion of Nelson, J., in Morlot v. Lawrence [Case No. 9,815]: "The words 'not otherwise provided for,' mean not otherwise provided for among the enumerated articles." The plaintiffs make use of this sentence as if it expressed the opinion that an article, to be considered as provided for, must be named; whereas all the learned judge intends to say is that an article could not be called provided for merely because there was a residuary clause imposing a uniform duty on everything not before either taxed or exempted; or in other words, that an article was not provided for by being left unprovided for; a sound ruling, but not important in this case. It has never been held that an article may not be designated by an apt description as well as by name. The plaintiffs furnished me with a copy of the charge of Judge Wallace to a jury, in which it was ruled that suspenders composed of india rubber and cotton, with some small admixture of silk were taxable under section 13 and not section 8. This opinion of a very able judge has caused me to hesitate and to re-examine carefully the grounds of my first impression, but I am unable to change them. I think the statute tolerably clear in this respect, as much so as can be expected. This webbing is a manufacture of india rubber, silk, and cotton, and so is provided for by section 8, and in explicit and unambiguous terms excepted out of section 13.

The district attorney gave a history of the legislation, which I think tends to prove that the intent of the legislature would be likely to be what I have held it to be; but the construction of the statute does not, in my opinion, need this re-enforcement, though it does certainly to some extent, strengthen the agreement. The statute of 1872 reducing the duty on all manufactures of india rubber, gutta percha, and straw, means, in my opinion, manufactures composed wholly of those articles, or substantially so, and therefore does not embrace this webbing. Judgment for the defendant.

[NOTE. This case was reversed by the supreme court on writ of error (154 U. S. 644, 14 Sup. Ct. 1201), Mr. Chief Justice Waite delivering the following opinion: "This judgment is reversed on the authority of Arthur v. Davies, 96 U. S. 135, and the cause is remanded for further proceedings in accordance with this decision. Upon another trial, however, no allowance can be made for the reduction of ten per cent. claimed under section 2 of the act of June 6, 1872 (17 Stat. 232), that point having been decided adversely to the plaintiff in Arthur v. Rheims, 96 U. S. 143."]

Case No. 4,708.

In re FAY.

[3 N. B. R. 660 (Quarto, 163).][1]

District Court, D. Massachusetts. 1870.

WITNESS—REFUSAL TO GIVE ANSWERS WHICH MAY FURNISH EVIDENCE AGAINST HIM IN CIVIL CASE.

A witness cannot refuse to answer questions concerning his dealings, etc., with the bankrupt,

[1] [Reprinted by permission.]

on the ground that his answer may furnish evidence against him in a civil case, brought or to be brought on behalf of the assignee.

[Cited in Re Krueger, Case No. 7,942; Re Stuyvesant Bank, Id. 13,582; Re Comstock, Id. 3,080.]

[In bankruptcy. In the matter of G. P. and B. W. Fay.] A question arose in this case upon the examination of E. Ira Richards, as a witness before Register Jewett. It appeared that Richards took the oath as a witness before the register on the 8th of May, 1869. The examination was, however, postponed from time to time, until January, 1870. While the examination was still unfinished the assignee commenced a suit against Richards in the circuit court, in which he sought to recover a large sum of money, which he alleged had been received by Richards. Richards now denied the right of the register to continue the examination while the suit against him was still pending, contending that he could not be compelled to give evidence against himself. By the request of parties the question has been certified to the district judge.

LOWELL, District Judge. The witness cannot refuse to answer questions concerning his dealings, etc., with the bankrupt, on the ground that his answer may furnish evidence against him in a civil case, brought or to be brought on behalf of the assignee. The main, if not the only, purpose of the statute authorizing such an examination is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence.

Case No. 4,709.

FAY et al. v. MONTGOMERY.

[1 Curt. 266.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1852.

PRIZE — LIBEL BY OWNERS FOR RESTITUTION — DUTY OF CAPTOR TO SEND IN PRIZE FOR ADJUDICATION—FORFEITURE OF CAPTOR'S TITLE.

1. If a vessel and cargo be seized as prize, and the owners file a libel on the instance side of the court, for restitution and damages, the court will ascertain whether there is a real question of prize, or no prize, to be tried; and if so, will direct the captors to institute prize proceedings.

2. A captor may forfeit his title by misconduct.

[Cited in The A. J. View, Case No. 118.]

3. It is a clear duty of a captor to send in his prize for adjudication; but he may be excused, if he cannot do it without so weakening his command, as to endanger the public service.

4. Quaere, whether mere delay is a ground of forfeiture of the rights of captors.

[Appeal from the district court of the United States for the district of Massachusetts.

In admiralty.

CURTIS, Circuit Justice. This is a libel in the admiralty, filed by Richard S. Fay and Charles B. Fessenden, as owners of the ship Admittance, against John B. Montgomery, a captain in the navy of the United States. The original libel states, that on the 24th of June, 1846, the owners of the Admittance, which was a registered vessel of the United States, chartered her to certain persons doing business in New Orleans, under the firm of Wyllie & Egand, for a voyage from New Orleans to San Blas, with a proviso, that if, upon the arrival of the vessel off the port of San Blas, that port should be blockaded, or the discharge of the cargo would be otherwise prevented, the vessel should proceed to the Sandwich Islands, and there remain, until the port of San Blas should be opened; but that it was not the intention of either of the parties that the vessel should enter or trade with any port in the possession of the Mexican government, unless peace had been previously declared; and that the master was instructed to ascertain, when he got into the Pacific ocean, and near the coast of Mexico, whether the war between the United States and Mexico continued; and if it did, and San Blas was not in the possession of the forces of the United States, to proceed to the Sandwich Islands. The libel further states, that, at Valparaiso, the master was informed that the whole coast of California was in possession of the forces of the United States, but on arriving off San Blas, he learned that the war continued, and that port was in possession of the Mexicans; but that the port of San José was in the possession of the forces of the United States, and being in want of wood and water, he proceeded thither. It then goes on to detail some facts tending to show the master did not design to trade with the enemy, and states, that while lying at San José, the sloop of war Portsmouth, commanded by the respondent, arrived, and, without any probable cause, the respondent took forcible possession of the Admittance, and has ever since retained the same; that he did not send the Admittance to the United States for trial, as he might easily and safely have done, and thereby converted the vessel and cargo to his own use; and they pray for a decree, adjudging the defendant to pay the value of the vessel and freight, and other damages. An amended libel was filed, substantially like the original libel, save that it avers that no proceedings have been instituted against the said vessel in any court of admiralty, and it prays that the respondent may be ordered to proceed to condemnation of the vessel as prize, in some proper court, within a fixed time; and that, in default thereof, restitution may be decreed in this suit. The answer of the respondent, after stating that the Admittance and her cargo were captured as prize of war, and propounding certain causes therefor, which are not necessary to be stated in this connection, avers

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

that it was impossible for the respondent, consistently with the public interest committed to his direction, to have sent the Admittance from San José to any port in the United States; but that the ship was carried into the port of Monterey, where a libel was filed against the vessel and cargo in the United States court of admiralty for California, by which court they were condemned as prize. Proofs having been taken, the cause has been heard upon the question, whether the respondent has so conducted, in reference to this vessel, as to forfeit his rights as captor, and render himself liable to a decree for restitution in this suit. No question is made concerning the other alternative prayed for in the amended libel, because, since it was filed, the captors have instituted prize proceedings in the district court for the district of Columbia, in obedience to a decree of the supreme court of the United States, made in a suit instituted by the owners of the cargo, and carried to the supreme court by appeal.

The grounds upon which restitution is claimed, in this case, are thus stated in the libel: "That such seizure and detention were without any legal, justifiable, reasonable, or probable cause, and without the pretence of any; and that the said Montgomery, in committing the same, was guilty of an act of illegal violence; and even if there had been probable cause for the seizure of the said vessel, the said Montgomery was legally bound to send the same to the United States for trial, which might easily and safely have been done, but which the said Montgomery illegally and unjustifiably omitted to do, and thereby illegally converted the same to his own use." Here are two distinct grounds; the first being that the seizure was an act of illegal violence, and the second, that by not sending the vessel to the United States for trial, the respondent illegally converted it to his own use. In respect to the first, it is certainly true, that it is not enough for the respondent to set up as a defence, that the vessel was captured as prize of war, to bar a libel filed on the instance side of the court for a marine tort in seizing the vessel. He must also make it appear that there is really a question of prize or no prize to be tried. Glass v. The Betsy, 3 Dall. [3 U. S.] 6; Talbot v. Jansen, Id. 133; Del Col v. Arnold, Id. 333; Maley v. Shattuck, 3 Cranch [7 U. S.] 458; Jennings v. Carson, 4 Cranch [8 U. S.] 2; The Anna-Maria, 2 Wheat. [15 U. S.] 327. But when it appears there is such a question to be tried, the correct practice, as settled by the case of Jecker v. Montgomery, 13 How. [54 U. S.] 498, is, to order the captors to proceed to condemnation. This course preserves the rights of all parties, because, upon such proceeding, by the captor, the prize court may not only award restitution, but decree such damages as may be justly due to the claimant. In this case, the facts being conceded that the Portsmouth was a public armed vessel of the navy of the United States; that the respondent was the commander of that vessel; that the Admittance, a registered vessel of the United States, was found by the respondent in a port of Mexico, then at war with the United States, and was there seized by him as prize of war, under such circumstances as repel the idea of a mere naked tort, it does appear that there is a question of prize to be tried, by proper proceedings on that side of the court, unless the respondent has forfeited his rights as captor; and this brings me to consider the other ground stated in the libel, that by his omission to send the vessel to the United States for trial, the respondent illegally converted the vessel to his own use. That captors may so conduct towards prize property, as to forfeit their rights as captors, and render themselves liable to make restitution, either with or without damages, is clear. The general proposition, that such restitution and damages may be decreed upon the instance side of the court, on a libel like the present, or, as the practice is in England, upon a monition to the captors to show cause, is equally clear. A case may be made, upon which it would be the duty of the court to declare, that it will not adjudicate upon the validity of the capture. But before the court can so declare, a case of forfeiture of rights, free from all reasonable doubt, must be made out. It is a circumstance of some significance to my mind, that while the general principle, "that a bona fide possessor may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered a trespasser," has been often laid down, there is no case in the books, within my knowledge, in which restitution has been decreed on this ground, on the instance side of the court, against the will of the captor. There are cases of restitution decreed on monition; but no case, which I have seen, proceeded upon a forfeiture of rights once acquired, and asserted and relied on, by the captors. In The Corier Maratimo, 1 C. Rob. Adm. 287, the captors, upon monition, consented to restitution. In The Acteon, 2 Dod. 48, the captors did not contend against restitution; and the only question made was as to damages and costs. And in these, as well as many other cases, the decree of restitution rested, not upon a forfeiture of rights, but upon defects in the original title.

In considering this part of the case, the question is, whether the allegation in the libel, that the respondent omitted to send the vessel to the United States for trial, when he could safely and properly have done so, and thereby illegally converted the property to his own use, is made out in proof. The answer of the respondent to this part of the libel states, "that it was impossible for him, consistently with the public interests committed to his direction, to have sent the

said ship Admittance to any port in the United States." It is objected that this is not such an allegation as entitles the respondent to exhibit proofs; that it is too vague to be sufficient for that, or any purpose. That the allegation is extremely loose and general, and, upon an exception, would have been stricken out, or ordered to be made more specific, must be admitted. But no exception was made to it; both parties proceeded to take their proofs, and it is admitted at the bar, that the libellants have not been surprised or misled. Besides, the propriety of allowing the respondent to exhibit proofs upon the question of his ability to send the vessel to the United States for trial, can hardly be doubted, when it is borne in mind that the libel rests upon an allegation that he could easily and safely have done so, and claims restitution upon the ground of a forfeiture of legal rights, by illegal neglect to do so.

Before considering the facts, upon which the forfeiture is asserted, one principle should be stated, which is entitled to an important effect on this part of the case. It is, that an honest exercise of the discretion necessarily arising out of his command, cannot be treated as such misconduct, in the commander of a public ship of war, as will forfeit the protection of his fair title, and render him liable to be treated as a trespasser. This principle is too obviously just, to require the support of authority; but it will be found to have been laid down and applied in the case of Wilkes v. Dinsman, 7 How. [48 U. S.] 89, and Dinsman v. Wilkes, 12 How. [53 U. S.] 390.

Now, it must be admitted, that the question, whether the necessities of the public service will allow the commander of a ship of war, in time of war, upon a remote station, on the other side of the globe, to spare one of his officers to go home in command of a prize, is one depending on his discretion necessarily arising out of his command. In the first instance, he alone has the power to decide this question; he alone has the needful knowledge of facts, and he is bound to exercise his judgment upon them. Certainly his judgment is not conclusive. Good faith and reasonable discretion are requisite; but it would be not only a hardship, but an injustice, to impose on the commander the duty of determining such a question, and when he has determined it, according to his best judgment, to attribute to him, as an act of misconduct, that he did not come to a different conclusion. On the contrary, I think, that while no clear and known duty is violated by him, all fair presumptions should be made in his favor. It is true, that it is a clear duty of a commander to send in his prize for adjudication; but this is not an absolute obligation. It depends upon his ability to perform it, and of this, as already said, he must judge in the first instance; and if he decides with reasonable discretion, and with an honest purpose to do his duty to all concerned, I cannot consider him guilty of misconduct, which works a forfeiture. Keeping these principles in view, I am not satisfied that in omitting to send the vessel to the United States, Captain Montgomery violated any known duty, or acted with so little discretion, as to render himself liable as a trespasser. This question has been before the supreme court of the United States, in the case of Jecker v. Montgomery [supra], and unless this case can be distinguished from that upon its facts, I must, of course, come to the same conclusion there arrived at. In that case, the allegation in the answer of the respondent, that he could not send the vessel to the United States for trial, with a due regard to the public interest, was admitted by the demurrer. In this case it is traversed, and the parties have gone into proofs. This is the principal difference between the two cases.

These proofs satisfy my mind that the necessary stores and supplies for a voyage to the United States were either on board the Admittance, or could have been obtained at Monterey. I am also convinced, that the crew were willing to continue on board and work the vessel home, under the command of Lieutenant Revere; so that no men for a prize crew need have been taken from the Portsmouth. For although, in general, the captor must man, as well as officer, a prize, even when it is a neutral, or belongs to citizens, yet this obligation results from the want of a right to subject the prize crew to the command of his own officer; and when the prize crew are willing to engage to serve under the command of the prize-master, and are neutrals, or citizens, no prize crew need be put on board. The Eleanor, 2 Wheat. [15 U. S.] 361. Lieutenant Revere says the crew of the Admittance all volunteered to serve under his command, and bring the vessel home; and although it does not appear that Captain Montgomery was informed of this, yet I am strongly inclined to think, that if this had been the only obstacle, it would have been his duty to have made inquiry, which would have apprised him of the fact. But this was not the only obstacle. One of the lieutenants of the Portsmouth was serving on shore; two only remained; and it does not appear that a single passed midshipman was on board. Lieutenant Revere has given an opinion, no doubt an honest one, that he might have been spared; but it is an opinion formed under no responsibility of command; and I am not prepared to say, that a sloop of war, on that coast, at that time, officered by only two lieutenants, ought to have been left with only one, in order to send home a prize; and still less, that the commander erred so grossly in not detaching this officer, on such service, as to forfeit his legal rights thereby. In respect to the proceedings at Monterey, it has been declared by the supreme court, in the case already referred to,

that they afforded reasonable ground for the belief, which the respondent, in his answers, swears he entertained, that no further proceedings were necessary. Indeed, it may well be doubted, after what was said by Sir William Scott, in The Maria, 1 C. Rob. Adm. 376, whether mere delay is of itself a cause of forfeiture; because the claimant has it in his power, at all times, to compel the captor to proceed, and the use of this power is so far a duty on his part, that his omission for six years to resort to it, was held to be a bar to a monition in The Susanna, 6 C. Rob. Adm. 48. And the difficulty of awarding restitution against this officer, by reason of delay, would be much increased by the fact, that the government has taken the proceeds of the property, and he has never had them in his own hands. In a regular prize proceeding, where the claimant made out a title to restitution, upon the ground that the capture was illegal, Lord Stowell manifested the utmost reluctance to award restitution against the captor, after the government had received the proceeds of the prize. The San Juan Nepomuceno, 1 Hagg. Adm. 269. I do not think that the executive government of the United States can turn a bad title into a good one, by a recognition of the possession of one of its officers; but if the possession was under a lawful title, and the question be, whether the officer has been guilty of such delay as works a forfeiture, it is a circumstance of no trifling weight, that the executive government has received from him the property, and itself retained it.

After a careful examination of this case, I have come to the conclusion, that I ought not to make a decree for restitution in this suit; and I rest in this conclusion with the more satisfaction, because, in the prize proceeding now pending, all the substantial rights of the libellants will be ascertained and determined. I observe that the decree of the district court purports, on its face, to be made by consent. I have great doubt concerning the jurisdiction of this court in such a case. The only power conferred on this court by congress, in suits in admiralty, is as an appellate court. But if decrees are made by consent in the district court, without a hearing, it becomes, in effect, a court of original jurisdiction. The act of congress directs this court to pass such sentence or decree as the district court ought to have passed; but if the parties consented to a decree, there can be no room to question its correctness. The rule of the court requires reasons for the appeal to be stated. In this case, the reason assigned is, that the district court ought to have decreed for the libellant; but the record shows that the decree was in accordance with the consent of the libellant, which removes all error.

Subsequently, it was stated to the court, that the record of the district court was not correct in stating the decree to have been by consent; that it had been amended, and the amendment certified to this court, and that it was agreed that the record here should be changed, so as to conform to the truth; and this having been done, a decree was entered, ordering the captors to prosecute, as against the vessel, the prize proceedings already instituted in the circuit court for the District of Columbia.

FAY (SMITH v.). See Case No. 13,045.

F. B. GARDNER CO. (ATLAS NAT. BANK v.). See Case No. 635.

F. B. THURBER, The. See Case No. 17,355.

Case No. 4,710.

FEARING et al. v. CHEESEMAN et al.

[3 Cliff. 91.][1]

Circuit Court, D. Maine. Sept. Term, 1867.[2]

CHARTER PARTY—DAY OF SAILING NOT SPECIFIED—UNREASONABLE DELAY—IMPLIED CONDITION—CONSTRUCTION OF STIPULATIONS.

1. Where in a charter-party no stipulation is made as to the day the vessel should sail, or the time she was to be allowed for the trip, the rule of construction is, that she is to sail within a reasonable time, and to proceed with reasonable despatch, and without unnecessary deviation, to the place of loading, unless delayed by the public enemy or perils of the seas.

[Cited in The Giulio, 34 Fed. 911.]

2. Such an implied covenant, in a charter-party is not a condition precedent, which, if broken, will justify the charterer in disregarding his covenants, unless the delay is so great that it deprives the charterer of the whole benefit of the contract or frustrates his object in chartering the vessel.

[Cited in Simonetti v. Foster, 2 Fed. 416.]

3. A stipulation in a charter-party that the charter should commence when the vessel was ready to load, does not mean that the charter-party does not attach until the vessel arrived at the place of loading. Performance of the implied contract, that the vessel was to sail to the place of loading within a reasonable time, was as requisite as that notice of the readiness of the vessel to receive cargo should be given on arrival at the place of loading.

4. A charter-party was executed April 27, 1865, while a vessel was laying in the harbor of Boston, by which she was to load at Farmingdale, Maine. No stipulation was made concerning the time at which she was to sail for the place of loading. She arrived at Farmingdale, May 20. When the master gave the required notice of the readiness of the vessel to receive cargo, the charterer refused to load her. Thereupon the following correspondence took place. From the charterer: "Will load the vessel at going rates; no other terms, damages or not." To which the owners replied that the charterer must "either load her per charter-party or pay damages." To this the following reply was received: "Will load vessel for the voyage at eight dollars, measurement or weight, difference between old and new, charter open, to be settled by the courts or by arbitration, without prejudicing the rights of either party." The

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

[2] [Affirming Case No. 13,312.]

final reply was. "We accept your proposition; load vessel as per despatch of this date." Thereupon the defendants loaded the vessel, and the cargo was duly transported and delivered. *Held*, that no new charter-party was made by the above correspondence, and that the respondent was liable unless he could show that the master, in failing to report the vessel within a reasonable time, had violated some condition precedent, or that the delay was so great as to frustrate the voyage.

[Cited in Dalbeattie Steamship Co. v. Card, 57 Fed. 305.]

5. A vessel was chartered April 27, 1865, at Boston, to go to Farmingdale, Maine, for a cargo of ice, to be transported to Mobile, Alabama. From stress of weather, she did not arrive at Farmingdale until May 20, when she reported as ready to receive cargo. The charterers had then hired and loaded another vessel, with the cargo destined for the first chartered vessel, on the arrival of which, however, they changed the destination of the vessel last hired and sent her in fulfilment of another contract, and the vessel first named actually performed the contract for which she was chartered, and the cargo was received without complaint. *Held*, that the facts showed that the voyage was not frustrated by the delay to notify, that the vessel was ready to receive cargo, and that the owners were entitled to recover under the charter.

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

In admiralty. Libel to recover a balance of the stipulated price under a charter-party. The libellant [Henry C. Cheeseman] was the owner of the brig Star of Hope, and the appellants [Henry L. Fearing and others] were the charterers. The charter-party was executed at Boston, Massachusetts, on the 27th of April, 1865, and was for a voyage from Farmingdale, Maine, to Fort Gaines or Mobile, Alabama. The owner let the ship for freight, and engaged that she should be kept seaworthy during the voyage, and to provide her with men and provisions. The charterers agreed to furnish her with cargo, sufficient for lading or ballast, and to pay the owners $4,250, as charter-money for the voyage. When the charter-party was executed the vessel was lying in the harbor of Boston, and the charter-party contained no stipulation as to the time when she was to sail to her place of lading. Provision was made for lay-days for loading and discharging, and the stipulation was, that they were to commence respectively from the time that the master should report that he was ready to receive or discharge.

The following were the precise terms of the stipulations as to lay-days: "Despatch in loading at Farmingdale, and ten working days at port of destination." The charter was to commence when the vessel was ready to receive cargo at the place of loading, and notice thereof was given by the master to the charterers or their agent; and the provision was, that the vessel was to be loaded and discharged, at the expense of the charterers, with the assistance of the crew. The vessel arrived at Farmingdale, May 20, 1865, and the master immediately reported to the charterers that the vessel was ready to receive cargo. It was admitted that the cargo was ultimately furnished, and loaded into the vessel, and that she safely transported and well and truly delivered the same at the port of destination and discharge. The principal defence was, that the vessel did not seasonably arrive at Farmingdale; that in consequence, the charterers were obliged to employ another vessel in her stead, and that they did not load her under the charter-party described in the libel, but under a new contract made with the owners, in which it was agreed that they should load her at eight dollars, measurement or weight, as specified in the bill of lading, and that they had paid that amount to the owners of the vessel in full discharge of the contract. They admitted, that if the charter-party remained in full force, they were liable for the difference between the sum therein named, as charter-money, and the sum paid, as already mentioned. In the district court, a decree was entered in favor of the libellants [Case No. 13,312], for the balance of the charter-money as provided in the charter-party.

Howard and Cleaves, for libellants.
W. L. Putnam, for respondents.

CLIFFORD, Circuit Justice. Appellants contend that they never became liable under the charter-party, because the proofs show, as they insist, that the owners of the vessel never fulfilled the stipulations of the charter-party on their part; that the delay of the vessel in arriving at the place of loading operated as a breach of the contract, and discharged them from all obligations to furnish her with a cargo for the voyage. The terms of the charter-party, properly construed, required the vessel, as a matter of legal implication, to sail from the anchorage where she lay within a reasonable time, and to proceed to the place of loading, without deviation, and with reasonable despatch, the dangers of the seas and navigation excepted.

The parties made no stipulation as to the day the vessel should sail, or as to the time to be allowed for the trip from Boston to Farmingdale, but the true rule of construction in such cases is, that the vessel shall sail within a reasonable time, and proceed with reasonable despatch and without unnecessary deviation to the place of loading, unless delayed by the public enemy or perils of the seas. Whether those qualifications to the obligation of reasonable despatch could be admitted as a matter of mere implication, it is not necessary in this case to determine, as the dangers of the seas and navigation are properly excepted in the charter-party, and there is no evidence in the record applicable to the other branch of the inquiry. The implied obligation of reasonable despatch in proceeding to the place of loading

must be considered in connection with the express exception of the perils of the seas and navigation. Such an implied covenant in a charter-party is not a condition precedent, which if broken will justify the charterer in disregarding all his covenants and promises, unless the delay is so great that it deprives the charterer of the whole benefit of the contract, or entirely frustrates the object he had in view in chartering the vessel. Conditions precedent must be definite, and they are usually express, but it is unnecessary to determine whether they may not also be implied, as I am clearly of the opinion that the covenant of the charter-party in this case, as now construed, if expressed in the instrument, would not amount to a condition precedent within the principle laid down in any well-considered judicial decision, unless it appeared that the delay had the effect to frustrate the voyage. The strongest case construing the covenant of a charter-party as a condition precedent is that of Lowber v. Bangs, 2 Wall. [69 U. S.] 728; but it is obvious that the rule of construction there adopted falls far short of what would be required in this case, in order to give that effect to the implied covenant under consideration. The majority of the court held in that case that the covenant, "ship to proceed from Melbourne to Calcutta with all possible despatch," was a condition precedent to the right of the ship-owner to recover. When the charter-party was executed, the ship was on her passage from New York to Melbourne, and the terms of the instrument expressly required the owners to use the most direct means to forward instructions to the master, ordering it to be fulfilled. Instructions were duly forwarded, but the ship arrived at Melbourne, discharged cargo, and sailed for Manilla before the mail arrived, and in consequence thereof, more than six months elapsed before the ship reached the place of loading. Instead of sailing direct to Calcutta, she went first to Manilla, and it was upon that ground that a majority of the court held that the owners had broken the contract. Decisions of a contrary character were referred to by the appellees, and a minority of the court were unable to agree to the conclusion. Since that time the question has again been considered in one of the English courts. MacAndrew v. Chapple, 1 L. R. C. P. 643.

The stipulation in that case was, that the steamer then just launched at Newcastle, and not quite fitted for sea, should, on being ready, proceed with all convenient speed to Alexandria, Egypt, and there receive a cargo of cotton, and thence proceed to London or Liverpool, as ordered on signing the bill of lading. The steamer deviated in the trip from Newcastle, and the charterers refused to furnish her with a cargo. The defence was, that the covenant to proceed to the place of loading with all convenient speed, was a condition precedent; that inasmuch as that covenant was broken by the owners, the charterers were discharged from all obligation to load the steamer; but the court unanimously decided that the phrase was only a stipulation, and not a condition precedent, and that the delay afforded no justification to the freighters for refusing to furnish a cargo, and that his remedy for the damage occasioned by the delay was by a cross-action. "Delay by deviation," said Willes, J., "is the same as delay in starting;" and he held it to be settled law that no delay or deviation which did not entirely frustrate the object the charterer had in view, was a sufficient answer to an action for not loading a cargo, but only gave a cross-action for damages. Neither the language of the charter-party, nor any proper implication from it, affords any support to the theory that the failure of the vessel to proceed with greater despatch to the place of loading was a breach of any condition precedent on the part of the ship-owners, which discharged the charterers from their obligations to load the vessel. The same conclusion must follow whether the correct rule be regarded as that advanced in the case of Lowber v. Bangs [supra], or the one laid down in the more recent case decided in one of the courts of Westminster Hall.

The next suggestion of the appellants is, that the charter-party was not to attach at all, until the vessel arrived at the place of loading, and inasmuch as she did not proceed to that place with reasonable despatch, the alleged contract was never concluded. Support to that proposition is attempted to be derived from the stipulation that the charter should commence when the vessel was ready to load, and notice thereof was given by the master. Undoubtedly the voyage for the transportation of the cargo commenced at that time and place, and it was the commencement of the voyage for the computation of lay-days, but the contract became operative when the charter-party was executed and delivered. The obligation of the ship-owners to put the vessel in a sea-worthy condition, and cause her to sail for the place of loading within a reasonable time, commenced when the charter-party became operative, and continued in force till the covenants were fulfilled. Performance of that implied covenant was as much required by the charter-party as that notice of readiness of the vessel to receive cargo should be given on her arrival at the place of loading. Such notice could not properly be given before the vessel actually arrived, and the implied requirement was, that she should proceed there with reasonable despatch, the dangers of the seas and navigation excepted. Unavoidable delay arising from these causes would not discharge the charterers from their covenant to load the vessel, unless the delay was so great as to frustrate the voyage or deprive the freighter of the benefit of his contract.

Where the delay ensues from unforeseen causes, but the voyage is not frustrated, the charterer is entitled to his claim for damages, as compensation for any injury he may sustain. Freeman v. Taylor, 8 Bing. 124; Clipsham v. Vertue, 5 Adol. & E. (N. S.) 265; Seeger v. Duthie, 8 C. B. (N. S.) 45; Tarrabochia v. Hickie, 1 Hurl. & N. 183; Dimech v. Corlett, 12 Moore, P. C. 227.

The defence that a new charter-party or contract was made, is entirely unsupported by the evidence. When the master gave the required notice that the vessel was ready to receive cargo, the charterers refused to load her, and on the 26th of the same month they telegraphed to the owners that they would "load the vessel at going rates, no other terms, damages or not." The owner of the vessel replied on the same day that they, the charterers, must either load her per the charter-party or pay damages. Responsive to that telegram, the plaintiff answered to the effect, that they would load the vessel for that voyage "at eight dollars, measurement or weight, difference between old and new, charter open, to be settled by the courts or arbitration," without prejudicing the rights of the other party. The final reply of the defendants was as follows: "We accept your proposition; load vessel as per despatch of this date," which closed the telegraphic correspondence. Pursuant to that arrangement of the controversy, the defendants loaded the vessel, and she duly transported the cargo, and made right delivery of the same at the port of destination and discharge. Prompt payment was made of the sum mentioned as freight in the telegraphic correspondence at the place, and within the time originally contracted. The present suit is for the difference between that sum and that stipulated in the charter-party, which it was agreed might be settled by arbitration or by the courts. Unable to agree and unwilling to refer, the parties come here, and it is evident that their legal rights must be determined under the charter-party, as the facts were when the master reported the vessel to the charterers. They made no new charter-party, and it is clear that the controversy then was the same as it is at the present time. The arrangement was made that the vessel should be loaded, and it was agreed that the voyage should not prejudice either party, that is, that their rights should remain unaffected by those subsequent acts, but be determined just as they would be if the defendants had refused to furnish the cargo and employed another vessel for the voyage. In that view the defendants are clearly liable, unless they can show that the master, in failing to report the vessel within a reasonable time, violated some condition precedent in the charter-party, or that the delay was so great as to frustrate the voyage.

The explanations already made show that the first ground of defence fails, and it is equally clear that the second cannot be sustained. When the Star of Hope was reported as ready to receive cargo, it is true that the defendants had employed and loaded another vessel with the cargo of ice intended for the plaintiff's vessel, but on the arrival of the latter vessel they changed the destination of the former, and sent her to another port, in fulfilment of another contract, which they had with the government. But the evidence that the voyage was not frustrated is, that it was fully performed, and the uncontradicted testimony is, that the cargo was duly delivered to the consignees at the port of original destination, and received without any complaint. No particular notice is taken of the causes of delay, as it is agreed that they arose from the perils of the seas, and not from any negligence or wilful default of the master or owners. Suffice it to say that the vessel encountered rough weather in her trip from Boston to Farmingdale, and having sprung a leak before she reached Bath, she was obliged to put back to Portland for repairs. Competent persons were called to determine what repairs were necessary, and they were completed with reasonable despatch.

Decree affirmed, with costs.

Case No. 4,711.

FEARING et al. v. DE WOLF et al.

[3 Woodb. & M. 185.][1]

Circuit Court, D. Rhode Island. June Term, 1847.

NEW TRIAL—VERDICT AGAINST WEIGHT OF EVIDENCE.

1. A verdict is not to be set aside as against the weight of evidence, if some existed on both sides, or if the credibility of some of the witnesses was in question, or if the court did not stop one side from putting in more testimony.

[Cited in Carr v. Gale, Case No. 2,435; Macy v. De Wolf, Id. 8,933; Aiken v. Bemis, Id. 109; Bentley v. Phelps, Id. 1,332; Whetmore v. Murdock, Id. 17,509; Hunt v. Pooke, Id. 6,895.]

2. It is not sufficient that the court differed in opinion from the jury on the facts, but there must have been some apparent mistake or clear abuse of power by the jury.

This was an action of assumpsit [by Noah Fearing and others] against the defendants [Mark A. De Wolf and others] as owners of the ship Corinthian for certain supplies furnished to her when fitting out on a whaling voyage. A variety of points arose in the case and much contradictory testimony was given. But none of these points or the testimony need be detailed except that, after verdict for the plaintiffs, on evidence so strong on each side as to lead to much argument by counsel and considerable difficulty in the jury in agreeing, a motion was made by the defendants to set aside the verdict solely on the

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

ground that it was against the weight of evidence.

Mr. Potter and R. Green, for plaintiffs.
Blake & Whipple, for defendants.

WOODBURY, Circuit Justice. At the trial of this case I was not expecting a verdict as very probable, for the plaintiffs. And if one was returned for them, I did not anticipate it would be for so large an amount. But no mistake in point of law arose in the rulings at the trial, or in the charge to the jury, which is excepted to by the respondents, and no allegation is made of any misbehavior by or towards the jury. Nor is any affidavit filed of newly discovered evidence. The motion presents then, this naked question—whether, when evidence was offered on both sides, and was so conflicting as to justify an argument on both sides, and to cause delay and difficulty with the jury in deciding on its weight, and when some of it was attacked as incredible, this court can be justified in setting the verdict aside? I think not. It is not the judges, whose office it is to weigh the facts, but the jurors. "Ad questionem facti non respondent judices, ad questionem juris non respondent juratores." 1 Inst. 155b. At the same time it is conceded, that while these two great arms of the state in administering justice have their general boundaries thus truly defined, the court, as the presiding authority, is required to exercise a superintending power over the trial of facts, in order to prevent gross injustice, either by accident or corruption. Hence it becomes the duty of the court in all cases to see that there has not been a mistrial, whether by surprise or an error of law, or accident, or misbehavior of the jury. And in cases where such a mistrial has probably happened, I entertain no doubt of the superintending power of the court to give a suffering party an opportunity to correct what is clearly wrong, whether it has occurred by being against the plain principles of law, or clear or undisputed evidence. U. S. v. Duval [Case No. 15,015]; Cunningham v. Magoun, 18 Pick. 13; Wilkie v. Roosevelt, 3 Johns. Cas. 211; Trask v. Bowers, 4 N. H. 312. This is not done, however, as many suppose, by the court's undertaking to reverse the decision of the jury and enter a judgment against it, making the opinion of the court on the facts paramount and final over that by jurors, but it is by allowing, in such cases of supposed manifest wrong, another trial, so that another jury,—not the court,— may correct any mistake which the last jury, after full hearing, may believe to have been committed in respect to the facts on the first trial. Brown v. Frost, 2 Bay, 126. But there is some danger in this, and in some states, therefore, laws have been passed prohibiting courts from allowing another trial, for this cause alone. And so fastidious and hesitating are some judges not to disturb verdicts, merely on account of the finding, in respect to questionable facts, that it has often been held a verdict ought never to be set aside merely because the judges happen to differ somewhat in their views concerning the facts, from the jury. 18 Pick. 13, 15; 1 Wils. 22; Gibbs v. Hooper, 2 Mylne & K. 353; Alsop v. Commercial Ins. Co. [Case No. 262]; U. S. v. Martin [Case No. 15,731]; Fehl v. Good, 2 Bin. 495; 2 A.K. Marsh. 521; Wendell v. Safford, 12 N. H. 171. Nor usually, if there was evidence on both sides so strong and conflicting as to require it to be argued and weighed with some care. See 7 Metc. [Mass.] 450; 3 Johns. Cas. 213; 5 Mass. 353; 15 Mass. 291; 4 Wend. 423; 2 Wend. 352; 5 Wend. 48; 4 Conn. 426; 11 Conn. 440; [Respublica v. Lacaze] 2 Dall. [2 U. S.] 118; Woodward v. Paine, 15 Johns. 495; Ward v. Center, 3 Johns. 271; 12 Johns. 455; Talcot v. Insurance Co., 2 Johns. 467. See other cases cited in these. Nor where the whole testimony on both sides was circumstantial. Blanchard v. Colburn, 16 Mass. 345; Sharp v. Wickliffe, 3 Litt. [Ky.] 10. Nor merely because another jury in another case, on evidence nearly similar, found the other way. Spong v. Hog, 2 Wm. Bl. 802. That is much like the present case. Nor because the evidence preponderated against the verdict, which is also like this. Swain v. Hall, 3 Wils. 45; Anon. Lofft, 147. Nor where an unimpeached witness testified to facts, but not positively, and the jury found against them. Harding v. Brooks, 5 Pick. 244. Formerly, for reasons soon to be given, courts interfered with more caution in New England, for this cause, than now. And even now, in some states (20 Pick. 288), the courts seem inclined to go farther than appears to me justifiable, consistent with the power and general wisdom of juries, as to facts, and their high integrity. For, though setting aside a verdict is not entering one the other way, yet it certainly is some impeachment of the conduct and correctness of the first jury, and tends to lessen the public confidence in that form of trial. If, on the same testimony, a case has to be tried by two or three different panels before they are able to balance the evidence properly, the system becomes cumbersome and expensive, and goes into ill repute. The presumptions and the leanings of courts, it appears to me, therefore, should be in favor of sustaining verdicts, and never hastily or lightly to set them aside.

There are some other settled limitations and analogies on this subject beside those yet referred to, which seem to deserve much respect, and should operate as a guide in motions like these, or the discretion of judges in this matter will become so loose as to render the trial by jury almost useless. It is, to be sure, a matter of discretion whether to grant or refuse a new trial in cases like this. People v. Supreme Court, of New York, 5 Wend. 114; [McLanahan v. Universal Ins. Co.] 1 Pet. [26 U. S.] 170; 11 Pick. 189. But that discretion must be regulated by fixed rules and just principles, so

as not only to pay due respect to the doings of juries, but to preserve uniformity in the administration of justice, and not to increase that uncertainty in the execution of the law, which is so proverbial, if not to some extent, unavoidable. Hence it has been adjudicated, that though in the exercise of this discretion a verdict may be set aside even when there is evidence on both sides, yet, to set aside a verdict, because against the supposed weight of the evidence, it must be clearly and palpably against it. Deacle v. Hancock, 13 Price, 226; Johnson v. Scribner, 6 Conn. 185; Laflin v. Pomeroy, 11 Conn. 446; Nichols v. Alsop, 6 Conn. 480; Newell v. Wright, 8 Conn. 319. One illustration given as to this, is where the evidence is all one way, except trifling or impeached matter, and the verdict is the other way. 2 Dowl. 711; 6 Conn. 185. So it may be set aside if the evidence was all on one side, in its tendency, no less than origin; and in this and the last case was apparently sufficient. 2 Dowl. 711; State v. Jones, 2 Bay, 520; Wilkie v. Roosevelt, 3 Johns. Cas. 213. Or where it is so strong for one side that the court did not deem it necessary to charge the jury, and the verdict was for the other side. Page v. Pattee, 6 Mass. 459. Or where the judge stops the defendant from putting in evidence because there is so little for the plaintiff, and the jury find the other way. Dunham v. Baxter, 4 Mass. 79. Circumstances like these show at once that there has been a mistrial. But if the mistrial or misfinding is not thus decidedly and manifestly wrong, standing out in bold relief, and clear to almost every impartial mind, and without a labored examination and comparison, the court must refuse to interfere. Because, otherwise, the court would, in every trial, be compelled by such motions to go over the whole evidence on both sides with care and labor, and balance it all in the scales, before coming to a conclusion. It must do it, too, again on a second or third trial, and so on, indefinitely. Miller v. Baker, 20 Pick. 289. This cannot be its duty, nor such the object of its interference, in cases of this character. But it is rather as before and at first intimated, when apparent mistakes have occurred, or gross abuses of power appear probable, to allow another jury an opportunity to correct them, and only then. 8 Pick. 122; 2 Wend. 353; Alsop v. Commercial Ins. Co. [Case No. 262]; 4 Maule & S. 192, 199.

It is a substitute in a proper case and under wise limitations for the old appeal from an inferior court on the facts to a superior court, or the old writ of review, or in case of supposed abuse, a substitute for the old system of attaint by the verdict of another jury. But it strips all these of their frequency for mere litigation or oppression, and allows them only when a mistake or gross abuse seems very clear and prominent on the face of the whole trial. Alsop v. Commercial Ins. Co. [supra]. Even when the evidence seems to have been stronger for one party than the other, if the evidence is not in writing, but by witnesses whose credit is open to impeachment, or is fairly questioned, it is very doubtful whether the verdict ought to be set aside, provided the jury went on the ground that the testimony was not entitled to belief. They are peculiarly fitted to decide such points. 12 N. H. 171. It certainly should not be if there were plausible reasons impairing the credibility of the witnesses, or plausible grounds to disbelieve them. 2 Bin. 495; 7 Mass. 261; 10 Mass. 39; 5 Pick. 244.

In this case reasons were urged, and perhaps existed, against the credit of Deruth. He lived near, and was likely to be known to several of the jury, who were thus the best judges of his credibility. And though if believing him fully, the balance of the whole evidence was probably for the defendants, on some of the grounds of defence, yet it was not so clearly and palpably for them as under that objection to Deruth, their principal witness, to justify a disturbance of the verdict. There is, also, in many cases, something in the manner of witnesses, and their character known to the jury, and cognizable by them, and which may lead them, as practical men, to a result different from the views of the court. And though courts, since appeals on facts and reviews have been generally abolished in New England, may, with some propriety, be more liberal in submitting a case to a second jury on motions of this kind, yet it cannot even now be done unless there appears in the verdict such a strong departure from the clear balance of the evidence as to indicate a mistrial and, probably, injustice to one of the parties.

It is natural that counsel and clients should look more favorably than others, on their own testimony and their own side of the case, and think the balance much stronger for them than indifferent judges or juries do. Abating something for that here, the case certainly is one where the difference is not so great between the finding and the weight of evidence as to show injustice to have been clearly done, or a manifest mistrial to have happened. Thus, in respect to the special point where the verdict of the jury is contended to be here so entirely against the weight of evidence, and which relates to the agency of De Wolf to bind the owners, it does not strike me that the testimony was all one way. For though the evidence by the respondent tended to show that De Wolf designed to give only his private credit or responsibility, to these plaintiffs, and gave it so in form, yet this was met by other testimony, that he had been their agent on former voyages by this ship; that on this occasion he pledged their credit in some cases, formally as well as in substance; that the respondents had settled for some other purchases made by him for this voyage; and that Deruth, who was the main

witness for the respondents, was, in some things contradicted and his credibility impugned. This whole point, and others connected with it, were consequently open to just inferences, such as the jury have drawn, that De Wolf was in truth their agent in this business, and especially so if they discredited Deruth; although in my view, the weight of the testimony as a whole, was the other way. This verdict, also, though nominally in favor of Fearing & Co., is for articles furnished through them, in part by Hathaway & Co., and in part by Taber. And Fearing & Co. sue in trust for them, and little or no evidence was given that the former firms, however it may have been otherwise with the last one, did not rely on the supposed credit of all the owners, and De Wolf's supposed agency for the whole.

I am anxious and willing to correct all palpable errors in trials, so far as may be done on safe principles in administering justice. But if courts interfere only in clear cases of mistake or abuse it will not only tend to preserve the respect due to the inestimable trial by jury, but elevate the character and responsibility of the jurors themselves. It will make them feel more their due influence, and increase their care and anxiety to come to correct conclusions, when these last are so final and decisive of the rights of parties. It will also give greater power and influence to the judges, because keeping carefully within their own appropriate spheres; and interfering only where, by the law and constitution it was meant they should, their action will always be viewed as remedial, and will be harmonious and satisfactory. There is no other circumstance presented here to show a sound or established ground for setting a verdict aside, and hence, judgment must be rendered upon it.

FEARS (UNITED STATES v.). See Case No. 15,080.

FEARS (UPPADEL v.). See Case No. 16,808.

FEARSON (KING v.). See Cases Nos. 7,789 and 7,790.

FEARSON (NICHOLLS v.). See Cases Nos. 10,226 and 10,227.

Case No. 4,712.

FEARSON v. UNITED STATES.

[1 Hayw. & H. 48.][1]

Circuit Court, District of Columbia. Dec. 11, 1841.

ELECTIONS—PRESENCE OF ALL THE JUDGES.

Held, not necessary that all the judges of an election appointed under the resolution of the board of aldermen and board of common council of the corporation of Georgetown, approved February 20, 1841, should be present to constitute a legal session of the said judges of election.

Error to the criminal court.

Joseph N. Fearson was indicted for unlawfully breaking and entering a certain room in the county of Washington within the corporation of Georgetown, in which certain judges of election, duly and lawfully appointed by the mayor, recorder, aldermen and common council of the corporation, were executing their duty and office, and were then counting and ascertaining the ballots and votes that had been given, and that the said Joseph N. Fearson, having then and there forced himself into the said room and into the presence of said judges as aforesaid, and so engaged in the discharge of their duty and office as aforesaid, did then and there by violence and threats and loud noises interrupt and obstruct the said judges in the discharge of their said duty and office, and then and there staid and continued in the said room making a great noise and tumult therein for a long space of time, to wit, for the space of two hours, and thereby during all that time greatly disturbed and hindered them in the execution of their office, &c.

On said indictment the jury brought in a verdict of guilty. Thereupon the criminal court, Judge James Dunlop presiding, rendered the following judgment: "That the said Joseph N. Fearson be fined, forfeit and pay to the United States as well the sum of $30 for the offense aforesaid as the costs of the suit."

Before the jury retired, the defendant, by his attorney, filed in court the following bill of exceptions: "In this case the United States offered in evidence the charter of Georgetown and also a resolution of the corporation of Georgetown,[2] and offered evidence tending to prove that the traverser disturbed and interrupted the judges of election as charged in the indictment. It also appeared from the evidence that John Cox, the mayor of Georgetown, one of the judges of election, was present at the election from the opening of the polls to the closing of the same, but that he then retired, and that at the time of the interruption of the judges of election who were then counting the votes, the mayor of Georgetown, one of the judges of election, was absent, but that all the other judges of election were present at the time of the interruption. Whereupon the traverser

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

[2] Resolved by the board of aldermen and board of common council of the corporation of Georgetown that John I. Stull, Charles C. Eckle, John Myers, Louis Carbery and Judson Mitchell, or a majority of them, be and that are hereby appointed judges of the next general election, and of all elections which may be necessary to be held until the fourth Monday of February, 1842. H. Addison, Pres. Board of Common Council. Clemt. Cox, Recorder and Pres. Board of Aldermen.

Approved February 20, 1841. John Cox, Mayor.

prayed the court to instruct the jury, that such being the case the said judges of election were not legally in session, and that the traverser on that ground was entitled to an acquittal, which said instructions the court refused. The traverser excepts and prays the court to sign this bill of exceptions, which is accordingly done this 27th of October, 1841."

James Hoban, for petitioner.
F. S. Key, for the United States.

After argument of counsel the judgment of the criminal court was affirmed.

FEARSON (UNITED STATES v.). See Case No. 15,081.

Case No. 4,713.

FEATHERMAN v. LOUISIANA STATE SEMINARY.

[2 Woods, 71.][1]

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

EXECUTION—PROPERTY SUBJECT TO LEVY—PROPERTY OF STATE INSTITUTION OF LEARNING.

1. The property of a seminary of learning which is a public corporation under the control of officers appointed by the state, and managed in the manner prescribed by law, and all whose property has been received either from the state directly, or has been granted by congress to the state for educational purposes, and which is required to educate free a certain number of students to be named by the governor, cannot be taken in execution on a judgment recovered against it.

2. When the personal property of such an institution is levied on, it is not necessary to file a bill in equity to restrain the sale. It may be done in Louisiana by intervention and third opposition.

This cause was heard upon a rule to revoke an order restraining the marshal from further proceedings upon an execution issued in the principal case.

H. D. Ogden, for motion.
J. O. Fuqua, contra.

WOODS, Circuit Judge. A fieri facias was issued upon a judgment recovered in this court by A. Featherman against the Louisiana State Seminary of Learning and Military Academy. It was levied on 6,500 volumes of books and other personal property, as the property of the defendant in execution, and the marshal was proceeding to advertise and sell the same, when the state filed her intervention and third opposition, claiming that the property levied on was the property of the state, and praying that the marshal be restrained from proceeding further with the sale under the execution. The marshal was restrained by the order of a judge of this court, and the plaintiff in execution now moves the court to dissolve the order.

The State Seminary is a public and not a private corporation. It is, by an act of the legislature, placed under the superintendence of a board of visitors, one of whom is the governor, and another the superintendent of education, and twelve others to be appointed by the governor. The fund which constitutes its only endowment is the proceeds of land donated by congress. The state has made frequent appropriations for its support. In 1867, the legislature appropriated out of the general fund $5,000 to enlarge the library. It appropriated $31,000 in 1869 out of the general fund for the general use of the seminary, $5,000 of which was appropriated for the purchase of apparatus and books. In 1870, $20,000 were appropriated to the seminary to supply losses occasioned by the fire, which destroyed the buildings of the institution, and in 1871, another appropriation was made of $10,000 for the purchase of books.

The institution has not only been under the exclusive control of officers appointed by the state, and managed in the manner specifically pointed out by the legislature, but all its property, except a few insignificant donations of books, has been received either from the state directly or has been granted to the state by congress for educational purposes, and it has been required to receive free a specified number of students to be named by the governor. It is therefore clearly one of that class of "public corporations which are founded for the public, though not for political or municipal purposes, and the whole interest in which belongs to the government." Ang. & A. Corp. § 14.

Can the property of such an institution be seized on execution? It seems to me that the marshal would have the same right to levy upon the furniture and other property of the state, used in the institution for the deaf, dumb and blind. The only difference between the cases is that the overseers of the State Seminary are made a body corporate, with power to sue and be sued, while the board of administrators in the deaf, dumb and blind institution is not. But this fact does not any the less make the corporation a public corporation, nor its property any the less the property of the state. I am therefore of opinion that the order forbidding the marshal to proceed with the execution ought not to be revoked.

It has been objected that the state has mistaken its remedy, which should have been by regular bill in equity. I do not think the objection well taken. The property levied on is personal property. At common law, the remedy would be replevin, but the jurisprudence of Louisiana has substituted for this common law action a proceeding called an intervention and third opposition. There is no necessity, therefore, for resorting to equity. It is not a case for the interference of a court of equity. There is a remedy at

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

law, and the practice of this state points out what it is. It has been followed in this case, and we are required by the practice act of 1872 [17 Stat. 196] to sustain it. Bank v. Labitut [Case No. 842].

Case No. 4,713a.

In re FEDERHEN.

[Cited in Re Lane, Case No. 8,044. Nowhere reported; opinion not now accessible.]

Case No. 4,714.

In re FEELY.

[3 N. B. R. 66 (Quarto, 15);[1] 15 Pittsb. Leg. J. (O. S.) 291.]

District Court, W. D. Pennsylvania. March 21, 1868.

BANKRUPTCY—ACT OF 1867—EXEMPTIONS—DISCRETION OF ASSIGNEE — EXEMPTION UNDER STATE LAW.

1. Under section 14 of the bankrupt law [of 1867 (14 Stat. 522)] household and kitchen furniture and other articles and necessaries to the amount of five hundred dollars may be set apart.

2. The discretion of the assignee limited to the "other articles and necessaries." Rule for exercising such discretion laid down.

[Cited in Re Steele, Case No. 13,346.]

3. Property of the value of three hundred dollars exempted under the laws of the state; but such exemption cannot include the same species of property as are named in the bankrupt law.

4. The state exemption must be ascertained by the mode designated by the state law.

I, Samuel Harper, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause, before me, the following question arose and was stated and agreed to by the counsel for the opposing parties. In his schedules, the bankrupt [Martin W. Feely] claimed exemptions as follows: Under the bankrupt act a burial lot in St. Mary's Cemetery, valued at forty dollars, and the wearing apparel of himself, his wife, and children, to the value of one hundred and sixty-seven dollars and fifty cents; and under the laws of the state of Pennsylvania, sundry articles, being the stock of trade of the bankrupt as a retail grocer, of the value of three hundred dollars. The assignee, in his report to the court, set apart to the bankrupt the burial lot and clothing, and denied to him the property claimed as exempt by the state laws. To this report, so far as it denied the latter named property, the bankrupt, through his counsel, has filed exceptions.

The assignee contends that the bankrupt is not entitled to claim, and cannot be allowed any property under the state laws, unless such laws exempt by name different kinds of property than are specified in the former part of the 14th section of the bankrupt law.

The bankrupt's counsel contend that the clause of the 14th section relating to the exemption by the state laws, allows the bankrupt to claim any property to the amount of $300, he may select, whether such property be specifically named or not.

By Samuel Harper, Register:

The 14th section of the bankrupt law contains the following provision: "Provided, however, that there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four." The true construction of this clause will allow the bankrupt the following exemptions, without qualification, viz.: First. Necessary household and kitchen furniture to an amount not exceeding five hundred dollars. Second. Wearing apparel of the bankrupt, his wife, and children. Third. Uniforms, arms, and equipments, if bankrupt has been or is in the military service. Fourth. Other property exempt by the laws of the United States; and Fifth. Property exempt by state laws of different species from that already specified. In addition to the foregoing it is the duty of the assignee, in the exercise of a sound legal discretion, taking into consideration "the family, condition, and circumstances of the bankrupt," to set apart other articles and necessaries, but so that, with the household furniture, the amount shall not exceed the sum of five hundred dollars. In considering the "family," the assignee must have regard to the number composing it; in inquiring after the "condition," he must ascertain the social status, and whether ill health prevails or not; and in regard to the "circumstances," he must inquire how the bankrupt

[1] [Reprinted from 3 N. B. R. 66 (Quarto, 15), by permission.]

is employed, what his income is; whether any—and if any, how many—of the family earn their own living, and whether they contribute to the support of the others; and also how much and what property the bankrupt is entitled to under the state laws.

It has been decided so frequently in other judicial districts, that the exemption under state laws is in addition to that allowed by the bankrupt law, whether the state laws exempt specifically, or allow the debtor to select, that I need not state the reasons why such an allowance should be made. But I am clear in the opinion, that the language of the clause relating to the state exemption materially qualifies the clause itself. The words "other" and "not included in the foregoing exceptions," properly construed, must deny to the bankrupt the right to claim household and kitchen furniture, wearing apparel, and the uniform, arms, and equipments of a soldier as exempt under the laws of the state, because such property is by name included in the preceding exceptions. If such be not the proper construction, those words can have no possible meaning, for without them the clause would be complete thus, "and such property as is excepted from levy and sale upon execution or other process, etc." Whilst a bankrupt is entitled to three hundred dollars worth of property, as exempt by the laws of the state of Pennsylvania, the peculiar construction of the clause under consideration requires him to make his claim upon other property than that specifically mentioned in the former part of section 14. In the case of a bankrupt who has one thousand dollars worth of household furniture, and who has claimed five hundred dollars of it under the 14th section, he cannot, under the latter clause of that section, claim to be allowed three hundred dollars of it under the state laws. In this view the assignee cannot set apart to the bankrupt, under the state laws, any property specifically designated by the bankrupt law; but any property not so designated, he may; and, in setting apart such property, he must be governed by the amount allowed and the mode designated by the law of the state under which the exemption is claimed. The exceptions to the assignee's report are sustained, and the exemption, as claimed by the bankrupt, allowed. And the said parties requested that the same should be certified to the judge, for his opinion thereon.

Dated at Pittsburg, the 19th day of March, A. D. 1868.

McCANDLESS, District Judge. The decision of the register is affirmed. In re Stevens [Case No. 13,392]; In re Welch [Id. 17,366]; In re Hay [Id. 6,253].

FEELY (UNITED STATES v.). See Case No. 15,082.

Case No. 4,715.

In re FEENY.

[1 Hask. 304;[1] 4 N. B. R. 233 (Quarto, 69).]

District Court, D. Maine. Oct., 1870.

INJUNCTION—CONTEMPT BY ONE NOT SERVED.

1. One, having knowledge of an injunction, and violating it, is guilty of contempt, although the same had not been served upon him. [Cited in Re Cary, 10 Fed. 627.]

2. A mortgagee of chattels, having been enjoined from enforcing his mortgage, is guilty of contempt by replevying the chattels, and is condemned to a fine equal to the expense he has occasioned the owner of the property in the premises.

In bankruptcy. Petition by the assignee of Martin N. Feeny, a bankrupt, that Peter Smith be adjudged in contempt for violating an injunction of the court. Respondent answered, admitting that he had violated the terms of the injunction, but asserted that the acts charged were done before the injunction had been served upon him, and therefore he was guilty of no contempt in violating the same.

William L. Putnam, for petitioner.
Bion Bradbury, for respondent.

FOX, District Judge. This is a petition by James Hurley, the assignee in bankruptcy, "that one Peter Smith may be adjudged guilty of a contempt, in violating the order of this court, passed on the 25th day of Dec. last, enjoining him from foreclosing a mortgage on the stock in trade of said bankrupt, or from commencing or prosecuting any suit for or on account of any claim by virtue of said mortgage, or from taking possession of said stock until the further order of the court." Notice of this petition has been given to said Smith, and he has filed a written answer thereto, admitting that he has commenced an action of replevin for the stock, but averring that the order of injunction had not been served upon him at the time he instituted the suit, and that he was not thereby in contempt.

On the hearing, it was shown that a petition was filed by said Hurley on the seventh of December last against said Feeny, praying that he might be adjudged a bankrupt, "for that he had given a preference to said Smith in fraud of the act [of 1867 (14 Stat. 517)], by mortgaging to him, Oct. 27, 1869, his stock in trade to secure sundry of his notes then overdue and held by said Smith." A trial was had before the jury on this petition, and on the morning of Dec. 25th, a verdict was rendered in favor of the petitioner, and Feeny was thereupon adjudged a bankrupt. Smith was a witness at the trial, was well aware of the cause for which Feeny was decreed bankrupt, and had previously consulted counsel in relation to it, Mr. Freeman of Cherryfield, where both parties re-

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

sided. Freeman was also a witness in the trial of the petition against Feeny.

Freeman, having learned that a petition for an injunction had been or would be presented to the district court to restrain Smith from commencing any suit in the state court for the mortgaged property, or from taking it into his possession, on the morning of Dec. 25th advised Smith that they were endeavoring to serve notice upon him of the petition for injunction, that he might be summoned to appear before the court, and that he had better commence his suit of replevin at once in the state court, before the injunction should be served upon him; and it was agreed that Freeman should leave that noon for Cherryfield, to sue out and complete service of the replevin writ as soon as practicable.

The marshal was unable to find Smith, to make service upon him of notice of the application for an injunction, and the court being satisfied that he was endeavoring to avoid service of the notice, and that he was fully advised of the pendency of the petition, on the same day, under authority of the provisions of the 40th sec. of the bankrupt act, granted the injunction as prayed for, to continue until the further order of the court. Smith remained in Portland until noon of Dec. 27th, and from his own testimony, I find that he believed no injunction had been obtained against him Dec. 25th, and he therefore avoided the marshal who endeavored to find him to make service of the order upon him, and it was not legally served by the marshal, by a copy of the order, until Dec. 31st, at Cherryfield, at which time and place he was in possession of the mortgaged property, having taken the same on his writ of replevin issued Dec. 28, 1869.

The assignee, in March, obtained an order for the sale of the goods and demanded the same of Smith, who refused to surrender them unless his demand against Feeny was paid. The assignee then petitioned the court for an order on Smith for the delivery of them, and after notice to Smith of this petition, on the 26th of April a warrant issued to the marshal to take possession of the property and deliver the same to the assignee, which warrant has been executed and the goods since sold at public auction. Expenses have been incurred by the assignee in thus obtaining possession of the goods from Smith, and in the defense of the action of replevin.

The respondent was informed of the application for the injunction, and on the same day was satisfied and believed it had been ordered, and subsequently, he sued out his writ of replevin, took possession of the property, and retained the same from the assignee until the last of April, when it was surrendered by him to the officer. His counsel apparently have supposed that there was no virtue or effect in an order for injunction until the same was legally served on the party by the marshal, and that if he could secrete himself and avoid service of the order until the replevin writ could be obtained, that he would be justified in so doing, although he knew or believed the injunction had been ordered. This is a very grave mistake; and the rights of the assignee to an indemnity for the damages occasioned by the breach of the injunction cannot be in any way affected by the fact that the respondent acted under the advice of counsel. Hawley v. Bennett, 4 Paige, 163.

It was decided in the time of Ld. Hardwicke (Skip v. Harwood, 3 Atk. 565), that when a person is present in court and has notice of the decree, if he does any act in contravention of the decree, he is guilty of a contempt, and is punishable for it, notwithstanding the order is not drawn up. In Osborne v. Tenant, 14 Ves. 136, the defendant and his attorney were present in court when the motion was made for the injunction, but were absent when the order was granted. Ld. Eldon said, "I cannot attend to a distinction so thin as that persons standing here until the moment the Ld. Chancellor is about to pronounce the order, which from all that passed they must know will be pronounced, can, by getting out of the hall at that instant, avoid all its consequences." In Kimpton v. Eve, 2 Ves. & B. 349, an order for injunction was granted, the defendant by his affidavit admitted his belief that the order had been made, alleging that he acted by the advice of his counsel, who conceived that mere notice, without service of the injunction or order, had no effect. Ld. Eldon said, "In this case, the party admitting that he believed the order was made, the principle is the same, as if his belief was formed from information short of actual service." The party was adjudged guilty of contempt, and required to pay the costs. The same principle was again re-affirmed by Ld. Eldon in Vansandau v. Rose, 2 Jac. & W. 264, so that the rule in England now is, that a party is liable for breach of an injunction after notice of its having been obtained, although the order has not been served upon him.

This rule is equally well established in this country. It was adopted by the court in Hull v. Thomas, 3 Edw. Ch. 236; Waffle v. Vanderheyden, 8 Paige, 45; Haring v. Kauffman, 2 Beas. [13 N. J. Eq.] 399. In this latter case it is stated: "All that is required to enable the court to enforce obedience to its process, is that the defendant should have knowledge of the order for the injunction. The court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence." Hil. Inj. 141–143; 1 Smith, Ch. Pr. 623.

This respondent is clearly guilty of contempt by instituting his replevin suit after he believed the injunction had been ordered, and in taking and retaining the possession of

the property; by thus proceeding he has subjected the assignee to costs and expenses, to which he would not otherwise have been subject, and the assignee is entitled to an indemnity. If the parties cannot agree on the amount, it will be referred to the clerk to determine it. The only course at present is to adjudge the respondent in contempt, and leave the amount of fine open until the actual loss and cost to the assignee by reason of the misconduct is ascertained.

The claim for damages, by reason of the detention and loss of seasonable market of the goods, is not sustained by the evidence, and is not allowed. The replevin suit having been discontinued, the only indemnity which should be allowed on that account is the expense the assignee has incurred in defending against it. Decree accordingly.

[NOTE. A bill in equity was filed by the assignee, praying that the mortgage executed by the bankrupt to Peter Smith be set aside as fraudulent under the bankrupt act. Hurley v. Smith, Case No. 6,920. A decree was rendered in favor of the complainant.]

FEES AND COSTS IN PRIZE CASES. See Costs, Fees, and Compensation in Prize Cases, Append. Fed. Cas.

FEES FOR REGISTERING. See Append. Fed. Cas.

FEES IN BANKRUPTCY CASES. See Costs and Fees, Append. Fed. Cas.; Fees for Registering, Id.

FEES OF ATTORNEYS IN CIVIL CASES. See Costs in Civil Cases, Append. Fed. Cas.

FEES OF DISTRICT ATTORNEYS. See District Attorneys' Fees, Append. Fed. Cas.

FEHRENBACK (UNITED STATES v.). See Case No. 15,083.

FEIGELSTOCK (UNITED STATES v.). See Case No. 15,084.

Case No. 4,716.

In re FEINBERG et al.

[3 Ben. 162;[1] 2 N. B. R. 425 (Quarto, 137); 1 Chi. Leg. News, 210.]

District Court, S. D. New York. March 9, 1869.

WITNESS—COUNSEL—PARTY.

1. Where, on a petition filed by an assignee in bankruptcy against one W., an injunction had been issued out of this court against him, restraining him from parting with any property that had come into his possession from the bankrupts during the four months preceding the adjudication of bankruptcy, and thereafter, on a summons issued at the instance of opposing creditors in the bankruptcy proceedings, W. attended as a witness before the register, and was sworn and claimed a right to be attended by counsel on such examination, and the bankrupts objected to his being examined at all, on the ground that W. had been made a party to the bankruptcy proceedings: *Held*, that the objection taken by the bankrupts to the examination was not well taken.

[Cited in Re Krueger, Case No. 7,942; Re Stuyvesant Bank, Id. 13,582; Re Comstock, Id. 3,080.]

2. Under the decision in Fredenberg's Case [Case No. 5,075], the witness was not entitled to be represented by counsel.

[I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the counsel for the opposing parties, to wit: Mr. P. J. Joachimssen, who appeared for the bankrupts [Robert Feinberg, Martin Steenbock, and Gustav Pessels], and Mr. G. W. Wingate, who appeared for Townsend & Yale, creditors of the said bankrupt. Isidor Wedeles, attending as a witness upon a summons issued at the instance of the said creditors, had been sworn and was under examination, Simon Stern, Esq., appearing with him as his counsel, when—First. Mr. Wingate objected to such attendance by Mr. Stern, denying the right of the witness to have attending counsel upon such examination, citing the decision of the court in Re Fredenberg [supra]. Second. Mr. Joachimssen objected to the examination of his witness at all under the said summons, on the ground that the assignee had filed a petition in this matter against the said Isidor Wedeles with other persons as to the property of the bankrupts, and that the court had granted an injunction thereon against him and them, whereby the said Wedeles had been made a party to these proceedings, entitling him to the protection of the court against the attempts of creditors, whose representative and agent the assignee was, to take undue advantage of the said Wedeles by summoning and examining him as a witness; and hereupon the register held—

[First. That however important it might be for a witness in the situation of the present one to have attending counsel, the language of the court in the case of Freidenberg denies it, declaring that only parties are so entitled, "unless where a witness is made a party to a new collateral proceeding, by being cited to answer for an alleged contempt." Second. That the objection of Mr. Joachimssen was not well taken, and that the witness might be examined.

[And at the request of the counsel, I herewith transmit the briefs filed by them hereupon.

[Edgar Ketchum, Register.][2]

G. W. Wingate, for creditors.

P. J. Joachimssen, for bankrupts.

S. Stern, for witness.

BLATCHFORD, District Judge. The register was correct in both of his decisions.

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

[2] [From 2 N. B. R. 425 (Quarto, 137).]

Case No. 4,717.

FELCH v. HOOPER et al.

[15 Alb. Law J. 333.]

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

SPECIFIC PERFORMANCE — CONTRACT FOR CONVEYANCE OF REAL ESTATE.

[An obligee in a bond for title, who, after paying part of the consideration, enters under verbal authority from the obligor, and erects a house and other improvements on the land, is entitled to a conveyance thereof upon paying the balance according to the condition of the bond.]

[David] Hooper, one of the defendants, executed a bond to the complainant [Mark C.] Felch, conditioned for the conveyance to the complainant of certain land in Somerville, upon the payment by the obligee of a certain sum, of which $150 was paid upon the delivery of the bond. Felch soon after, under verbal authority from Hooper, entered upon the land and erected a dwelling-house and made other improvements. Hooper afterwards refused to convey. The supreme court of Massachusetts decided that the land was charged with an implied trust in plaintiff's favor. 119 Mass. 52. The circuit court decided that, upon the facts in the case, the plaintiff was clearly entitled to a conveyance upon paying the amount due according to the conditions of the bond, and ordered a conveyance accordingly.

[NOTE. It was further ordered that the case be referred to a master to ascertain the amount of interest due on said bond, and to inquire and report as to certain other matters referred to him for consideration. In pursuance of this order, the master made his report, to which exceptions were taken by the defendants. On the hearing, the court overruled these exceptions (Case No. 4,718), and confirmed the master's report.]

Case No. 4,718.

FELCH v. HOOPER et al.

[4 Cliff. 489.][1]

Circuit Court, D. Massachusetts. May Term, 1878.

PRACTICE IN EQUITY — AUTHORITY OF MASTER TO DEPART FROM ORDER OF COURT — HEARING ON EXCEPTIONS TO MASTER'S REPORT—REVIEW.

1. Masters have no right to review, reject, or disregard the decision, order, or directions of the court, contained in the decretal order under which they are appointed. They are bound to follow all such orders and directions.

2. Courts of equity may, in certain cases, give the parties a new hearing, but nothing of that kind will be allowed in a hearing on exceptions to master's report.

3. Applications for a review at law, or in equity, and proceedings upon master's report, are altogether different proceedings.

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

Hearing upon exceptions to master's report in equity.

A. G. Stinchfield, for respondents.

The master's functions are limited by the decree, and it was no part of his duty to go into the investigations as to the fact of a tender, or its sufficiency to stop the running of interest upon the bond. This question was not referred to him. We are entitled, by the terms of the bond, to $1,650.00, with interest at the rate of eight per cent. per annum after October 15, 1873. Of this the master has allowed one month and six days (page 2), and from April 1 to October 11 (page 7), and no more. Gordan v. Hobart [Case No. 5,608]; Lonsdale Co. v. Moies [Id. 8,497].

At the hearing, the court considered this question of tender only as it bore upon the question of granting relief from the forfeiture insisted on in the answers, and not at all, as the master supposed, in its relation to interest. Though the master has disallowed interest, he has at the same time referred to the court the question as to whether a tender not kept good, as this confessedly was not, can defeat the interest payable by the express terms of the contract.

But, if authorized to go into the investigation of the sufficiency of a tender to stop interest, we except to the disallowance upon the facts and grounds stated in the report. The contract is a special one, and the plaintiff [Mark C. Felch] is entitled to a conveyance only upon the express condition that within ninety days from date, he tender the amount and interest after sixty days at eight per cent, which the master finds he did not do. By the terms of the bond, the tender, to be effectual to stop interest, should have been made, at latest, Nov. 14, 1873, but the master finds that, as matter of fact, it was not made till Nov. 21, 1873. It is well settled that a tender after the day is ineffectual as a tender. It is an equitable circumstance, which the court regarded upon the issue submitted by the bill and answer in granting relief from forfeiture of condition, but it cannot be regarded as sufficient to stop interest payable by the express terms of the contract. Merritt v. Lambert, 7 Paige, 344; Hume v. Peploe, 8 East, 168; Poole v. Tumbridge, 2 Mees. & W. 223; Adams v. Cordis, 8 Pick. 269. No money was deposited in court, and the master finds, as matter of fact, that the identical money intended was not kept on hand at all, but at once returned to the person of whom he borrowed it; that no money at all was at all times kept ready for the defendants; that the defendants had no notice that any money was ready for them; that on the 21st day of Nov., 1873, when the alleged tender was made to David Hooper, the title to the land was in Matilda H. Hooper, and that no tender was made to her; that the plaintiff ever, after the execution of the bond, was in possession of the

premises, taking the rents and profits. Upon such a state of facts the master was not authorized to disallow interest, which is expressly a part of the contract, and not claimed simply as damages for non-performance. Before it can so operate it must be made duly and kept good ever after. It is not enough that the money is kept a part of the time "where he could get it on short notice," whatever that means, and a part of the time in his business. Adams v. Cordis, 8 Pick. 269; Roosevelt v. Bull's Head Bank, 45 Barb. 579; Merritt v. Lambert, 7 Paige, 344; Claflin v. Hawes, 8 Mass. 261; Dorkray v. Noble, 8 Me. 285; Reed v. Woodman, 17 Me. 46; Marshall v. Wing, 50 Me. 62; Sheredine v. Gaul, 2 Dall. [2 U. S.] 190; Livingston v. Harrison, 2 E. D. Smith, 197.

We except to the refusal of the master to report the evidence upon which he bases his conclusion, that the plaintiff at any time had, after the alleged tender, the money where he could get it easily. We think this finding more favorable to the plaintiff than he was entitled to, or the evidence would warrant. The master is not the ultimate tribunal in the determination of questions of law and fact referred to him, and the exception is well taken. Greene v. Bishop [Case No. 5,763]; Foster v. Goddard, 1 Black [66 U. S.] 509.

G. W. Park, for complainant.

The court found a tender, and the master found that it had been kept good. Prior to April 1, 1877, the complainant got no interest or income on the money, and after this date, on the presumption of profit from use, the master charges complainant with interest on the whole amount. This should have been only on the balance due respondents after deducting costs (no exceptions taken by us however). After a tender is refused, the party tendering need not give notice that the money is on hand, or do anything whatever until the party refusing shall call for the money. The receipt of "the rents and profits, whatever they were," without evidence of value or amount, does not show that any thing was in fact received. After tendering the purchase-money, complainant was the equitable owner of the land, and as such, was entitled to the rents and profits; and if he received no interest or income on the money left in his hands, he is not liable to pay interest. Davis v. Parker, 14 Allen, 94. And if he received interest or benefit from the money, he is only liable for so much. Davis v. Parker, Id. The interest referred to in the decree was that given by the terms of the contract before complainant's ground of suit accrued. The master allowed this to Nov. 21, 1873, the day of tender, but it should have stopped Nov. 14, when Hooper was in default in performance—no exception, however, by us), together with such interest (if any) as the evidence before the master should show that the complainant had subsequently received for the money. The court having found that Matilda H. Hooper was not a purchaser in good faith, and she not being a party to the bond, no tender to her was necessary.

The costs in the state court were lawfully taxed and certified, in pursuance of the decree in this cause. The complainant could not have that matter specifically adjudicated by the state court unless the respondents appealed from the clerk's taxation, which they did not do. Gen. St. Mass. c. 156, § 22 et seq. The costs taxed for this court are the usual costs allowed by law, and of the usual amount.

CLIFFORD, Circuit Justice. Frequent cases arise in which the exceptions to a master's report require some reference to the original pleadings and proceedings, in order that the alleged errors imputed to the master may be fully understood. Enough appears in the pleadings and proofs to show that the suit was removed from the state court into the circuit before the merits of the controversy were decided. By the record it appears that the respondents executed a bond to the complainant, conditioned for the conveyance to the complainant of certain real estate by a deed of warranty, sufficient to vest in the latter a good and clear title to the premises, free and clear from all incumbrances, upon the payment to the complainant by the obligor in the bond of eighteen hundred and fifty dollars, as therein specified. Controversy arose between the parties, and the complainant instituted the present suit in the state court. Service was made, and the respondents appeared and demurred to the bill of complaint. Hearing was had, and the state court overruled the demurrer, and decided that the premises were charged with an implied trust in favor of the obligee in the bond, it appearing that he had paid or tendered the sum stipulated to be paid, and had entered into the possession of the land, and made improvements by the permission of the owner. Felch v. Hooper, 119 Mass. 52.

Immediate removal of the cause was made into the circuit court, where the respondents appeared and filed an answer. [See Case No. 4,717.] Subsequent to the hearing, the circuit court entered a decree that the stipulations of the bond ought to be specifically performed and carried into execution, and that the complainant is entitled to have a good and sufficient conveyance of the land, and that the respondents should give their deed of the same, with all the covenants of title usually inserted in warranty deeds by the custom and practice of the state. Appended to the same is the further decree, that the cause be referred to John G. Stetson, Esquire, one of the masters of the circuit court, to inquire and report what amount of principal and interest is due and payable from the complainant to the re-

spondents, and to tax the plaintiff his costs of suit in the circuit court, and also in the state court from which the cause was removed. Directions were also given to the master, in the decree, as follows, to wit: that he, the master, shall deduct the amount of all such costs from the amount due in respect of the purchase-money of the land described in the bond, and the further decree is, that, upon the complainant's paying into the registry of the court the balance of the purchase-money, after the deduction of such cost, the respondents, including the obligor of the bond and his mother, to whom he had conveyed the premises, execute, acknowledge, and deliver to the complainant, such deeds of conveyance as, in the opinion of the master, shall be adequate and sufficient to vest in him a clear and perfect title to the premises, free and clear from incumbrances. Inquiries were to be made by the master, and the decree directed that the evidence taken for the trial of the cause in chief might be used before the master, as far as it was pertinent to such inquiries, and that the master should report upon the matters referred for his consideration.

Pursuant to the decretal order, the master heard the parties, and made the report to which the exceptions under consideration are addressed. They are all embraced in one general statement, which, for convenience, is divided into propositions as follows:—

1. To the refusal of the master to report the evidence or make findings of fact, as requested.

2. To the master's refusal to allow interest on the bond, according to its terms and conditions, as required by the decree.

3. To his refusal to find and determine, as matters of law, that the alleged tender had not been kept good by the complainant.

4. To the allowance of the costs taxed in the state court.

5. To the amount of costs, and to the charge of the master for his services.

Masters have no right to review, reject, or disregard the decision, order, or directions of the court contained in the decretal order under which they are appointed. Instead of that they are bound to obey, follow, and carry into effect all such decisions, orders, and directions. Apply that rule to the case before the court, and it disposes of most of the questions raised by the exceptions. Courts of equity, in certain cases, may give the parties a new hearing, but nothing of the kind will be allowed in the hearing of exceptions to a master's report. Applications for review in law or in equity, and hearings upon exceptions to a master's report, are altogether different proceedings, and cannot be blended either in argument or decision. Argument to support the two preceding propositions is quite unnecessary, as their correctness is self-evident, and they are sufficient to show that it was the duty of the master to follow and obey the directions of the decretal order. All the exceptions not covered by the foregoing propositions have been carefully examined, and are hereby overruled upon the ground that the rulings and decisions of the master are correct, including the charge for his services which is deemed to be just and reasonable.

Decree for the complainant, that the exceptions to the master's report are overruled, and that the report of the master be, and the same is, hereby confirmed.

Case No. 4,719.

FELICHY v. HAMILTON.

[1 Wash. C. C. 491.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

PARTNERSHIP—WHAT CONSTITUTES—COMMUNITY OF INTERESTS.

1. To constitute a partnership, there must be a community of interests—a participation in profit and loss; and this joint interest must continue to the time of the sale of the articles in which the parties are thus interested.

[Cited in Hunt v. Oliver, 118 U. S. 221, 6 Sup. Ct. 1088.]

[Cited in Edwards v. Tracy, 62 Pa. St. 377.]

2. It is the joint interest in the whole, which constitutes the joint liability of all, for the contracts of one; and not the credit which is given to all, as in the instance of a dormant partner.

3. If A & B purchase an article on joint account, and ship it, they are jointly liable for advances made by the consignee on account of this joint concern.

The two Mackeys, and the defendant, in 1795, shipped a quantity of snuff to the plaintiff, at Leghorn, and the invoice and bill of lading, stated it to be on their account and risk, and consigned to the plaintiff to sell. In pursuance of a general permission, given by the plaintiff to the Mackeys, who had before done business with them, to draw on London for two-thirds of the invoice price of all goods consigned to the plaintiffs, the Mackeys drew upon Robert Hunter, the friend and agent of the plaintiff in London, for two-thirds of the amount of this shipment; and although the plaintiff found the snuff to be altogether unsaleable and worthless, he nevertheless directed Hunter to take care of the bills. Some of them were paid and some protested, in consequence of the plaintiff's not providing, at the time, funds for the reimbursement of Hunter, from which he was prevented, the French having taken possession of Leghorn. The plaintiff corresponded with the Mackeys alone, upon the subject of this shipment, without once mentioning the name of Hamilton. They charge the advances, made on account of it,

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

to them, in sundry accounts; and in one, they credit that account with a sum previously due from them, to the Mackeys, on their separate account; no objection was ever made to the mode of stating the account by the Mackeys, during their solvency. They afterwards became bankrupts, and this action is brought to recover the whole advances made on the snuff account, against Hamilton.

The only question of law argued before the jury, was, whether Hamilton was liable, as a partner with the Mackeys. It was contended that he was not; because, it being agreed between the Mackeys and Hamilton, that the former was to transact the whole business of the sale in Europe, Hamilton was deprived of one of those powers, or of the whole, which is essential to a co-partnery. 2d. That all was done in the names, and on the credit of the Mackeys. 3d. The plaintiff claimed of Hamilton only one-half of the advances. Cases cited, [Scottin v. Stanley] 1 Dall. [1 U. S.] 129; Cowp. 636, 448; [Hollingsworth v. Hamelin] 1 Dall. [1 U. S.] 151; [Tillier v. Whitehead] Id. 269. Wats. Partn. 253, 80; 1 Ld. Raym. 666; 2 Ld. Raym. 1484; Salk. 126, 292; Wats. 58, 59.

WASHINGTON, Circuit Justice. To constitute a partnership, there must be a community of interest; a participation in profit and loss; and this joint interest must continue to the time of the sale, as well as to the purchase. This joint interest in the whole, is what constitutes the liability of all for the contracts of one. If the Mackeys and Hamilton purchased on joint account, and shipped the snuff to be sold on joint account, then they are liable jointly for the advances made by the plaintiffs, on account of this joint concern. The measure of their interest in the snuff, will be the measure of their liability for the advances. If they were not jointly concerned in the sale, the conduct of the Mackeys, in making the shipment on joint account, if not done with the knowledge of Hamilton, cannot make it a partnership transaction. But, if they were jointly concerned in the sale, then the plaintiff, corresponding only with the Mackeys, did not discharge Hamilton. The responsibility of one partner, for the contracts of another, is not solely on the ground of the credit being given to all, which it is not in the case of a dormant partner; but because, that being to share the profits, they must share the loss. Neither would the agreement of one partner with another, not to act in the business; whatever may be the effect of this as between the parties, it is nothing to third persons; neither ought the plaintiff to be affected by his having claimed only a moiety from Hamilton. For, if there was really a partnership, it was no more than a mistake of his legal rights.

Verdict for plaintiff.

Case No. 4,720.

FELIZ v. UNITED STATES.

[Hoff. Land Cas. 69.]

District Court, N. D. California. Dec. Term, 1855.

GRANTS BY MEXICAN GOVERNORS OF CALIFORNIA —SUFFICIENCY OF DESCRIPTION.

[A grant described as the "place called 'Sanel,' its boundaries being the 'Serranias Altas' and the river," is sufficiently definite in description, it appearing that the place of that name is well known, and is delineated on a map so that a surveyor could, with its aid, locate the land.]

[This was an appeal by Fernando Feliz from a decision of the board of land commissioners rejecting his claim to the Rancho Sanel.]

Claim for four squares leagues of land in Mendocino county, rejected by the board, and appealed by the claimant.

Irving & Rose, for appellant.

S. W. Inge, U. S. Atty., for appellees.

HOFFMAN, District Judge.

The claim in this case was rejected by the board of commissioners for want of proof of the genuineness of the grant, and because the grant itself contained no description of the land to identify it or enable a surveyor to determine its locality. On looking at the evidence before the board, we find no proof even of the signature of the governor to the original grant. The expediente from the archives was neither produced nor accounted for, but the evidence was confined to the point of occupation and cultivation by the grantee. Since the appeal has been taken, evidence of the genuineness of the signature of Governor Micheltorena has been offered, and a duly certified copy of the expediente on file in the archives has been offered in evidence and admitted by the district attorney. In the original grant the signature of the secretary is wanting, but though this circumstance might suggest a doubt as to the genuineness of the document, we are not aware that the signature of the secretary was a legal requisite to grants of this description. The grant was made on the ninth of November, 1844. By the testimony of James Black and Jesus Piña, taken in this court, it appears that the claimant in the spring of 1845 was living on his land, and that in August of that year he had built a house, and also had a garden, a corral, and had cattle upon it. This testimony is important, not only as showing a performance of the conditions, but tending to dissipate whatever doubts might otherwise have been entertained as to the authenticity of the grant. The objection taken by the board to the claim for want

of proof as to its genuineness is thus obviated by the additional testimony taken in this court, and as no argument has been offered, or suggestion made to the contrary, we presume that no doubt is entertained on the point by the district attorney.

The second ground on which the claim was rejected by the board, was the want of a description sufficient to indicate the granted premises. The expediente containing the map referred to in the grant has been produced in this court, as already mentioned. The grant describes the land as the "place called 'Sanel,' its boundaries being the 'Serranias Altas' and the river." By the testimony of Jesus Piña, it appears that the place called "Sanel" is well known; that it is situated on Russian river, and derives its name from a tribe of Indians called "Sanel Indians," who live there and have a rancheria there. The witness, on being shown the map in the expediente, recognizes it as being a map of the place called "Sanel." James Black testifies that he has known the place called "Sanel" since 1842, and that it was always called by that name. That it is the name of a valley, and that every body in that vicinity knows it by that name, and that it has always been so known since he became acquainted with it. The witness further states that in his opinion a surveyor could, by the aid of the map, locate the land thereon designated as the "Terreno que se solicita." Without invoking, therefore, the principles decided in the Case of Fremont,[1] we think we are justified under this evidence in concluding that the designation by name in the grant of the tract granted, with its boundaries, and the delineation on the map taken together, indicate with reasonable certainty and precision the locality of the granted land.

No doubt as to the performance of the conditions is suggested. The claimant has from the spring of the year succeeding that in which he obtained the grant, up to the present time, continued to reside upon and cultivate his land; and he even appears to have given his name to the place, for in the engraved map of the mining region of California, appended to the deposition of Black, the name "Feliz" appears, and is identified by the witness as the name of the place occupied by the claimant.

No other objections than those already considered are mentioned in the opinion of the board, or are suggested by the district attorney. We think, therefore, that this claim ought to be confirmed, to the extent of four leagues, if that quantity shall be found within the boundaries delineated on the map; and if the quantity so contained shall be less than four leagues, then that that lesser quantity be confirmed to him.

[1] [Case No. 15,164.]

Case No. 4,721.

FELLOWS v. BURNAP.

[14 Blatchf. 63.][1]

Circuit Court, S. D. New York. Nov. 29, 1876.

APPEAL IN BANKRUPTCY—JURISDICTIONAL REQUISITES.

The filing in this court, under general order No. 26 in bankruptcy, by a creditor in bankruptcy, of an appeal from a decision rejecting his claim, and of a statement of his claim, within ten days after giving notice of his intention to enter his appeal, are not jurisdictional requisites, and, if the requirements of section 4981 of the Revised Statutes in regard to the notice and bond on such appeal are complied with, this court has power to relieve the creditor from any consequences of not filing such an appeal and statement within such ten days.

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

[This was a suit by George A. Fellows against Uzziah C. Burnap, assignee in bankruptcy of Francis Many and James Marshall.]

George A. Black, for plaintiff.

William B. Hornblower, for defendant.

JOHNSON, Circuit Judge. This is a motion to dismiss the appeal of an alleged creditor of a bankrupt from a decision of the district court expunging his claim as against the joint estate of the bankrupts, but allowing it to stand as against their separate estates. The order embodying this decision was entered June 21st, 1876. Under the statute (Rev. St. § 4981), the creditor had ten days in which to take certain necessary steps in compliance with the requirements of that section, to effect an appeal. The statute is very specific and peremptory in regard to these steps. It says: "No appeal shall be allowed in any case from the district to the circuit court," unless three specified things are done within ten days after the entry of the decree or decision appealed from. In this case, each of these prescribed steps was taken within that time. The appeal was claimed and notice given to the assignee and to the clerk, and the requisite bond was given, approved and filed, within the ten days. If these steps are wanting, jurisdiction is not acquired by the circuit court. In re Coleman [Case No. 2,979]; Sedgwick v. Fridenberg [Id. 12,611]; Wood v. Bailey, 21 Wall. [88 U. S.] 640.

Sections 4982 and 4984 provide that the appeal so taken shall be entered at the next term of the circuit court for the district, held after the expiration of ten days from the time of claiming the appeal, and that, on so entering the appeal in the circuit court, the appellant must file in the clerk's office of that court a statement of his claim, substantially as in a declaration at law. No. 26 of the general orders in bankruptcy seems to

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

impose a narrower limit of time upon the appellant. It requires him to give notice of his intention to enter the appeal within ten days from the entry of the final decision of the district court, and to file his appeal in the clerk's office of the circuit court within ten days thereafter, setting forth a statement in writing of his claim, as prescribed by the law.

In this case, the bond was filed on the 24th of June, and the notice of appeal was given to the district clerk on the 26th of June, as sworn by the person who filed it, although the file mark on the original paper is June 24th. The appeal and statement required were filed in the clerk's office of the circuit court on the 6th of July, within ten days from the time of filing the notice of appeal, if that was filed on the 26th of June. But, whether it was or not is, in my opinion, not vital to the rights of the appellant. If there was a failure, it was not in a matter going to the jurisdiction of the court. The party, beyond all question, intended to proceed in time, and supposed himself to be in time. The office register showed the 26th as the day of filing the notice of appeal, and, counting from that day, the 6th of July was in time. Such a slip, if it be a slip, will, of course, be corrected. The excuse is sufficient to warrant relief, in any matter which does not go to the jurisdiction of the court. The motion to dismiss must be denied.

Case No. 4,721a.

FELLOWS et al. v. The CRESCENT CITY.

[Betts' Scr. Bk. 141.]

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

CARRIERS—LOSS OF PACKAGE—UNKNOWN CONTENTS—JEWELRY.

[A carrier is responsible for loss of jewelry when he makes no inquiry as to the contents of the package, and the shipper had no notice of a rule requiring such a disclosure.]

[In admiralty. Libel by James Fellows and others against the steamer Crescent City for loss of cargo.] The question involved was whether the owners of the Crescent City were liable for a case of jewelry and revolving pistols, shipped on board to be sent to New Orleans, and which were lost on the voyage.

BY THE COURT. This cause having been heard upon pleadings and proofs, and it being made to appear to the court that a bill of lading was duly signed on the part of the claimants, thereby engaging to deliver the case of merchandise shipped by the libellants in New York, on board said ship at New Orleans, according to the terms of said bill of lading, and it appearing to the court that at the time of the delivery of said case of merchandise on said steamship, and on signing and delivering said bill of lading, no inquiry was made on the part of the claimants respecting the contents or value of said case; and it not being made to appear to the court that the libellants had notice that the claimants would not be responsible for jewelry shipped on board said ship, unless the contents and value of the package were disclosed by the shipper; and it appearing to the court that the said case of merchandise was not delivered at New Orleans, pursuant to the engagement of the said bill of lading it is considered by the said court that the said ship is liable to the libellants for the value of the merchandise so shipped by them on board her; and it is further considered by the court that the libellants are competent and proper parties to maintain this action on the said bill of lading. Whereupon, it is ordered and decreed that the libellants recover against the said steamship their damages by reason of the premises, and that the said steamship be condemned therefor, together with their costs to be taxed. And it is further ordered that it be referred to a commissioner to ascertain the value of the merchandise in said bill of lading specified, and report to the court with all convenient speed, &c.

THE COURT, after the return of process, adjourned to this day week.

Case No. 4,722.

FELLOWS et al. v. HALL et al.

[3 McLean, 281.][1]

Circuit Court, D. Michigan. Oct. Term, 1843.

BANKRUPTCY PLEADED BY DEFENDANT — WAIVER OF DISCHARGE BY DEFENDANT — DECREE PRO CONFESSO IRREGULARLY ENTERED.

1. Bankruptcy should be pleaded at law and in equity.

[Cited in Re Burton, 29 Fed. 639.]

2. Until this is done, the plaintiff has no notice of the bankruptcy.

3. The defendant may waive his discharge.

4. A decree pro confesso, when irregularly entered, as a matter of course, will be set aside on motion.

[This was a suit by Fellows and others against Hall and Allen.]

Hand & Walker, for complainants.

Douglass & Walker, for defendants.

OPINION OF THE COURT. This is a creditor's bill. It was filed the 22d August, 1842. The 10th of October, a decree pro confesso was entered against the defendant Hall, and on the 10th of November ensuing, a decree pro confesso was entered against both of the defendants. Before the bill was filed, the defendant Hall applied to be declared a bankrupt; and on the 14th of September, 1842, he was declared a bankrupt, and an assignee was appointed. And a mo-

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

tion is now made to set aside the proceedings in the chancery suit after that date. The facts on which the motion is founded are stated in an affidavit.

Formerly it was held that the bankruptcy of a party to a suit abated it, and Lord Eldon so decided in the case of Russell v. Sharp, 1 Ves. & B. 500. In Randall v. Mumford, 18 Ves. 424, his lordship said, "This court, however, without saying whether bankruptcy is or is not strictly an abatement, has said that, according to the course of practice of the court, the suit has become as defective as though it had abated." And in Monteith v. Taylor, 9 Ves. 615, he held, if a defendant becomes bankrupt or insolvent, the plaintiff brings the assignees before the court by a supplemental bill, and if he neglects to do so, and to prosecute the suit, the bankrupt defendant may move to dismiss the bill for want of prosecution. The plea of bankruptcy is not properly a plea in abatement. It is sometimes classed among pleas in abatement to the person, but it is rather a plea in bar. Story, Eq. Pl. § 726. Until this plea is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant. He may indeed waive the defence, rather than draw in question the validity of the proceeding in bankruptcy. The 4th section of the bankrupt act [of 1841 (5 Stat. 443)] provides that a discharge and certificate, when duly granted, "shall be, and may be pleaded as a full and complete bar to all suits," &c. This is not a favored defence. It may be defeated if the discharge was fraudulently obtained. And we think it should be pleaded both at law and in equity, and cannot be taken advantage of by motion. Whether the bankrupt was guilty of fraud in obtaining his discharge, may be a question of great difficulty, involving, as questions of fraud frequently do, a great variety of facts, which should be submitted to a jury. If the discharge were obtained before the answer was filed, it should be set forth in the answer, or be made the subject matter of a plea. If after answer filed, then special leave should be given to the defendant, that he may plead it. But it seems that in this case the decree pro confesso was prematurely entered, as by the rules of court, the tenth of October was the first rule day on which a rule on the defendant to answer could be entered. The bill was filed the 22d August; no rule could be taken for answer on the first Monday of September, as twenty days had not elapsed from the filing of the bill. The first Monday in October was the first rule day on which the defendant could be required to answer. But on that day a decree pro confesso was entered against Hall, in violation of our rules of practice. On this ground, the decree against Hall may be set aside, and all subsequent proceedings.

[NOTE. For further litigation between these parties, see Case No. 4,723.]

Case No. 4,723.

FELLOWS et al. v. HALL et al.

[3 McLean, 487.][1]

Circuit Court, D. Michigan. Oct. Term, 1844.

BANKRUPTCY OF DEFENDANT DURING PENDENCY OF ACTION — NOTICE BY COURT ON MOTION AND AFFIDAVIT — INVALIDITY OF DECREE SHOWN BY PLAINTIFF — DECREE PRO CONFESSO — IRREGULARITY.

1. Where, during the pendency of a suit, one of the defendants is released under the bankrupt law, the suit as to him abates, and the assignee should be made a party.

[Overruled in Oliver v. Cunningham, 6 Fed. 61.]

2. But the bankruptcy should be pleaded.

3. The court are not bound to notice it on motion founded upon an affidavit.

4. The plaintiffs may show the invalidity of the decree of bankruptcy, through the fraud of the bankrupt. And this can only be done on a plea or answer.

5. Where a decree pro confesso is taken before the expiration of the time given to the defendant to answer, it is irregular, and will be set aside on motion.

[Cited in Edwards v. Janesville, 14 Wis. 27.]

[This was a motion to set aside proceedings in the suit of Fellows and others against Hall and Allen, as irregular and void.

[For a similar motion in October term, 1843, see Case No. 4,722.]

Mr. Hand, for complainants.
Douglass & Walker, for defendants.

OPINION OF THE COURT. This is a creditor's bill. It was filed the 20th of August, 1842. On the 10th of October ensuing, a decree pro confesso was entered against the defendant Hall, and, on the 10th of November following, a decree pro confesso was made against both of the defendants. A judgment at law was entered against Hall before this bill was filed; but prior to this Hall had filed his petition for the benefit of the bankrupt act, to wit, on the —— day of July, 1842, and, on the 14th September ensuing, he was declared a bankrupt. On the 27th of December following, Hall was discharged. A motion is now made to set aside all the proceedings, for irregularity, since the 14th of September.

It is insisted, that after the decree in bankruptcy against Hall, no step in the suit could be taken, until the assignee of Hall was made a party; that the decree of bankruptcy abated the suit. In the 3d section of the bankrupt act [of 1841 (5 Stat. 443)] it is provided—"And all suits in law or equity then pending (at the time of the decree of bankruptcy) in which such bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way and with the same effect, as they might have been by such bankrupt." Where, as in this case, the law devolves the interest in con-

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

troversy on an assignee, he should be made a party to the proceedings. If this be not done, it would be difficult to etablish that the interests represented by the assignee are concluded by the decree. But, in this case, the bankruptcy should be brought before the court by a plea or answer. This not having been done, it is not clear that the court can consider the motion founded upon an affidavit merely. The plaintiffs have the right to show that the decree of bankruptcy was obtained through the fraud of the petitioner, which would render it invalid. This cannot be done regularly on a motion. The point should be brought before the court by the pleadings.

But there are other irregularities for which the decree must be set aside. The bill was filed the 22d of August, and the return day, by the 12th rule of the court, was the first Monday of October following, and the defendants had until the first Monday of November to plead, demur, or answer. No steps could be taken by the complainants until November; but they entered a decree pro confesso against the defendant Hall on the 10th of October, within ten days after the appearance day. This was in direct violation of rule 18th of this court. This proceeding was wholly irregular. Hall had no opportunity of being heard, as no time was given to him to answer. The default and decree pro confesso in November following were also irregular, as the former decree remained, which, of course, prevented the defendant from filing his answer.

The suit being still on the docket for further proceedings, the court order both decrees to be set aside, as having been irregularly entered, and leave is given to the defendant to plead or answer.

Case No. 4,724.

FELLOWS v. PEDRICK.

[4 Wash. C. C. 477.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

DEED — EVIDENCE OF ACKNOWLEDGMENT — EVIDENCE — JUDGMENT IN FORMER SUIT RELATING TO SAME MATTER—EJECTMENT—ACCEPTANCE OF SURVEY BY STATE—TITLE UNDER FOREIGN STATE —LIMITATIONS.

1. The magistrate's certificate of the acknowledgment of a deed is sufficient to admit it in evidence, though it be not under seal. This is under the statute of Pennsylvania.

2. The record of a judgment in ejectment brought by a person, under whom the lessor of the plaintiff claims, in favour of the defendant, was admitted in evidence, but not as conclusive.

3. If defendant in ejectment do not set up a title under the state, it is not competent for him to allege negligence in the plaintiff in not having surveyed his warrant in time. It is sufficient if the survey was accepted at the land office.

4. A title under Connecticut, cannot avail the defendant in ejectment for any purpose in Pennsylvania.

5. The act of Pennsylvania of 1813, 25th of March (6 Smith's Laws, 61), merely repeals the act of the 11th of March, 1800 (3 Smith's Laws, 421), which repealed the act of limitations of 1785, after two years from the date of the former act, except as to those who should bring their actions within the two years; and, as to these, the act of 1800 continues in force, and no person claiming, or who has claimed title under Connecticut, can, at any time, set up a title by length of possession as a bar, or as a ground for recovery in ejectment.

Ejectment for two hundred acres of land in Luzerne county. The title of the lessor originated in a warrant dated the 1st of July, 1784, which was duly surveyed in August, 1789, and returned about the year 1803, when a patent was granted by the state. The title was then regularly deduced from the grantee to the lessor of the plaintiff. The plaintiff then gave in evidence the record of recovery in ejectment of the land in dispute, against the defendant, at the suit of Samuel Dewitt, under whom the lessor of the plaintiff in this action claims. That suit was commenced in the year 1814. Judgment was confessed, and a writ of habere facias possessionem issued in April, 1815, which was not fully executed in consequence of the defendant agreeing to rent the land of Dewitt for one year. He, nevertheless, although noticed to quit at the end of the year, continued the possession.

One of the title deeds offered in evidence was objected to by the defendant's counsel, on the ground that the magistrate's certificate of its acknowledgment is not under his seal, which the act of assembly requires. But the court overruled the objection, upon the authority of the case of Whitmire v. Napier, 4 Serg. & R. 290.

The defendant gave in evidence a deed from Dyer, administrator of Fell, to Richard Halstead, for a patch of land of six hundred acres, (including the land in question,) which recites that the said land was surveyed by two persons appointed by the directors of a certain company. Also, a deed from Richard Halstead for the same land, dated in 1793, to the defendant. He also proved that the defendant entered into the possession of the land in dispute in the year 1791; built upon and improved the same, and has continued in possession ever since. He also offered in evidence the record of an ejectment brought for this land against the defendant by William Searl, one of the persons under whom the plaintiff claims, when a verdict was rendered in favor of the defendant. This was objected to, but admitted by the court, not as conclusive, but to have such weight as the jury might think it entitled to.

The principal question discussed at the bar, was, whether the plaintiff was barred by the length of the defendant's possession from 1791 to 1815, when he agreed to rent

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

the land for one year? It was contended by the counsel for the plaintiff, that the act of limitations passed in the year 1785, March 26th, was repealed by the act of 11th of March, 1800, as to the land in question, which is claimed by the defendant under a Connecticut title. That act declares (4 Dall. Laws, 582; 3 Smith's Laws, 421) that the act of limitations of 1785 shall be repealed in respect to lands lying within the seventeen townships in Luzerne county, or which is claimed under Connecticut, or the Susquehanna Company. The act of the 25th of March, 1813, enacts that "two years from and after the passing of this act, the act entitled, &c. (the above act of the 11th of March, 1800) shall be, and the same is hereby repealed, and the act of March 26, 1785, entitled, &c. (the act of limitation) shall, after the expiration of the second two years, be taken and construed to extend as fully and effectually to that part of the commonwealth against every person whomsoever, except those who shall have brought their action for the recovery of their possessions within the said period of two years, as in any other parts of the same." See 6 Smith's Laws, 61. Dewitt, under whom the plaintiff claims, having brought his ejectment for the land in question in the year 1814, within the time limited by this act, it was contended, that the act of limitations, as to his title, remains in operation, and cannot be set up against him. On the other side, it was contended, that the exception in the act of 1813 applies only to the action which should be brought within the two years, and not to the title of the plaintiff in any subsequent action brought by or against him. That although the defendant was estopped by the parol lease to him, from setting up a possession gained by the lease against the lessor of the plaintiff, he was not precluded thereby, nor by those acts, from asserting the prior title, gained by twenty-one years possession antecedent to the recovery against him.

Mr. Rawle, for plaintiff.

Mr. Tilghman, for defendant.

WASHINGTON, Circuit Justice (charging jury). The plaintiff has laid before the court an unexceptionable paper title, from the warrant down to the conveyance of the land in dispute to himself. An objection has been made to the length of time which intervened between the survey of the warrant, and its return to the office. But as the defendant does not set up a title under the state adverse to the plaintiff's, it is not competent for him to charge the plaintiff with negligence in any of the steps taken previous to the grant. It is sufficient that the survey was returned and accepted at the land office.

The defendant sets up no title under the state, and as to the title under Dyer, which appears to have been derived under Connecticut, it cannot avail him for any purpose whatever. How far it destroys his title by length of possession, will depend upon the correct construction of the acts of 1800 and 1813, which are relied upon by the plaintiff's counsel. It is perfectly clear, that, if the act of 1813 had not passed, the act of limitation could not be set up in a case where the defendant claims, or has at any time claimed title under the Susquehanna Company, or in any way under the state of Connecticut, to lands within this state. What then is the effect of the act of 1813? We think it is merely to repeal the repealing act of 1800, after two years from the date of the former act, except as to those persons who should bring their actions within the two years; and as to them, the act of 1800 continues in force in like manner as if the act of 1813 had never passed. The consequence is, that, against those who brought their actions within the two years, no person claiming, or who has claimed title under Connecticut, can, at any time, set up a title by possession, either as a bar, or as a ground of recovery in ejectment. To give to the act 1813 the construction contended for by the defendant's counsel, would be to render it absurd, and altogether inefficient. It would make the act declare, that though possession should give no title to the defendant in the action which should be commenced within the two years, it should, nevertheless, give him a title in the action which he might bring, immediately after he was turned out of possession, to recover back the land. This could have no other effect but to encourage litigation, since an ejectment to recover back the land, would, in all cases, be brought, if the title of possession could, in such action, be asserted. It would have been much better for all parties not to have made the exception at all, if such was its meaning, and have permitted the defendant, in the first ejectment, to set up his possession as a bar.

The opinion of the court, therefore, is, that the plaintiff is not barred by the twenty-one years possession of the defendant, prior to the recovery against him by Dewitt.

Verdict for plaintiff.

FELT (STEPHENS v.). See Case No. 13,368.

FEMBERG, In re. See Case No. 4,743.

Case No. 4,725.

FENDALL v. BILLY.

[1 Cranch, C. C. 87.][1]

Circuit Court, District of Columbia. April Term, 1802.

PLEA OF "NO RENT ARREAR" — NOTICE OF SET-OFF—EVIDENCE—BOOKS OF ORIGINAL ENTRY.

1. Upon the plea of "no rent arrear," the tenant may give evidence of work done and

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

goods sold and delivered to the landlord, without notice of set-off.

2. The party's own books of account are not evidence in his favor, although in the handwriting of a deceased clerk, unless they contain the first entry of the charges.

Covenant to pay rent.

On the plea of no rent arrear, Mr. Jones, for defendant [Peter Billy], offered evidence of work done, and trees sold to the plaintiff.

E. J. Lee, for plaintiff, objected to the evidence, because there had not been notice given of a set-off.

THE COURT allowed the evidence to go the jury, on the equity of the act of Virginia (Rev. Code, 40), and on the practice of the state of Virginia.

The plaintiff offered his leger to prove counter charges against the defendant, the entries were in the handwriting of his clerk, who was dead.

Mr. Jones, for defendant, objected, and cited Esp. Reports.

THE COURT refused to let the leger go in evidence to the jury, it not being proved that the entries therein were the first entries. The journal also was refused for the same reason.

FENDALL (LOVE v.). See Case No. 8,547.

Case No. 4,726.

FENDALL et al. v. TOCHMAN.

[1 Hayw. & H. 259.] [1]

Circuit Court, District of Columbia. May 17, 1847.

CIRCUIT COURT, DISTRICT OF COLUMBIA — DETERMINING AUTHORITY OF RIVAL COUNSEL — ISSUE SENT UP BY ORPHANS' COURT.

It is not a proper issue to be sent up by the orphans' court to the circuit court for a determination as to which of the contending parties or counsel has a right to manage the case in said orphans' court. Under the act of Maryland of 1799, c. 101, § 20, and sections 15 and 17, the court has no jurisdiction in the case.

[This was an action at law by Philip R. Fendall and Joseph H. Bradley against Gaspard Tochman.]

On the 25th of February, 1847, Gaspard Tochman, a counselor of this court, presented to the court here the following record and order from the orphans' court for the county of Washington, and prayed that the same may be filed and entered in the minutes of the court, which is done accordingly in the words following, to wit: "Said Gaspard Tochman, an attorney and counselor at law duly admitted to practice in the circuit court of this district, as well as in the supreme court of the United States, on behalf of the heirs of the late General Thaddeus Kosciusko, on the 29th day of January, 1847, having filed here in this court a certain petition for an order of distribution to one George Bomford, administrator de bonis non of said Kosciusko, Philip R. Fendall and Joseph H. Bradley, also attorneys and counselors, duly admitted to practice in the courts aforesaid, appeared in this court and represented that they alone are authorized to manage the claims of said heirs on said Bomford, administrator as aforesaid, and denied the right and power of said Tochman to interfere in any manner in the prosecution of said claims, and subsequently, to wit: on the 12th day of February, 1847, filed here in this court their petition of that date claiming for themselves the power aforesaid, and denying the same to said Tochman, to which petition having on the 16th of said month filed his answer and thereupon moved in open court for an issue in this cause to be made up and sent to the circuit court of the District of Columbia sitting as a court of common law, to be there tried according to the statute in such case made and provided. This court now here orders and directs the following issue to be framed and made up, and sent and certified the same to said court, to be there tried according to the statute in such case made and provided, viz: In which of the attorneys and counselors at law exists the true power and authority to manage and prosecute said claims of said heirs of General Thaddeus Kosciusko? Nathn. Pope Causin, Judge." And thereupon the said Gaspard Tochman moved the court that a jury may be impanelled and sworn to try the issue aforesaid. But the court having considered the said motion and the record and order aforesaid, and the Maryland act of 1799, c. 101, § 20, and section 15 and section 17, refused to grant the said motion and to order a jury to be impanelled and sworn to try the said issue, being of opinion that the said issue is not such an issue as is provided for in said act, and that the court has no jurisdiction in the case; and therefore it is, on this 17th day of May, 1847, ordered by this court that the case be remanded to the orphans' court with a certificate of the opinion of this court.

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

Case No. 4,727.

FENDALL v. TURNER.

[1 Cranch, C. C. 35.] [1]

Circuit Court, District of Columbia. July Term, 1801.[2]

SHERIFF—FAILURE TO PAY MONEY MADE UPON A FI. FA. — LEVY ON MONEY MADE ON ANOTHER FI. FA.

1. A motion against a sheriff for not paying over to the plaintiff money made upon a fi. fa. may be made in the name of the original plaintiff in the fi. fa., although he had taken the insolvent oath.

2. The sheriff cannot levy a fi. fa. upon money in his hands made upon another fi. fa.

[See note at end of case.]

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

[2] [Affirmed in 1 Cranch (5 U. S.) 117.]

This was a motion for judgment against Charles Turner, late town sergeant of Alexandria, for not paying over to the plaintiff money made on a fi. fa. of Fendall v. Towers. The motion was grounded on the act of assembly of Virginia respecting executions. Rev. Code, p. 317, § 51. See this case in the supreme court of the United States. 1 Cranch [5 U. S.] 117.

The cases cited in this court were: Esp. N. P. 741; King v. Webb, 2 Show. 166; Dalt. Sher. 145, 543; Fulwood's Case, 4 Coke, 67; Rex v. Bird, 2 Show. 87; Hoe's Case, 5 Coke, 90; Act of Virginia respecting executions, §§ 13, 51, 25, 36, 50; Armistead v. Philpot, Doug. 231; Benson v. Flower, 4 Cro. Car. 166, 176; Staple v. Bird, Barnes, Notes Cas. 214; Miller v. Race, 1 Burrows, 457; Cannon v. Smalwood, 3 Lev. 203; Godb. 147; Bealy v. Sampson, 2 Vent. 95.

THE COURT decided: 1. That the motion might be sustained in the name of Fendall, although he had taken the insolvent oath. 2. That the sergeant could not levy the execution of Deneale v. Fendall on the money in his own hands made on the fi. fa. of Fendall v. Towers, and that such return was not good.

Judgment for the amount made on the fi. fa., and fifteen per cent. per annum damages.

[NOTE. On writ of error this judgment was affirmed by the supreme court, the opinion being delivered by the chief justice. It was held that as the mandate of a writ of fieri facias as originally formed is that the officer have the money in court on the return day, there to be paid to the creditor, and that in this case the sheriff, not having brought the money into court, but having levied an execution on it while in his hands, has not sufficiently justified the nonpayment of it to the creditor, and therefore the court committed no error in rendering judgment against him on the motion of that creditor. Turner v. Fendall, 1 Cranch (5 U. S.) 117.]

Case No. 4,728.

In re FENDLEY.

[10 N. B. R. 250;[1] 3 Am. Law. Rec. 105.]

District Court, W. D. Texas. May 11, 1874.

BANKRUPTCY — JURISDICTION OF DISTRICT COURT IN EQUITY — BILL SWORN TO BY AGENT OR ATTORNEY — EFFECT OF ADJUDICATION IN BANKRUPTCY—INJUNCTION.

1. Certain creditors of Fendley filed their petition for an adjudication in bankruptcy. Prior to this time, some of the creditors filed a bill praying that Miller be restrained by writ of injunction from selling or otherwise disposing of a certain stock of goods, charged to have been fraudulently transferred by F. to M. A motion was made to dissolve the injunction, on the grounds that the bill was not sworn to by the petitioning creditor, but by an agent; that, being a case of equity, the circuit court alone has jurisdiction; that the debtor has been adjudicated a bankrupt, and that such adjudication dissolved the injunction. *Held*, that the affidavit of an agent or attorney is sufficient.

2. Under the provision of the bankrupt act [of 1867 (14 Stat. 517)], the district courts have jurisdiction both in law and equity.

[Cited in Johnson v. Price, Case No. 7,407.]

3. While the bill in this case has the general features of one in equity, it is nothing more than a petition, application, or other summary proceeding under the bankrupt act.

4. Section 40 of the bankrupt act refers to such injunctions as were granted simultaneously with the order to show cause, and is not applicable to such as might be granted between the time of the commencement of proceedings and up to the date of adjudication, or even up to the appointment of an assignee. Motion to dissolve the injunction denied.

In bankruptcy.

Robertsons & Herndon, for petitioners.
Ray & McClure, for respondent.

DUVAL, District Judge. On the 21st day of March, 1874, the creditors (W. H. Walker & Co.) filed their petition, praying, for reasons therein set forth, that I. I. Fendley be adjudged a bankrupt. On the 6th of April, 1874, such adjudication was had. Prior to this adjudication, to wit, on the 31st day of March, 1874, the same creditors filed a bill praying, for causes therein alleged, that E. Q. Miller be restrained by writ of injunction from selling or otherwise disposing of a certain stock of goods and merchandise, charged to have been fraudulently transferred by Fendley to him, in violation of the bankrupt act, on or about the 1st day of February, 1874, until the rights of Fendley's creditors thereto could be determined. The writ was granted, and was issued on the 31st day of March, 1874.

A motion was made to dissolve this injunction for several reasons. The most material are, I think:

First. That the bill is not sworn to by the petitioning creditor, but by an agent. As to this objection, the act does not in terms say that it shall be verified by the oath of the petitioner; and this not being expressly required, I think the affidavit of his agent or attorney in fact sufficient. On this point there have been different decisions by the bankrupt courts; but I prefer to follow those which, in the absence of express legislation to the contrary, recognize the general rule of "qui facit per alium facit per se."

Second. Another objection is, that this court has no jurisdiction over the case. That being a bill in equity, the circuit court only has jurisdiction. This, I think, is a mistake. Under the provisions of the bankrupt act, the district courts have jurisdiction both in law and equity. It is only after the assignee has been appointed that suits by or against him, whether at law or in equity, are required to be by original proceedings, and should be commenced and prosecuted in the mode and according to the practice peculiar to the two jurisdictions. Prior to that event, proceedings in bankruptcy are summary, and

[1] [Reprinted from 10 N. B. R. 250, by permission.]

an application of a creditor setting forth the proper reasons for the relief or remedy sought, will be entertained and acted upon by the bankrupt court. It matters not whether such application be in the nature of a bill in chancery, or of an ordinary petition. In either case, the court has jurisdiction; and if a proper case is presented, will grant the process prayed for if deemed right and appropriate. While the bill in this case has the general features of one in equity, I do not regard it as anything more than a petition, application, or other summary proceeding under the bankrupt act. It presents a proper case for granting the injunction or restraining order prayed for, in a subject-matter over which the bankrupt court has full jurisdiction.

Third. Another ground taken by the motion is, that the debtor, Fendley, has been adjudicated a bankrupt, and that such adjudication, by operation of law, dissolved the injunction. It is true that under section 40 of the bankrupt act, there is some reason to suppose it was intended that injunctions should cease to operate when adjudication was had. This, however, is by no means certain. But if such be the correct construction, I confidently believe that it only refers to such injunctions as were granted simultaneously with the order to show cause, and is not applicable to such as might be granted between the time of the commencement of proceedings, and up to the date of adjudication, or even up to the appointment of an assignee. Between those intervals of time, matters may occur, or facts become known, which would render the use of the writ absolutely indispensable to the rights of creditors. And in my judgment, the section referred to does not preclude the bankrupt court from granting such writs, under summary proceedings had for that purpose, at any time subsequent to the commencement of proceedings and prior to the appointment of an assignee. And I further believe that injunctions thus granted continue until vacated by order of the court.

The motion presents some other grounds for dissolving the injunction, but they do not seem to me to be material. I think a prima facie case was made by the creditors herein, authorizing the injunction prayed for, and am of opinion that the answer of respondent, Miller, and the affidavits read in support of the same, do not justify its dissolution until an assignee has been appointed, and a reasonable time allowed him to assert whatever rights the creditors of the bankrupt may have in the premises. The motion to dissolve is therefore refused at this time. But inasmuch as the respondent, Miller, should not be subjected to any unreasonable delay in the disposition of the goods by him, if they are not properly assets of the bankrupt's estate, it is ordered that if within ten days after the appointment of an assignee herein, such assignee do not take the necessary steps to assert his right to the property in question, as against said Miller, by some original proceeding as auxiliary to or independent of that of the petitioning creditors, then the injunction will be considered as dissolved; and the clerk of this court, in that event, is hereby directed to issue an order to the marshal to that effect.

FENELON (UNITED STATES v.). See Case No. 15,085.

FENLON (LONERGAN v.). See Case No. 8,475.

FENN (LYTLE v.). See Case No. 8,651.

FENNEL (WOODWORTH v.). See Case No. 18,015.

FENNELL (POSTMASTER GENERAL v.). See Case No. 11,307.

Case No. 4,729.

FENNER et al. v. DICKEY et al.

[1 Flip. 34;[1] 3 West. Law Month. 208.]

Circuit Court, N. D. Ohio. March Term, 1861.

COMPOSITION BY INSOLVENT WITH HIS CREDITORS —PRIVATE AGREEMENTS TO PAY—EFFECT.

1. If insolvent-debtor and his creditors enter into a composition, by which they agree to take a less sum than what he owes them respectively, or security therefor, in discharge of their indebtedness, and at the same time and as an inducement to enter into the composition he secretly agrees with one of them that he will then or at some future day give his note to such creditor for the balance of the principal, and such note is subsequently given pursuant to such agreement: *Held*, that such agreement is a fraud upon the other creditors, and both the agreement and the note so given are utterly void from the beginning.

2. Fraud has various forms, and every case before the courts must be decided upon the circumstances surrounding it.

[At law. Suit by Dean K. Fenner and others against Hiram K. Dickey and Martha C. Whipple.]

Flattery & Griswold, for plaintiffs.

Pease & Bierce, for defendants.

WILLSON, District Judge. This is an action brought upon defendants' promissory note for $883.65, payable to the order of the plaintiffs, one year from date, at the Merchants' Bank of Massillon, and dated New York, December 1, 1857.

The case was heard upon demurrer to a special plea in bar.

The facts disclosed by the plea are, that the defendants, previous to the 19th of November, 1857, had been largely engaged in the mercantile business at Massillon, Ohio; had become insolvent beyond their ability to pay in full, on account of their liability for goods to the plaintiffs and other eastern merchants.

That, on the suggestion of the plaintiffs,

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

and in order to obtain relief from such embarrassment, they did, on the 19th day of November, 1857, propose to all of their creditors (including the plaintiffs), to pay them fifty percentum of said indebtedness in the manner following, viz.: To execute and deliver to each of said creditors their promissory notes, jointly with one John Whipple, their surety, for said fifty percentum, payable at six, twelve, and eighteen months; said notes to be in full payment and in discharge of the entire indebtedness of the defendants.

This proposition was accepted by each of the creditors, and a composition deed for that purpose, bearing date Nov. 19, 1857, was signed by all of them.

The notes were accordingly executed by the defendants and Whipple, and delivered to the creditors as agreed, and by them accepted.

These compromise notes were all promptly paid as they matured.

It is alleged in the plea that, after the plaintiffs had verbally assented to the compromise, and before they had signed the composition deed, they secretly, and without the knowledge or consent of the other creditors of Whipple, required and extorted (as a condition upon which they would sign the composition deed), that the defendants should, in addition to the notes secured by the surety of Whipple, give the plaintiffs their own notes without security for the remaining half of the original debt. And they aver that, being thus in the power of the plaintiffs, they did, without the knowledge of the other creditors, agree to give such notes, and thereupon the plaintiffs signed the composition deed with the other creditors.

It appears that afterwards, on the 1st day of December, 1857, the note now in suit was given to the plaintiffs in pursuance of such an agreement, without the knowledge of the other creditors, and without any other consideration than the verbal agreement made as aforesaid, as is alleged, in fraud of the general creditors.

The question of law raised by the demurrer to this plea is, Whether the note now in suit was given under such circumstances of fraud as to render it void?

It is contended by the defendants' counsel that the note was absolutely void in its creation as being a fraud upon the other creditors, and as oppressive on the defendants, who were insolvent at the time of the compromise in November, 1857.

Fraud is as difficult to define as it is easy to perceive. It is sometimes said to consist of "any kind of artifice employed by one person to deceive another." But the term is one that admits of no positive definition, and cannot be controlled in its application by fixed and rigid rules. It is to be inferred or not, according to the special circumstances of every case. Whenever it occurs, it vitiates the transaction tainted by it. No contract, although it be apparently fair and in compliance with the formalities of the law, can be enforced, if it be essentially unfair, or is founded upon a dishonest or corrupt consideration. The law has ever scrupulously guarded the integrity and good faith required in the general compromises of creditors with their debtors. It is, as well from considerations of public policy as of sound morals, that these transactions should be conducted with truth and fairness, lest any undue, secret advantage be secured to one creditor at the expense of another.

The adjudged cases upon transactions of this kind are numerous, and we suppose the law in relation to them is well settled.

In Cockshot v. Bennett, 2 Term R. 763, the action was assumpsit upon a promissory note. The circumstances of that case were, that the defendants being considerably indebted to the plaintiffs and other creditors, and being insolvent, assigned over all their effects in trust to pay 11s. in the pound to their creditors, to which they all assented and signed the deed, except the plaintiffs, who refused to sign the deed, and to take any composition, unless the defendants would give them a note for the remaining 9s. in the pound. They accordingly gave the note for that amount, on which the plaintiffs signed the deed, and the defendants made a subsequent promise to pay it.

In deciding the case, Lord Kenyon placed his opinion on the foundation that the temptation to give the note was a fraud on the creditors who were parties to the contract on which their debts were to be cancelled in consideration of receiving such consideration, and he said that "all the creditors being assembled for the purpose of arranging the defendants' affairs, they all undertook, and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed." As to the revival of the debt by a subsequent promise, the learned chief justice said, that "contracts not founded in immoral considerations may be revived; but this transaction is bottomed in fraud, which is a species of immorality, and not being available as such, cannot be revived by a subsequent promise."

In the same case, Mr. Justice Ashurst concurred in opinion with the chief justice, that the transaction of giving the note to the plaintiffs was a fraud on the rest of the creditors. "For," said he, "they were induced to enter into the agreement on principles of humanity in order to discharge the defendants from their incumbrances, and if they had not thought such would be the effect, they would not probably have signed the deed, but each would have endeavored to obtain payment of his whole debt. The security, therefore, is not merely voidable, but absolutely void. The note was void on the ground of fraud, and any subsequent promise must be nudum pactum."

In Jackson v. Lomas, 4 Term R. 166, a secret agreement was made by the debtor with a creditor to pay an additional sum, the consideration of which agreement was that the creditor should sign a composition deed with the other creditors.

Mr. Justice Buller declared the general principle in such case to be, that a secret agreement of this kind, made between the insolvent and some of his creditors, in order to induce the rest of creditors to agree to the composition, is absolutely void. and the court of king's bench in that case refused to enforce the secret agreement. Such, we believe, has been the uniform course of decision of the court of king's bench in England, and of the judges of that court at nisi prius. Doug. 696; 1 H. Bl. 647; 3 Term R. 551; 6 Term R. 146; 4 East, 371; 1 Esp. 131, 236; 5 Bing. 432; 3 Barn. & C. 605.

The principle established by these English cases has been adopted and strictly followed by the courts of this country.

In Payne v. Eden, 3 Caines, 213, it was held necessary for the insolvent debtor (under the New York statute) to obtain the consent of a certain portion of his creditors, and, in that case, the insolvent had a sufficient number, without the payee of the note. But the note having been given in consideration of his signing the insolvent debtor's petition, it was adjudged void.

In Wiggin v. Bush, 12 Johns. 305, it was decided that a note executed by a debtor to a creditor to induce him to withdraw his opposition to the debtor's obtaining his discharge under an insolvent law, was void.

In that case, Mr. Justice Yates declared that the policy of the law forbids such transactions; its purpose is to effect an equal distribution of the insolvent's estate, and thereby secure equal advantages to the creditors. And although the giving of the note and the payment of it afterwards would not, as to the amount, lessen their distributive share in his estate, yet the suppression of facts producing such a result was held to be alone sufficient to prevent a recovery.

The same principle was affirmed in Waite v. Harper, 2 Johns. 386; Bruce v. Lee, 4 Johns. 410; Yeomans v. Chatterton, 9 Johns. 295; Tuxbury v. Miller, 19 Johns. 311.

Such, also, is the law in Massachusetts. In Case v. Gerrish, 15 Pick. 49, the plaintiff, with the other creditors of the defendant, entered into an agreement with the defendant by which he consented to take an equal distribution of his property and give him a discharge. But at the same time he entered into a secret agreement with the debtor by which he stipulated to have a separate note for the balance of his debt.

Chief Justice Shaw, in deciding the case, says: "This was an unwarrantable coercion upon the debtor, and a fraud upon the other creditors, which rendered the note void."

In that case, although the note was given at the time of the execution of the agreement, and as an inducement to the plaintiffs to sign that instrument, it was, nevertheless, post-dated in order to give it the appearance of a subsequent and independent transaction, entered into after the defendant had obtained his discharge. It was insisted in the argument of the case before us, that, as there was no legal obligation created by the defendant's agreement of the 19th of November, 1857, to give this note, his subsequent execution and delivery of it to the plaintiff was a voluntary act, and that the unpaid portion of the original debt was a sufficient consideration for it.

The language of the special plea is, that "the defendants, in pursuance of said agreement, and for no other consideration, did execute and deliver to the plaintiffs the note aforesaid." The demurrer admits the truth of this allegation in the plea.

It does not, therefore, present the case of a thing done voluntarily without the taint of fraud. Nor is it a case of the execution of a contract which is merely voidable. We must take the fact stated in the plea as true. The note as given in pursuance of a fraudulent contract, and for no other consideration.

This is not like an agreement made by an infant, which is only voidable, for that may be revived by a promise after he comes of age. In such a case he is bound in equity to discharge the debt, though the law would not compel him to do so. But here, the plaintiffs had consented to take a smaller sum than the original claim, and they had annihilated what remained of the original debt by the discharge contained in the written agreement of 19th of November, 1857.

The whole transaction was fraudulent in its conception, and the paper obligation was fraudulent in its execution. The note, therefore, is absolutely void.

The demurrer to the special plea is overruled.

FENNER (EARTH CLOSET CO. v.). See Case No. 4,249.

FENNER (SMITH v.). See Case No. 13,046.

FENNER (WHITE v.). See Case No. 17,547.

Case No. 4,730.

FENTON v. BRADEN et al.

[2 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. April Term, 1825.

CONTRACTS—IMPORTATION OF MERCHANDISE—UNREASONABLE INVOICE PRICE — VALUE AT PLACE OF SHIPMENT.

1. If goods are shipped, by a merchant in England, to a mercantile house in this country, according to their order, they cannot refuse to receive them here; but, by receiving them, are not bound to pay the invoice price.

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

2. The plaintiffs can recover only as much as the goods were worth at the time and place of shipment, if the defendants object to the invoice price in a reasonable time.

Assumpsit for the price of flannels shipped by order of the defendants. The defendants [Braden, Morgan & Co.] thinking they were invoiced too high, had them appraised, and sold them.

Mr. Mason, for the plaintiff, contended that the defendants, having received and sold the goods, are bound to pay for them at the invoice price. If they did not like the price they should not have taken them.

Mr. Taylor, for the defendants. The receiving of the goods, without any explanation, would have been only prima facie evidence of agreement to the invoice price; but the act of receiving may, at the time, be explained by declarations and by acts. The defendants could not refuse to receive them, and did all they could to show that, by receiving them, they did not agree to the invoice price.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that, as the goods were at the risk of the defendants, when put on board the ship at Liverpool, and the defendants had no agent there to accept, or refuse, or even to examine the goods and compare them with the invoice prices, and the defendants had given a general order for such goods, without any express agreement as to the price, the law will only raise an implied promise to pay as much as the goods were worth at the time and place of shipment. The defendants could not refuse to receive them, and oblige the plaintiff to take them back if they were such goods as the defendants ordered; and their receiving them here is no evidence of an agreement to pay the invoice price of them. But the receipt of the goods and of the invoice is prima facie evidence that the invoice price is the value, unless the defendants objected to that price in a reasonable time.

Verdict for the plaintiff, deducting 7½ per cent. from the invoice price.

Case No. 4,731.

FENTON v. COLLERD.

COLLERD v. FENTON et al.

[8 Ben. 27;[1] 11 N. B. R. 535.]

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

PARTIES—WITHDRAWING APPEARANCE.

1. A suit in equity was brought by an assignee in bankruptcy. The assignee absconded. Defendant moved to dismiss the bill. In a cross suit brought against the assignee and others, a motion was made to withdraw the appearance of the assignee, and that other defendants, against whom an order had been entered taking the bill pro confesso, might have leave to answer. It appeared that a co-assignee had been appointed, but had not been made a party to the suit: *Held*, that the motion to dismiss could not be entertained, nor any further proceedings had in the first suit until proceedings had been taken, on notice to the co-assignee, to bring him in and compel him to elect whether he would be made a party to the suit.

2. As the assignee was personally served in the suit, his appearance could not be withdrawn.

3. The order taking the cross-bill as confessed must be vacated; but, before that suit could proceed, the co-assignee must be made a party.

These were cross actions, the first by [John B. J.] Fenton, as assignee in bankruptcy of Daniel G. Brown, to set aside a chattel mortgage held by the defendant [Abraham] Collerd, which was commenced in December, 1873; and the other by Collerd, seeking, among other things, to set aside the bankruptcy proceedings as fraudulent, which was commenced in March, 1874, and in which an order had been entered taking the bill pro confesso. In May, 1874, Fenton absconded; a motion was now made by the defendant in the first suit to dismiss the bill, or that the complainant give security for costs, and a motion was made in the second suit, that three of the defendants might have leave to answer and that the appearance for Fenton be withdrawn. It appeared on the motion that a co-assignee with Fenton had been appointed but had not been made a party to either action.

BLATCHFORD, District Judge. As to the motion to dismiss the bill and proceedings in the first suit, or, if that motion be not granted, then that the plaintiff give security for the costs and disbursements of that suit, I should not deem it proper to grant either motion, on the facts shown, even if the suit were in proper shape for such a motion to be entertained. But, as it appears that there is a co-assignee appointed with Fenton, and as Fenton has absconded, it is not proper to entertain the motion, or to proceed further in the suit until proper proceedings are taken by the defendant, on notice to the co-assignee, to bring him in and compel him to elect whether he will or not be made a party plaintiff to the suit and become responsible for its conduct.

As to the motion in the cross suit, that the defendants Dickinson, Brown and Taylor have leave to answer, and that the appearance for the defendant Fenton be allowed to be withdrawn, I should be disposed to allow the three defendants named to answer, were the suit in proper shape. But, before the suit can proceed further, the plaintiff in it must take measures, on notice to the co-assignee of Fenton, to make him a party defendant to the suit. An order may be entered vacating the order taking the bill as confessed against the defendants Fenton, Taylor, Dickinson and Brown. As the defendant Fenton was per-

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

sonally served with process, the appearance for him cannot be withdrawn.

In all other respects the motions in the two suits must be suspended, with leave to bring them on again, after the proceedings have been had in respect to the co-assignee.

FENTON (COOK v.). See Case No. 3,156.

Case No. 4,732.

FENWICK v. BRENT et al.

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

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

PRACTICE—RULE TO EMPLOY NEW COUNSEL—FAILURE TO SERVE AS REQUIRED BY ORDER OF COURT—CONTINUANCE.

When there is a rule to employ new counsel, the cause may be continued after the fifth term, notwithstanding the acts of Maryland of November, 1787 (chapter 9), and 1721 (chapter 14).

Assumpsit [against Robert Brent and others]. A rule had been laid, at the term before the last, on the plaintiff, to employ new counsel. At the last term the court made a general order, that in all cases where such rules had been laid, they must be served upon the party, if in the District of Columbia, but if not in the District, the rules must be published in a certain mode prescribed by this order. Neither of these modes of service had been pursued; but this suit was brought to July term, 1801, and having been more than five terms continued, Mr. Mason urged the acts of assembly of November, 1787 (chapter 9), and 1721 (chapter 14).

But THE COURT continued the cause.

FENWICK (CHAPMAN v.). See Case No. 2,604.

FENWICK (GOULDING v.). See Case No. 5,641.

Case No. 4,733.

FENWICK v. GRIMES.

[5 Cranch, C. C. 439.][1]

Circuit Court, District of Columbia. March Term, 1838.

ACTION ON THE CASE — BREACH OF CONTRACT — JUSTIFICATION—ARREST OF JUDGMENT— GENERAL VERDICT—COUNTS OF THE DECLARATION.

1. An action upon the case for deceit will not lie for a breach of promise.

2. If the owner of a female slave sell her for less than the market price upon the purchaser's representation that he wished to have her for his own use, and that she should not be removed out of the District of Columbia, nor sold to any person to be by him transported out of the District, and that she should live in the District, near her friends; and the purchaser afterwards sell her to a negro-trader living in the District, by means whereof the slave is removed out of the District; it is no justification of the defendant, in an action for the deceit, that after he had purchased the slave, he was persuaded by a friend, that she was unfit for his use, and that he ought to sell her; although the purchase was originally made by the defendant in good faith.

3. If the verdict be general, and one of the counts is bad, the judgment must be arrested; and the court will not, after the verdict has been recorded, order it to be amended, by applying it to the good count only, unless the evidence given was applicable only to that count.

4. An action upon the case for deceit will not lie unless there was a false affirmation of some fact. A non-performance of promises is not sufficient. The declaration must charge that the defendant averred some fact to be true, and that it was false.

[Cited in Banque Franco-Egyptienne v. Brown, 34 Fed. 192.]

This was an action upon the case, for deceit by [Guy Grimes] the purchaser of a female slave, by which the vendor [Edward Fenwick] was induced to sell her for less than the market price. The declaration contained two counts.

1. The first count stated, that in conversation between the plaintiff and defendant concerning the purchase of the plaintiff's slave Henny, it was agreed between the plaintiff and defendant that she should not be removed out of this District of Columbia, nor sold to any person to be transported out of the said District, but that she should live, as a slave, in this District, so as to be near and convenient to her friends and acquaintances; and that the defendant, upon that conversation, falsely, fraudulently, and deceitfully affirmed to the plaintiff that the said slave should, after the defendant's purchase of her from the plaintiff, reside in this District during her lifetime; and the plaintiff, believing the affirmation to be true, sold her to the defendant for $400, a price much less than the value of the slave if there had been no such understanding or agreement as to her residence; yet the defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff, sold and delivered the said slave to a negro-trader living in this District; by means of which said last sale and delivery the said slave has been removed out of this District to foreign parts, there to reside at a great distance from her friends and relatives; "and so the said plaintiff saith that the defendant him the plaintiff then and there falsely and fraudulently deceived and defrauded."

2. The second count stated that on the 1st of June, 1833, the plaintiff was possessed of another valuable woman slave, named Henny, who had been brought up in the plaintiff's family and service, but for whose services he had no further use, and was willing to dispose of said woman slave for a sum far less than her real value to a master who resided, and who would keep her in the neigh-

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

borhood, and would engage that she would not be sold away to the southern negro-traders, and the defendant, well knowing the same, fraudulently came and represented that he desired her for his own private use, wanting such a slave to be kept and employed in the neighborhood aforesaid, and thereupon falsely, fraudulently, and deceitfully declared and protested that he would engage that the said slave should not be transported or sold away to traders in negroes, but should be kept and employed in this District; by reason of which false and deceitful representations, the plaintiff was imposed upon and prevailed with to sell to the defendant the said slave for the sum of $400, a sum far less than her real value, which the plaintiff avers was at least $600.

The plaintiff further avers, that he would not have sold the said slave but for the consideration of her being within this District, for any sum of money whatever, and the defendant well knew the same; and the plaintiff being so imposed upon as aforesaid, and relying upon the said representations, and promise, and engagement of the defendant, did sell and deliver to him the said woman slave. And the plaintiff further declares, that the said representations, declarations, and promises of the defendant, were utterly false and deceitful; and that at the time he thus gave himself out, and imposed upon the plaintiff, as wishing to purchase the said woman slave upon the conditions and considerations aforesaid, for his own use and employment within the District, he had engaged to sell this woman slave to a negro-trader, a certain James Burch, who he well knew wanted to transport the said woman slave beyond the limits of this District; and the defendant, having, as aforesaid, by fraud and deceit, bought the said woman slave intendedly for his own use, and possessed himself of the said woman slave, sold and delivered her to the said negro-trader, who took her and transported and carried her out of this District to foreign parts, unknown to the plaintiff; and so the plaintiff saith, that by reason of the fraudulent, false, and deceitful representations as aforesaid, he was imposed upon to sell and dispose of the said woman slave for a much less sum than her real full value, and thereby lost the value of the said slave; and was otherwise greatly injured by the said several promises, and hath damage to the sum of $1,000.

Upon the trial, Mr. Key, for defendant, moved the court to instruct the jury, "that if they should believe from the evidence, that the defendant bought the woman for his own use, and intending bona fide to keep her according to the said agreement; and was afterwards persuaded by his friend that she was unfit for his use, and that he ought to sell her as aforesaid, and that he did, on such persuasion, sell her, then there was no deceit, and then the plaintiff is not entitled to recover."

But THE COURT (MORSELL, Circuit Judge, not giving an opinion, having been absent at the commencement of the argument) refused to give the instruction.

Verdict for the plaintiff, $115.53.

Mr. Key moved in arrest of judgment, contending that the first count was bad for want of a scienter; that is, an averment that the defendant knew that the person to whom he sold the slave, was a negro-trader. In the case of Price v. Read, 2 Har. & G. 291, which has been cited by the opposite counsel as the precedent for the present case, the sale was averred to have been made to a negro-buyer, living out of Maryland, and in one of the southern states.

R. J. Brent, contra. The declaration is drawn from that in Price v. Read. The averment is, that the defendant sold her to a negro-trader. The inference is, that she was to be taken out of the district. Adams v. Anderson, 4 Har. & J. 558. This objection comes too late after verdict. The jury could not have found the verdict for the plaintiff, unless it had been proved that the defendant knew he was a negro-trader; or that the sale was with the intent that she should be removed out of the district. At most, the ground of action is defectively stated, which is cured by verdict. Rushton v. Aspinall, Doug. 681, 683.

Mr. Key, in reply. The ground of action is not defectively set out; but the first count states no cause of action.

CRANCH, Chief Judge. In the case of Price v. Read, 2 Har. & G. 291, from which this declaration was drawn, there was no question made as to the validity of the counts in that declaration; nor did the counsel for the defendant argue the case before the court of appeals; and therefore the case is of little weight upon that question. The substance of the first count is, that the plaintiff was induced to sell the slave for less than her value, by the defendant's agreement that she should not be removed from the District of Columbia; yet the defendant sold her to a negro-trader, living in the District, by means whereof she has been removed from this District; and so the defendant deceived and defrauded the plaintiff. Here is no false affirmation of a fact, but, at most, only a breach of promise. No deceit is averred previous to the sale by the defendant; and the deceit, if any, was subsequent to the sale, and consisted only in a disregard of the agreement; and was only that kind of deceit which every debtor practices when he refuses to pay his debt according to his promise. Even if it had been an action of assumpsit, instead of deceit, there is no cause of action alleged. The promise was, that she should not be removed from the District; the breach is, that the defendant sold her to a negro-trader living in the District, by means of which sale she was removed; but it is not averred that this last sale was made by the defendant with intent that the slave

should be removed, or that the defendant caused the removal. There was no engagement on the part of the defendant that he would not sell the slave within the District, nor to a negro-trader. This count may be true, and yet the defendant may have taken an obligation from his vendee that the slave should not be removed. I think the count is bad, and that, as the verdict is general, the judgment must be arrested.

THRUSTON, Circuit Judge, absent. MORSELL, Circuit Judge, concurred.

Mr. Brent then moved to amend the verdict so as to make it applicable to the second count only; and cited Barnard v. Whiting, 7 Mass. 358; 2 Tidd, 770; Williams v. Breedon, 1 Bos. & P. 329.

Mr. Key, contra. In the case of Williams v. Breedon, 1 Bos. & P. 329, there was a certificate of the judge that the jury gave their verdict for damages upon evidence applicable only to the good count; and therefore the court had a right to alter the verdict, which was general, so as to apply it only to the good count, and to enter a verdict for the defendant upon the other count. But in the present case there was no such certificate, nor any other means of knowing on which count the jury found their verdict; and in the same case of Williams v. Breedon, the court said that as there was evidence applicable to both counts, if there had been no other evidence to show on what ground the damages were given by the jury, it would not be competent for the court to alter the verdict. Stevenson v. Hayden, 2 Mass. 406; Barnes v. Hurd, 11 Mass. 57, 58; Sheely v. Biggs, 2 Har. & J. 364. But the second count is as bad as the first. There is no scienter that the defendant sold the slave with intent that she should be carried out of the District.

CRANCH, Chief Judge. The only misrepresentation of fact, stated in this second count, is, that the defendant represented that he "desired" the slave "for his own use;" but that representation is not averred to be false; it is not averred that the defendant did not desire the slave for his own use. The other supposed misrepresentations are only breaches of promise or contract, for the performance of which, the plaintiff relied upon the credit of the defendant. It is true, that the plaintiff "declares that the said representation, declarations, and promises, were utterly false and deceitful," and that "at the time the defendant gave himself out as wishing to purchase the slave upon the conditions," &c., "and for his own use," &c., he had engaged to sell the slave to a negro-trader who he knew wanted to transport her, &c.; but this is no direct denial that the defendant "desired the slave for his own use." If this count is to be considered a count for money obtained by false pretences, the pretence should have been distinctly averred, and its truth denied in terms. The mere non-performance of a promise is not such a deceit as will support an action of deceit. The remedy is an action of assumpsit, to which the general issue is not, not guilty, but non assumpsit. I am, therefore, of opinion, that the second count as well as the first is bad, and that judgment must be arrested upon both.

The other judges concurred.

Judgment arrested upon both counts.

Mr. Brent then moved for leave to amend the declaration, and for a venire de novo; and cited the case of Golding v. Good [Case No. 5,514], in this court, at December term, 1821, and Sherburne v. Semmes, at December term, 1825 [Id. 12,760], in which case it is said judgment was arrested for a fault in the declaration, and the court gave leave to amend on payment of the costs of the term; but I have no note of the point, and no note of the case of Golding v. Good.

Cur. ad. vult.

THE COURT (nem. con.), at November term, 1838, refused leave to amend.

[NOTE. For further proceedings, see Case No. 4,734.]

Case No. 4,734.

FENWICK v. GRIMES.

[5 Cranch, C. C. 603.][1]

Circuit Court, District of Columbia. Nov. Term, 1839.

PLEADING—ABATEMENT—PLEA IN BAR—ORDER OF PLEADING—ACTION ON THE CASE FOR DECEIT—FALSE REPRESENTATIONS.

1. A plea in abatement, not upon oath, may be treated as a nullity, and will be ordered to be stricken out.

2. A plea in bar overrules a plea in abatement.

3. The order of pleading is part of the common law, and does not depend upon a mere rule of the court.

4. An action upon the case for deceit will lie against a person who by false and fraudulent representations induces the plaintiff to sell his female slave for less than her value.

After the court had arrested the judgment in this cause, and had refused to give the plaintiff leave to amend his declaration [Case No. 4,733], it was, by consent, amended by adding a third count. The defendant pleaded in abatement; the plaintiff objected that the plea was not put in upon oath. The defendant had also pleaded non assumpsit, and the statute of limitations.

The plaintiff's counsel, Brent & Brent, moved to strike out the plea in abatement, for want of the oath and because it was overruled by the pleas of non assumpsit and limitations.

Mr. Key, for the defendant, contended that the plea in abatement, having been sworn to before any order for striking it out, was now good, and ought to stand; and that there was no rule of practice of this court

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

which prevented the defendant from pleading the general issue and a plea in abatement at the same time.

But THE COURT (nem. con.) ordered the plea in abatement to be struck out, CRANCH, Chief Judge, observing that the order of pleading was part of the common law, and did not depend upon any rule of this court; and that, by the common law, a plea in bar of the action overruled a plea in abatement. That the plea in abatement, not on oath, may be treated as a nullity, and will be set aside unless sworn to when offered, or before the rule to plead under the special imparlance has expired. There was a verdict for the plaintiff upon the third count, for $150 damages, and a motion in arrest of judgment.

CRANCH, Chief Judge. This is an action upon the case for deceit. The deceit, in this count, consists in the defendant's promise, which, at the time he made it, he did not intend to perform; by which promise the plaintiff was induced to sell the slave for less than her real value. The court had arrested the judgment upon the first and second counts, because in them the alleged deceit was in the non-performance of a promise on the part of the defendant, which the court thought would not support an action upon the case for deceit, and that the plaintiff's remedy would be an action of assumpsit. But in this new count, the alleged deceit is not in the non-performance of the promise, but in making the promise, mala fide, without intending to perform it; and with the intent fraudulently to obtain the slave at an under price by abusing the confidence which the plaintiff reposed in him. It substantially alleges that the defendant, fraudulently and deceitfully intending to remove the slave from this District, by selling her to a person who, he knew, was a trader in negroes, and whose professed business it was to transport negroes from this District to the southern states; and knowing that the plaintiff would not sell her but upon the consideration of her being kept within this District, and that the plaintiff was willing to dispose of her at an under price, to a master residing in the District, and who would engage that she would not be sold away to southern negro-traders, fraudulently came and represented that he desired to purchase the slave; and, if sold to him, he would undertake that she should not be removed out of the District of Columbia; and thereupon, falsely, fraudulently, and deceitfully declared, protested, and engaged that the said slave should not be removed out of the said District, &c., by reason of which false and deceitful representations, the plaintiff was imposed upon, and prevailed with, to sell the said slave at much less than her real value; and relying upon the said representation and promise and engagement of the defendant, did sell and deliver to him the said slave for $400, when her real value was at least $600, and that the defendant did sell her to a southern negro-trader, who took her away out of the District to foreign parts unknown to the plaintiff, &c. It avers that the said representations, declarations, and promises of the defendant, were utterly false and deceitful, and that at the time he made them, he fraudulently and deceitfully intended and designed to remove the said slave, &c. In this consists the deceit, and we think it is sufficiently set out in this count; especially after a general verdict for the plaintiff, by which the jury have found all the material facts therein averred. We are therefore, of opinion that the motion in arrest of judgment must be overruled.

Mr. Key, for defendant, in his argument, cited: 2 Dane, Abr. 555, 556; Payne v. Whale, 7 East, 278; Evertson's Ex'rs v. Miles, 6 Johns. 142; Emerson v. Brigham, 10 Mass. 202.

R. J. Brent, for plaintiffs, cited: Fitzh. Nat. Brev. 224; Com. Dig. 351; 1 Rolle, Abr. 101; Cro. Eliz. 79; Ferguson v. Carrington, 9 Barn. & C. 59; Spafford v. Griffen, 13 Johns. 327; Price v. Read, 2 Har. & G. 291; Adams v. Anderson, 4 Har. & J. 558; Osgood v. Lewis, 2 Har. & G. 495; 1 Har. & J. 318; Cross v. Garnet, 3 Mod. 261. See, also, Dane, Abr. c. 62, art. 1, tit. "Deceit;" Pasley v. Freeman, 3 Term R. 51, 64; Com. Dig. "Action on the Case for Deceit," A. 1; Eyre v. Dunsford, 1 East, 318; Young v. The King, 3 Term R. 100; Rolle, Abr. 96, l. 32; 11 East, 4, 6; Southern v. How, Cro. Jac. 468; Leakins v. Clissel, 1 Sid. 146; Ekins v. Tresham, 1 Lev. 102; Harvey v. Young, Yel. 21; 1 Rolle, Abr. 101, 1, 40; Springwell v. Allen, 2 East, 448, note a, Aleyn, 91; Chandelor v. Lopus, Cro. Jac. 4; Com. Dig. "Action on the Case for Deceit," F. 2; D'Anv. Abr. 178; Harding v. Freeman, Style, 310; Shepherd v. Wakeman, 1 Keb. 309; Northcote v. Maynard, 3 Keb. 807; Michael v. Alestree, 2. Lev. 172; Moore, 467, pl. 666; Leakins v. Clizard, 1 Keb. 510, 518, 522; Brooke, Abr. "Deceit," 29; 11 East, 4, 6; Samuel v. Judin, 6 East, 333; Stuart v. Wilkins, Doug. 17; 1 Chit. Civ. Pl. 129, 130; Evertson's Ex'rs v. Miles, 6 Johns. 138; Shepherd v. Worthing, 1 Aikens, 188; Pickering v. Dowson, 4 Taunt. 786; Dickon v. Clifton, 2 Wils. 319; Williamson v. Allison, 2 East, 446; 2 Chit. Civ. Pl. 679, 694, 704; Govett v. Radnidge, 3 East, 69; Dawes v. King, 1 Starkie, 75; 3 Camp. 156; 2 Dane, Abr. p. 553, c. 62, art. 3; Warren's Case, 6 Mass. 72; Dale's Case, Cro. Eliz. 44; Turner v. Brent, 12 Mod. 245; Medina v. Stoughton, 1 Ld. Raym. 593; Furnis v. Leicester, Cro. Jac. 474.

FENWICK (ROGERS v.). See Case No. 12,011.

Case No. 4,735.

FENWICK v. TOOKER.

[4 Cranch, C. C. 641.] [1]

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

SLAVERY IN THE DISTRICT OF COLUMBIA—REMOVAL FROM ONE COUNTY TO ANOTHER.

The right to remove slaves from one county to another in the District of Columbia, under the ninth section of the act of the 24th of June, 1812 [2 Stat. 755], is confined to the inhabitants of the county from which the slaves are to be removed.

This was a petition for freedom. By the Maryland law of 1796 (chapter 67), which was continued in force in the county of Washington, D. C., by the act of congress of the 27th of February, 1801 (1 Stat. 103), it was not lawful to bring into this county any slave for sale, or to reside therein, with some exceptions not material to the present case. This law was adjudged to apply to a removal of slaves from Alexandria to Washington county, until the act of congress of the 24th of June, 1812 (2 Stat. 755), by the ninth section of which it is enacted, "That hereafter it shall be lawful for any inhabitant, or inhabitants, in either of the said counties, owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves therein, which would be exercised over him, her, or them, in the county from whence the removal was made, any thing in any legislative act in force at this time in either of the said counties to the contrary notwithstanding." The mother of the petitioner [William Fenwick, a negro] was the slave and in the possession of Robert Patton, who was an inhabitant of, and resided in Alexandria county, in the year 1817; and evidence was given on the trial, that in that year she was sold and delivered by him in Alexandria to Mr. Tennison, an inhabitant of Washington county, who took her immediately to Washington county, to reside therein, and that the petitioner was afterwards born in Washington.

Mr. Key, for petitioner, contended that the power of removal of slaves from Alexandria to Washington, under the act of 1812, was confined to inhabitants of Alexandria owning slaves therein; and that an inhabitant of Alexandria could not bring slaves from Washington to Alexandria, nor an inhabitant of Washington bring slaves from Alexandria to Washington.

Mr. Jones and Mr. Bradley, for defendant [Launcelot Tooker], contended that under the act of 1812, an inhabitant of Washington, owning slaves in Alexandria, had a right to bring them to Washington; and cited a decision of this court to that effect in the case of Lee v. Lee [Case No. 8,194], in May, 1832.

THE COURT (MORSELL, Circuit Judge, contra), upon the prayer of the petitioner's counsel, instructed the jury, that if they should be of opinion, from the evidence, that the petitioner's mother, in the year 1817, was living in Alexandria county, the property, and in possession of Robert Patton, then an inhabitant of that county, and residing there; and that Mr. Tennison, then being an inhabitant of, and residing in Washington county, went to Alexandria and there bought her of the said Robert Patton, who thereupon delivered her into the actual possession of the said Tennison in Alexandria, who brought her forthwith to Washington county, to reside therein, then such importation is not within the provision of the ninth section of the act of the 24th of June, 1812; and that if the petitioner was born after that importation, he is entitled to his freedom.

CRANCH, Chief Judge, observed, that in Lee v. Lee [supra], the point was decided without argument; and that upon further reflection, his opinion was changed as to the meaning of the word "therein," in the ninth section of the act of the 24th of June, 1812.

Verdict for the petitioner.

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

FENWICK (UNITED STATES v.). See Cases Nos. 15,086 and 15,087.

Case No. 4,736.

FENWICK v. VOSS.

[1 Cranch, C. C. 106.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

COSTS ON CONTINUANCE — ATTACHMENT FOR CONTEMPT.

When a cause is continued at the costs of a party, no execution can issue for them. The proper remedy, if they are not paid, is an attachment of contempt.

Fieri facias for costs.

Mr. Hewitt obtained a rule to show cause why this execution should not be quashed and the money restored to Voss. The action had been continued at the costs of Voss at a former term, and before final judgment in the cause Mr. Peacock, for the plaintiff, had ordered this execution for those costs.

Rule absolute, THE COURT being of opinion that an execution could not be issued without a judgment, but that the remedy, in such cases, is by attachment of contempt, if the costs are not paid upon demand.

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

Case No. 4,737.

The FERAX.

[1 Spr. 180;[1] 12 Law Rep. 183.]

District Court, D. Massachusetts. March, 1849.

LIEN FOR ALTERATION OF VESSEL—STATE LAW.

1. St. Mass. 1848, c. 290, gives a lien for alterations of vessels.

[Cited in Donnell v. The Starlight, 103 Mass. 232.]

2. Where a sale of a vessel was made on a condition, upon the non-performance of which she was to revert to the original owners, and the purchaser took possession, and made alterations necessary for the voyage which he contemplated; and subsequently, by the non-performance of the condition, the vessel reverted to the original owners: *Held*, that the carpenter who made the alterations, and was ignorant of any condition in the sale, had a lien upon the vessel.

The claimants, Thacher & Sears, were owners of the Ferax, and in January last, made a written contract with Anthony Brackett, therein agreeing to sell him said ship, to be paid for by instalments. The contract further provided, that in case of failure to complete the payments before May 1st, the previous payments should be forfeited, and the title revert to the claimants; but that after the first payment, Brackett should take possession of the ship, with liberty to "make such repairs as he may wish, to load the ship, or secure passengers for her, provided nothing is done to injure the vessel." The first instalment was paid, and the vessel delivered into Brackett's possession, who immediately advertised her for a California voyage, and fitted her up with accommodations for passengers in the steerage. For this purpose he employed the libellant [Joseph Gould], who worked on board about a fortnight, putting up berths, bulkheads, tables, &c., and setting a number of deck lights in the deck, for the state-rooms. Brackett failed to make his payment of May 1st, the vessel reverted to the claimants, who altered her destination, removed the work put in by the libellant, and sent the vessel on a freighting voyage. The libellant not succeeding in getting his pay of Brackett, brought this libel to enforce his lien under St. Mass. 1848, c. 290. The statute provides as follows: "Whenever a debt is contracted for labor performed, or materials used in the construction or repair of, or for provisions and stores or other articles furnished for, or on account of, any ship or vessel within this commonwealth, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages."

It appeared that the libellant knew nothing of the contract between Brackett and the claimants; that the vessel, while these alterations were in progress, lay at the wharf on which the claimants' counting-room stood; and that the counting-rooms of Brackett and of the claimants were within two doors of one another. It was admitted, that the libellant's charges were reasonable, and that the work done was proper and suitable for a vessel bound on a long voyage, with numerous passengers, but unsuitable for freighting purposes.

R. H. Dana, Jr., for libellant.
Ch. T. Russell, for claimants.

SPRAGUE, District Judge, delivered his opinion substantially as follows:

This is an important question. It depends mainly upon the meaning of the term "construction" in the statute; for the libellant's work, being in the nature of alteration, cannot well be treated as "repair," which is restoration. The statute is recent, and the word has been the subject of no legal determination. We must look to the intention of the legislature. The reason of the statute would make it apply to alterations and reconstructions, as well as to the original construction; and if the latter only had been intended, the word "building" would seem to have been more natural. Suppose a vessel is changed from a brig into a bark, or internal alterations made to fit a merchantman for a whaleman; or suppose a vessel be coppered for the first time, on a change of her destination; the reason of the act would apply to these changes, as much as to repairs, or to the original building. It is not desirable, on practical subjects and among practical men, to create nice distinctions, where there is no distinction in the reason of the statute.

The next point made by the claimants is, that Brackett had not such authority over the ship as to bind her by this lien. By his contract, he is the purchaser, under certain conditions; is to have possession and control, to engage passengers, and make repairs, provided he does not injure the vessel. No personal liability of the claimants is here contended for, but only a lien in rem. The term "injure," must mean something which makes the vessel less valuable to the owners. The true meaning of the contract is, that Brackett may fit the vessel for such purpose as he shall destine her for, making the appropriate changes, with a guard against waste, or such alteration as would diminish the value of the vessel. But, beyond all this, the libellant made his contract with a person placed by the claimants in possession and apparent ownership of the vessel; the alterations which he made were proper for the projected voyage, were nautical in their character, and he acted in good faith, and in ignorance of any contract between the parties.

But supposing that, by the contract be-

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

tween Brackett and the claimants, the latter had the right to interfere to prevent the alterations being made. They did not interfere. From the circumstances proved, the advertisements, the situation of the vessel and the counting-rooms, the reference to passengers in the contract, and the great remaining interest which the claimants had in the vessel, I should, if the case depended on this point, require strong evidence to contradict the violent improbability of their being either ignorant, or dissatisfied, with what was going on. It is not necessary to decide what would have been the effect, in case they had given the libellant notice.

Decree for the amount of the libellant's bill, $233.87, and costs.

Case No. 4,737a.

FERDON v. The JUSTUS E. EARLE.[1]

FORSYTH v. FERDON.

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

COLLISION BETWEEN SAILING VESSELS—INSUFFICIENT LOOKOUT—CHANGE OF COURSE.

[Where a sloop and schooner are approaching each other, on a clear night, on courses which will carry them starboard to starboard without danger of collision, the failure of the sloop to discover the schooner's lights until they are but a few lengths apart, and her action in immediately porting her wheel, without waiting to observe the schooner's course, renders her in fault.]

[Libel for collision filed by Margaret Ferdon against the schooner Justus E. Earle (Alexander Forsyth, claimant), and cross libel by the claimant against the libelant.]

F. A. Wilcox, for the schooner.

W. H. McDougall, for the sloop.

CHOATE, District Judge. These are cross libels to recover damages occasioned by a collision between the schooner Justus E. Earle and the sloop Catharine Wygant which took place about daybreak of the 11th of August, 1877, in the Hudson river, near the west shore, between Spyten Duyvell and Yonkers. The sloop was bound down the river, laden with brick. The schooner was bound up the river, light. The tide was ebb. The wind nearly west; a good breeze. On the deck of the sloop were the master, who was at the wheel, and directing the movements of his vessel, and a seaman forward as lookout. On the deck of the schooner were the mate, forward, acting as lookout and directing the wheelsman, and at the wheel a seaman. There is no controversy that the schooner's course, until she luffed, just before the collision, was straight up the river, not more than five hundred feet from the west shore. The night was clear, so that vessels' lights could be seen at a considerable distance. Both the men on the schooner saw the sloop, some time before the collision, to the northward and eastward of the schooner, coming down the river. The lookout on the schooner saw her green light as she approached, and her course was such that she would have passed on the starboard side of the schooner, at a perfectly safe distance, if she had kept her course. When she had reached a point not more than two or three lengths from the schooner, she ported, and showed her red light to the schooner, thus taking a course directly across the schooner's bow. This manoeuvre was executed at so short a distance from the schooner that it made a collision inevitable. To ease the blow, and to prevent the schooner's striking head on to the sloop at full speed, the mate of the schooner ordered the wheel to be starboarded, and the schooner came up in the wind just as they came together. The sloop kept bearing more and more to the westward till the instant of collision. This is the account given by the lookout on the schooner, and I think it is, in all material respects, confirmed by the two men on the sloop. The master of the sloop did not see the schooner till she was reported by the lookout. The lookout reported a schooner on the lee bow. Both witnesses testify that she was then very near. They put her at two or three lengths off from the sloop. To excuse themselves for not seeing her before, they both testify that they saw no lights on the schooner. But the testimony is entirely satisfactory that the schooner's lights were properly set and brightly burning. The master of the sloop, thus seeing the schooner to leeward, ported his helm, and the next thing he noticed was a shout from the schooner to keep off. He looked again, and saw that the schooner had changed her course and had luffed, and immediately the collision happened. The bowsprit of the sloop struck the starboard side of the schooner near the forerigging. Both vessels were injured. The testimony of those on the sloop is in itself conclusive that they were grossly negligent. Their testimony shows that they did not keep a good lookout. The schooner must have been visible to them at least a mile away, and they only saw her two or three lengths off. On his own showing, the master was grossly negligent after she was reported to him. The vessels were in very close proximity, and, especially as he could not see any lights to assist his judgment as to the course of the other vessel, he should have kept her steadily in view till he was by her. Instead of this he ported his wheel, and took the chances of passing her, and then his attention was called back to her by the shout, which was an instant before the vessels came together. In fact, what those on the sloop say they saw is precisely what the account given by the lookout of the schooner requires that they should have seen, upon the supposition that the lookout of the sloop did not discover the schooner until, by the change of course

[1] [Not previously reported.]

which the lookout of the schooner observed, the sloop had headed across the schooner's bow. That change brought the schooner on the lee or port bow of the sloop, where the lookout of the sloop first saw her. The sloop then ported still more, and at the time of the collision was under a hard a-port helm, as her master admits. Almost the only statement of those on board of the sloop, as to her movements, which it is necessary to reject, on this theory of the case, is the statement of the master that until he ported, after the lookout reported the schooner, he had for a considerable time been coming straight down the river, without a change of course. But where those on the sloop are so clearly proved to have been taken by surprise at finding a schooner under their bow, which they ought to have discovered long before, it is little likely that they were, immediately before, paying any particular attention to their course. The porting of the schooner was, under the circumstances, justifiable. It was made necessary by the fault of the sloop, to avert the most serious consequences of the collision, and it seems to have had that effect. Up to the time of the ship's change of course, there was, upon the evidence, no danger of collision. If the courses of the vessels crossed, the point of intersection was so far astern of the schooner that they would have passed in safety. The collision was caused wholly by the fault of the sloop, in not keeping a good lookout, in porting when about passing the schooner on her starboard side, without observing the schooner, and at such a distance that the collision was thereby rendered inevitable. Decree for the claimants in the first suit, with costs, and for the libellant, with costs, in the second suit, and reference to compute damages.

FERGUSON, Ex parte. See Case No. 7,560.

Case No. 4,738.

In re FERGUSON.

[2 Hughes, 286;[1] 16 N. B. R. 530.]

District Court, E. D. Virginia. March 30, 1875.

JUDGMENT — PRIOR DISCHARGE IN BANKRUPTCY — FAILURE TO PLEAD SAME — RELIEF.

When a bankrupt, after his adjudication in bankruptcy, is sued in another court on a debt arising before the adjudication, and he fails to plead his discharge, and judgment goes against him, the bankruptcy court cannot relieve. He must apply to the court granting judgment against him for relief, or to an appellate court having jurisdiction to revise its proceedings, or to a court of equity of the same jurisdiction. In general, he can have no relief after such laches.

[Cited in Rogers v. Parker, Case No. 12,018; Re Burton, 29 Fed. 639.]

In bankruptcy.

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

HUGHES, District Judge. John A. Ferguson filed his petition here, on the 27th October, 1874, setting forth that he had received a discharge from his debts as a bankrupt on the 25th day of March, 1870; that after the issuing of said discharge a suit was brought against him, upon a debt contracted before his adjudication, in the circuit court of the county of Pittsylvania; that after being sued he placed his certificate of discharge in the hands of the attorney employed by him, to wit, R. H. Tredway, to be used in his defence; that the discharge was not filed (pleaded) by reason of the neglect of his said counsel, and judgment was in consequence obtained against him, at the May term of the said circuit court in 1874; that execution was issued thereon; that an injunction was applied for and obtained from the said circuit court, to stay proceedings; that with his bill praying for said injunction his discharge was filed as an exhibit; that the judge of the said circuit court of Pittsylvania, at the succeeding term of said court, dissolved the said injunction; and that execution again issued and was in the hands of the sheriff of Pittsylvania at the filing of this petition.

On the filing of the petition here, this, the court of bankruptcy which granted the discharge, granted a restraining order against all proceedings by the said sheriff until the further order of court; and a rule was given against the plaintiff in the said suit in the circuit court of Pittsylvania and the said sheriff, to show cause why the injunction should not be made perpetual. The parties are now before this court on the rule awarded as aforesaid, and on the answer of the said sheriff, who as administrator was also the plaintiff in the suit on which the executions issued. I should not have granted the restraining order upon the Pittsylvania sheriff, but for the frequency with which this question of the bankrupt's liability when he fails to plead his discharge, arises. The only question presented is, whether this court has jurisdiction to relieve against a judgment obtained against a bankrupt in a suit brought against him after his adjudication, in which, for any cause, he has failed to plead his discharge. Clearly it has not. The discharge in bankruptcy must be pleaded in suits upon debts existing before the bankruptcy, just as payment, or the statute of limitations, should be pleaded in proceedings where those pleas constitute the proper defences. If the bankrupt fails, from any cause, to interpose the discharge in bankruptcy, in the suit against him in the state court, this court will not relieve against the consequences of his own neglect. His proper recourse is in the court of law in which the suit was pending; or else by appeal from that court to one having appellate jurisdiction over it, which, in the present case, this court of course has not; or else by a bill of injunction in a state court of chancery.

There is but one view of the matter in

which this court could consider the question of relief against such a judgment as that complained of. By virtue of the district court of the United States, as a court of equity, having jurisdiction of matters connected with and growing out of bankruptcy proceedings, it might exercise the same jurisdiction to relieve from a judgment at law in a matter connected with bankruptcy which a state court of equity would have if the matter were not connected with bankruptcy.

Although not required in the present case to pass upon that question of jurisdiction, which is a very important one, I will assume for the sake of argument that this court would enjoin against the judgment at law complained of, if the facts of this case were such as to warrant it in doing so. In determining whether they are of that character my safest and most proper guide are the decisions of the court of highest resort of this commonwealth. The rulings of that court are so strongly against the exercise of such a jurisdiction, that I should feel bound to refuse to interfere if I were passing upon a bill of injunction brought on the chancery side of this court, rather than a petition in bankruptcy on its bankruptcy side.

The following are extracts from some of the decisions of the Virginia court of appeals on this subject. In Tapp's Adm'r v. Rankin, 9 Leigh, 478, that court said: "Although it may be manifest that great injustice has been done a defendant at law by the verdict and judgment against him, yet if this injustice had not been produced by any fraud, or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence or of his counsel's ignorance or bad management, a court of equity can give him no relief."

In Meem v. Rucker, 10 Grat. 506, that court decided that an injunction to a judgment at law will not be sustained where the defendant at law has failed to make his defence at law, from ignorance of the nature of the proceeding against him, and a mistaken apprehension of the steps it was necessary to take in his defence, remarking: "Now, that a party to whom a day and an opportunity have been allowed to make his defence against a demand set up against him in a court of law, but who has wholly failed to avail himself of them, will not be entertained in a court of chancery on a bill seeking relief against the judgment which has been rendered against him in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason founded on fraud, accident, surprise, or some other adventitious circumstance beyond the control of the party, be shown why the defence was not made in that court, is a proposition which has been so repeatedly affirmed that it has become a principle and maxim of equity as well settled as any other whatever. It has been recognized and acted upon in very numerous cases in this court as well of ancient as of recent date. The rule has its foundation in wisdom and sound policy. It springs out of the future necessity for prescribing some period at which litigation must cease; and I am utterly unable to appreciate the force or justness of the complaints, which, in view of its supposed harsh operation in particular cases, have sometimes been made against it. I think that private right and public interest alike require that it should be adhered to. So numerous indeed and so familiar are the cases in which this court has recognized the doctrine, that I deem it entirely unnecessary to cite them here."

Lee, J., in Meem v. Rucker, 10 Grat. 509, 510. In another case that court said: "A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with employing a lawyer who practices in the court to defend him, without giving him any information about his defence, or inquiring whether he is attending to the case, is not entitled to relief on the ground of surprise, however grossly unjust the decree may appear to be." Hill v. Bowyer, 18 Grat. 382–386.

In another case, however, that court decided that where a defendant at law has been prevented from making his defence by the assurances or promises of the counsel of the plaintiff, equity will relieve him. 22 Grat. 136. For the grounds on which equity will or will not relieve against judgment at law, see Holland v. Trotter, Id. 136.

In Wallace v. Richmond, decided by the court of appeals of Virginia, as late as the 25th March, 1875, reported in 26 Grat. 67, which was on a bill in chancery to enjoin a judgment at law, that court again said: "It is true that after the writ was served on him he retained counsel to defend the suit, and informed him of the grounds of his defence, to wit, that he was sued as a partner of Black & Co., and was not and never was a partner or member of said firm, in any way liable for said debt. But he gave no further attention to the suit. It does not appear that he even spoke to his counsel on the subject or made any preparation for his defence; though he was probably at the place where the court was held during the term. His counsel entered no plea to set aside the office judgment, and made no defence whatever, and judgment went against him by default. His counsel says he examined the docket and saw no case upon it of 'Richmond, Assignee, v. Wallace.' He saw the case of Richmond, assignee, against Black & Co., but it never occurred to him that the appellant was sued in that case, and he did not look into the papers to see. Yet he had been informed by the appellant that he was sued as a member of that firm, and that his ground of defence was, that he was not and never had been a member of it; and he thinks he showed him a copy of the summons which had been

served on him. His counsel says he did not remember to have been shown a copy of the summons, and was not aware that the appellee was interested in that suit, else he would have looked into the papers and entered a plea. But a plea denying the partnership could not have availed for his defence unless verified by affidavit; but the defendant was not there to make affidavit to it. It seems to the court a plain case of negligence on the part of the appellant's attorney, not unmixed with fault or negligence on his part. And without deciding that mere inadvertence or forgetfulness on the part of the attorney would deprive a party of his right to relief in equity, where the defendant himself had used proper diligence and was chargeable with no laches, the court is of opinion that a court of equity could not interfere by injunction in this case, to restrain the execution of the judgment, and to give the appellant another trial, who has already had his day in court, without overturning the well-established rule in such cases."

Such are the decisions of the court of the highest resort in this state on the question of opening judgments obtained through the negligence of defendants or their attorneys. Even, therefore, if the court of bankruptcy had the right of a court of equity in such a case as that of this bankrupt, it would not interfere to relieve him against the laches of his counsel and himself.

FERGUSON (COOKINGHAM v.). See Case No. 3,182.

FERGUSON v. The JACK PARK. See Case No. 13,984.

Case No. 4,739.

FERGUSON v. LAMBERT.

[2 Cin. Law Bul. (1877) 46.]

Circuit Court, S. D. Ohio.

ABATEMENT — DEATH OF PARTY — OHIO CODE OF CIVIL PROCEDURE — MALICIOUS PROSECUTION — FALSE IMPRISONMENT.

1. Survivor or abatement of actions, where death of parties intervenes, depends upon the state or local law.

2. An action for malicious arrest and imprisonment upon a state warrant, under regular proceedings, though instituted maliciously, is within the provision of section 399 of the Ohio Code of Civil Procedure, and abates by the death of the defendant.

3. Actions for "malicious prosecution" and "false imprisonment" distinguished.

[This was an action by Wayne Ferguson against William Lambert. Plaintiff moved to dismiss the suit by reason of abatement.]

Argued by Simrall & Hosea and Gen. W. H. Enochs, of Ironton.

Before SWING, District Judge.

Upon suggestion of death of defendant, and motion to dismiss by reason of abatement, the COURT construed the action, upon the declaration filed, as one for a malicious arrest, it appearing that, though maliciously instituted, the proceedings were by a magistrate having jurisdiction, and were in due form of law. After careful and exhaustive review of the common-law authorities, the COURT held that:

An action for "false imprisonment" is in the nature of a trespass, and only lies in that form where the imprisonment is vi et armis, either by force wholly illegal, or only colorably legal. The latter case might arise where the arrest was by the forms and agencies of law, but where jurisdiction was wanting. In either event the action of trespass is the proper remedy; and for the arrest under colorable legal process the action on the case also lies. But the action for "malicious prosecution" can only be maintained as a special action on the case for the improper and malicious instigation of proceedings which in themselves are legal, yet result in damage to the defendant. These proceedings may be either civil or criminal, and may or not cause the arrest and imprisonment of the party. It must appear, however, that the party is damaged thereby; either in person, as by imprisonment; in reputation, as by the scandal; or in his property, by the expenses incurred. The imprisonment is an incident of the malicious prosecution upon a criminal charge, and may arise upon a civil action also. It does not change the form or substance of the action, however, for the "malicious prosecution." Citing: 3 Bl. Comm. 123, 127; 1 Chit. Pl. 121, 214; 1 Chit. Pr. 47; 2 Bouv. Law Dict. 98, 437; 1 Bouv. Law Dict. tit. "False Imprisonment;" 3 Broom & H. Comm. 136; Add. Torts, 222, 243; 3 Steph. Comm. 384; Nash, Pl. 210, forms, etc.; Greenl. Ev. Index, tit. "Malicious Prosecution."

Upon the question of abatement, the COURT held that the local law was conclusive. Section 399 of the Ohio Code provides for the abatement of certain actions by the death of the defendant, among which are actions for "malicious imprisonment." The dividing line intended by the legislature is that which, in the authorities cited, distinguishes the action for "malicious prosecution" from "false imprisonment." And the action for malicious or false arrest is at least sui generis with that for malicious prosecution, and falls upon the same side of the line. Motion granted and cause dismissed.

Case No. 4,740.

FERGUSON v. O'HARRA.

[Pet. C. C. 493.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

PLEADING IN EQUITY — PLEA TO PART OF BILL — ANSWER — DEMURRER — AMENDMENT.

1. The general rule is, that if the defendant to a bill in equity answer to the same matter

[1] [Reported by Richard Peters, Jr., Esq.]

which is covered by his plea, and which by his plea he contends he is not bound to answer, the latter overrules the former.

[Followed in Dakin v. Union Pac. Ry. Co., 5 Fed. 667. Cited in Hayes v. Dayton, 8 Fed. 706.]

[Cited in Bell v. Woodward, 42 N. H. 194.]

2. Exceptions to this rule.

3. If the plea is only to some part of the bill, the defendant must answer to the residue, unless the matter should be proper for a demurrer.

4. Amendment refused.

In equity. The bill was filed in order to set aside the purchase of a tract of land, to which the plaintiff claims title, as heir of her father upon the ground of a sale thereof under a fraudulent judgment obtained against the administrator of her father, and a subsequent purchase by the defendant, he having full notice of the fraud. To this bill the defendant filed a plea, denying any knowledge of the frauds charged, and asserting himself to be a purchaser for a valuable consideration. He also filed an answer to the whole of the bill, alleging himself, as in the plea, to be a purchaser for a valuable consideration, without notice of the fraud.

In support of a motion by the complainant, to disallow the plea upon the ground of its being overruled by the answer, a number of cases were cited. Mitf. 239, 241, 237; 2 Atk. 155; Coop. Eq. Pl. 229; 1 Anstr. 14, 59, 97; 6 Ves. 586.

On the other side were cited 2 Ves. Jr. 455; Har. Ch. Pr. 363; Mitf. 95, 96; Coop. Eq. Pl. 227–229; 1 Anstr. 14, 59, 97; 6 Ves. 586.

WASHINGTON, Circuit Justice. The general rule upon this subject is, that if the defendant answer to the same matter which is covered by his plea, and which by his plea he contends he is not bound to answer, the latter overrules the former. The only exception to the rule is the case where an answer is necessary to support the plea, as where the bill charges circumstances calculated to avoid the anticipated bar of the defendant; there it is proper, not only that the plea should contain all necessary averments to remove those circumstances out of its way, but the defendant must support his plea by an answer also denying the same circumstances, because otherwise, he would lose the opportunity of excepting, and thus drawing from the defendant some confession, which might destroy the bar set up by the plea. This at least is the reason assigned in the books, for the necessity of supporting a plea by an answer. The general rule is founded upon the most obvious reasons, growing out of the nature and design of a plea in equity. It is intended to narrow the controversy, or so much of it as the plea covers, to a single point, and thus to avoid the expense of going into an examination of the case at large, and the delay incident to such an investigation. If then the plea goes to the whole bill, and contains averments sufficient to bar the plaintiff of the relief he seeks, and also to protect the defendant against a full discovery, an answer to the whole bill renders the plea, to say the least of it, useless as to the relief, and is in itself a felo de se as to the discovery. Why decline to answer on account of the matter set up in the plea, and yet in the next moment give the answer? And why object to the relief prayed by two forms of pleading, when either would have been sufficient? If indeed the plea is only to some part of the bill, then it will be necessary for the defendant to answer as to the residue, unless the matter should be proper for a demurrer.

In case the court should entertain the opinion above expressed, the defendant has preferred a motion for leave to amend his plea, by striking out the denials of the specific averments in the bill, so far as such denials are contained in the answer. This motion is not sufficiently specific to entitle it to the indulgence which is asked. The defendant ought to have stated more precisely which are the particular parts of the plea intended to be omitted, that it might be seen whether the amendment would remove the difficulties, which the pleadings now suggest. The objection is not to the form of the plea, but to the answer which renders the plea unnecessary. If the motion had been to amend the answer, by striking out such parts of it as are not necessary to support the plea, it would have been more intelligible to the court. But it is at least probable, that if the plea were divested of all the denials of the specific averments, which are also stated in the answer, it might be open to objections, from which in its present form it is exempt. The court overrules this motion with the less reluctance, as the defendant may have all the benefit of the matter of the plea at the hearing.

FURGUSON (PARKER v.). See Case No. 10,733.

Case No. 4,741.

FERGUSON et ux. v. PECKHAM et al.

[6 N. B. R. 569; 29 Leg. Int. 285; 6 Alb. Law J. 291.][1]

District Court, D. Rhode Island. May 12, 1872.

BANKRUPTCY—PROCEEDINGS BY ASSIGNEE TO RECOVER ASSETS—SUIT AGAINST ASSIGNEE.

1. An assignee in bankruptcy can proceed against an adverse claimant of property only by action at law or plenary bill in equity; but whether an adverse claimant may not proceed against an assignee by mere petition, quaere?

[Cited in Goodall v. Tuttle, Case No. 5,533.]

2. Rulings in Barstow v. Peckham [Case No. 1,064], and Re Masterson [Id. 9,268], reconsidered and qualified, and rulings in Knight v.

[1] [Reprinted from 6 N. B. R. 569, by permission. 6 Alb. Law J. 291, contains only a partial report.]

Cheney [Id. 7,883], and Smith v. Mason [14 Wall (81 U. S.) 419], and Re Evans [Case No. 4,551], commented upon.

The petitioners having a valid mortgage upon certain property of a bankrupt of which the assignee held possession, by petition sought to obtain an order from the court that the assignee make sale of simply his right of redemption in said property. The petition was opposed on various grounds, and dismissed for reasons assigned; the only point of much interest being that which is presented and treated of in the concluding portion of the court's opinion, as follows:

Wingate Hays, for petitioners.

James Tillinghast and Abraham Payne, for respondents.

KNOWLES, District Judge. I deem it advisable in this connection to notice more pointedly than I yet have done one objection urged by the learned counsel of the respondents. That was, that the court could not consistently entertain the motion under consideration, because in Barstow v. Peckham [Case No. 1,064] it had ruled, and in Re Masterson [Id. 9,268] had assumed that only by a suit in equity, or by action at law, can a controversy between an assignee and a claimant of an adverse interest be brought to the consideration of the court. This objection, it may be conceded, seems to be well taken, but I find it unnecessary here to consider its pertinence or validity. It suffices to say, that the ruling referred to (in October, eighteen hundred and seventy) was intended and believed to be in entire conformity with that of Justice Clifford, in Knight v. Cheney [Id. 7,883], as orally announced in September, eighteen hundred and seventy, in a brief communication to counsel and parties, informing them of his judgment in that case, and of his purpose at a more convenient season to commit to writing and place on file his opinion in extenso upon the questions involved. As it was not noticed by myself or others, that in that communication any distinction was recognized between a petition by an assignee against an adverse claimant, and a petition by such a claimant against an assignee, the court in its opinion recognized no distinction. By suit in equity or action at law, said the court, expressly or impliedly, and not by petition, must such parties respectively assert their antagonist rights and claims. But herein it seems the court acted under a misapprehension of the scope of the rulings of Justice Clifford, for it appears that in his opinion in Knight v. Cheney [supra], as written and published in October, eighteen hundred and seventy-one, he restricts his reasonings and language to the case on hand, (that of a petitioning assignee against an adverse claimant,) adjudging that by action at law, or suit in equity, must an assignee proceed against an adverse claimant, studiously avoiding any expression of his views respecting the right of an adverse claimant to proceed by simple petition against an assignee. Indeed, for aught that is expressed in his opinion as printed, (of implications I here say nothing,) or in the opinion in Smith v. Mason [14 Wall. (81 U. S.) 419], (supreme court, December, eighteen hundred and seventy,) their author may hereafter without inconsistency assent to the views of the learned judge of the Massachusetts district, in Re Evans [Case No. 4,551], (uttered in January, eighteen hundred and seventy-one, but not printed, it is believed, until May, eighteen hundred and seventy-two), lucidly expressed as follows:

"It is said to have been decided by Mr. Justice Clifford, sitting in the district of Rhode Island, that actions by assignees against persons 'claiming an adverse interest,' should be by regular suits at law or in equity, as the facts may require, and not by summary petitions in the court of bankruptcy. I suppose this decision is to be taken subject to the qualifications of sections six and twenty-five of the statute [of 1867 (14 Stat. 520, 528)], the first of which gives power to any persons who choose to submit to the jurisdiction to take the opinion of the district court on a case stated; and the latter gives the court of bankruptcy power to order the sale of property in the actual possession of the assignee, who is to hold the proceeds instead of the property, subject to all lawful claims and liens. And I may add, that on general principles the assignee, who is an officer of the bankrupt court, may be proceeded against by summary petition in respect to any fund in his hands, if the opposing party choose to proceed in that way, though the assignee himself has no right to take similar action against third persons. The decision to which I refer has not been written out; but I take it to be the law, that subject to the exceptions which I have referred to, the assignee must bring his action."

Lowell, J., it is here seen, adopts and follows the rulings of Justice Clifford, (as did the supreme court in Smith v. Mason [supra], in December, eighteen hundred and seventy,) restrictive of the rights of an assignee, while in unmistakable terms he accords to an adverse claimant a right of election of remedies, as between the simple petition and summary proceedings on the one hand, and a regular suit at law or in equity on the other.

I add, in conclusion, as due to myself and to litigants in this district, that my rulings in Barstow v. Peckham [supra], and in other cases, if any, are here retracted so far as in conflict with those of my brother of the Massachusetts district, as above quoted, mine having been made under a misapprehension as to the scope of Justice Clifford's decision, rather than as the conclusions of my own judgment as a judicial officer. Under a decision of the supreme court coinciding with that of Justice Clifford, I must, of

course, continue to hold that an assignee cannot by summary petition prosecute his claims against an adverse claimant; but whether an adverse claimant may or can prosecute his claims against an assignee by such petition, as held by Lowell, J., is a question upon which I reserve my opinion, until it shall again arise, and shall have been as it never yet has been in my hearing, fully argued by opposing counsel.

To an argument in support of the doctrine that under the provisions of the bankrupt act an adverse claimant is entitled to an election of remedies not accorded to his antagonist assignee, it will be a gratification to listen at any time; as it will also be to learn by what "general principles" affecting the question at issue, the special provisions of that act in regard to the jurisdiction in bankruptcy of the federal courts, are to be held to be controlled, limited or qualified.

Case No. 4,742.

FERGUSON v. ZEPP.

[4 Wash. C. C. 645.][1]

Circuit Court, E. D Pennsylvania. April Term, 1827.

CONSTRUCTION OF WILL — FEE SIMPLE TITLE TO REAL PROPERTY — REMAINDER AND RESIDUE — DEBTS CHARGED ON ESTATE DEVISED, OR ON DEVISEE PERSONALLY.

1. The testator devised as follows: "As to my worldly goods, I devise to my wife A, all and singular my goods and effects, both real and personal, of what kind soever, after my debts and funeral expenses are paid." He then appoints his wife and another his executors, and revokes all former wills. A fee simple passed to the wife.

2. The effect of an introductory clause, and of the words "remainder" and "residue," in the construction of a will.

3. Where a gross sum in debts, &c. is charged by the will on the estate devised, and not on the devisee; the devisee in a general devise to him takes only an estate for life. But where the charge is on him personally, in respect of the devise, then he takes a fee.

Mr. Kittera, for plaintiff.

Mr. Rawle, for defendant.

WASHINGTON, Circuit Justice. The only question in the case is, whether Mary Dickenson took an estate in fee, or only a life estate in the land which is the subject of this suit. If the former, judgment must be given for the defendant; if the latter, then for the plaintiff.

After giving his soul to his Creator, and declaring that, as to his worldly goods, he gives as follows, the will proceeds thus,—"Item, I give and bequeath unto my beloved wife, Mary Dickenson, all and singular my goods and effects, both real and personal, of what kind soever, or wheresoever, after my debts and funeral expenses are paid." The only other clause in the will is that which follows the above, whereby he appoints his wife, and his brother Cadwallader Dickenson, his executors, and revokes all former wills theretofore made, either by word, or writing. In this will we find no words of inheritance annexed to the devise to the person who is the sole devisee; and the only inquiry is, whether there are any expressions which, when used in a will, are in themselves equivalent to words of inheritance; or whether an intention to give the whole of the testator's interest in his real property to this devisee, can be fairly collected from the whole of the will. If there be no such intention, or no such expressions, it is agreed by the counsel on both sides, that the general rule of law, which favours the heir at law, must prevail. As to intention, independent of the legal interpretation of the words used in the clause containing the devise to Mary Dickenson, nothing can be gathered from other parts of this will to explain their meaning, unless it is furnished by the introductory clause; since they constitute the whole of the will, with the exception of the one which appoints the executors.

The inquiry is then narrowed down to the particular phraseology of the devising clause; and the question is, whether the words here used, are sufficient, in point of law, to pass all the interest which the testator had in his real estate. There are many words denoting the quantity of estate, or interest intended to be disposed of by the testator, which, from their own import, sanctioned by judicial authority, assume a technical character; and, unless they are controlled by a contrary intention, manifestly appearing in other parts of the will, are equivalent in their legal effect to words of inheritance in their strictest sense. Thus the words "estate," "for ever," "the devisee to have all his inheritance," "purchase," "to give and dispose of at the pleasure of the devisee," "all the right, title and interest," or "all the interest of the devisor in the thing devised," "all the real property of the testator," or "all his worldly substance," &c. What, for example, is the "estate," the "interest," the "inheritance," "property," or "worldly substance" of a tenant in fee simple of real property, but a fee simple interest; and it is that which forms the subject of the devise, when those expressions, or either of them are used. They import in their most common acceptation, all the interest which the testator possesses, and can part with, generally, or in the thing devised, as the case may be; and to restrict their meaning to a life estate, would manifestly violate his intention; unless from other expressions in the will, it is clear that they were used merely to indicate a particular species of property, or a particular piece of land, and to distinguish it from other property of the testator. But these and other expressions of

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

like import, which, before they had obtained a meaning under the established judicial authority, were merely indicative of the intention of the testator to give a fee, and on that ground were construed to give it, have, under the sanction of that authority, become as strictly technical as those other words, which are so independent of intention. Thus, a devise of all a man's estate, interest, property, or worldly substance, will pass a fee simple in land, in like manner as if it had been given to him and his heirs; unless those expressions be restrained by some other words, or unless a contrary intention appear from some other part, or from the whole of the will. And it is most important for the sake of security in the disposal of real property, which so much depends upon a uniformity of decisions, that, when certain expressions have obtained a particular definite meaning by a course of decisions, or even by an undisturbed and unquestioned adjudication, such meaning should be adhered to, and the expressions so defined should be considered as technical in all subsequent similar cases.

This brings me to the consideration of the particular expressions used in the devise to Mary Dickenson, which I have purposely excluded from the list before mentioned, with a view to a more minute examination of their meaning. They are, "all and singular my goods and effects, both real and personal, of what kind soever, or wheresoever." As these expressions have received a definite judicial interpretation, by the highest authority, more than half a century ago, it can only be necessary to refer to the authority itself for their meaning. In the case of Hogan v. Jackson, Cowp. 299, decided in the year 1775, the devise was to the wife of the testator of his house and lands of G. for her natural life; and also of his lands of B. for the term of her natural life, without liberty of committing waste; and, after sundry annuities and legacies to different persons, he gives to his said wife "all the remainder and residue of all the effects, both real and personal, which he shall die possessed of." Lord Mansfield observed, that the cause turned upon a single point, which was to fix the meaning of the word "effects" in the English language. "If," said he, "it be equivalent to 'worldly substance,' used by the testator in the beginning of his will, or if it be synonymous to 'property,' there is an end of the question, because then all the cases prove that the sweeping clause passes a fee. On the contrary, if it can be shown that 'effects' mean 'chattels,' or personality only, then the residuary clause can include them only." He then concludes by saying, that he takes "effects" to be synoymous to "worldly substance;" which means, whatever can be turned to value; and therefore, that real and personal effects mean all a man's property. This decision was afterwards carried by writ of error before the house of lords, where it was affirmed in conformity with the unanimous opinion of all the judges, that the devisee took an estate in fee in all the testator's property under the residuary clause. If there be no material difference between that case and the one now under consideration, the decision in that ought to be conclusive; since its correctness has never been questioned in any subsequent decision in England, or in the United States.

It is insisted by the plaintiff's counsel, that the two cases are strikingly different in the three following particulars: 1. In the introductory clause. 2. In the import of the words, "remainder and residue." And, 3. In the devise of an annuity to the heir at law. As to the introductory clause, it is well settled, that it can never be attached to the devising clause, so as, per se, to enlarge the latter to a fee, unless the words used in the devising clause admit of passing a greater interest than for life; and it is only in such cases, and where the intention of the testator is, from other parts of the will rendered doubtful, that the court will lay hold of an introductory clause for the purpose of aiding in ascertaining the intention. This is stated by Lord Mansfield in the case we are examining, and by the learned judge who delivered the opinion of the supreme court in the case of Wright v. Denn, 10 Wheat. [23 U. S.] 228. It is further to be remarked, that little or no reliance was placed upon that clause by Lord Mansfield; or in the case just referred to from 10 Wheaton, where it is stated that the former case did not turn upon the effect of the introductory clause, but upon the other words of the will; which were thought sufficient to carry the fee, particularly the words, "all my effects both real and personal." Page 229. The truth is, that the discovery of the real intention of the testator in that case was rendered very difficult by other parts of the will, particularly that which devised to the wife two specified portions (which possibly embraced the whole) of his real estate expressly for life, and, as to one of them, without impeachment of waste; which devises, it was contended, and with great strength, would be rendered of no effect, if the residuary clause should be so construed as to give a fee, and so to merge the life estate by being engrafted on it. In a case of that kind, it was entirely consistent with the well established rules of construing wills to derive from the introductory clause, or from any other clause in the will, all the aid it could afford in ascertaining the general intention of the testator.

But the counsel for the plaintiff in this case appears from his written argument, to have overlooked the introductory clause; which, although comprised in a few words, is, when taken in connection with the devising clause, quite as significant as the expressions used in the introductory clause in Hogan v. Jackson. I admit that "worldly goods" would, per se,

apply, as would "worldly effects," only to personal property. But then they import the whole of the testator's interest in that species of property, and when those expressions are explained and extended to "worldly goods, real and personal," they are clearly equivalent to "worldly substance;" which are the words used in the introductory clause to Jackson's will. I desire, however, to be understood as placing no reliance whatever upon the introductory clause in this case, which turns altogether upon the meaning of the particular expressions in the devising clause, and is unembarrassed, as to the intention of the testator, by other clauses in the will. As to the words "residue and remainder," in the case cited, they are not in themselves sufficient to enlarge an estate; nor have they ever been so construed, unless from necessity, in cases where, a life estate in all the testator's property, or in the particular property to which they apply, having been previously disposed of by the will, those expressions would have nothing to operate upon, unless they should be construed to pass the inheritance, or remaining interest of the testator in the property. This was clearly decided in the cases of Canning v. Canning, Mos. 240; Moor v. Denn, 2 Bos. & P. 247; 5 Term R. 558, under the name of Denn v. Mellor; Doe v. Richards, 3 Term. R. 356; and Norton v. Ladd, 1 Lutw. 755, 756; and was fully recognized by the supreme court in the case of Wright v. Denn, 10 Wheat. [23 U. S.] 206, before alluded to. As to the devise of the annuity to the heir at law, I admit that this is a circumstance of no small weight in ascertaining the intention of the testator to dispose of his whole interest, in a case where that intention is rendered doubtful by other parts of the will. But it is in such a case only that such a bequest can be material. It is with this view only that it is resorted to by Lord Mansfield, as appears from what he says respecting it in [Hogan v. Jackson, Cowp.] page 307. But it is manifest, from the quotation which I have given at large of what was said by him, that his opinion was founded solely upon the meaning of the expressions "effects real and personal;" and that the other expressions upon which the plaintiff's counsel in this case relies, were noticed for the sole purpose of showing that the general intention of the testator was consistent with the meaning which he had given to the expressions upon which the cause was declared by him to turn. I think then that the case of Hogan v. Jackson has conclusively settled the meaning of the expressions used in the devise to Mary Dickenson; and that it would introduce great uncertainty and mischief, were the courts now to say that they were not sufficient to pass a fee, in a case where their meaning stands unaffected by other parts of the will indicating a contrary intention.

It will be observed that in this opinion I have placed no reliance upon the charge for payment of debts and funeral expenses, to which the plaintiff's counsel in his written argument has devoted much of his attention. My reason is, that I entirely concur with him in the view which he has taken of that subject, and if the quantum of estate given to Mary Dickenson depended entirely upon that part of the will, I should be of opinion that she could claim no greater interest than an estate for life. Whatever obscurity may be supposed to have rested upon the question, how far a charge upon land for payment of debts enlarged the estate of the devisee of such land, it is cleared away, and the principle is permanently settled, by the cases of Doe v. Richards, 3 Term R. 356; Denn v. Mellor, 5 Term R. 558; Doe v. Allen, 8 Term R. 497; and Wright v. Denn, 10 Wheat. [23 U. S.] 206. That principle is, that where a gross sum, or debts, &c. are charged on the estate devised, and not on the devisee, the devisee, on a general devise to him, takes only an estate for life. But where the charge is on him personally in respect of the devise, there he takes a fee; since he might be a loser in a case where a benefit was intended, if his estate should terminate with his life.

In the case of Denn v. Mellor, the devise was of all the rest of his lands, &c. goods and personal estate, after payment of his just debts, to C., who was appointed executor. Lord Kenyon takes the above distinction, and observes, that the case of Doe v. Richards turned upon the words "my debts and funeral expenses being thereout paid;" which imported that they were to be paid by the devisee out of the interest given her, and were a charge on the estate in her hands; and that if she died soon after the testator, and had only an estate for life, the fund out of which she was to bear those charges might have failed. But that in the case at bar there were no words which charged the estate in the hands of the devisee with the payment of the debts, &c., nor were they a charge on him. This opinion was afterwards affirmed in the house of lords; and being fully recognized as law by the supreme court of the United States in the case of Wright v. Denn, before referred to, has fully settled the law upon this point, at all events in the courts of the United States. It may be observed, in addition to the above mentioned reasons stated by Lord Kenyon, and such indeed is the conclusion to be drawn from the case he supposes, that the devise to the wife was nothing more than the property which might remain after the debts were paid, which, upon no principle whatever, could be construed to imply a personal charge. In the case of Doe v. Allen, 8 Term R. 497, the testator devises that all his debts and funeral expenses shall be paid out of his personal estate, and if that fall short, then he charges his real estate with the payment of them; after which he gives all his lands, &c. unto W. A. It was decided upon the principle before stated, that only an estate for life

passed. The devise in this case is precisely like that in the case of Denn v. Mellor, "to Mary Dickenson, after my debts and funeral expenses are paid." But I am of opinion, upon the other expressions in the will, that Mary Dickenson took an estate in fee simple in all the real estate of the testator. Judgment for defendant.

Case No. 4,743.

In re FERNBERG et al.

[2 N. B. R. 353 (Quarto, 114); 1 Chi. Leg. News, 163; 2 Am. Law T. Rep. Bankr. 53.] [1]

District Court, S. D. New York. Jan. 20, 1869.

BANKRUPTCY—SECURITY REQUIRED OF CHOSEN ASSIGNEE.

A chosen assignee may, in a proper case, on application of a creditor, be required to give security.

By Edgar Ketchum, Register.

The register, in transmitting the choice of assignee made in this matter to the judge, sends with it the application of a creditor, represented by Mr. G. A. Seixas, that security be required of the assignee, and the answer and objection of the assignee thereto. Eight creditors voted for Edward L. Corlies, having claims amounting to eight thousand nine hundred and thirteen dollars and thirteen cents. Four creditors voted for James Davis, having claims amounting to one thousand one hundred and twenty-seven dollars and eight cents. Three creditors did not vote, whose proven claims amount to six thousand six hundred and fifty-nine dollars and ninety-five cents. It seems to the register that, under the circumstances of this case, bond ought to be given by the chosen assignee, but that half the amount proposed by the creditor would be reasonable in the first instance.

BLATCHFORD, District Judge. This view of the register is approved.

Case No. 4,744.

FERRAND v. FOWLER.

[The case reported under above title in 2 Am. Law T. Rep. U. S. Cts. 4, is the same as Case No. 4,678.]

Case No. 4,745.

FERRARA et al. v. The TALENT.

[Crabbe, 216.] [2]

District Court, E. D. Pennsylvania. May 22, 1838.

SEAMEN—SHORT ALLOWANCE—ADDITIONAL WAGES—ACT JULY 20, 1790—EXAMINATION OF LIBELLANTS AS WITNESSES.

1. It is clear that the claim for additional wages under the ninth section of the act of 20th July, 1790 [1 Stat. 131], is not founded on the mere fact that the crew were put on short allowance, but on the neglect or omission of the master to take on board the quantity and species of provisions required by that act.

2. The two circumstances of deficiency in the quantity or quality of the provisions, and a short allowance, must concur in order to entitle the crew to the remedy provided by the ninth section of the act of 20th July, 1790.

3. Where the respondent's counsel does not object to the examination of the libellants themselves as witnesses, the court will receive their evidence.

This was a libel for double wages [by Francisco Ferrara, Donato Sangregorio, Rosalio Micale, Giacomo Cambria, and Nicolo Fiera against the bark Talent (Jenkins, master)], under the ninth section of the act of 20th July, 1790,—1 Story, Laws, 106 [1 Stat. 131].

Mr. Grinnell, for libellants.

Mr. Gillou, for respondent.

HOPKINSON, District Judge. The libel of complaint in this case is founded on the act of congress of the United States, passed on the 20th July, 1790, which ordains that every ship or vessel belonging to a citizen of the United States, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from which she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship bread, for every person on board such ship or vessel, besides such other provisions, stores, and live stock, as shall, by the master or passengers, be put on board. The act then enacts that in case the crew of any ship or vessel, which shall not have been so provided, shall be put on short allowance, in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel shall pay, to each of the crew, one day's wages, beyond the wages agreed on, for every day they shall be so put on short allowance. It is clear by this law that the claim for additional wages is not founded on the mere fact or circumstance that the crew were put on short allowance, but on the neglect or omission of the master to take on board of his vessel the quantity and species of provisions required by the act of congress. If the crew have been put on short allowance, and the ship had not the requisite provisions on board, then the penalty ordained by the act accrues, and may be recovered by the seamen. The two circumstances must concur; that is, a deficiency in the quantity or quality of provisions directed by the law, and a short allowance, in order to entitle the crew to the remedy provided by this act of congress.

What is the evidence in this case? To support the complaint of the libel, two witnesses were examined—Nicolo Fiera and Francisco Ferrara. They speak of their hav-

[1] [Reprinted from 2 N. B. R. 353 (Quarto, 114), by permission. 2 Am. Law T. Rep. Bankr. 53, contains only a partial report.]

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

ing been put on short allowance fifteen days after they left Messina, but neither of them has a knowledge of the provisions really put on board, and that is the primary fact to be established. On the other side, three witnesses, exclusive of the answer and deposition of the captain, swear positively, and with accurate knowledge, to the quantity of beef, pork, and bread, taken on board at Messina; and, if they are to be believed, the quantity was much greater than that required by the law. They also assert that the crew were not put on short allowance until the vessel had been sixty-five days out from Messina. It must be observed that the passage in this case was of one hundred and four days, whereas an ordinary voyage is performed, on an average, in about fifty days. There seems then to have been a good reason for being careful and economical in the consumption of the provisions.

The witnesses examined in support of the libel were also joined in it as parties. I have received their evidence, as the counsel for the respondent did not object to it; but it must not be understood that I have decided witnesses in that situation to be competent to prove the allegations of the libel, as a decree in favor of the libellants must, necessarily, be a decree for all of them. Libel dismissed.

Case No. 4,746.

In re FERRENS.

[3 Ben. 442.][1]

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

HABEAS CORPUS—ENLISTMENT OF A MARRIED MAN—OATH OF ENLISTMENT—ARTICLES OF WAR.

1. A writ of habeas corpus was issued on the petition of the wife of F., to inquire into the regularity of the enlistment of F. into the army of the United States. The discharge of F. was claimed on three grounds—(1) That the oath of enlistment taken by him was taken before an officer of the army, and not before a civil magistrate, whose services could easily have been obtained; (2) that he had a wife and child when he enlisted, and his enlistment was, therefore, contrary to paragraph 930 of the rules and regulations for the recruiting service of the army of the United States, prescribed by the secretary of war, which were claimed to have the force of a statute, under the 37th section of the act of July 28, 1866 (14 Stat. 338); (3) that he was intoxicated when he enlisted: *Held*, that the wife of F. might prosecute the writ.

[Cited in Re McLave, Case No. 8,876.]

2. The oath taken by F. was substantially the oath prescribed by the 18th section of the act of January 11, 1812 (2 Stat. 673), and not that prescribed by the act of April 10, 1806 (2 Stat. 361). The act of January 11, 1812, contained no provision requiring the oath to be taken before a civil magistrate.

3. The "oath of enlistment" mentioned in the 3d section of the act of June 12, 1858 (11 Stat. 336), and the "oath of allegiance" mentioned in the 11th section of the act of August 3, 1861 (12 Stat. 289), are the same, and, under the latter act, the oath taken by F. was properly administered by a commissioned officer of the army.

4. As the 37th section of the act of July 28, 1866, authorizes the secretary of war to report a code of regulations "for the regulation of the army and of the militia in actual service," embracing "all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service," such regulations could not be held to apply to the question as to who may lawfully be enlisted into the army; nor were existing regulations on that subject made statutory by the provision in that section, that "existing regulations are to remain in force until congress shall have acted on that report." Therefore, the 1st section of the act of December, 10, 1814 (3 Stat. 146), which authorizes the enlistment of "any free, effective able-bodied man, between the ages of 18 and 50 years," was not by implication repealed by the 38th section of the said act of 1866.

5. Paragraph 930 of the regulations above referred to was, therefore, only a regulation of the war department, directory to its subordinates. and the fact that F. had a wife and child did not invalidate his enlistment.

6. Moreover, as, when he enlisted, he signed a declaration that he had neither wife nor child, and as he had received the rations and clothing of a recruit, and had performed the duties of a recruit for twenty days, when the petition for a habeas corpus was presented, he must be *held* to have ratified his contract of enlistment.

7. He was not intoxicated when he enlisted.

8. The writ must be discharged, and the recruit be remanded.

At law.

John C. Darrow, for petitioner.

Lt. Asa B. Gardner, for the United States.

BLATCHFORD, District Judge. This is a petition for a writ of habeas corpus, signed and verified by Mary Ferrens, the wife of Thomas Ferrens. It sets forth that the said Thomas Ferrens is imprisoned or restrained of his liberty by General T. H. Neill, at Fort Columbus, in the harbor of New York, and avers that the cause or pretence of such confinement or restraint is, that it is alleged that the said Thomas Ferrens enlisted as a soldier in the army of the United States for the period of five years; that such enlistment was procured while the said Thomas Ferrens was intoxicated, and was so much under the influence of liquor, that he did not know what he was doing; and that all papers signed by him at the time of such enlistment, and all acts done by him with reference thereto, were done and signed while he was so intoxicated and incapable of knowing his own mind, or what he was doing. The petition also avers, that the said Thomas Ferrens is a married man, having a wife and child dependent upon him for support. The writ was issued, and, in obedience to it, General Neill produces the body of the said Thomas Ferrens, and makes return to the writ, that the said Thomas Ferrens is a private soldier in the army of the United States, and held to service therein by virtue of a contract of enlistment, entered into by him with the United States, a copy of which is annexed to the return, and the original of which is sub-

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

mitted to the inspection of the court. The return further states, that the said recruit, of the general service, United States army, was minutely and critically inspected, after being received at the depot of Fort Columbus, New York harbor, with his said enlistment paper, in the manner and mode provided in paragraph 976 of the general regulations for the army of the United States, and accepted into the service as a duly enlisted able-bodied soldier, and that said Thomas Ferrens has performed the duties of a soldier in said army, and received such clothing and rations as are established by law. The petitioner, Mary Ferrens, traverses the return, and states, that the oath of enlistment, as appears by the pretended contract of enlistment annexed to and forming part of the return, was administered to the said Thomas Ferrens by Brevet Brigadier-General J. B. Kiddoo, U. S. A.; that such enlistment oath could not be administered by the said Kiddoo, as a commissioned officer in the army of the United States, except in cases, as provided by the laws of the United States, where the services of a civil magistrate, authorized to take oaths, could not be obtained, and that such services of such civil magistrate were not obtained, nor was any effort made by the said recruiting officer, Kiddoo, or any other officer, to obtain the same, although the services of such civil magistrate could have been easily obtained by such officer; and that the petitioner has offered, and is now ready and willing, to repay and return to the respondent, or other officer authorized to receive the same, the pay, uniform and clothing furnished to the said Ferrens by the United States. The oath of enlistment annexed to the return is as follows: "State of New York, town of New York. I, Thomas Ferrens, born in Wexford, in the state of Ireland, aged twenty-six years, and by occupation a soldier, do hereby acknowledge to have vountarily enlisted, this fifteenth day of September, 1869, as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority; do also agree to accept such bounty, pay, rations and clothing as are, or may be, established by law; and I, Thomas Ferrens, do solemnly swear, that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever, and that I will observe and obey the orders of the president of the United States, and the orders of the officers appointed over me, according to the rules and articles of war. Thomas Ferrens. Sworn and subscribed to at New York City, this 15th day of September, 1869, before J. B. Kiddoo, Brevet Brig.-Gen., U. S. A." Testimony has been taken as to the matters alleged in the petition, the return and the traverse, and the question is now to be determined, whether the recruit is entitled to his discharge.

It is claimed on the part of the United States, that the writ must be dismissed, because it is not prosecuted by the recruit himself; that no one can prosecute it but himself, unless it be shown that he is debarred the opportunity of preferring a petition himself; and that such fact is not shown in this case. It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus, to inquire into the cause of his detention. In the case of People v. Mercein, 3 Hill, 399, 407, the supreme court of New York intimate that such authority from the person detained is not ordinarily necessary. In Case of Ashby, 14 How. St. Tr. 814, the house of lords, in England, in 1704, resolved "that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for and obtain a writ of habeas corpus, in order to procure his liberty by due course of law." This resolution was assented to by the house of commons. Id. 826. In the present case, the petitioner states, in her petition, that she is the wife of the recruit, and is dependent upon him for support. This is, I think, sufficient to authorize her to prosecute the writ.

The first ground urged for the discharge of the recruit is, that General Kiddoo had no authority to administer the oath of enlistment to him, it being shown that the services of a civil magistrate could have been obtained, and that no effort was made to obtain the services of such a magistrate. The oath taken by the recruit, in this case, so far as it is a promissory oath, is, in substance, nothing but an oath of allegiance. It is not, in terms, the oath prescribed by the 10th article of the articles prescribed for the government of the armies of the United States, by the act of April 10, 1806 (2 Stat. 361), and by paragraph 935 of the army regulations, but it is, with an immaterial variation, the oath prescribed by the 18th section of the act of January 11, 1812 (2 Stat. 673). This last section is not repealed, and it was manifestly the intention to administer to the recruit the form of oath prescribed in it; and that was, in substance, done. The two oaths are, to all intents, the same. Each is an oath of allegiance, and each, when taken by a recruit, on his enlistment, is properly called an oath of enlistment. So much of the form of the oath taken by the recruit, in the present case, as is not an oath of allegiance, is an acknowledgment that he has enlisted. The act of April 10, 1806 (article 10), authorized and required the oath therein prescribed to be taken before "the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army, or, where recourse cannot be had to the civil magistrate, before the judge advocate." The act of January 11, 1812, contained no pro-

vision as to the officer before whom the oath prescribed in the 18th section thereof should be taken. Act June 12, 1858, § 3 (11 Stat. 336), provides, "that it shall be lawful for any commissioned officer of the army to administer the prescribed oath of enlistment to recruits, provided the services of a civil magistrate, authorized to administer the same, cannot be obtained." Act Aug. 3, 1861, § 11 (12 Stat. 289), provides, that, in all cases of enlistment and re-enlistment in the military service of the United States, the prescribed oath of allegiance may be administered by any commissioned officer of the army. The counsel for the petitioner suggests that it is doubtful whether the act of 1858 means, by the words, "the prescribed oath of enlistment," the same thing that the act of 1861 means, by the words, "the prescribed oath of allegiance," and whether the proviso found in the 3d section of the former act is repealed by the provisions of the 11th section of the latter act. There can be no doubt that the two acts refer to one and the same oath. Only one oath is prescribed by law to be taken by a person enlisted or enlisting in the military service of the United States, and that is an oath of allegiance. It is, therefore, properly called an oath of enlistment, as well as an oath of allegiance. Nor can there be any doubt that the intention and effect of the act of 1861 are to give to a commissioned officer of the army the power to administer the prescribed oath of allegiance, in all cases of enlistment and re-enlistment in the military service of the United States, without reference to the question whether the services of a civil magistrate, authorized to administer the same, can or cannot be obtained. The oath, in this case, was, therefore, administered by a proper officer.

The second ground urged for the discharge of the recruit is, that he had a wife and a child at the time he was enlisted, and has now a wife and a child and that his enlistment was, therefore, unlawful. Paragraph 930 of the regulations for the recruiting service of the army of the United States, prescribed by the secretary of war, provides, that "no man having a wife or a child shall be enlisted, in time of peace, without special authority obtained from the adjutant-general's office, through the superintendent;" but that "this rule is not to apply to soldiers who re-enlist." It is claimed, on the part of the petitioner, that this rule or regulation has, by virtue of the 37th section of the act of July 28, 1866 (14 Stat. 338), the force of a statutory enactment. That section provides as follows: "That the secretary of war be, and he is hereby, directed to have prepared, and to report to congress, at its next session, a code of regulations for the government of the army, and of the militia in actual service, which shall embrace all necessary orders and forms of a general character, for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until congress shall have acted on said report." The regulation in question was in force on the 28th of July, 1866. The 38th section of the same act repeals all laws and parts of laws inconsistent with its provisions. The 1st section of the act of December 10, 1814 (3 Stat. 146), authorizes the enlistment into the army of the United States, of "any free, effective, able-bodied man, between the ages of eighteen and fifty years." That enactment authorizes, by that language, the enlistment of a man having a wife, and of a man having a child, and it has never been directly repealed, that I have been able to find. The question is, whether paragraph 930 of the recruiting regulations is to be considered as a statutory enactment, by force of the 37th section of the act of 1866, and whether, if so, the provision of the 1st section of the act of 1814 is to be regarded as inconsistent with the said paragraph, and, therefore, as repealed by the 38th section of the act of 1866. A repeal by implication is not favored. The code of regulations, which, by the 37th section of the act of 1866, the secretary of war is directed to report to congress, at its then next session, is a code of regulations "for the government of the army, and of the militia in actual service," and the then existing regulations, which it is provided by that section shall remain in force until congress shall have acted on said report, are regulations "for the government of the army, and of the militia in actual service." The 37th section also directs that the new regulations shall "embrace all necessary orders and forms of a general character, for the performance of all duties incumbent on officers and men in the military service." Regulations for the government of the army, and orders and forms respecting duties incumbenton men in the military service, cannot, without doing violence to language, be construed to apply to the question as to who may lawfully be enlisted in the army. They can only apply to persons who are lawfully in the military service, leaving entirely outside the question as to whether a particular person is in such service. The question as to whether a person is or is not lawfully enlisted in such service, cannot, in any proper sense, be determinable by or under a regulation for the government of the army—that is, for the government of persons enlisted in such service. When it is determined, otherwise, that the person is lawfully enlisted in such service, then the regulations refered to in the 37th section of the act of 1866 become regulations affecting him, but not till then. Paragraph 930 is, therefore, not one of the regulations referred to in such 37th section, as regulations which are to remain in force until congress shall have acted on the report therein named. It is a mere regulation made by the war de-

partment, directory to its subordinates, and not a statutory enactment. An enlistment not in compliance with it is not made in violation of any statute, but is expressly authorized by statute.

If this court would assume, in any case, to discharge a recruit on habeas corpus, because he had a wife when he was enlisted, in time of peace, and no special authority to enlist him was obtained from the adjutant-general's office, through the superintendent, this is not a proper case for a discharge. The recruit declared, by a declaration signed by him when he enlisted, that he had neither wife nor child, and he had, when this petition for a habeas corpus was brought, been in the service for twenty days. He enlisted voluntarily, and it appears that he has, since his enlistment, voluntarily performed the duties of a soldier, and received, without protest or remonstrance, the rations and clothing allowed by law to a recruit. Under these circumstances, he must be held to have ratified his contract of enlistment, and the United States, by the proceedings in this case, must be regarded as having adopted such enlistment, after ascertaining that he had a wife when he enlisted.

On the question of intoxication, the evidence satisfactorily shows that the recruit was carefully examined by the proper officers at the time of his enlistment, and that he was not intoxicated at the time, or in any manner unconscious of what he was doing. Every thing in regard to his enlistment appears to have been conducted with proper care, caution and deliberation, and nothing is shown to warrant his discharge.

The writ is, therefore, discharged, and the recruit is remanded to service under his proper officer.

FERRER v. NAIRAC. See Case No. 4,261.

Case No. 4,747.

FERRETT et al. v. ATWILL.

[1 Blatchf. 151;[1] 4 N. Y. Leg. Obs. 215, 294.]

Circuit Court, S. D. New York. April Term, 1846.

QUI TAM ACTION—NUMEROUS SUITS AGAINST SAME DEFENDANT — ABIDING THE EVENT OF ONE—COPY-RIGHT IMPRINT ON WORK NOT COPY-RIGHTED—PENALTY—RECOVERY BY TWO PERSONS — DEMURRER — ALLEGATION OF ALL NECESSARY FACTS.

1. Where a plaintiff brought eleven qui tam actions for penalties against the same defendant, the defendant having demurred to the declaration in each case, and the pleadings in all being alike, a motion by the plaintiff that the demurrer in one of the cases be argued, and that the others abide its event, and all proceedings in them be stayed meanwhile, was denied.

[Cited in Keep v. Indianapolis & St. L. R. Co., 10 Fed. 459; Winne v. Snow, 19 Fed. 508.]

2. Upon issues of law, the party bringing a multiplicity of suits must take the responsibility of meeting them in the usual way.

3. The penalty imposed by section 11 of the copy-right act of February 3, 1831 (4 Stat. 438), for putting the imprint of a copy-right upon a work not legally copy-righted, and given by the act to "the person who shall sue for the same," cannot be recovered in the name of more than one person.

4. A declaration for such penalty in the name of two persons is bad on general demurrer.

5. In an action on a statute, the party prosecuting must allege every fact necessary to make out his title and his competency to sue.

[Cited in Fish v. Manning, 31 Fed. 341.]

[Cited in Waddle v. Duncan, 63 Ill. 225; Tabor v. Herrick, 54 Vt. 631; Cummings v. Brock, 56 Vt. 311.]

6. The language of the statute is to be particularly adhered to in the construction of penal laws.

[Cited in U. S. v. Morris, Case No. 15,814; U. S. v. Clayton, Id. 14,814; U. S. v. Williams, 3 Fed. 491; Pentlarge v. Kirby, 19 Fed. 503, 504; U. S. v. Comerford, 25 Fed. 904.]

7. It seems, there might be a difference between the construction of a statute giving a penalty to a common informer, and of one imposing a penalty for the benefit of a person aggrieved by its violation.

8. A charge by a defendant in a bill of costs, for services in putting in special bail a second time, is not taxable, where the second service was made necessary by the failure of the bail first put in to justify.

9. Nor are an attorney's charges for a rule to declare, or for services in obtaining security for costs, allowable in each one of eleven suits, where the attorneys in all the suits were the same, and the services were rendered on one set of papers entitled in all the suits.

10. Nor are such charges allowable in each suit, even where separate sets of papers are made in each suit.

11. A charge for perusing demurrer by counsel in each one of eleven suits is allowable, although the pleadings in all the suits were alike.

12. Where the pleadings in eleven suits were alike, and they were all argued on demurrers, but there was only one argument in fact for all the cases: *Held*, that demurrer books, and brief and points, were taxable in each case, if they were actually made out in each at the time of the argument, which fact must be shown to the officer, if the charges were objected to; and that attorney and counsel fees on argument were taxable in each case.

[This was an action at law by Edmund Ferrett and Timothy S. Arthur, suing jointly for themselves and the United States, against Joseph F. Atwill.]

This suit was one of eleven brought by the same plaintiffs against the same defendant. Each of the actions was debt for a penalty, for an alleged violation by the defendant of the eleventh section of the copy-right act of February 3, 1831 (4 Stat. 438), in publishing a musical composition, called the "Alethia Waltz," with an imprint of a copy-right upon it, when he had not at the time legally acquired a copy-right. The defendant was held to bail in each suit. The defendant demurred specially to each declaration, and the plaintiffs joined in demurrer. The plaintiffs now applied for an order that

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demurrer in one of the cases be argued, and that, in the meantime, all proceedings in the others be stayed and they abide the event of the one to be argued. The pleadings were alike in all the suits.

The court said that they knew of no case where such an application had been made by the plaintiff on an issue of law; that applications of the kind in regard to issues of fact to be tried at a circuit were generally made by a defendant, in which cases a regard for the time of the court and for the expenses of trials entered into the question; that upon issues of law, the party bringing a multiplicity of suits ought to take the responsibility of meeting all the cases in the usual way, if his adversary saw fit to notice them for argument; that, of course, if it turned out that the same question was involved in all of them, one argument only would be heard; but that to relieve a plaintiff from the responsibility in cases like these, might lead to experiments upon the court as regarded the law of the cases, without any proper check upon the multiplication of suits. Motion denied, with costs.

The argument of the demurrers was then brought on. The declaration contained two counts. The first count alleged that the defendant, within two years before the commencement of the suit, published at New-York a certain musical composition, called the "Alethia Waltz," and printed on its face these words: "Entered according to act of congress, A. D. 1844, by Joseph F. Atwill, in the clerk's office of the district court of the southern district of New-York;" and that he had not, at the time of the publication, acquired the copy-right of the composition under the laws of the United States. The penalty claimed was $100. The second count alleged the like publication of a volume of music by the same name, and with the same imprint, and claimed the same penalty. The principal ground of demurrer assigned was, that the action was commenced by two jointly, for themselves and the United States, whereas an action to recover the penalty sued for in the case, could only be brought by one person qui tam.

Samuel Sherwood and Randolph W. Townsend, for plaintiffs.

Marshall S. Bidwell and Samuel Owen, for defendant.

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

BETTS, District Judge. The decision of the court in this case being limited to two points, we do not consider it proper to discuss the other questions involved in the pleadings, and argued at length by the counsel; and our judgment being peremptory against the action, an attempt now to settle the other points presented by the case, will not, as if an amendment were allowed, tend to abridge litigation or to aid the parties in the disposition of the cause.

The declaration contains two counts, each of which demands a distinct penalty of $100. The first count charges that the defendant, on the first of July, 1845, at New-York, published a musical composition, called "Alethia Waltz," and falsely inserted therein and impressed upon the face thereof, the words: "Entered according to act of congress, &c.," without having at the time legally acquired the copy-right of the said musical composition. The second count alleges that the defendant, at the time and place aforesaid, published a volume of music, called "Alethia Waltz," and falsely inserted therein and impressed upon the title thereof, the words: "Entered according to act of congress, &c.," without having at the time legally acquired the copy-right of the said volume of music.

The defendant demurs to the declaration, and, in connection with the general demurrer, assigns various causes of demurrer, only one of which is passed upon by the court; to wit, that the action is brought by two persons jointly, for themselves and the United States of America. Some exceptions were taken to the sufficiency in form of the special demurrer, but we do not regard the question as material, the objection to the declaration being good on general demurrer; because the right of action, if any, is under the statute, and the declaration must show that the party suing is competent to maintain the suit. Almy v. Harris, 5 Johns. 175. The decision, accordingly, rests upon this, that the act of congress does not authorize an action in the name of several persons and the United States, for the recovery of the penalties incurred by its violation.

The provisions governing the question are contained in the eleventh section of the act, which enacts, "that, if any person or persons, from and after the passing of this act, shall print or publish any book, map, chart, musical composition, print, cut, or engraving, not having legally acquired the copy-right thereof, and shall insert or impress that the same hath been entered according to act of congress, or words purporting the same, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognizance thereof."

In actions directly upon a statute, or on rights derived from a statute, the party prosecuting must allege, and consequently prove, every fact necessary to make out his title to the thing demanded, and his competency to sue for it. Com. Dig. "Action on Stat." A 1-3, and "Pleader," c. 76. An informer cannot support an action unless there be an express provision in the statute enabling him to sue. Rex v. Malland, 2 Strange, 828; Fleming v. Bailey, 5 East, 313. And, if

the statute creating the penalty, and bestowing it upon the informer, does not give the mode of proceeding, he is bound to set forth the special matter upon which the right of action arises, and allege and prove in what way the penalty vests in him. Cole v. Smith, 4 Johns. 193; Bigelow v. Johnson, 13 Johns. 428; Smith v. Merwin, 15 Wend. 184; Fairbanks v. Antrim, 2 N. H. 105; Ellis v. Hull, 2 Aiken, 41. The doctrine in effect is applicable to actions founded upon statutes other than for penalties; for, when a statute is made to remedy any mischief or grievance, or to bestow any interest or right upon an individual, the mode of remedy, when one is designated by it, must be exactly followed. Stowell v. Flagg, 11 Mass. 364; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466. And, if the form of remedy is not pointed out, and the law supplies one by implication, the plaintiff must aver and prove every fact necessary to show the existence of the right in him under the statute. Bigelow v. Cambridge & C. Turnpike Co., 7 Mass. 202; Bigelow v. Johnson, 13 Johns. 428. We think, under these well established rules of law, that the two plaintiffs prosecuting this action do not come within and satisfy the provisions of the statute giving the penalty "to the person who shall sue for the same."

There is a manifest distinction between giving a penalty to a common informer, and imposing one for the benefit of the person aggrieved by the violation of the statute. In the latter case the term "person" might justly be regarded as comprehending every one affected by the injury; because, the design of such enactment must be to give a remedy co-extensive with the mischief or grievance provided against. This consideration has no relation to positive penalties established as sanctions of the law, and not intended to recompense individuals because of their particular injuries.

The language of the statute is to be particularly adhered to in the construction of penal laws, and, when it has a natural and plain meaning, an artificial or forced one is not to be adopted. 1 Bl. Comm. 88; Dwar. St. 707, 711; Van Valkenburgh v. Torrey, 7 Cow. 252. Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied. U. S. v. Sheldon, 2 Wheat. [15 U. S.] 119; Myers v. Foster, 6 Cow. 567; Daggett v. State, 4 Conn. 61. They sedulously limit the action of penal statutes to the precise cases described in them, and reject an interpretation tending to comprehend matters not named by the legislature, although analogous. The authorities cited are explicit to this point, and are in unison with numerous others, English and American. Cone v. Bowles, 1 Salk. 205; Reniger v. Fogossa, 1 Plowd. 17; Fleming v. Bailey, 5 East. 313.

The privilege of claiming or enforcing a penalty is one of statutory appointment, and must be construed with like strictness. In an action by husband and wife against executors, to recover a penalty imposed by statute for not proving a will within a fixed period, one-half of the penalty being given to the plaintiff and the other to the legatees, and the wife being a legatee, it was held by the supreme court of Massachusetts, that the suit could not be maintained in the name of husband and wife, the action being a popular one, and there being no joint interest in the verdict. Hill v. Davis, 4 Mass. 137. The doctrine was still more fully and explicitly declared in a later case in that court, in which it was held that several persons could not unite in a qui tam action as informers, the right to sue in such case resting upon the express provisions of the statute. Vinton v. Welsh, 9 Pick. 87. When the penalty is given to "any person or persons," a corporation aggregate cannot sue for it. 1 Kyd, Corp. 218; Weavers' Co. v. Forrest, 2 Strange, marg. p. 1241. Hammond, in his treatise on Parties (48), says: "It seems two cannot join as common informers in a penal action, unless specially allowed by statute."

The plain language and sense of the statute under consideration, restrict the right of action to a single person; and we should not be disposed, on general principles, to enlarge its operation, so as to encourage associations of individuals in instituting and conducting penal actions, the nature of those actions in our opinion exacting a rigorous adherence to the terms of the law.

Judgment is accordingly rendered in this case for the demurrant, with costs; and the same judgment is rendered in the ten other suits between the same parties on like pleadings.

In taxing the defendant's costs on the demurrers in the eleven cases, several questions arose. The costs were taxed by the clerk. There were eleven bills of costs all alike. 1. There were two sets of charges in each bill for putting in special bail, the bail first put in not having justified. 2. Each bill contained charges for a rule to declare, and for services in obtaining security for costs, the attorneys in each suit being the same, and there being but one rule in each matter, and but one set of papers, in which the titles of all the causes were included. 3. Each contained a charge for perusing demurrer by counsel. 4. Each contained a charge for a rule to join in demurrer, there being a separate rule in each suit. 5. Each contained charges for five demurrer books, and for brief and points, and for attorney and counsel fees on argument, there having been but one argument in fact for all the cases. The plaintiffs appealed to the court from the taxation as to the above items.

NELSON, Circuit Justice. 1. The second set of charges for putting in special bail

should have been stricken out, because they were incurred by the neglect of the defendant in not causing the bail first put in to justify, and for his own benefit. 2. The defendant's attorney is not entitled to a separate charge in each suit for the services embraced in this item. The settled practice is against the allowance. Jackson v. Keller, 18 Johns. 310; Schermerhorn v. Noble, 1 Denio, 682. 3. This item is taxable in each suit. Rule 27, Cir. Ct. U. S. 4. It is urged that this item is distinguishable from the second, because there was a separate rule in each suit. But the principle is the same, and has been so held since the case of Jackson v. Clark, 4 Cow. 532. There can be but one charge for the service, as respects attorney's fees. 5. The demurrer books, and brief and points, are taxable in each case, if they were actually made out in each at the time of the argument. The fact must be shown to the taxing officer, if objection be made to the charge. Attorney and counsel fees on argument are taxable in each case.

[NOTE. Subsequently, the defendant in this case filed a bill in equity against Ferrett and others for an injunction and for other relief, for a violation of complainants' copy-right. Case No. 640.]

FERRETT (ATWILL v.). See Case No. 640.

FERRIE (CAUJOLLE v.). See Case No. 2,525.

FERRILL (CUYLER v.). See Case No. 3,523.

Case No. 4,748.

In re FERRIS et al.

[6 Ben. 473.][1]

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

MARSHAL'S RETURN—SERVICE OF NOTICE ON CREDITORS.

1. In a proceeding in involuntary bankruptcy, the marshal returned to the warrant that he had sent notices to the creditors named on a schedule delivered to him by the attorney for the petitioning creditor. *Held*, that the return was defective, and must be amended.

2. The 12th section of the bankruptcy act [of 1867 (14 Stat. 522)] and the 13th general order must be complied with, as to the manner of serving such notices.

In this case, which was a proceeding in involuntary bankruptcy, the marshal returned to the register the warrant, with a return thereto that he had published notice by advertisement, and that he also, within fifteen days after the date of the warrant, sent written or printed notices to the bankrupts [Josiah S. Ferris, Jr., and Florence Mahony], "and to the creditors named on the schedule delivered to me by the attorney for the petitioning creditor, and herewith returned." Objection was made to the sufficiency of the return, in that it did not show that the marshal had fully obeyed the mandate of the warrant, in the matter of notifying the creditors whose names should be given to him by the bankrupts, or, in default thereof, had not shown why he had not done so, and that it did not appear that the statements on which his return was made were in writing, and sworn to by the parties making them. The register thereupon adjourned the first meeting of creditors to a subsequent day, that the marshal might amend his return, so as to show why he had not procured a list of creditors from the bankrupts, or prepared a list from the books and papers of the bankrupts (concerning which he had made no statement), or served the creditors from a sworn statement made. The warrant was sent back to the marshal, who returned it on the adjourned day, declining to make any further return. Objection was made to proceeding under the warrant and return, whereupon the register again adjourned the meeting, and certified to the court the question whether the return was sufficient, giving his opinion that it was insufficient; that the 12th section of the bankruptcy act, and the 13th general order, pointed out clearly the manner in which service should be made on creditors, and of conducting the proceedings, if due service was not had; and that he could not determine, on the return, whether the marshal had pursued the regular and necessary course.

BLATCHFORD, District Judge. The marshal's return is defective in the particulars stated by the register, and must be amended.

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

FERRIS, The (RUTTER v.). See Case No. 12,178.

FERRIS (UNION MILL & MIN. CO. v.). See Case No. 14,371.

Case No. 4,749.

FERRIS et al. v. WILLIAMS.

[1 Cranch, C. C. 281.][1]

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

LEAVE TO AMEND ON PAYMENT OF FULL COSTS.

The writ was to answer to "Ferris & Gilpin." The declaration was in blank, as to dates and sums, and was for goods, &c., delivered. The defendant had pleaded non assumpsit, and the statute of limitations, and the plaintiffs had filed a general replication.

Mr. Mason, for the plaintiffs, moved to amend the pleadings, and to reply specially to the plea of limitations, stating that the plaintiffs were beyond the seas (that is, in the state of Delaware.)

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

Leave was given to the plaintiffs to amend all the proceedings on the payment of full costs to this time.

KILTY, Chief Judge, absent.

[NOTE. Subsequently, judgment was rendered for the plaintiffs on demurrer. Case No. 4,750.]

Case No. 4,750.

FERRIS et al. v. WILLIAMS.

[1 Cranch, C. C. 475.][1]

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

LIMITATIONS—RESIDENCE "BEYOND THE SEAS."

1. The plea of non assumpsit infra tres annos is not a good plea to a count upon a promissory note, payable thirty days after date.

[See Bank of Columbia v. Ott, Case No. 879.]

2. The state of Delaware is beyond seas, in regard to the District of Columbia, within the meaning of the statute of limitations.

The declaration was upon a promissory note, payable thirty days after the 14th of April, 1798, made at Wilmington in Delaware, viz.: at Washington county, District of Columbia. Plea: (1) Non assumpsit and issue. (2) Non assumpsit infra tres annos. (3) Actio non accrevit infra tres annos. General demurrer to the second plea. Replication to third plea, that the note was made and delivered, and the money due thereon, was a debt contracted by the said Thomas Williams with the plaintiffs, abroad in foreign parts beyond the seas, to wit, at Wilmington, in the state of Delaware, in the United States of America, and the plaintiffs continued and remained abroad in foreign parts, beyond the seas, as aforesaid, at the place aforesaid, from the time aforesaid, and long before, and always since, and at this time; and this the plaintiffs are ready to verify. General demurrer to that replication and joinder.

[For a hearing on motion of plaintiffs to amend proceeding, see Case No. 4,749.]

Mr. Law, for defendant, cited the act of limitations of Maryland of 1715, c. 23; and King v. Walker, 1 W. Bl. 286; and Ward v. Hallam, 2 Dall. [2 U. S.] 217.

Mr. Morsell, for plaintiffs, mentioned the case of Pancoast v. Addison [1 Har. & J. 350], in which the general court of Maryland, after full argument and great deliberation, decided that another state of this Union is beyond seas within the meaning and reason of the statute.

Judgment for the plaintiffs upon the demurrers.

FERRY (AIKEN v.). See Case No. 112.

FERRY (PAGE v.). See Case No. 10,662.

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

Case No. 4,751.

FERSON v. SANGER et al.

[2 Ware (Dav. 252) 256;[1] 5 N. Y. Leg. Obs. 43.]

Circuit Court, D. Maine. Oct. Term, 1845.

EQUITY — DEPOSITION OF INTERESTED PARTY TO PROVE FRAUD — EFFECT OF COVENANT NOT TO SUE—JURISDICTION—DAMAGES—OTHER RELIEF—LIMITATIONS.

1. In a suit in equity by the purchaser, for fraud in the sale of a chattel, charging that the purchase was made by A for and as the agent of B, the deposition of A, taken to prove the fraud, cannot be used, if it appear that A was jointly interested in the purchase.

2. The prayer of the bill being, that the purchaser should take up and pay certain notes given by A and B jointly for the purchase-money which were in the hands of an indorsee, a covenant, by the indorsee to A, not to sue him on the notes, will not render him a competent witness, for he would be liable over to the indorser on his taking up the notes.

3. Courts of equity will not entertain jurisdiction of a suit for damages arising out of fraud, where damages are the sole object of the bill, for the remedy is complete at law.

4. But where other relief is sought by the bill which can be had only in equity, and damages are claimed as incidental to this relief, equity, having properly possession of the cause for relief that is purely equitable, to prevent multiplicity of suits, will proceed to determine the whole cause.

5. Whether it will entertain jurisdiction in such a case, and award damages on the ground only that discovery is sought and obtained—Quaere?

6. The statute of limitations does not, in its terms, apply to courts of equity, but lapse of time, independent of the statute, is often a bar in equity.

[Cited in Sullivan v. Portland & K. R. Co., 94 U. S. 811.]

7. In cases that are within the statute, equity ordinarily follows the law, and will hold the statute to be a bar to equitable relief, when it is a bar at law.

8. But in cases of concurrent jurisdiction, as of fraud, equity sometimes goes beyond the law, and holds lapse of time a bar to equitable relief, when the prescription is not fully acquired at law.

9. In cases of concurrent jurisdiction, if a party sleeps on his rights until the progress of events and change of circumstances have put it out of the power of the court to do equal justice between the parties, which as a court of conscience it is bound to do, it will remain passive, and leave the party to his legal remedy.

10. Where equity is not bound ex debito justitiae to act on the case, the court will not interpose with its extraordinary powers, unless the party comes in such time as leaves to it the power of fairly adjusting all the material equities involved in the case, in such a manner that, while justice is done to one party, injustice will not be done to the other.

11. In such cases the court does not act on the right, but leaves the parties as it found them, to pursue their remedies at law.

On the 15th of July, 1835, Baker and Lindsey, being the owners of five-eighths of township No. 2, 5th range in Oxford county, called the Alder Stream tract, gave a bond to

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

the defendants to convey to them the land, at the rate of six dollars per acre, the defendants paying $1000 on the execution of the bond, which, if the purchase was made, was to be in part payment for the land, and if not made, was to be forfeited. With this contract, [Zebulon] Sanger and Richardson, two of the defendants, went to Boston, and there met John Webber, and on the 24th of July, sold and assigned their interest in the bond and rights under it to Webber, for the sum of $3000, of which $1000 were to be in part payment of the land if Webber should elect to purchase, and $2000 a bonus to the defendants for their right of pre-emption. At the time of the assignment, there was exhibited to Webber and [William] Ferson, who were present at the making of the bargain, a certificate of Charles Stackpole, one of the defendants, dated July 16, 1835, at Waterville, stating that he had explored the township, and that there was on the land 'at least 3000 feet of good pine timber to the acre on an average, besides a large quantity of spruce,' and another certificate of Eben T. Bacon, one of the selectmen, and Nathaniel Crommet, treasurer of the town of Waterville, stating that Stackpole had 'the reputation of being a good judge of timber lands.' Three other certificates were also exhibited of Berry, Deering, and Homans, dated at Boston, July 24th, the day of the assignment of the bond, each certifying that they had explored the land, and that there was 10,000 or more of pine timber, and 3000 of spruce to the acre. After the assignment of the bond, Webber went to Waterville, took Stackpole with him, and went to view the land about the first of August. Webber states in his deposition, that an injury, which he received when he first went on the land, prevented him from exploring it himself. But Stackpole made further exploration, and in another certificate, dated August 5th, confirms the first he gave, and says that he saw additional timber that he had not seen before. While Webber was on this exploration, he procured certificates from a number of other persons as to the value of the land, which were exhibited to Ferson on his return. Webber states in his deposition, that he obtained these certificates through Stackpole, who represented that the persons were acquainted with the land, and also went with him to their houses, he, Webber, not knowing them personally. On the 11th of August, Webber notified Baker and Lindsey of his election to complete the purchase and take the land. On the 24th of August, the day on which the bond expired, Baker and Lindsey extended the time for one day to the 25th. On the 24th of August, probably a mistake for the 25th, Baker and Lindsey conveyed the land to Ferson, the plaintiff, by the direction of Webber, and on the 25th, Ferson re-conveyed the land to Baker and Lindsey in mortgage, to secure the payment of the purchase-money unpaid, being $45,965.25, and executed a bond to pay certain notes of Baker and Lindsey. This mortgage was afterwards assigned to Martin Gore, June 1st, 1837. Ferson, by deed, gave quiet possession of the land to Gore, for breach of the condition, and the condition remaining unperformed, the mortgage became foreclosed, June 1st, 1840, and the title perfect in Gore. The bill was filed May 10th, 1841. The relief prayed in the bill was, that the defendants might 'be compelled to pay to your orator all sums of money, with interest, which he has paid, on receiving a deed of release from your orator of his right and title to said lands,' and to pay and take up the notes given by the plaintiff, with Webber, which remain unpaid.

S. Fessenden, for plaintiff.

C. S. & E. H. Daveis, for defendants.

WARE, District Judge. This is in substance a bill in equity seeking damages for an alleged fraud and misrepresentation, in the sale and assignment of a right of pre-emption of certain lands in this state. A preliminary question is presented, and was discussed at the argument, as to the admissibility of Webber as a witness in the cause. His deposition was taken, subject to the objection made when the interrogatories were filed. These are, first, that he was a party to the contract and ought to have been a party to the bill; and, secondly, if not a necessary party, that he has an interest in the cause.

The contract was in fact made by Webber in his own name. He appeared not only as a principal, but as the sole contracting party. He made the purchase, and the assignment of the bond was made to him. He held himself out as the purchaser, and was certainly considered by the defendants as a principal in the contract, if not the sole purchaser. And he continued to act as a principal, if not the sole party in interest, in the purchase. He undertook a journey to explore and examine the land, and after going on the land and satisfying himself as to its value, gave notice to Baker and Lindsey of his election to purchase the land in his own name, and obtained from them an extension of the time allowed by the bond to complete the purchase, though, when the transfer was made, it was by his direction made to Ferson. But he joined with Ferson in giving the notes for the purchase-money. In his deposition he says that he signed the notes as surety, but this does not appear by the notes themselves. He appears, therefore, from the beginning to the end, as a principal in the contract. Indeed, the only circumstance which could lead the defendants to a suspicion that Ferson had any interest in the contract, is the fact that he assisted Webber in raising the money to pay the price of the bond. It is true that Ferson wrote the assignment, and was present when the contract was made, but he does not appear to have taken any active part in it, but it seems to

have been made entirely by Webber. Ferson put his name to the assignment as an attesting witness. It is stated in the bill that Webber made the contract as the agent of Ferson, but the defendants were not notified of it at the time, and, from the fact that he signed the contract as a witness, they had certainly a right to infer the contrary, and that, if he was to have any interest in the contract, it was to come through Webber. Further, it appears to me to be a plain if not a necessary inference, from the whole evidence in the case, that Webber was not only directly interested in the purchase of the bond, but also in the purchase of the land. In his own deposition he admits that he contemplated taking an interest in the land to the amount of one-ninth, and in the letters which he wrote to Baker and Lindsey after the purchase of the land, he writes precisely as he would have done if he had an interest in it. In a letter of June 16th, 1838, signed by him and Ferson jointly, relative to the payment of the outstanding notes, they speak of their interest as joint. 'We are determined,' they say, 'having the land to offer as security, to make a desperate effort,' etc. The natural if not the necessary interpretation of such language is that the land was owned by them jointly. In all Ferson's letters he speaks, in the plural number, of others being interested with him, though he names no individuals. Baker, in his deposition, says that he understood that others were interested, to the number of seven in all, including Ferson and Webber. In truth, Ferson's letters distinctly show the fact that the land was bought on speculation, not with an intention of holding it, but to sell again at an advanced price. In his letter of May 9th, 1837, he says, 'we did not intend to keep it, but bought with the design of selling it;' and again, 'we have used every exertion to sell, from the moment of the lands being purchased,' and, May 24th, referring to the letter of the 9th, he says, 'it was adopted by a deliberate consultation of my associates.' Now it seems to me impossible to doubt, on the evidence in this record, that Webber was one of these associates, and that he was interested as a principal party in the contract with the defendants, in the purchase of the bond, as well as in the subsequent purchase of the land. The bond was assigned to Webber, but the legal title in the land was conveyed to Ferson, but in both cases, in trust for other parties who were jointly interested in the speculation. If so, then undoubtedly Webber is a proper if not a necessary party to the bill. It is not necessary in this case to inquire whether the bill is demurrable for the omission, but certainly one of the joint contractors cannot, by the omission of his name as a party plaintiff in the bill, be rendered competent as a witness, for he would be a witness in his own cause. On this ground I think Webber inadmissible as a witness.

Again, the deposition of Webber is objected to on the ground of interest. A part of the prayer of the bill is, that the defendants may be compelled to pay and deliver to the plaintiff the unpaid notes, given by Ferson and Webber to Baker and Lindsey to secure the payment of the price of the land. These notes are in the possession of Martin Gore, and, in an instrument executed by him, he covenants not to sue Webber on the notes; and there is another by Ferson, which may be construed perhaps to release him from his eventual liability on the notes, should they be paid by Ferson. But these notes have been indorsed, and Gore does not release the indorsers. If he calls on them and they pay the notes, they will have their remedy over against Webber. The covenants of Gore do not, therefore, release him from his ultimate liability on the notes, and of course he has a direct interest in having them delivered up and canceled. On this ground, also, my opinion is that the deposition of Webber is inadmissible.

Without the testimony of Webber, it is quite clear that this bill cannot be maintained, for he is the only witness to prove the fraud. But waiving this question, and considering the testimony of Webber as in the case and entitled to full credit, how will the case then stand? Suppose the contract to have been made, as charged in the bill, with Ferson, through Webber as his agent, it was a contract for the right and interest which the defendants had in the bond, and that only. The bond of Baker and Lindsey conveyed no interest in the land, not even in equity. It merely gave a right of pre-emption, and that to be exercised within thirty days from its date. It gave a mere right of action, by complying with the terms of the condition, of compelling the party, by a bill in equity, to a specific performance of the contract, or a right to damages at law for the non-performance. All that the assignment transferred was a right to perform the condition, and thus acquire a title to the land, or a claim for damages.

But the time limited for performing the condition is expired. This is not, therefore, a case in which the court can rescind the contract, and replace the parties in the condition in which they were before the contract was made. If the contract is rescinded, the right of pre-emption, which was the object of the contract, is gone. The thing sold is extinct, and has ceased to exist. All the relief, which the court can give, is damages for the alleged fraud, and this is substantially the prayer of the bill. This suit must, therefore, be considered as properly a bill to recover damages for a fraud in the sale and assignment of the contract. It cannot be for a fraud in the sale of the land, because the defendants never had any interest in the land which they could sell. The right to purchase the land was what was bought of the defendants, and the land itself was afterwards purchased of Baker and Lindsey. For this fraud, if there was

one, there is a perfect remedy at law. Will a bill in equity lie for damages only, arising out of fraud in a contract where no other relief can be given?

It is undoubtedly true, that equity has a general jurisdiction over matters of fraud. Fraud, accident, and trust constitute the ancient and broad foundation of its powers. Com. Dig. "Chancery," c. 2; 1 Bl. Comm. 92; 3 Bl. Comm. 431; 1 Story, Eq. Jur. 59. Lord Hardwicke, in the case of Chesterfield v. Janssen, 2 Ves. Sr. 155, said that equity had an undoubted jurisdiction to relieve in all cases of fraud, affirming the jurisdiction without any limitation. There is, however, at least one admitted exception to the universality of this proposition; it is, that equity has not jurisdiction to relieve against fraud in obtaining a will, and in Coop. Eq. Jur. p. 125, this is said to be the only case in which relief against fraud cannot be had in equity. The jurisdiction is affirmed in terms nearly as strong in 1 Story, Eq. Jur. § 184. With the exception that has been mentioned, it is stated that courts of equity may be said to possess a general, and perhaps a universal concurrent jurisdiction with courts of law in cases of fraud cognizable at law. Lord Eldon, in the case of Evans v. Bicknell, 6 Ves. 190, appears to have affirmed the jurisdiction of the court in terms quite as large and unqualified. That was a suit in equity for damages, a personal demand against the defendant; and he held that, provided an action might be maintained at law, relief could be had in equity. He remarked that it is an old head of equity, that if a party makes a representation to another person going to deal in a matter of interest on the faith of that representation, if the party who makes the representation knows it to be false, he shall make it good; and the rule equally holds, as it seems, that if he does not know whether it be true or false, if he affirms it to be true, he shall be responsible for its truth. 1 Story, Eq. Jur. § 193. And the doctrine of Lord Eldon, in this case, appears to have been fully concurred in by Chancellor Kent. Bacon v. Bronson, 7 Johns. Ch. 201.

These are certainly very grave authorities, and they assert the jurisdiction in terms exceedingly broad and comprehensive. And yet, notwithstanding this array of imposing authority, it seems that practically the jurisdiction is not maintained to the whole extent that is apparently claimed by them. The right to relief in equity, for fraud in the sale of personal chattels, seems to be distinctly denied by Chief Baron Alexander, in the case of Newham v. May, 13 Price, 752. 'It is not,' says he, 'in every case of fraud that relief is to be administered in equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud in the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity.' And the general terms, in which the jurisdiction is claimed in the passage in Story's Equity Jurisprudence before cited, it seems, must be received with considerable qualification in practice; for in a note to that section, it is said that courts of equity will not ordinarily give relief in cases of warranties, misrepresentations, and frauds in the sale of personal property. And in the second volume, in the chapter on compensation and damage (sections 794–796), the jurisdiction of the court is stated in terms much more limited. It is there laid down as a general proposition that courts of equity will not entertain jurisdiction over breaches of contract and other wrongs and injuries, that are cognizable at law, to give compensation or damages where these are the sole objects of the bill, but only as incidental to other relief, which is sought by the bill and may be granted by the court. For whenever the bill goes merely for damages, the remedy is perfect at law, and it is more proper that the damages should be ascertained by the jury than by the conscience of the judge. And it appears to me that Lord Eldon, in the case of Todd v. Gee, 17 Ves. 278, 279, had materially modified the opinion expressed in the case of Evans v. Bicknell. The bill, in that case, prayed the specific performance of a contract, and if the defendant was unable to perform it, which was the fact, then for compensation or damages for the non-performance. Lord Eldon said, that the court ought not, in a bill for specific performance, except under very special circumstances, to direct an issue or a reference to a master to ascertain the damages. That, he emphatically added, is purely law, and had no resemblance to compensation given out of the purchase-money, where a party is unable completely to fulfill his contract. 2 Story, Eq. Jur. § 796. Though in the former case he seems strongly to hold that, in fraud, a bill may be maintained whenever an action will lie at law. This doctrine of Lord Eldon is deliberately affirmed by Chancellor Kent, in Kempshall v. Stone, 5 Johns. Ch. 195, and is sanctioned in many other cases. Clinan v. Cooke, 1 Schoales & L. 22; Greenaway v. Adams, 12 Ves. 401; Russell v. Clarke, 7 Cranch [11 U. S.] 87. It is very pointedly asserted by the court of Kentucky, in Hardwick v. Forbes, 1 Bibb, 212 (quoted 1 Story, Eq. Jur. § 184, note). On a review of all the cases, the rule practically established seems to be, that a court of equity will not take jurisdiction of a suit for damages, when that is the sole object of the bill, and when no other relief can be given. The reason is, that in such a case the remedy is as complete and perfect at law as it is in equity. The same evidence will support the claim in both courts, and the assessing of damages is a subject more proper for the jury than for the court. But when other relief is sought by the bill, which a court of equity is alone competent to grant, and damages are claimed as incidental to relief which

cannot be obtained at law, then the court, being properly in possession of the cause for the purpose of relief purely equitable, will, to prevent multiplicity of suits, proceed to determine the whole cause.

Whether, in a case of damages for fraud, where a discovery is sought and obtained, the court will proceed to ascertain the damages on that ground alone, by directing an issue to the jury, or a reference to a master, has not perhaps been distinctly settled. The general doctrine, which is said to be pretty well established in this country, is that where the court has jurisdiction for discovery, and it is obtained, it will proceed to give relief, although the remedy at law is complete. 1 Story, Eq. Jur. § 71. It would seem to follow, that, in such a case, where the court has an undoubted jurisdiction to compel a discovery, after it was obtained, that the court would, in its own way, proceed to ascertain the damages and give the relief. This seems to be a regular and necessary inference from the general doctrine. And yet it is said by a great master of equity jurisprudence that there is strong reason for declining the jurisdiction, as damages ought to be ascertained by a jury, and such cases belong appropriately to courts of law. Id. § 72. But however this may be, it is clear that jurisdiction does not attach when the discovery is not obtained. In this case, the fraud is distinctly and unequivocally denied. It cannot be pretended that the bill can be maintained on any disclosure made in the answer.

But if the jurisdiction was as indisputable as it appears to me to be questionable, my opinion is, that in this case equitable relief is barred by lapse of time. It is true that proceedings in equity are not strictly within the statute of limitations, because the words of the statute apply to particular legal remedies by name, and do not, therefore, include proceedings in equity. But courts of equity have always held themselves bound by the spirit of the statute, and, therefore, where there is a legal title and right and it is barred at by law by the statute, equity, acting in obedience to the statute, will hold it barred in equity. In the present case, the legal bar had not been fully acquired, as six years had not elapsed when the suit commenced, and it may be said, as the remedy was not barred at law, it ought to be held as not barred in equity. But this, it seems to me, would be taking an imperfect view of the effect of time on equitable remedies. Lapse of time, in equity, operates not only as a positive bar, extinguishing the civil title or right while it leaves the natural right to have all that effect which the law allows it (and this is the case where the court acts in obedience to the statute), but it also has an operation in cases not within the statute, so that there has always been a limitation of suits in equity of every description. It is a rule adopted by the court, in the public interest and for the peace of society, to discourage the litigation of stale and antiquated demands. On this principle the court refuses to interpose its extraordinary authority, unless the party prosecutes his right with reasonable diligence. If he sleeps on his rights for an unreasonable length of time, the court will withhold its hand and leave him to his legal remedy. What delay will amount to what is technically called laches, necessarily depends on the nature and circumstances of the case. And this principle is applied, as I understand the practical doctrine of equity, not only to cases not comprehended within the statute in any sense, that is, to rights which are purely equitable, and for which the forms of law afford no remedy, but rights and titles which are within the statute, and over which the court has a concurrent jurisdiction with courts of law. In these cases it not only acts in obedience to the statute denying the remedy, when the statute bar is complete, but will, sometimes, on its own peculiar notion of justice, decline to interpose when the prescription is not fully acquired at law. In these cases the court does not pretend to act on the right, but is simply passive, and leaves the party to pursue his legal remedy. If he sleeps on his rights, until the course of events and the change of circumstances have put it out of the power of the court to administer that equality of justice between the parties, which, as a court of conscience, it is bound to do, it will decline to act at all. In cases of concurrent jurisdiction, where a party is at liberty to apply either to the tribunals of law or equity, a court of law is bound by the letter of the statute, because the statute speaks to that court in direct and positive terms. If the prescription is full, no remedy can be given; but if it wants a single day of being complete, it does not exist at all, and the court ex debito justitiae is bound to give the remedy. To refuse to, would be a denial of justice. But it is not so in equity. The statute does not address itself to courts of equity, and, therefore, equity, in strictness, is not bound by it. But then equity is not bound to interpose at all. It is no denial of justice to leave the party to such remedy as the law will give. Equity therefore says to the suitor, that while the statute bar may not be imperative, yet that in equity there is a prescription independent of the statute, not fixed to any invariable time, but depending on the nature and circumstances of the case, which may be a bar to equitable, when it would not be to legal, relief. In these cases of concurrent jurisdiction, equity will not interpose with her extraordinary powers unless the matter is brought before the court in such time as will leave to it the power of adjusting all the material equities involved in the case, in such a manner that, while justice is done to one party, injustice will not be done to another. If this cannot be done, and this is

the consequence of the delay, equity will not act on the right, but leave it for the decision of law.

If this be a correct view of the practice of equity in cases of concurrent jurisdiction, as to the influence of lapse of time on equitable remedies, it will apply with great force to the facts of the present case. This was a sale of a right of pre-emption of certain lands, that is, of a chose in action. The gravamen of the bill, when reduced to its last analysis, is that the plaintiff was induced, by the fraudulent misrepresentation of the defendants, to pay for their right an exorbitant price. But after the purchase of the bond, the plaintiff went on the land, by his agent, for the purpose of satisfying himself by actual examination by a person who was well acquainted with timber lands, and, after such examination, deliberately made the purchase of the land. It cannot be pretended that the purchase of the land was made principally, if it was at all, on the strength of the representations and certificates of the defendants. The plaintiff chose to trust his own eyes, or those of his confidential agent, and, in fact, co-purchaser of the bond, and it was on the strength of his representations and the additional certificates he obtained, that the bargain for the land was ultimately closed. It is quite clear that the plaintiff, by this bill, can claim no relief directly for damages he may have sustained by the purchase of the land. All he can pretend to is, that he was induced by the fraud of the defendant to pay too much for the bond, and that, if the defendant made false representations, he is bound to make them good. My opinion is, that he is too late in claiming relief for this damage in a court of equity. He should have made his claim before the right of pre-emption expired, or, if not, at least while he had a title to the land, and the power of restoring to the defendants what he received of them, that is, the right to take the land at the bond price. Instead of that, he has held the land for nearly six years, has made constant efforts to resell, demanding a higher price than he gave, has gone on to operate on the land and taken off a large quantity of the timber, has mortgaged it, and finally allowed the mortgagees to foreclose and extinguish his title. Under these circumstances, my opinion is, that even admitting the fraud (and with respect to Sanger, the only defendant who has answered, Richardson being dead and Stackpole having demurred, the evidence entirely fails, as it appears to me, in making actual fraud) but even admitting it, my opinion is, that the plaintiff is barred of equitable relief by his own laches.

The result of my opinion is, that the bill must be dismissed with costs for the defendant.

[NOTE. See Ferson v. Sanger, Case No. 4,752.]

Case No. 4,752.

FERSON v. SANGER et al.

[1 Woodb. & M. 138.][1]

Circuit Court, D. Maine. May Term, 1846.

RELEASE—COVENANT NOT TO SUE ONE SIGNER OF PROMISSORY NOTE—COMPETENCY OF WITNESS—INTEREST — RULES IN CHANCERY — FRAUD CHARGED TO RESPONDENT—EVIDENCE.

1. A covenant not to sue one signer of a promissory note is no release of the others.

[Cited in Tuthill v. Babcock, Case No. 14,275; Veazie v. Williams, 8 How. (49 U. S.) 159.]

2. A liability for costs in the event of a recovery on notes, prevents the person so liable, from being a competent witness in a bill in equity to have the notes surrendered and cancelled.

3. The rules of courts of chancery, as to the competency of witnesses, are the same as those of law, though the tendency in modern times is to let most objections go only to the credibility of witnesses, and especially is this more safe in the former where judges weigh the evidence.

4. To charge a respondent on account of fraud, there must not only be evidence of it, but also that he was conusant of the fraud, or profited by it.

[Cited in Grymes v. Sanders, 93 U. S. 62.]

5. It is a strong circumstance, disproving a material mistake as to the premises, that the purchaser occupied them nearly six years without complaint.

6. Where full opportunities were enjoyed of examining the premises, and they were examined, and no falsehood or fraud appear in any material representations, or act in relation to them, no recovery can generally be had on the ground of a mistake.

7. A long occupation of the premises without complaint, and without any fraud to conceal mistakes, is strong evidence not only against mistakes, but of a negligence in seeking relief, which should bar it.

8. It would not be equitable to rescind the contract after the purchaser had taken timber from the land, treated it as his own for several years, and mortgaged it to a third person, who had foreclosed the mortgage, as a release by the purchaser would be worthless, and the propriety of awarding damages, as well as the power in such a case, being not entirely clear.

This was a bill in equity, filed May, 1841. [See Case No. 4,751.] It averred, that Charles Baker, Jr. and John Lindsey, on the 15th of July, 1835, owned five eighths of the Alder Stream township, in the state of Maine, and executed a bond, in the penalty of $30,000, to Milford P. Norton, Zebulon Sanger, Edw. Sanger, and Ezekiel Richardson, their executors or assigns, to convey to them said five eighths within thirty days from date; provided, the obligees should pay to them, at the rate of six dollars per acre, one fourth cash, deducting $1000 already paid, and to be forfeited if the purchase was not completed, and the rest in three equal annual installments, to be secured by notes and a mortgage of the premises. The bill further alleged, that Norton, who had since

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

gone abroad, and Richardson, since dead, with Sanger, Savage, and one Charles Stackpole combined to sell their interest, acquired by said bond, at an exaggerated price, far beyond the value of said land, and procured Stackpole to make a certificate, on the 16th of July, 1835, that he was skilled in exploring lands, and had examined this township, and there was 8000 good pine timber per acre on it, beside a large quantity of spruce, and the facilities great for getting it off—all of which statements were false and exaggerated. That on the 5th of August, 1835, they caused Stackpole to give another certificate, of like falsity, as to his having seen more timber on the township given and described, that logs could be driven out, by $1500 expense, on the stream within the township. It was next averred, that on the 16th of July aforesaid, they procured a certificate of the selectmen and treasurer of Waterville, where Stackpole resided, in recommendation of his qualifications to judge of timber. Also, on the 4th of August, 1835, another of Asa Richardson, similar to Stackpole's; and sundry others in July, and August, and September, representing falsely the pine timber to average eight or ten thousand per acre. And to enable them to make a sale at an inflamed price, a nominal transfer of the land was averred to have been made by Sanger, Savage, Norton and Richardson, to John Webber, on the 24th July, 1835, and on the 11th of August, 1835, Baker and Lindsey agreed on the back thereof, that Webber had notified them of his intention to purchase the land on the terms specified therein, and their willingness to convey to him, on a compliance therewith, and on the 24th of said August they extended the time one day longer to Webber. The bill then charges, that Sanger came to Boston with said certificates, and in company with Richardson exhibited them to the complainant as true, July 25th, 1835, and wished him to purchase their interests by said bond, on the terms therein specified, well knowing, and having good reasons to believe, the representations therein contained were inflamed and false; and he, relying on these statements, and there not being time to make proper examination himself, agreed with Webber to purchase for him the bond, and paid to the obligees the $1000 advanced by them, and secured and paid, as stipulated, the other sums to the obligee in the same, having actually paid thereon, in money, over $44,000; that Baker and Lindsey, on the 24th of August, 1835, conveyed five eighths of the township to the complainant; that not being able to pay the mortgage thereon, the land has been abandoned to the mortgagee, and little timber of value cut therefrom by the complainant, the quantity thereon not exceeding $3000 per acre; and for his relief from losses sustained by the exaggerated and false accounts of the timber on the land, he prays, beside an answer to certain inquiries, that the respondents be required to refund the money received for the land on a release by the complainant of all his interest therein, and take up the notes given by him and Webber, and that the complainant be in all respects indemnified.

The answer of Sanger admits the execution of most of the bonds and deeds referred to, and the payment of $1000 for the bond or preemption title to five eighths of the township, believing it to be valuable, and that they sold it to the complainant for $3000 advance or thereabout, making the bargain with John Webber, and after he, Webber and Stackpole had in person examined the land as long as they pleased. He denied that any false representations were made by him, or any false certificates exhibited, or any combination formed with others to deceive. He, moreover, denied all privity with Baker and Lindsey in selling their land, and the nominal transfer to Webber, but insisted that Webber acted as a real purchaser, and they contracted with him as such; and averred, that the complainant, the winter after the purchase, entered in person on said land, and drew logs therefrom, and declared there was timber enough; and the respondent was not aware of any dissatisfaction, till the filing of this bill; that possession of the land was given to Mary Gore, the assignee of the notes, in June, 1837, and the three years for redemption having expired, the title is absolute in her, and the respondent has no power to reconvey the premises. It concluded with averring, that if the land has as much timber on it as the bill admits, no injury or loss happened, and denies all combination or mistake, so far as regards himself.

Stackpole demurred to the bill, and assigned for causes, that the bargain as to the bond appears to have been made with Webber and not the complainant; that the purchase of the land was by [William] Ferson of Lindsey and Baker direct, and not through the respondent, and that no offer was ever made to Ferson while owner of the land, to reconvey to the respondents on their refunding the money. Sanger being in Massachusetts was not summoned, and did not appear.

There was much evidence that need not be detailed, except as given in the opinion of the court where it bore on the points which were considered, in disposing of the case.

Fessenden & Dublois, for complainant.
Ch. Davies & Son, for respondents.

WOODBURY, Circuit Justice. A preliminary question in this case is an objection to the competency of John Webber as a witness. He signed the notes as surety to the complainant, and is averred to have made the bargain and been at first interested in the

land in dispute. But he has been released by Ferson, so as not to be liable to contribution, and has himself released Ferson from any liabilities to him, and the holder of the notes has covenanted not to sue Webber thereon. This covenant, if Webber was the only promisor, might in equity be deemed tantamount to a release, and operate as such, and thus prevent any interest in Webber in this case to get rid of any suit whatever on the notes, and run no risk and incur no trouble in afterwards attempting to recover the amount in a separate action on the covenant. This is often the doctrine at law as well as in equity, if it be the case of a sole promisor, and the covenant be never to sue him. But such a covenant is not construed as a release, if it be not to sue during only some given or specified time; because, if deemed a release during that time, it must be so forever; as a demand once released is always released. On these two points, see 1 Durn. & E. [Term R.] 446; 8 Durn. & E. [Term R.] 486; Salk. 673; 19 Johns. 129; 16 Mass. 24; 6 Mass. 105; 2 Johns. 473; Hob. 10; 15 Mass. 112; 2 Saund. 48a, note; 8 Johns. 54. And more especially is it the reasonable doctrine in equity as well as law in a case like the present, of more than one promisor, that a covenant never to sue one, is not a release, as otherwise a contract not to sue one, though founded on mere personal favor or only part payment, would, if operating as a release, discharge all the other promisors. 12 Mod. 551; 8 Durn. & E. [1 Term R.] 168; 6 Taunt. 289; 7 Johns. 207; 11 N. H. 437; Durrell v. Wendell, 8 N. H. 369; President, etc., of Catskill Bank v. Messenger, 9 Cow. 37; 4 Greenl. [4 Me.] 421; 17 Mass. 585; 15 Mass. 112. Probably, then in the present case, the interest and feelings of Webber cannot be considered as entirely removed in respect to Gore by this covenant, as the remedy over, on it by Webber, if sued, might prove worthless, and is attended by some trouble and expense, even when successful, that cannot be fully indemnified.

But we do not find it necessary to dispose of the question entirely on this ground. Because, unfortunately for the plaintiff, there is a stipulation in the case, given by Webber to Gore, when the latter made the covenant, by which Webber undertakes to save Gore harmless from any cost she may incur by Ferson's contesting his liability on the notes, as he did, after the covenant. This creates a direct interest in Webber to support the prayer of the present bill, in order to have the notes given up, and thus prevent any suit or cost on them, which he might in the end be obliged to pay under that stipulation. So if Gore should sue one of the indorsers of the note, (not Ferson) no reason can be seen why that one might not, for what was recovered against him, sustain a suit against Webber. The testimony of the latter is therefore inadmissible, and under the objection made, must be excluded. This does not seem to conflict with what in some views is equitable as well as legal. For Webber appears to have been throughout deeply interested in the whole transaction, if not a principal in it. Though in hearings in chancery the parties are to be listened to, when testifying to their bills and answers, notwithstanding their interest; yet neither they nor others can be used as witnesses technically, as to the merits of the case in a court of equity, any more than in a court of law, if directly affected in a pecuniary point of view by the result of the proceedings. And though the inclination in modern times is to let objections to witnesses operate rather on their credibility than their competency, and more especially might a judge hear all, and weigh all without great risk; and though Bentham urges this, as the true philosophy of evidence (see 1 Benth. Ev. 1), still the rules as to witnesses are the same before a judge in our systems on the trial of the merits, as before a jury, and till altered by legislation in both, we must continue to adhere to the settled discriminations between competency and incompetency.

Excluding the testimony of Webber, much of the controverted matter of fact in the case is put out of question. He is the only witness who testifies to any interest in Stackpole, either in the bond from Baker and Lindsey, or in the land itself. He is, likewise, the only witness, who testifies to any representations by Stackpole before the sale, as made by him to Ferson or Webber, and which are charged in the bill to have been exaggerated or false. It is clear, then, that had it not been for the demurrer by Stackpole, the bill would now have no ground to rest on for justifying any decree whatever against him, and so far might be at once dismissed. But the demurrer being in, the several causes assigned for it must be examined, unless the last of them is found to be sufficient. This relates to the neglect of the complainant to demand that the contract be rescinded till after June, 1840, when the title had passed from him to Gore, and could not be reconveyed to the respondents. The effect of that will be considered in connection with the case of the other respondent, Sanger, who among other objections raises that also. The answer of Sanger, as detailed in the statement of the facts, before given, denies any false or exaggerated representations either made or exhibited by him in relation to the timber or land at the sale of the bond. As this denial is responsive to the bill and sworn to, it must be regarded as true, considering that no witness or document proves the contrary, after excluding the testimony of Webber. Carpenter v. Providence Wash. Ins. Co., 4 How. [45 U. S.] 185. From the other evidence in the case, it is doubtful, whether the statements if made, were really exaggerated, or to such an extent as to indicate a fraudulent intent; or any material mistake. Baker swears to his belief at the

time, that the land was richly worth more than it was sold for, which was six dollars per acre, and that Webber himself, before the purchase, did examine the tract in person, and "express himself satisfied" with it. He further swears, that Ferson examined it in part, before making some of the payments, and was also satisfied, and made no complaint of any unfairness. Bartlett, another witness for the plaintiff, testifies, that the reputation of this land stood high at that time, and indeed superior to any other on the Dead river, and that Ferson, after examining it in 1836, said he thought there was as much timber on it as had been represented. Lindsey also swears to the high reputation of this land in 1835, and that Ferson, after examining a part of it with him, before paying the first notes, expressed himself satisfied, and asked $8 per acre; and when he failed in 1840 to make further payments, complained of no unfairness. He swears further, that Webber examined it before the sale, and said it was better than had been represented. So Lemuel Pratt swears to the high reputation of this tract in 1835, as also does Jacob G. Loring.

It is true, that two of these witnesses had been owners of the land; but they are not now interested, and are supported by several, who had not been owners, and they are not contradicted by any other testimony in the case. Most of those testifying to the small amount of timber on the lot, when the depositions were given, knew nothing as to the quantity of pine on it at the time of the sale in question, in 1835. And since then a large quantity is proved to have been cut off. Near two millions are sworn to by one witness in one year, and another witness swears, that at least three millions of good pine timber have been cut from this land since 1835. It would be very difficult on such evidence to raise any question as to false representations having been made, or any mistake having happened, that would justify the interference of a court of equity.

There is, then, no sufficient evidence of fraud by Sanger, or by others, to which he was either conversant or knowingly profited by. One of these is usually necessary to charge a person primâ facie with fraud. See Warner v. Daniels [Case No. 17,181]; Hepburn v. Dunlop, 1 Wheat. [14 U. S.] 189. Expressing an opinion is not enough. Bacon v. Bronson, 7 Johns. Ch. 194, 201; Bibb, 212; 1 Story, Eq. Jur. § 197; 9 N. H. 116; 2 Kent, Comm. 485; [Russel v. Clark] 7 Cranch [11 U. S.] 69; Stone v. Denny, 4 Metc. [Mass.] 151, 158; Haycraft v. Creasy, 2 East, 92; 1 Sugd. 280–283, 391; Small v. Attwood, 3 Younge & C. Ex. 107. Certainly there must be knowledge to charge one criminaliter for fraud of an agent. Many of the cases that avoid transactions for fraud or false statements made by others, seem to require, that those others must be part owners or agents. Lobdell v. Baker, 1 Metc. [Mass.] 193; Seaver v. Dingley, 4 Greenl. [4 Me.] 306. But it is probably enough, if the vendor, knowing that such false representations had been made by any one, and that they influenced the vendee to make the purchase, neglected to undeceive him and profited by the falsehood. 14 Ves. 91. So in cases of sales, if the owner profited by the terms of the trade made, brought about by the fraud of an agent, but of which fraud or falsehood he was not personally conusant, the sale may be void for any mistake of material facts involved, and, according to some cases, he is liable certainly for the fraud, if adopting the contract made by fraud. They go on the ground, that fraud by an agent is fraud by the principal, and that the principal should be bound by the wrong or misconduct of his own agent, rather than that a stranger should suffer, and that the principal cannot take the benefits of a trade by his agent without taking the burthens. and finally, that he cannot adopt part and repudiate the rest, where the transaction is a unit, and he claims the benefits of the whole. See Warner v. Daniels [supra], and cases there cited.

But it is unnecessary to settle this last point in the present case, as the evidence of any fraud in the agent is defective, imperfect, and not at all satisfactory. In respect to a material mistake, there is more evidence repelling it than has yet been alluded to. The question as to false representations or fraud being out of the case in connection with Sanger, the idea, that a mistake existed, mutual or otherwise, which was of sufficient magnitude to require the contract to be rescinded in order to do justice, is further negatived by the length of time Ferson forbore to make any complaint. He delayed to do it not only until long after the execution of the contract, but until long after the personal examination of the premises separately by himself as well as Webber. The time was nearly six years. Had such a mistake existed originally, it would most probably have been discovered at once and complained of. There is no pretence of any discovery of new matter at subsequent periods. In addition to this, the mistake, if happening, will not avail to rescind a contract, if the party had full means of examining the truth of the matter, and if opportunities were given for that purpose by the vendor, and if the vendee improved them, and thus relied on his own inquiries and inspections, rather than on the statements of the other contracting party. Hough v. Richardson [Case No. 6,722], explaining Daniel v. Mitchell [Id. 3,562]; Salem India Rubber Co. v. Adams, 23 Pick. 256. This always presupposes that no falsehood or fraud are used to mislead in connection with his inquiries. Warner v. Daniels, before cited. Here, time existed, between the statements on the first negotiation and the sale, to examine into the real state of the land and timber and

streams of water. The agent or party then in interest did examine, and made report, and expressed himself satisfied with the result, and no misrepresentations accompanying it are proved. It would be very difficult to say after this, that if a mistake occurred, it arose from a reliance merely on the statements made by the vendor, and without any means or opportunity of personal inquiry and judgment. The celebrated case of Attwood v. Small, 6 Clark & F. 232, as decided finally in the house of lords, is very direct on this point. See, also, cases cited in Warner v. Daniels [supra]. But the six or seven years during which the grantee lay by, without complaint of any mistake or misrepresentation, or other matter entitling him to relief, and the work done by him on the land in the mean time, and the continued payments made on the notes, strongly repel the idea that any ground of any kind for relief existed, and go far to bar any equity in setting up a claim to it on any ground at this late day. Livingston v. Story, 11 Pet. [36 U. S.] 407; [Piatt v. Vattier] 9 Pet. [34 U. S.] 416; Boyce v. Grundy, 3 Pet. [28 U. S.] 210; McKnight v. Taylor, 1 How. [42 U. S.] 161, 168; Bowman v. Wathen, Id. 189; 1 Sugd. 392; 2 Schoales & L. 636; [Prevost v. Gratz] 6 Wheat. [19 U. S.] 481; [Hughes v. Edwards] 9 Wheat. [22 U. S.] 489; [Miller v. M'Intyre] 6 Pet. [31 U. S.] 61. There must be some satisfactory apology for continuing so long to treat the property as one's own, and the sale valid, by showing that the vendee had no means of discovering the mistake sooner, or that it was concealed by fraud, or something else of that exculpatory character. Chandos v. Brownlow, 2 Ridg. App. 345; 1 Story, Eq. Jur. §§ 146, 148; 2 Story, Eq. Jur. § 1520; 2 Kent, Comm. 480; Junkins v. Simpson, 14 Me. 364. There must be evidence of reasonable diligence, where no fraud is used for concealment, or a court of equity will remain passive. McKnight v. Taylor, 1 How. [42 U. S.] 161. Moreover, the grantee has taken off some timber since the purchase, and allowed others to take off still more, so as not to be able to restore the land in the condition in which it was received; and beyond this, has parted with the title entirely by allowing the mortgage on it to be foreclosed in the hands of a third person not a party to these proceedings. So, that if the contract could otherwise be properly rescinded for a mistake, it could not be under circumstances, rendering it impossible to place all the parties in statu quo. Hough v. Richardson [supra]; Richards v. Allen, 17 Me. 296; Coolidge v. Brigham, 1 Metc. [Mass.] 547; 1 Durn. & E. [1 Term R.] 135, 136; 4 Marsh. 85; 2 Kent, Comm. 480; 5 East, 449; 1 Mer. 643. A release by the complainant of all his right and title, as preferred in the bill, would be a release of mere moonshine. This view of the subject, connected with the fact, that no offer was made to rescind the contract before Ferson parted with the title, goes to sustain the last cause of demurrer set out by Stackpole. The bill itself contains matter inconsistent with the relief prayed for.

Looking then to the whole case, there seems to be no mode of relief, except by damages, even if a material wrong has been done by either of the respondents. And as to such relief, in case of a mere mistake, it would not only be inequitable generally after such a lapse of time, but of very questionable propriety in a court of equity, at all. Certain am'I, that however may be the weight of authority or principle on this point in a case of clear wrong or fraud, accompanied by injury and full relief not obtainable at law,—and my inclinations are to give damages in such cases; see Warner v. Daniels [supra],—yet there is too much doubt concerning the fraud and injury in the present case, to render it necessary to go into the question, whether damages should be awarded in a court of equity, where, on the face of the record, they or nothing must be allowed. 1 Sugd. Vend. 364, note; Stone v. Denny, 4 Metc. [Mass.] 151; Newham v. May, 13 Price, 749; Todd v. Gee, 17 Ves. 273.

Some other questions have been presented in the argument of this case, which it is not found necessary to settle, such as whether the false representation of mistake, if occurring at all, did not happen between Webber and the respondents, and not between Ferson and them, and whether Ferson must not on the facts be considered as having made a new contract with the former owners, rather than buying of the respondents under Webber. Another is, whether the respondents can be considered as selling the land itself, or only the bond, only a right to purchase the land, if the assignees, after examination, pleased to do it, and thus making the measure of damage, as to the vendors of the bond, merely the extra sum or bonus paid to them for that right. But I do not express any opinion on these, as none is necessary. Bill dismissed.

FESTE (CURTIS v.). See Case No. 3,502.

Case No. 4,753.

In re FETHERSTON.

[5 Chi. Leg. News, 193; 3 Pittsb. Rep. 480; 20 Pittsb. Leg. J. 77.]

District Court, W. D. Pennsylvania. Dec. 19, 1872.

BANKRUPTCY — SETTING PROPERTY AS EXEMPT—EXCEPTIONS TO ACTION OF THE ASSIGNEE.

Where property has been set apart by the assignees of a bankrupt under his claim for exemption, and no exceptions are taken to the action of the assignees, the property exempted passes to the bankrupt freed from the jurisdiction of the bankrupt court.

In bankruptcy.

By N. W. Shafer, Register:

A. Ortleib & Co., by indenture of lease dated April 1st, 1867, demised the premises, 175 Lacock street, Allegheny City, Pa., to P. Fetherston for the term of six years, viz.: to April 1st, 1873, at the rent of one hundred and fifty dollars a year, payable monthly. In the lease or instrument of lease is a clause "waiving the benefit of all laws or usages exempting any property from liability for rent." On the 12th day of June, 1872, A. Ortleib & Co., issued their landlord's warrant, and under and by virtue of it an actual levy was made on the premises, 175 Lacock street, Allegheny City. On the 15th day of June, 1872, a creditor's petition was filed against Fetherston, and upon it in due course, he was adjudged a bankrupt. As soon as it became known that Fetherston was declared a bankrupt, counsel for A. Ortleib & Co., the landlords, directed the officer not to proceed, that P. Fetherston had gone into bankruptcy, and that all sales and transfers of his property were prohibited. This notice suspended proceedings under the warrant. The premises 175 Lacock street, Allegheny City, are occupied by P. Fetherston as a saloon, and the articles distrained on the premises were one looking glass, eleven pictures and frames, four barrels of ale, twenty-seven barrels of stock ale, one clock, one barrel of porter and one ice chest. The amount of rent in arrear on the first day of June, 1872, was three hundred and twenty-five dollars, and, it was to cover the rent then due that the distraint of June 12, 1872, was made. By the levy under this warrant, A. Ortleib & Co. acquired a valid lien. In re Butler [Case No. 2,236].

The bankrupt claims, under the 14th section of the bankrupt act [of 1867 (14 Stat. 522)], household and kitchen furniture, wearing apparel, etc., and about which there is no question; also, under the laws of Pennsylvania (act approved the ninth day of April, 1849), he claimed in his schedules "stock and fixtures and stock ale at No. 175 Lacock street, Allegheny City, Pa." Other articles were also set apart, but are not in dispute. On the 25th day of October, 1872, the assignees, with notice to the bankrupt a few days afterwards, set apart the said articles as exempt under the act of the general assembly of Pennsylvania, approved April 9, 1849. The premises No. 175 Lacock street, Allegheny City, being in dispute, the assignees never took possession of them. They were and are claimed by one B. Grant by virtue of an assignment dated ——, and duly signed, sealed and delivered by the bankrupt to said Grant.

The register is of opinion that in view of the fact that the bankrupt claimed the articles in the saloon, and saloon itself, at 175 Lacock street, Allegheny City, as exempt under the act of 9th of April, 1849; that in pursuance of said claim by him, they were actually set apart to him with notice, and no exceptions to their actions in this behalf were filed, the said saloon and fixtures and stock ale, at No. 175 Lacock street, Allegheny City, Pa., were withdrawn from the jurisdiction of this honorable court. It would therefore seem that the bankrupt has mistaken his forum, and that the injunction heretofore granted would have to be dissolved. The decision of the parties belongs properly to the state tribunals under whose laws they are claimed. In re Stevens [Case No. 13,392]. I therefore recommend that the injunction granted November 5, 1872, be dissolved.

PER CURIAM. The opinion of the register is affirmed, and the injunction is dissolved.

FIBRE DISINTEGRATING CO. (AMERICAN WOOD PAPER CO. v.). See Case No. 320.

FIBRE DISINTEGRATING CO. (ATKINS v.). See Cases Nos. 600–602.

Case No. 4,754.

FIDELIO v. DERMOTT.

[1 Cranch, C. C. 405.][1]

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

SLAVERY—MANUMISSION BY WILL — CONDITIONAL SALE—FREEDOM AFTER TERM OF YEARS.

1. The sale of a slave upon the express condition that he should be free at the end of six years, is not a manumission under the Maryland act of 1796 (chapter 67). A manumission by will is not in prejudice of creditors if the real and personal estate are sufficient without the value of the manumitted slave, to pay all the debts of the testator.

2. A manumission by will after a term of years is not revoked by a codicil, directing all the negroes to be sold, if at the time of making the codicil their term of service had not expired.

Petition for freedom. The petitioner proved by Lund Washington that he was sold by him to James R. Dermott, in April, 1800, upon the express condition that he should be free at the expiration of the term of six years from the sale; and the price paid (£80) was much less than if the sale had been for life.

F. S. Key, prayed the court to instruct the jury that such evidence is not evidence of a manumission, and is not of itself, without a writing, sufficient to establish the freedom of the petitioner. See Laws Md. 1796, c. 67, § 29.

Mr. Caldwell, for petitioner, contended that the act of assembly was not negative of any other mode of manumission. The words are, "may manumit." The law was intended to prevent old and infirm negroes becoming a burden to the public.

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

THE COURT (FITZHUGH, Circuit Judge, absent,) gave the direction as prayed.

CRANCH, Chief Judge, wishing the question of law might be reargued on a motion for a new trial in case the verdict should be against the petitioner,—

The petitioner's counsel then gave in evidence the will of James R. Dermott, by which he bequeathed the petitioner his freedom after a service of four years.

To repel this, Mr. Key, for defendant, produced the inventory and settlement of the personal estate in the orphans' court, by which it appeared that the defendant had paid eight or nine hundred dollars more than the inventory and debts collected, to show that the manumission by will was in prejudice of creditors.

Mr. Caldwell and Mr. Law, for petitioner, objected, that it was only evidence as to part of the estate, namely, the personal.

THE COURT admitted the inventory and settlement to be given in evidence, but said it was not conclusive; it only threw the burden on the other side, to show that there was estate enough, besides the value of the petitioner, to pay all the debts.

THE COURT also, after argument, instructed the jury, that if they should be satisfied, by the evidence, that the real and personal estate of the intestate, exclusive of the value of the petitioner, was more than sufficient to pay his debts, the bequest of his freedom was good. See Act Assem. 1796, c. 67, § 13.

Mr. Key, for defendant, then contended that a codicil, by which the testator ordered his "negroes," (generally), to be sold, revoked the bequest of freedom.

But THE COURT said clearly it does not, because, at the time of making the codicil, there were three years unexpired of the time of his service; which might be sold, and so make the codicil consistent with the will, and give operation to both.

Verdict for the petitioner.

Case No. 4,755.

The FIDELITER.

[1 Abb. U. S. 577; 1 Sawy. 153.][1]

Circuit Court, D. Oregon. May 6, 1870.[2]

SEIZURES—JURISDICTION OF DISTRICT COURT.

1. The jurisdiction of the district courts over causes of seizure, under the laws of impost, navigation, and trade, under section 9 of the judiciary act of 1789 (1 Stat. 77), does not attach, unless it is alleged and proved that the property proceeded against was openly and visibly seized prior to the commencement of such proceeding; either within the district where the proceeding is had, or upon the high seas, and afterwards brought within such district.

[Cited in The May, Case No. 9,330; U. S. v. One Raft of Timber, 13 Fed. 799; U. S. v. The Frank Silvia, 45 Fed. 642.]

2. The objection that the district court has not jurisdiction of a cause of seizure under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court.

Appeal from a decree of the district court of the United States for the district of Oregon.

[This is a proceeding in admiralty, to condemn the steamship Fideliter, for violation of the laws of the United States. There was no actual seizure of the vessel prior to the filing of the libel, and no seizure was alleged. No objection to the libel on this ground was taken in the district court, and a decree was entered, condemning the vessel. [Case No. 4,756.] An appeal having been taken, an objection was raised for the first time in the circuit court, that no seizure was alleged, and, consequently, that the libel failed to show jurisdiction.][3]

Delos Lake and Milton Andros, for appellant.

Joseph N. Dolph, for appellee.

SAWYER, Circuit Judge. The first point made by appellant, and which, if tenable, is fatal, is, that the district court had no jurisdiction over the vessel, and that this court has now no jurisdiction.

The ground of the objection is, that the jurisdiction of the district courts of causes of "seizure under the laws of impost, navigation, and trade of the United States," under the provisions of section 9 of the judiciary act of 1789 (1 Stat. 77), does not attach unless the property judicially proceeded against is seized prior to such proceeding, either in the district where the proceeding is had, or on the high seas, and brought into such district. It is insisted that an open, visible seizure by an officer of the government or other person authorized by law to seize, must precede the commencement of the judicial proceedings, and that such seizure prior to the filing of the libel must be alleged therein, and proved on the trial. Upon an examination of the authorities, I find this to be the law as settled by the decisions of the federal courts, including the supreme court of the United States. I shall only cite the authorities, without a restatement of the reasoning upon which the decisions rest: The Ann, 9 Cranch [13 U. S.] 289; The Silver Spring [Case No. 12,858]; The Octavia [Id. 10,422]; The Josefa Segunda, 10 Wheat. [23 U. S.] 312; Keene v. U. S., 5 Cranch [9 U. S.] 305; Conk. Pr. 254; Ben. Adm. 301; Betts, Adm. 68, 69; Gelston v. Hoyt, 3 Wheat. [16

[1] [Reported by Benjamin Vaughan Abbott, Esq., and by L. S. B. Sawyer, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Abb. U. S. 577, and the statement is from 1 Sawy. 153.]

[2] [Reversing Case No. 4,756.]

[3] [From 1 Sawy. 153.]

U. S.] 318; Rule 22, Adm. Rules Sup. Ct. U. S.

That the objection may be taken in this court for the first time is clear, from the same authorities. In the language of Sprague, J., in The Silver Spring [supra]: "This is a question of the existence of those facts, which will warrant the court in proceeding to decree a forfeiture. In requiring a seizure by the collector, prior to the filing of the libel on the part of the government, the legislature has made that fact a prerequisite to a condemnation, and the plea in this case is like the plea of not guilty to an indictment, and puts in issue all material allegations of the information, and if upon the trial, it does not appear that there was a seizure previously to the filing of the libel, the information is not sustained, and a forfeiture will not be decreed."

Upon a suggestion that the allegation of seizure is immaterial and might be omitted, the learned judge said: "But the information would be defective if this allegation were omitted." And this is manifestly so under the decision in The Ann, 9 Cranch [13 U. S.] 289. The seizure is a material jurisdictional fact. In the latter case the court say: "It follows from this consideration (that the place of seizure should decide as to the proper tribunal)—that before judicial cognizance can attach upon a forfeiture in rem, under the statutes, there must be a seizure; for until a seizure it is impossible to ascertain what is the competent forum. And if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who made the seizure, all rights are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings, and it can be revived only by a new seizure." 9 Cranch [13 U. S.] 291.

The 22nd rule in admiralty, prescribed by the supreme court, requiring the libel to state the place of seizure, is framed in strict accordance with the law, as thus settled by the courts. In this case the libel does not allege a seizure. It nowhere appears that there was a seizure, and the libel is therefore substantially and not merely technically defective, in failing to state a material jurisdictional fact, without which the court cannot proceed to decree a forfeiture. See, also, as bearing upon this point, Kempis v. Kennedy, 5 Cranch [9 U. S.] 185; Turner v. President, etc., 4 Dall. [4 U. S.] 8; McCormick v. Sullivan, 10 Wheat. [23 U. S.] 199; Hodgson v. Bowerbank, 5 Cranch [9 U. S.] 303; Capron v. Von Noorden, 2 Cranch [6 U. S.] 126; Sullivan v. Fulton Steamboat Co., 6 Wheat. [19 U. S.] 450; [Koing v. Bayard] 1 Pet. [26 U. S.] 258; [Brown v. Keene] 8 Pet. [33 U. S.] 112; [Jackson v. Ashton] Id. 148. It is conceded also, that there was, in fact, no seizure, so that an amendment would be of no avail. It follows, therefore, that the decree of the district court must be reversed and the libel dismissed.

Decree accordingly.

[NOTE. Subsequently the vessel was seized, and a libel for forfeiture filed in the district court of the district of California. Decree of forfeiture entered. Case No. 15,088.]

Case No. 4,756.

The FIDELITER.

[Deady, 620; 11 Int. Rev. Rec. 62.][1]

District Court, D. Oregon. Sept. 20, 1869.[2]

SHIPPING — FRAUDULENT SALE OF VESSEL TO SECURE AMERICAN REGISTER—SEIZURE.

1. Where the owner of a vessel makes a bill of sale thereof without consideration, to another, and retains the possession of such vessel, for the purpose of fraudulently obtaining an American register for the same, such transaction is a nullity and does not vest any legal title or right in the pretended vendee, so as to authorize the statement in the oath for a register under section 4 of the act of December 31, 1792 (1 Stat. 287), that he is the true and only owner thereof.

2. A sale of a British vessel by an American citizen to a Russian subject, at Alaska, after the ratification of the treaty of purchase with Russia, and before the country was formally turned over to the American government, for the purpose of having such vessel thereby become an American bottom under article 3 of said treaty, is a fraud upon the American government, and an American register obtained for such vessel thereon, is fraudulently obtained within the meaning of section 24 of the act of July 18, 1866 (14 Stat. 184).

In admiralty.

Joseph N. Dolph, for libellant.

Erasmus D. Shattuck, W. W. Page, and S. W. Brockway, for claimant.

DEADY, District Judge. This is a suit for the condemnation of the steamship Fideliter, as being forfeited to the United States for the violation of section 4 of the registry act of December 31, 1792 (1 Stat. 287), and section 24 of the act to prevent smuggling, etc., of July 18, 1866 (14 Stat. 184). The libel was filed by the district attorney on behalf of the United States, on December 27, 1867, praying that said vessel, her tackle, etc., might be adjudged forfeited to the United States for the reasons and causes therein alleged. The libel substantially charges:

I. That the Fideliter is an ocean steamship of 175 16-100 tons burden; that she is not an American vessel, but is a British bottom, built in some British port to the libellant unknown, and has since sailed under the British flag and is not entitled to sail under any other, and that William

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission. 11 Int. Rev. Rec. 62, contains only a partial report.]

[2] [Reversed in Case No. 4,755.]

Kohl is the sole owner thereof, and has been such owner since April, 1867.

II. That between the middle of May and June, 1867, the said Kohl took said vessel from the port of Portland-on-Wallamet, to Sitka, in Alaska, with the intent to there make a sham or pretended sale thereof to some Russian subject, so as to enable said Kohl to obtain an American certificate of registry for said vessel under the treaty of purchase concluded between the United States and Russia, on March 30, 1867; and that between June and November, 1867, said Kohl did make a sham sale of such vessel to one Joseph Lugebil, a Russian subject; and that such Lugebil is now, was then and has been for a long time in the employ of the Emperor of Russia as interpreter, and was without means, and paid no valuable consideration or thing whatever for such purchase.

III. That in order to obtain the registry of said vessel under the laws of the United States, and the treaty of purchase aforesaid, and with the intent to obtain such registry, the said Kohl, on October 28, 1867, at the port of Sitka aforesaid, appeared before William S. Dodge, the collector of customs for said port, and solemnly affirmed that said Lugebil was then and there the owner of said vessel; and that the matter of fact in said affirmation, to wit: that Lugebil was the sole owner of such vessel, was, within the knowledge of said Kohl, not true, but the same was false and untrue; and that within the knowledge of said Kohl, he, the said Kohl, was then and there the sole owner of such vessel, and not Lugebil.

IV. That said Kohl, on the date and at the port last aforesaid, and in the manner and by the means aforesaid, did unlawfully and fraudulently obtain from the collector aforesaid, a certificate of registry of said vessel; which register so obtained has been wrongfully and improperly used for said vessel ever since.

On the filing of the libel a warrant of arrest was issued against the vessel, upon which she was seized by the marshal on the same day while lying at this port.

On December 28, 1867, William Kohl appeared and filed a petition, praying that the vessel be delivered to him on bond, in which petition he represented himself as the "agent of the owners" of the same. On the same day the vessel was released, upon the bond of said Kohl and his sureties, to pay the agreed value thereof—$30,000—in case she was condemned as forfeited by the decree of this court. On January 4, 1868, Kohl filed a claim of ownership of the vessel, without verification, in which he alleged that he was "the agent of the persons who are the true and bona fide owners thereof," without naming or otherwise indicating who such persons were.

These particulars concerning the claim of ownership are noticed for the purpose of calling attention to the irregularity of releasing the vessel to Kohl before a claim of ownership was made in the case, and to the fact that the claim of ownership made by Kohl was as agent for "persons" and "owners"—more than one—while in the answer filed by him the same day, as the agent of Lugebil, it is alleged that Lugebil is the sole owner.

On January 4, 1868, Kohl, as the agent of Joseph Lugebil, answered the libel in substance and legal effect as follows:

I. Admits that the Fideliter was a British built vessel and sailed under that flag; but avers that on October 28, 1867, she became and has ever since been an American vessel, by virtue of the United States laws, relating to shipping and the treaty of purchase aforesaid. Denies that Kohl is or ever was the owner in whole or in part of said vessel. Admits that the owner of said vessel took her from the port of Portland-on-Wallamet to the port of Sitka, as alleged in the libel; but denies that he took her there for the purpose of making a sham or pretended sale to a Russian subject, with a view of obtaining an American register therefor, as alleged in the libel.

II. That about June 6, 1867, John Dutnell, a British subject was, and for some time prior thereto had been the owner of said vessel; and that about said date said Dutnell, by said Kohl, his attorney in fact, duly sold, conveyed and transferred said vessel to the claimant, Joseph Lugebil, who was at that time a Russian subject, living at Sitka, aforesaid, and employed there as bookkeeper by the Russian American Fur Company, a corporation then existing under the laws of Russia; and that, in pursuance of such sale, a bill of sale of said vessel was then and there duly executed and delivered to the claimant; who thereupon came into possession, and was thereby made sole owner of said vessel, at Sitka, aforesaid; and that said sale was made with the knowledge and approval of Maksatoff, the governor of Russian America, and in accordance with the laws of Russia; and said vessel was duly registered in the archives of the Russian government at Sitka, aforesaid, and thenceforward passed under and lawfully sailed under the Russian flag, until about October 28, 1867.

III. Admits that Kohl appeared before Dodge and procured an American register for said vessel, as alleged in the libel; but denies that the matters there affirmed as fact and truth by said Kohl, before said Dodge, were false within the knowledge of said Kohl, as alleged in the libel; and alleges that claimant is the sole owner of the vessel, as said Kohl did affirm, and is now such owner; and that said Kohl was then and had been since June, 1867, acting as agent for claimant of said vessel, under a written power of attorney from claimant, which power said Kohl still holds.

IV. Denies that Kohl obtained said register fraudulently or unlawfully, or that the same had been wrongfully or improperly obtained and used by said vessel, ever since or at all. Denies that by reason of the premises that the vessel has become liable to be seized and forfeited.

On May 5, 1868, a general replication to the answer was filed by the libellant, and on May 8, thereafter, on motion of libellant, the cause was continued until the November term, to obtain the testimony of certain witnesses, alleged then to be in British Columbia and Sitka. At such November term, the testimony of said witnesses not having been obtained, on motion of the district attorney, the cause was continued to the March term, 1869. At the last mentioned term the libellant again moved for a continuance, to obtain the testimony of the claimant, Lugebil, and one John Dutnell, alleged in the answer to have been the owner of the Fideliter, which was refused by the court, for want of diligence in suing out the commission and letters rogatory, to obtain such testimony, and because there was a stipulation between the parties that the cause should be tried at this term. On March 5th and 6th the court heard the allegations and evidence of the parties; and on June 18th the cause was argued by counsel and submitted.

The following is a summary of the evidence introduced by the libellant:

1. A duly certified copy of an American register, issued to the Fideliter, by William S. Dodge, special agent and collector at the port of Sitka, October 28, 1867, which among other things, recites and declares:—"That in pursuance of the acts of December 31, 1792, and May 6, 1864 [13 Stat. 69], concerning the registering and tonnage of ships and vessels, and by virtue of special instructions from the secretary of the treasury in pursuance of article 3 of the treaty of purchase, between the United States and Russia; and 'William Kohl, of New Archangel, Sitka, agent for Joseph Lugebil, Russian resident of Sitka, by power of attorney having taken or subscribed the proofs required by said acts, and having affirmed that said Joseph Lugebil is the only owner of the ship or steam vessel called the Fideliter, of Sitka, whereof Melville C. Erskine is master;' and 'that the nationality of said vessel being duly verified and authenticated by the passport of his imperial majesty, the emperor of all the Russias, under the hand and official seal of Prince de Maksatoff, his majesty's governor of the Russian colonies in America, which having been surrendered to this office, the said steamer has been duly registered at the port of Sitka, Alaska.'"

2. A certified copy of the affirmation of "William Kohl as agent of Joseph Lugebil"—being the affirmation mentioned in the certificate of registry aforesaid—dated October 28, 1867, and made before William S. Dodge, special agent and collector," in which said Kohl recites, that he is of New Archangel, and agent for Joseph Lugebil of the same place, and affirms, among other things: "That said Joseph Lugebil is a bona fide Russian resident of Sitka, and has been such resident for ten years; that his present usual place of abode or residence is Sitka; that he is the true and only owner of the said ship or vessel" (the Fideliter).

3. The deposition of P. O. Dwyer, taken September 23, 1868, before the clerk of this court, in which said Dwyer deposes: That he had been a resident of Victoria since 1860, and that sometime between that date and 1866, the Fideliter was wrecked near Victoria, and sold at auction, and that it was the common understanding, then and there, that Mr. Kohl was the purchaser. That he was well acquainted with the principal business men of Victoria, but had never seen or heard of such a man there, as John Dutnell. That he went from Victoria to Sitka on the Fideliter with Kohl, and arrived there June 6, 1867, and that during such voyage Kohl told witness that he was taking the Fideliter to Sitka to make an American vessel of her, and that he wanted to get there by the time the country was turned over and the American flag hoisted, in order that the Fideliter might become an American vessel. That upon their arrival at Sitka and afterwards, Kohl was expecting the U. S. government agent to arrive every day and take possession of the country, but no one came, and there being no communication with the country at that time, and Kohl being tired of waiting, left on the evening of July 4, for Victoria. That sometime before Kohl left for Victoria, he informed witness that he had in some way transferred the Fideliter to Joseph Lugebil, a Russian citizen and resident of Sitka, but whether there was a bona fide sale of the vessel, witness could not say, and that immediately before leaving for Victoria, as aforesaid, that Kohl informed witness that he was not quite sure of Lugebil's honesty, and in order that Lugebil might not act the rogue in the matter, he then gave witness a paper, telling him, that if during his, Kohl's absence, Lugebil should attempt to sell the vessel, that he, the witness, should step forward with this paper to show that Lugebil had "no call or authority to sell the steamer." This paper the witness kept in his trunk, at Sitka, in an envelope with other papers, belonging to Erskine, the master of the Fideliter, and other persons, until the latter part of November, 1867, when it was abstracted from his trunk by Kohl or the son of witness—a lad then about twelve years of age—under the direction of Kohl, at which time Kohl and said son of witness left Sitka for Victoria, on the steamer Stephens, the vessel which had brought up General Rousseau, the government agent, to receive the country from the Russians. That said paper

was not examined by witness, so as to enable him to know its contents, and that the other papers which were in the same envelope were not disturbed when this was abstracted.

4. W. W. Barlow, a witness called on the trial testified: That he was a passenger to Sitka in the Fideliter in the spring of 1867, and that during the voyage he heard Kohl remark that he intended to transfer the Fideliter to some person in Sitka for the purpose of making her an American vessel; and that this impression as to the object of the voyage to Sitka was derived as well from the conversations with the passengers as with Kohl. That the Fideliter remained at Sitka about four weeks when she returned to Victoria and thence to Portland, with a cargo of wool from Victoria and some cargo from Sitka, and with witness and Kohl on board. That during the stay at Sitka witness remained on shore, and the Fideliter lay a few rods out from the wharf, and that witness saw Lugebil on board the Fideliter two or three times, but cannot state what, if any, business he had there. That Lugebil came on board on the first day of Fideliter's arrival at Sitka, and that he was a Russian citizen and a leading man at Sitka, but whether or not he was a man of means, witness could not say.

5. William H. Grey, a witness called on the trial, testified: That witness visited Sitka in steamer Wright in July, 1868. That while there the Fideliter was at Kodiac under charge of Erskine, master, and that during same time witness saw and conversed with Lugebil on the wharf and in the custom house. That in the course of these conversations witness learned from Lugebil that he was interpreter for the Russian Fur Company, and was then engaged in closing up its business, and that in reply to a direct question from witness, Lugebil told witness that "he—Lugebil—had never owned any interest in vessels."

The following is a summary of the evidence introduced by the claimant:

1. A letter of instructions addressed to Kohl, dated—"Office of the American Russian Fur Co., San Francisco, May 17, 1867," and signed "John F. Miller, President," and attested by "Henry Baker, Secretary," in which Kohl is advised: That he has been appointed general agent by the American Russian Fur Company in Russian America, with full power to act for them in all matters which may arise in that country and to make locations, appoint sub-agents and such other employés as he might deem necessary. That purchases (if it deemed advisable to make any) should be made subject to the approval of the company; and that "you (Kohl) are authorized to draw on us (the company), not exceeding $2,000." The letter concludes—"Wishing you a pleasant and successful trip, I remain, yours respectfully."

2. A certified copy of records and entries in the custom house at Victoria, Vancouver's Island, relating to the British built steamer—the Fideliter—the substance of which is as follows:

(a) June 4, 1866. Certificate of registry granted to Fideliter by collector of port of Victoria, Vancouver's Island, which recites that Melville C. Erskine, of Victoria, V. I., is the master of said vessel, and that she was built at Liverpool, England, in 1859, and that John Dutnell is her owner. Record of certificate endorsed—"Vessel sold to foreigner under certificate of sale dated May 29, 1867, at Sitka." Also—"Certificate delivered up and canceled July 10, 1867. Registry closed."

(b) October 13, 1866. A bill of sale from Godfrey Brown to John Dutnell of Victoria. Consideration $35,000 paid down. Endorsed —"Entered of record Oct. 18, 1866."

(c) October 19, 1866. Mortgage from Kohl and Dutnell to Joseph Lovett—given to secure the payment of $16,500, due on same date from Kohl to Lovett; with interest at 1½ per centum per month, by Kohl without qualification and by Dutnell ("as registered owner") "according to our and each of our respective interests" of the 64 shares, "of which we or one of us, are, or is owner or owners in the ship" Fideliter; with a covenant by Kohl and Dutnell and each of them, "that we have power to mortgage" said shares.

(d) November 6, 1866. An assignment of the last mentioned mortgage by Lovett to the Bank of British Columbia to secure the payment of four notes of $1,000 each, made by said Lovett and Kohl and one Thomas Wright, to said bank. Endorsement on assignment—"Entered of record Nov. 7, 1866"—on mortgage and assignment—"Release and discharge to Lovett by Bank of British Columbia, May 7, 1867."

(e) May 29, 1867. Mortgage from Dutnell to Kohl to secure the payment of $28,000, due July 1, 1867, with interest at 1½ per centum per month. Mortgage recites that Dutnell is owner of the vessel and Dutnell covenants therein that he has power to mortgage vessel and that it is free from incumbrances. Recorded same day.

(f) May 29, 1867. Power of attorney from John Dutnell to William Kohl, irrevocable, to sell vessel in the name of Dutnell or Kohl, and to execute the necessary writings therefor; with declarations by Dutnell—that vessel not to be sold for less than $28,000; that vessel might be sold at Sitka or elsewhere; and that power not to be exercised after eighteen months. Recorded same day. Acknowledged before McCrea "in the absence of the collector." At the head of this paper it is entitled—"Certificate of Sale."

3. Originals of bill of sale from Brown to Dutnell, and power of attorney from Dutnell to Kohl, copies of which, above lettered (a) and (f).

4. A certified copy of bill of sale of the Fideliter, dated June 6, 1867, from "William Kohl, of Victoria, in the colony of Vancouver's Island (British Columbia)," as "agent for

steamer Fideliter, belonging to John Dutnell of Victoria," to "Joseph Lugebil, Russian citizen, resident in the Russian colonies of America." Consideration, $30,000 paid down; with a covenant that Kohl had power "to transfer" vessel, and that same is free from incumbrances. (Signed) "Wm. Kohl, Agent for John Dutnell." Witnessed by M. C. Erskine.

5. A power of attorney irrevocable, dated June 6, 1867, from Joseph Lugebil, "Russian resident at the port of New Archangel, Sitka," to William Kohl, "of New Archangel, Sitka," to sell the steamer Fideliter in the name and behalf of said Kohl or Lugebil, and to execute the necessary writings therefor;—with declarations by Lugebil—that vessel not to be sold for less than $28,000; that it may be sold at Sitka or elsewhere; and that power not to be exercised after eighteen months. Power recites that Lugebil, "being the owner of the steamer Fideliter—as specified in the bill of sale of June 6, 1867,"—the paper last above mentioned.

6. Russian passport to Fideliter, dated June 7, 1867, which recites that Fideliter "is under the command of Capt. Erskine, and owned by the Russian subject and honorable citizen, J. Lugebil." (Signed) P. Maksatoff.

7. William Kohl, a witness called on the trial, testified:

That Godfrey Brown resided at Victoria in 1866, and was connected with the firm of Janion, Green & Rhodes, and that on March 1, 1866, witness first knew of Brown's having Fideliter in his possession. That in December, 1866, witness commenced negotiations with one Capt. Bock to take Fideliter to Sitka. Bock bought the vessel for Lugebil, and provided she arrived at Sitka in time and suited him, Lugebil was to pay witness for her. That this negotiation or agreement with Bock was reduced to writing, but witness does not know what he done with it or where it is—he may have destroyed it. At time of this agreement Bock was master of the steamer Alexander, but when witness last saw him—July, 1868—was master of a bark at Sitka. Under this agreement with Bock, Fideliter was to be taken to Sitka in May, 1867, to be used as a fur trader in some country in Russian America, that had been leased to the Hudson Bay Company. The Russian American Fur Company had been organized in San Francisco to take fur there. The company included among others named, and not named by the witness, Miller, the collector of the port of San Francisco, and Lugebil and witness. That witness presumed it was the intention of the Russian American Fur Company to use the Fideliter for the purposes of the company, but he never made any arrangement with Lugebil himself. That the vessel was to be used in the waters of Russian America, and therefore had to be a Russian vessel and owned by a Russian citizen. Lugebil being a Russian citizen, purchased the vessel—confirmed the contract of Bock when witness got to Sitka. That the Russian America Fur Company had had an agent at St. Petersburg for two years to get a lease of the grounds or country that had been leased to the Hudson Bay Company, and expected to get such lease on May 1, 1867, and "I (witness) went up to Sitka to carry out our part of the contract." Prince de Maksatoff would not give Fideliter clearance, but said to witness that he expected the lease from the Russian government soon, and in the meantime for witness to go on and trade, but "I thought I would wait until I heard from our folk at San Francisco." That witness got to Sitka with Fideliter about last of May or first of June—two days before bill of sale to Lugebil. Did not then hear anything about ratification of treaty of purchase. Saw Lugebil the first day of arrival at Sitka, he came on board Fideliter for despatches for the prince. Sold vessel to Lugebil then, and made bill of sale to Lugebil in office of Russian Fur Company. On June 6, 1867, witness went aboard and gave Lugebil possession, but Erskine continued in command. That witness remained at Alaska until evening of July fourth, when he went to Victoria, and returned to Alaska on the steamer John L. Stephens, two or three weeks before General Rousseau arrived there, which was in October, 1867. That witness took the power of attorney from Lugebil because he did not pay witness his money—did not pay all of it. That witness next saw Lugebil at Sitka on October 3 or 4, 1867. Lugebil was then an inhabitant of that country, and had been, to the knowledge of witness, since June 6, 1867, and was financier and translator for the Russian Fur Company. That witness last saw Lugebil a week or ten days ago (about February 25 or 26, 1869), in San Francisco, at Hubbard's office.

That Fideliter was once wrecked on the coast of Victoria and never ran afterwards until witness became her agent. That witness advanced money to Dutnell twice on the vessel—the first time to the amount of $12,000: and that first and last he advanced the vessel near $28,000. That when money was so advanced the second time, then witness went into possession of vessel, and that after he took mortgage from Dutnell, witness had exclusive control of vessel. That witness first became acquainted with Dutnell in 1858; but that witness was never an intimate or associate of Dutnell's or a friend, and last saw him on December 22d or 23d, 1868.

That witness heard Dwyer's deposition read in court, and that he did not to his recollection say to Dwyer what he testifies witness did. That witness might have made Dwyer evasive answers, as we were then in competition with H. B. Co., and wanted to keep knowledge from them. That witness did not leave paper with Dwyer nor take any paper out of his trunk.

That in speaking of the alleged sale of the

Fideliter to Lugebil, to A. C. Gibbs, then acting United States district attorney, at his office in Portland, and just after the seizure of the vessel, witness did not say, and he had no recollection of saying—"It was a bona fide sale and the money paid, but of course I don't say where the money came from." That on same occasion, witness did not say to A. C. Gibbs—"That as soon as R. A. F. Co. organized, so as to hold vessel and receive title to her, she was to be turned over to it."

For the purpose of impeaching the testimony of William Kohl, the libellant called A. C. Gibbs as a witness, who testified:

That at the time the seizure of the Fideliter was made, he was acting as United States district attorney, and that soon after such seizure he had a conversation with Kohl concerning this matter at his (witness') office, and that he wrote to the collector of customs at Astoria, at once, telling him some things that Kohl said in this conversation, and his own conclusion as to the law of the case. (Here witness was shown a letter of six pages, dated Portland, December 28, 1867, addressed to "Hon. A. Hinman, Collector," etc., and signed "A. C. Gibbs.")

That the letter now shown witness was written by himself to the collector at Astoria, and is the one referred to by him. After reading the letter, witness testified that in the course of the conversation referred to, Kohl said to witness, in speaking of the alleged transfer of the Fideliter to Lugebil—"It was bona fide and the money paid, but of course I don't say where the money came from." These are the very words of Kohl, as spoken by him in that conversation, and put in writing in the letter aforesaid, in quotation marks, and that witness is now satisfied that Kohl used these words on that occasion. That on same occasion Kohl said in substance to witness—"That as soon as Russian American Fur Company organized, so as to hold said vessel and receive title to her, she was to be turned over to it," and that witness remembered this declaration of Kohl's, without the aid of the letter to the collector at Astoria.

From the foregoing evidence, I find the following conclusions of fact:

I. That the Fideliter was a British vessel, built at Liverpool, in England, in 1859, and that prior to June 4, 1866, she was wrecked near Victoria, and while in that condition, was sold by Godfrey Brown, at auction or otherwise, on account of owners, underwriters or other persons whom it concerned, and that Kohl became and was the purchaser at such sale.

II. That Kohl being an American citizen could not obtain the registry of the Fideliter, in his own name, in the custom house at Victoria, and therefore, on June 4, 1866, he fraudulently procured said vessel to be registered at said custom house, in the name of John Dutnell, a British subject, as owner thereof; and that in pursuance of this registry, and for the reason aforesaid, said Kohl, on October 13, 1866, procured the bill of sale of said vessel to be made by said Brown to said Dutnell, which bill of sale was false and fraudulent, and without any consideration whatever, moving from said Dutnell.

III. That the mortgage and power of attorney from Dutnell to Kohl, above mentioned and described, and dated May 29, 1867, were both made without any consideration whatever, and with a view of enabling said Kohl to make an apparent bill of sale of said vessel to said Lugebil or other Russian subject, at Sitka, for the purpose of having her thereby become an American vessel, under and by operation of article 3 of the treaty of purchase aforesaid, then already ratified by United States senate, and awaiting exchange of such ratification with the government of Russia, and contrary to the true intent and meaning of said treaty, and in fraud thereof.

IV. That the bill of sale from Kohl, agent of Dutnell, to Lugebil, and the power of attorney from the latter to Kohl, above mentioned and described, and dated June 6, 1867, were both made without any consideration whatever, and were fraudulently made and accepted by said Kohl and Lugebil respectively, for the purpose of assisting said Kohl in making an American vessel of said Fideliter, in fraud of said treaty as aforesaid; and that it is not true that said Lugebil was, on October 28, 1867, or other day, the bona fide owner of said vessel, or of any interest therein, or that said Kohl, as agent or otherwise, ever in good faith sold said vessel or any interest therein to said Lugebil, and that the pretended sale of said vessel to said Lugebil, at Sitka as aforesaid, was in truth and in fact a mere sham and fraudulent device for the fraudulent purpose aforesaid.

V. That the matter of fact stated in the affirmation of said Kohl, made before the said William S. Dodge on October 28, 1867, as aforesaid, to wit: that said Lugebil "is the true and only owner" of the Fideliter, was then and there untrue within the knowledge of said Kohl; and that said matter of fact was falsely affirmed by said Kohl for the purpose of obtaining the American registry aforesaid of said vessel, he, the said Kohl, then and there well knowing that said vessel was in fact a foreign vessel, and not entitled to obtain or use said certificate of registry.

VI. That the American certificate of registry, issued to the Fideliter, at Sitka, as aforesaid, was obtained by said Kohl by fraud as aforesaid, he, the said Kohl, then and there well knowing that said vessel was not entitled to the benefit thereof; and that said certificate was thenceforth and until the seizure of the Fideliter as aforesaid, fraudulently used for said vessel, they, the said Kohl and Lugebil and each

of them, then and there well knowing that said vessel was not entitled to the benefit thereof.

Upon these conclusions of fact there must be a decree condemning the Fideliter as forfeited to the United States, for the violation of section 4 of the act of December 31, 1792 (1 Stat. 289), concerning the registering of vessels; and section 24 of the act of July 18, 1866 (14 Stat. 184), to prevent smuggling, and for other purposes.

The first mentioned of these sections prescribes the oath or affirmation "to be taken and subscribed by the owner or one of the owners" of a vessel, in order to obtain the registry thereof, in which such owner is required to declare "his or her name and place of abode, and if he or she be the sole owner of such ship or vessel, that such is the case; or if there be another owner or other owners, that there is or are such other owner or owners, specifying his, her or their name or names and place or places of abode, and that he, she or they, as the case may be, so swearing or affirming, is or are citizens of the United States." This section also provides: "And in case any of the matters of fact in the said oath or affirmation alleged, which shall be within the knowledge of the party, so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which the same shall have been made." Section 24 of the act of 1866, above mentioned, provides: "That if any certificate of registry, enrollment or license, or other record or document granted in lieu thereof, to any vessel, shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel and furniture, shall be liable to forfeiture."

Having thus fully stated the pleadings and evidence in the case, I do not deem it necessary to make an extended argument in support of the conclusions of facts already deduced therefrom.

All the circumstances of the case point to one conclusion—that is, that from the sale of the Fideliter by Brown, Kohl has been and still is the sole owner of this vessel. During all this period wherever she may be, or whoever else pretends to own her, she is nevertheless in the actual custody and under the absolute control of this ever present and "irrevocable" agent—William Kohl and his captain—Melville C. Erskine. The alleged sales from Brown to Dutnell, and from the latter to Lugebil, have no visible effect upon the use or possession of the vessel or upon the relation of any of these parties to her. Dutnell, whoever he may be, is never seen or heard of, as exercising any acts of authority or ownership in the premises, except the equivocal and suspicious ones of signing the mortgage to Lovett in 1866, and the mortgage and power to Kohl in 1867. True, the British registry of June, 1866, asserts that Dutnell is owner, but the record is suspiciously silent as to who procured this registry, or upon whose representations it was granted. I have no doubt that Kohl procured the registry in the name of Dutnell, because being an American citizen, he could not obtain the registry in his own name. The mortgage to Lovett was undoubtedly given to secure the payment of an actual debt then due from Kohl to Lovett. In this mortgage, Kohl asserts that he or Dutnell, or both of them, are owners of the vessel—the latter being the registered owner—that is, named as the owner in the registry, but not so in fact. Now, if the vessel really belonged to Dutnell, no reason is shown or suggested for his mortgaging it to secure the payment of a debt of $16,500, due from Kohl to Lovett; nor can any reason, consistent with Dutnell's alleged ownership, be even surmised for Kohl's joining Dutnell in a mortgage of the latter's vessel for any purpose. As Kohl testifies, he and Dutnell were neither friends or associates, and at this time Dutnell does not appear, from the custom house records, to have had or claimed any authority over or interest in the vessel whatever.

The most plausible explanation of this matter is, that Kohl was all the while the real owner of the vessel, and that Dutnell's pretended ownership was a mere sham and blind for the purpose of obtaining a British register, at Victoria, and that as Dwyer testifies Kohl's ownership of the vessel was understood in that community. Accordingly Lovett took his mortgage from the real owner—Kohl, and the pretended owner, named in the registry—Dutnell. Again, it is unreasonable to suppose that Dutnell could have been the real owner of a piece of property of as much comparative importance and value, in Victoria, as the steamship Fideliter, and not be known or heard of there, by persons of ordinary opportunities for observation and acquaintance. Upon this point there is the direct testimony of Dwyer, that he had lived in Victoria since 1860, and was well acquainted with the business men of the place, but had never seen or heard of such a man there as John Dutnell. Then there is the fact, substantially admitted by Kohl in his testimony, that Dutnell never exercised any actual control over the vessel, but that from and after the sale by Brown, he, Kohl, was her agent and controlled her movements and employment.

Consider also, that if it were a fact that Brown sold this vessel to Dutnell, at Victoria, and that the transactions concerning her, which took place between the latter and Kohl, were had in good faith and upon sufficient considerations, why has not the claimant produced the testimony of Brown and Dutnell upon these points. Its non-production by the claimant leads to the conclusion —in the absence of any excuse therefor—

that if produced, it would but confirm the suspicions which the uncommon circumstances of the case necessarily excite. But it also appears from the papers in the case, that the government has procured letters rogatory to be issued, addressed to the proper court at Victoria, to obtain the testimony of Dutnell, and that when Dutnell was found and brought before the officer appointed to take his deposition, that an attorney representing Kohl appeared and obtained a postponement of the proceeding until the next day, at which time Dutnell promised to appear and give his testimony, but that upon the next day Dutnell was missing and kept himself concealed out of the reach of process, so that his testimony was not obtained. These facts appear in the papers upon which the libellant moved for a continuance at the last March term, namely, the affidavit of the collector, the letters of the American consul and the barrister at Victoria, employed by libellant in the matter of obtaining Dutnell's testimony. They leave no room for doubt, and I am confident of the fact that Kohl procured or hired Dutnell to keep concealed, out of the reach of process, so as to prevent his testimony being taken and read on the trial of this suit; and from these circumstances, the conclusion is irresistible that Kohl prevented the testimony of Dutnell from being taken, because he knew that it would not tend to prove the reality or good faith of the alleged ownership of the Fideliter by Dutnell, or his mortgage of the same to Kohl, but the contrary.

Kohl's testimony in this case, is marked by studied attempts at evasion, and by notable omissions and indefiniteness in regard to circumstances, concerning which he ought to be able, and it is his duty, to speak with certainty and particularity. For instance, supposing that it was true, that he had loaned money to Dutnell at various times, for which he afterwards took a mortgage on the Fideliter, how easy and natural it would have been for him to have given an intelligent and detailed account of the matter—to have given the circumstances of time, place and particular amounts. If a person of Kohl's apparent sagacity and intelligence had loaned a mere stranger—as he says Dutnell was—$28,000 in small sums and at various times in 1866–7, he would most probably be able now to refer to some contemporary writing or witness to refresh his memory of the matter or confirm the fact. But after being examined and cross-examined, he is only able or willing to say in a vague, indefinite way, that he once loaned Dutnell $12,000, and first and last, that he loaned him about $28,000, for which he afterwards took a mortgage on the Fideliter, but not until May 29, 1867, when he was on the eve of taking the vessel to Alaska to convert her, through the device of a sham Russian ownership, into an American bottom.

But suppose that Dutnell was the real owner of the vessel prior to June, 1867, this does not affect the conclusion that the alleged sale to Lugebil was a mere sham and pretence. This jugglery about the title and ownership of the vessel while she was registered in Dutnell's name, is shown by the testimony of the claimant, and commented upon now, not for the purpose of showing a forfeiture then and there to the United States, but to show the animus and crooked conduct of the principal actor and witness in this matter on behalf of the claimant, from the beginning, so as to judge more intelligently of the integrity of his conduct generally, and the credibility of his testimony in this case in particular. If Kohl, by means of sham sales and false writings, had successfully imposed upon the custom house officers at Victoria, and thereby obtained a British register for the Fideliter, when she was not entitled to it, there is good reason to infer that he was ready and willing, when opportunity offered, to practice a similar fraud upon the American government, for the purpose of obtaining an American register.

The treaty of purchase with Russia and the delay between the ratification and exchange of it, furnished the opportunity. The third article of this treaty provides: "The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

This provision might be understood by the public as giving the Russian inhabitants of Alaska, an immediate right to have an American register for his vessel, upon the ground that the treaty had made him an American citizen; and so it appears that the department of state construed it, and instructed the collector of customs to administer it. The treaty was concluded on March 30, 1867; and it was ratified on May 28 and exchanged on June 20, thereafter. As a matter of public notoriety it is safe to say, that it was well understood or confidently expected on the Pacific coast that the treaty would be ratified at least one month before it was. The telegraph gave us instant and constant information of the progress of the treaty in the senate, and its ratification was probably known here within twenty-four hours from the time it took place.

Under these circumstances, Kohl being an American citizen, and either the legal owner of the Fideliter or the mortgagee of the same, for quite if not her full value, and she being a British vessel sailing under a British register, and the commerce of the

coast being mainly carried on from and between American ports, it is not unreasonable to suppose that he would desire to convert her into an American bottom.

That Kohl did take the Fideliter to Alaska for the purpose of availing himself of this opportunity to convert her into an American vessel, and not for the simple purpose of disposing of her in good faith to Lugebil, or other Russian inhabitant of the country, is shown by his own admissions or statements, as testified to by both Dwyer and Barlow. In addition to this, the circumstances attending and surrounding the alleged sale to Lugebil, are sufficient of themselves to raise a presumption that the transaction was a mere sham, and really designed to facilitate the accomplishment of some ulterior purpose. For instance: Kohl arrives with the Fideliter in a strange port, without commerce, and immediately sells the vessel to a Russian subject and a stranger, without any apparent means or property, for $30,000, and at the same moment takes from the purchaser, Lugebil, an "irrevocable" power of attorney, authorizing him to sell the vessel at Sitka, or elsewhere, in behalf of Kohl or Lugebil, for not less than $28,000. No visible change is made in the actual possession of the vessel. Kohl's convenient captain—Melville Erskine, still retains command. After lying idle in port three or four weeks, and the United States agents not arriving to receive the possession of the country, including the Fideliter in her new role of a Russian ship, as Kohl had expected, Kohl returns with the Fideliter to this port via Victoria. All this time, and for that matter ever since, "the Russian subject and honorable (?) citizen, J. Lugebil," as Prince de Maksatoff graciously styles him in his passport to the Fideliter, is apparently as unconcerned about the vessel as if he had never seen or heard of her. When she is seized on account of the sequel of this transaction, he does not even appear in this court to claim her as his property. True, this "irrevocable" agent makes such claim for him. But if Lugebil really owned this vessel, it is but reasonable to assume that self interest, at least, would have induced him to come before this court and testify as to the facts and circumstances which would establish such ownership; but, instead of doing this, he manages to keep out of sight and knowledge of the district attorney and collector, so that the government, although it has sent its commissions to Alaska and San Francisco, has been unable to find him or obtain his testimony.

One phase of Kohl's story is, that he negotiated this sale to Lugebil at Victoria, in December, 1866, with Captain Bock, of the steamer Alexander, and that the agreement between them was then reduced to writing, but what he did with this writing, or where it is, he cannot now say—indeed, he is not certain but that he destroyed it. Now, this negotiation is a material circumstance for the claimant, as tending to show that the alleged sale to Lugebil, in June, 1867, was not a fraudulent device, whereby to make the Fideliter an American bottom, because it took place before the treaty was negotiated, and so far as known, before it was contemplated. If this story be true, why is not the testimony of Captain Bock produced to confirm it? Kohl testifies that he saw him at Sitka in 1868, since this suit was commenced. Besides, he might be able to give valuable information concerning the whereabouts and character of the writing said to have been entered into between himself and Kohl, in December, 1866, and about which Kohl's memory is now so singularly and conveniently at fault. The legal and reasonable inference from this suppression of evidence or withholding Lugebil's testimony is, that while Lugebil consented to be known on paper as the purchaser and owner of the Fideliter, so as to assist Kohl in fraudulently obtaining an American register for a British vessel, yet, that he was not willing to go so far as to commit the crime of perjury in support of such scheme.

Again, if Lugebil was the "true and only owner" of the Fideliter, he and not Kohl should have taken and subscribed the owner's oath, upon which the American certificate of registry was issued to her at Alaska, on October 28, 1867. For obvious reasons, the act of 1792 requires this oath to be taken by the owner. No excuse, however insufficient in law, is shown or pretended for his not taking it. He was in the port when and where the certificate was granted, and probably in the very building where the transaction took place. But Kohl took and subscribed this oath, affirming therein that Lugebil was the "true and only owner"—and the only reason why Lugebil did not take it, was, that he was not willing to serve Kohl so far as to commit perjury for him.

And here I may remark, that the collector before whom this proceeding took place has attempted, since this suit was commenced, to excuse and palliate his very singular and suspicious conduct in granting this certificate of registry to the Fideliter, upon the oath of a person who therein affirmed that at the time another was "the true and only owner" of the vessel, when the statute under which he was acting, required that said oath should be taken by the owner. This excuse is found in a volunteer, extra-official, ex post facto statement endorsed by the collector upon the power of attorney from Lugebil to Kohl, and dated "Custom House, Sitka, July 23, 1868;" in which, among other things, said collector states that he "allowed William Kohl, as agent aforesaid, to make the affidavit of ownership, the said Lugebil being at that time confined to his house, and issued to him the register (No. 1)." This statement, not being an official certificate or under oath, was not admitted to be read in evidence in

the case, and if it had been would in no way or degree tend to prove that Kohl's oath as to the ownership of the vessel was true.

On the other hand, the very insufficiency of the reason given by the collector for Lugebil's not taking the owner's oath, raises the presumption, that the real reason if disclosed, would militate against the party withholding it. Admit, for the sake of the argument, that Lugebil was confined to his house on October 28—admit this statement to be true in every sense, and to the greatest extent that can be attributed to it, and still nothing is shown by it or can be inferred from it, but that Lugebil, notwithstanding such confinement, could take and subscribe an oath that he was the true and only owner of the Fideliter—if such was the fact.

Many other circumstances point to the conclusion that the alleged sale to Lugebil was a mere make believe for the purpose of obtaining an American register for the Fideliter. When a lawful and actual transaction takes place between intelligent parties, they are generally able to tell the same story twice about a simple and important fact of the matter. But the evidence of the claimant as to the consideration alleged to have been paid by Lugebil is full of discrepancies and contradictions. In the bill of sale signed by Kohl it is declared that the sum—$30,000, was paid down by Lugebil. After the seizure Kohl told the then acting district attorney, Ex-Governor Gibbs, that the money was all paid down, but of course he did not say where it came from—which expression, under the circumstances, was evidently intended by Kohl to be understood as a suggestion that Lugebil, in making the purchase, was acting for other parties, who furnished him the money. Upon his examination in court as a witness, on the trial of the cause, being pressed to explain why, if he had sold the vessel to Lugebil and got the money for her, he retained the possession and took back from the purchaser an "irrevocable" power of attorney to manage and sell the vessel as though it was his own, Kohl answered that Lugebil did not pay him for the vessel—and then upon second thought, qualified that statement by adding that Lugebil did not pay him all the money for the vessel.

Upon its face, Lugebil's power of attorney, authorizing Kohl to manage and sell the vessel, not being given in connection with a mortgage or other security for debt, can only be accounted for on the theory that the vessel was still in fact the property of Kohl and was to remain in his possession unaffected by the pretended sale to Lugebil. In all probability, this power was the paper that Kohl put into the hands of Dwyer when he left Sitka with the vessel on the evening of July 4, telling Dwyer at the same time that he was not certain of Lugebil's honesty, and this paper would show that "he had no call or authority to sell the steamer." Very naturally, having found Lugebil willing to aid him in his design to impose upon the United States government, in obtaining an American register for a British vessel under the pretense of its being a Russian-American one, Kohl was not quite certain that Lugebil would do to trust out of sight; so he took this power of attorney from him, which in effect amounted to a re-sale to himself, and left it with Dwyer, to be exhibited in case his Russian confederate should attempt "to act the rogue in the matter" during his absence.

On the whole, it seems that there cannot be a reasonable doubt, but that Kohl's affirmation was knowingly false, when it asserted that Lugebil was the true and only owner of the Fideliter; and that the register granted upon such affirmation was knowingly and fraudulently obtained and used for said vessel. The Neptune, 3 Wheat. [16 U. S.] 609. This being so, the vessel is forfeited under both sections of the statute already quoted. But even a prima facie case is sufficient to cast the burthen of proof upon the claimant, and if he do not overcome or explain it, there must be a decree of condemnation. The Luminary, 8 Wheat [21 U. S.] 411.

On the trial, counsel for claimant maintained this proposition,—admitting that sham sales or fraudulent acts had taken place or been committed in respect to this vessel, as they took place without the jurisdiction of the United States, if at all, and within the jurisdiction of the British and Russian governments respectively, they can not be inquired into here; or in other words that this government did not assume to punish frauds upon the navigation or shipping laws of other countries. The proposition considered with reference to the question before the court is fallacious, and the answer to it is simple and satisfactory.

The forfeiture of the Fideliter is not claimed in this suit because of the frauds committed in respect to her upon the British and Russian navigation laws, but because of the further and additional fraud, namely—the false affirmation of Kohl, by means of which an American registry was obtained for the Fideliter in fraud and violation of the treaty and laws of the United States. I admit that this answer assumes, that the sale by Kohl to Lugebil, being in fact a sham or fictitious sale, without possession, although made within Russian jurisdiction, conveyed no interest in the vessel to Lugebil. Certainly such a transaction cannot transfer title to property in any civilized country. It is no sale—a mere nullity. This court, then, instead of being engaged in an attempt to punish frauds upon the laws of other countries, is simply endeavoring to ascertain whether the affirmation of Kohl, an American citizen, made on American soil and under American laws, was false or not, in the particular alleged. In so doing, it becomes necessary to inquire whether one Lugebil, a Russian subject, was on that day

the true and only owner of the Fideliter, as stated in such affirmation. This is a question of fact, and the scope of the inquiry is not limited by either the political or geographical divisions of the globe, but extends to all pertinent and material acts and circumstances, without reference to the place or jurisdiction in which they transpired or arose. If the law of the place gave a certain legal effect to these facts, the same effect would be given to them here, so far at least as the comity of nations requires one country to enforce and recognize the municipal laws of another. But who will pretend that the law of Russian America or British Columbia gave any legal effect or consequence whatever, to a sham sale of a vessel without consideration or possession. Such a transaction is a mere nullity, always and everywhere. But if the laws of these countries did give any effect to such a sale, they would not in this respect be enforced or recognized in this court, when it appears, as in this case, that it was made for the express and only purpose of enabling one of the parties thereto, to perpetrate a fraud upon the navigation laws of the United States.

These conclusions are fully sustained by the case of The Acme [Case No. 27], lately decided by Mr. Justice Benedict. The facts are stated by the court as follows:

"The bark Acme appears to have been built in Baltimore in 1855. At some time thereafter she was transferred, whether nominally or not does not appear—to one John Patterson, described as 'of Inverness, Scotland, but now residing in the city of Brooklyn, State of New York.' In January, 1866, she by purchase became the property of persons residing and doing business in New York, who were not British subjects, and who, in the absence of other proof must be presumed to be American citizens. These persons, in order to avoid the navigation laws, and to retain for the vessel the British flag, to which as the property of American citizens, she was no longer legally entitled, caused the title of the vessel to be placed in the name of one Henry James Creighton, described as 'of Halifax, Nova Scotia, but now residing in the city of New York,' and who had, in fact, no interest in the vessel nor any possession thereof; and thereafter, although in reality owned and possessed by American citizens, controlled by them alone, and used for their sole benefit, the vessel, up to her seizure by the marshal, sailed under false colors, with a fraudulent nationality. While so sailing, the present respondent (Millington) agreed with the real American owners of the vessel, to loan them the sum of $12,000, upon the security of their personal obligation, and a mortgage on the vessel, to be executed by the fictitious owner, and accordingly, in accordance with the forms of the British laws, Creighton, then without interest or possession in the vessel, executed a mortgage upon her to secure the amount so loaned by Millington, which mortgage was received by Millington with the knowledge that the mortgagor did not own the vessel, but simply held the title for the purpose of giving her a false nationality. Under this mortgage Millington, never having taken any possession of the vessel, now claims the proceeds of her sale, as against Herrara," who had a lien for advances made to her.

The court rejected the claims of Millington, because the alleged title of his mortgagor, Creighton, was a fictitious one and a sham. In the course of the opinion, Mr. Justice Benedict says:

"The transaction here disclosed, as it regards the title and character of this vessel, was a clear fraud upon the navigation laws of the nation whose flag was thus assumed. By the law of England, the use of the British flag and national character upon vessels owned by other than British subjects is unlawful, and subjects the vessel to forfeiture. Were this case, then, before the English admiralty, the claim of the mortgagee would be rejected as founded upon a sham title, created in violation of law; and the question is presented whether it is not the duty of this court to apply the same rule."

The opinion of the learned judge proceeds to show, that "courts of admiralty are in some sense international courts, charged with the duty of declaring the law applicable to ships, and in force upon the sea. * * * The nature of the transaction in question, and the effect which such transactions, if upheld, must have upon the mode of use of that most peculiar species of property, the ships, seems to require, in a court of admiralty, in a case like this, to accord effect to the laws of England, in contravention of which the title to this vessel was held. * * * Furthermore, the United States have an interest in enforcing this law as well as England, for it is of importance to all maritime powers, that the national character borne by a ship should be her true character. * * * I am of the opinion that it is the duty of this court upon principles of comity in this case, to apply the rule which would be applied in the English admiralty, and refuse to recognize a claim to the fund, based upon a sham title, created in fraud of the navigation laws of England, for the purpose of giving to this ship a false nationality."

It was also insisted by counsel for claimant that the Russian passport granted to the Fideliter, by Maksatoff, was conclusive evidence in favor of Lugebil's ownership. This paper was admitted in evidence, not to show the ownership of the vessel, but her nationality. In the consideration of the case, I have not regarded it as material to the inquiry before the court, except, perhaps, to show that the official who granted it, was not very scrupulous as to what vessels he gave

a Russian character, for the purpose of enabling them to acquire the American nationality under the treaty of purchase, which was about to terminate his rule and interest in the country. Under the same circumstances, Maksatoff would probably have given to Lugebil or Kohl a Russian passport for the British navy. The claim of ownership contained in this passport, is simply a recital by Maksatoff of what Lugebil or Kohl told him when the paper was applied for. No higher character can be claimed for this paper than that of a register. Now a register in favor of the party claiming to be owner, is no evidence of ownership at all, being nothing more than his own declaration. 1 Greenl. Ev. § 494.

A decree will be entered condemning the vessel as forfeited to the United States for the reasons and causes in the libel propounded and alleged, and because the vessel has been delivered to the claimant upon the bond of himself and sureties, a further decree will be entered, that the libellant recover off the parties in said bond the sum of $30,000, that being the stipulated value of said vessel, and that if such sum is not paid to the clerk of this court, within ten days from the date thereof, that the libellant have execution therefor.

NOTE. Reversed and libel dismissed on appeal to the circuit court [Case No. 4,755] because it did not appear from the libel that there had been a seizure of the vessel before the commencement of the suit: May 6, 1870, Sawyer, J., citing The Ann, 9 Cranch [13 U. S.] 289; The Silver Spring [Case No. 12,858]; The Octavia [Id. 10,422]; The Josefa Segunda, 10 Wheat. [23 U. S.] 312; Keene v. U. S., 5 Cranch [9 U. S.] 305; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 318; Adm. Rule 22.

[NOTE. Upon the dismissal of the libel in the circuit court, another libel was filed alleging a seizure of the vessel, and a decree of forfeiture was entered. Case No. 15,088.]

FIDELITER, The, v. UNITED STATES. See Cases Nos. 4,755 and 4,756.

FIDELITER, The (UNITED STATES v.). See Case No. 15,088.

Case No. 4,757.

The FIDELITY.

[9 Ben. 333.] [1]

District Court, S. D. New York. Feb. 1878.[2]

SEIZURE OF MUNICIPAL PROPERTY—NOTICE UNDER STATE LAW.

1. A steam-tug owned by a municipal corporation, and employed exclusively in the service of a department of such corporation, in performing the public duties of the government of the municipality, is not liable to seizure in a suit in rem, in admiralty, for a maritime tort.

2. The act of the legislature of New York, passed April 30, 1873 (Laws N. Y. 1873, p. 513, § 105), requiring thirty days' notice of a claim to be given to the comptroller of the city of New York before suit is brought against the city corporation on the claim, and ten days' notice to be given to him, after judgment, before an execution can issue, is inconsistent with a seizure before judgment, of such steam-tug. [Cited in Long v. The Tampico, 16 Fed. 497.]

In admiralty.

E. D. McCarthy, for libellant.

T. B. Clarkson, for claimants.

BLATCHFORD, District Judge. The libellant, as owner of a canal-boat, brings a libel in rem against the steam-tug Fidelity, to recover damages for the sinking of the canal-boat through the alleged negligence and wrong of the tug. The substance of the libel is, that, while the canal-boat was lying at a wharf at Blackwell's Island, some outside person cast off her lines against the will of the person on board and in charge of her, and pushed her away from the wharf, and that thereupon the tug, acting under the direction of the same persons, and without the request of the person in charge of the canal-boat, made fast with a line to the canal-boat, and proceeded to pull her out into the river so carelessly and recklessly that her stern was thrown against a wall and some submerged rocks, the existence and position of which were known to those in charge of the tug, and that, in consequence, the stern planking of the canal-boat was torn off, and she became a wreck and sank with her cargo, to the damage of the libellant $1,500.

The mayor, aldermen, and commonalty of the city of New York, a municipal corporation charged with the government of the city of New York, were the owners of the tug at the time of the occurrence, and intervened and put in a claim to her, on her arrest under process, and have answered the libel through the master of the tug. It appears that the tug was in the employment of, and under the exclusive control and direction of, a board or department of the corporation, called the commissioners of public charities and correction, and was employed by them in transporting prisoners and in carrying sick persons and the bodies of the dead, and in towing boats with supplies for the department—all these services being in the course of the discharge by the commissioners of their proper public duties; and that she was not engaged in any other business. The canal-boat had on board at the time a cargo of coal, intended for the use of the commissioners, and was lying at the wharf waiting to have such cargo discharged, and was cast loose by direction of a proper subordinate of the commissioners, in order to enable a schooner with a cargo of ice to take her place and unload, and that the tug took hold of the canal-boat in order to put her outside of the schooner.

On these facts it is contended for the

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

[2] [Affirmed in Case No. 4,758.]

claimants that the tug is not liable to seizure in a suit in rem, in the admiralty, to respond for this alleged maritime tort. In the case of The Seneca [Case No. 12,668], it was sought to enforce a lien for wharfage, by a suit in rem, in the admiralty, against a steamboat belonging to the corporation of the city of New York, and exclusively employed in the service of the police department of the city. The court held, that, as the vessel was public property, devoted to a specific and public use, she was not subject to be seized in the admiralty, to enforce the demand claimed. The decision was placed on the ground that such property is exempt from seizure on execution. I do not think that the fact that the claim for wharfage arose out of an implied contract, and that the present case is one of tort, makes any difference. The tug was, by an authorized act of the city government, devoted to public use. She was public property, and the public use to which she was devoted was a specific use. Such property, belonging to any governmental body, federal, state, or municipal, cannot be seized to satisfy an execution on a judgment. Darlington v. Mayor, etc., 31 N. Y. 193. Nor can it be seized by process in advance, to be held as security for a judgment which may be recovered. Such action has the effect of interfering with the public officers in the discharge of their public duties, by depriving them of necessary instruments for the discharge of those duties. The tort alleged in this case is the negligence of those in charge of the tug, who were the servants of the commissioners. The principle on which the tug would ordinarily be liable for the tort is, that her owners have entrusted their servants with the tug, and thus made themselves responsible for what such servants may negligently do in the course of their employment. But the act of using the tug to pull away the canal-boat was no different, in its scope and quality, from the act of using the wharf for wharfage. No distinction can be taken between the two, which would uphold the seizure in the case of the tort and forbid it in the case of the implied contract for wharfage. The question is one of public policy, and the principle involved is, that to permit a seizure of the tug in this case would endanger the performance of the public duties of the government of the municipality. A lien may exist, and the court, where it has control of the res in a proper manner, may enforce the lien upon it; but it will not enforce the lien upon the res, where, in order to obtain such control and sustain the proceeding, the possession of the governmental authority must be invaded under the process of the court. The latter is the present case. Briggs v. Light Boat, 11 Allen, 157; The Davis, 10 Wall. [77 U. S.] 15. In City of Chicago v. Hasley, 25 Ill. 595, it was held, on principle, that an execution could not issue against a municipal corporation, on a judgment for a debt or damages recovered against it.

This suit is not one in form against the municipality, but it is in substance. The statute law is in harmony with the rule of public policy before referred to. It is provided as follows, by the state statute of April 30, 1873 (Laws N. Y. 1873, p. 513, § 105): "No action shall be maintained against the mayor, aldermen, and commonalty of the city of New York, unless the claim on which the action is brought has been presented to the comptroller, and he has neglected for thirty days after such presentment to pay the same. Before any execution shall be issued on any judgment recovered upon such a claim, a notice of the recovery thereof shall also be given to the comptroller, and he shall be allowed ten days to provide for its payment by the issue of revenue bonds in the usual manner according to law." The general rule of public policy being as stated above, there is nothing in any statute of the state or of the United States which varies such rule for the purposes of the present case. On the contrary, the statute above cited is inconsistent with a seizure before judgment, of the property seized in this case.

I have not considered the merits of this case, as to whether there was, in fact, negligence on the part of those in charge of the tug, or even as to whether the canal boat was injured while attached to the tug; but, for the reasons above assigned, the libel must be dismissed, with costs.

[NOTE. The libellant appealed to the circuit court, where the decree of the district court was affirmed. Case No. 4,758.]

Case No. 4,758.

The FIDELITY.

[16 Blatchf. 569.][1]

Circuit Court, S. D. New York. Aug. 5, 1879.[2]

SEIZURE OF VESSEL BELONGING TO MUNICIPAL CORPORATION—MARINE TORT—EFFECT OF STIPULATION FOR RELEASE.

1. A steam-tug, the property of a municipal corporation invested with certain powers of local government in a city, and used exclusively by an executive department of such municipal government, as an instrument for performing duties imposed on it by law, is not liable to seizure in a suit in rem against such steam-tug, in admiralty, in the district court, brought to recover damages for an act of the tug, while actually engaged in public service under the orders of such department.

[Cited in The Monte A, 12 Fed. 333; Long v. The Tampico, 16 Fed. 494; The F. C. Latrobe, 28 Fed. 378; The Oyster Police Steamers of Maryland, 31 Fed. 768.]

2. A stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug.

[Cited in Long v. The Tampico, 16 Fed. 497; The Hungaria, 41 Fed. 112; The Berkeley, 58 Fed. 921.]

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

[2] [Affirming Case No. 4,757.]

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

This was a libel in rem, filed in the district court, in admiralty. That court dismissed the libel [Case No. 4,757] and the libellant appealed to this court. This court found the following facts: "The steam-tug Fidelity, at the time of the occurrences complained of, and at the time of the commencement of this suit, was the property of the mayor, aldermen and commonalty of the city of New York, a municipal corporation of the state of New York, invested with certain powers of local government within the limits of its jurisdiction. She was used exclusively by the department of public charities and correction, one of the executive departments of the municipal government, and was one of the instruments by means of which that department was enabled to perform the duties imposed on it by law. It was public property, devoted to a specific public use in connection with the daily operations of the government. The injuries complained of occurred, and the attachment under the process issued in this action was made, within the jurisdiction of the municipality, and while the tug was actually engaged in public service under the orders of the department to which she belonged. The canal-boat Herbert Phillips, owned by the libellant, was employed by the same department of charities and correction to transport a cargo of coal from Hoboken, N. J., to Blackwell's Island. After her arrival at the Island she was taken by the Fidelity, under orders from the department authorities, and placed alongside of what is known as the penitentiary dock, and there made fast. On the morning of the 8th of April, 1876, the department officials, being desirous of unloading at that dock a schooner having ice on board for the use of the institutions under their charge on the island, requested those on board the canal-boat to move her forward out of the way, so as to let the schooner take her place. This not being done, some of the penitentiary convicts, then on the dock, were directed, by the same officials, to let go her lines and move her away. This they did, and, in obedience to orders, placed her alongside an old barge lying against the sea-wall above the dock, but her bow extended a considerable distance beyond the barge, and was headed somewhat out in the stream. All this was done against the remonstrance of those on board the canal-boat. Very soon afterwards, the Fidelity came alongside, and, passing the canal-boat a line, commenced to pull her bow around. In doing so, she was driven against some obstruction in the river, by which a hole was broken into her and she sank. The object of the Fidelity was to remove her to a place of greater safety. The obstruction which caused the injury was not known to or observed by the Fidelity until after the accident."

Edward D. McCarthy, for libellant.

William C. Whitney, for claimant.

WAITE, Circuit Justice. It is well settled, that public property, devoted to public uses, and necessary for carrying on the operations of the government, is not subject to seizure and sale on execution. The supreme court of the United States had occasion to consider that question at its last term, in Klein v. New Orleans, 99 U. S. 149. It was there said, that "municipal corporations are the local agents of the government enacting them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers, become a part of the machinery of government, and, to permit a creditor to seize and sell them to collect his debt, would be to permit him, in some degree, to destroy the government itself." "The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality." The same rule prevails in New York, and is laid down broadly and explicity in Darlington v. Mayor, etc., 31 N. Y. 164, 192, and Leonard v. City of Brooklyn, 71 N. Y. 498, 500. It would seem to be clear, that, if the instruments of government cannot be seized to pay a debt after judgment, they cannot before.

It is said, however, that the maritime law gave the libellant a lien on the tug for his damages, and that, whenever there is a maritime lien, an action in rem lies, in admiralty, for its enforcement. It seems to me that the same principle which forbids the seizure to pay a debt, forbids the lien, which can only be enforced by a seizure. Analogous questions have arisen in New York under the mechanics' lien laws, and in the very well considered case of Brinckerhoff v. Board of Education, 2 Daly, 443, the court of common pleas held that such a lien could not be acquired, on the express ground that public property devoted to public uses was exempt by public necessity from seizure and sale under execution. This case, it is said, was affirmed by the court of appeals, under the name of Poillon v. Mayor, etc., 47 N. Y. 666. In Leonard v. City of Brooklyn, 71 N. Y. 498, 501, where a similar question arose, it was said: "If judgments in other actions cannot be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly, a judgment obtained under the lien law * * * should stand in no better position." For the reason, therefore, that the plaintiff's demand could not be "enforced as a mechanic's lien upon property held for public use by the corporate authorities of the city of Brooklyn," a demurrer to his complaint asking a foreclosure of such a lien, was sustained.

While the libellant concedes that the public vessels of the United States cannot be sued in rem, he insists that the exemption arises solely from the fact that the government itself cannot be sued, and then argues, that, because the municipality of New York may be sued in the common law courts, the

instrumentalities of its government, coming within the admiralty jurisdiction, may be proceeded against according to the usages and practice of an admiralty court. As has already been seen, the public property of a municipal corporation cannot be seized on an execution, although the corporation may be sued to obtain a judgment on which an execution can issue. The simple right to sue, therefore, does not carry with it the right to seize all property. It follows, necessarily, that the exemption from seizure is not always the same thing as an exemption from suit.

A careful examination of the cases satisfies me that the exemption of public vessels from suits in admiralty arises not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel. A public vessel is part of the sovereignty to which she belongs, and her liability is merged in that of the sovereign. Under such circumstances, redress must be sought from the sovereign, and not from the instruments he uses in the exercise of his legitimate functions. Public creditors look to the public faith for their security, and not to the public property. But, it is insisted, that, during the public ownership, the maritime liability of the vessel may be incurred, although the remedy in admiralty is suspended. If this be so, then seamen employed on vessels of war, if their wages are not paid and their vessel is sold to private owners, to be employed in the ordinary business of commerce, may libel the vessel in the hands of her private owners, to secure their money. A simple statement of such a proposition is all that is required to show its fallacy. The real truth is, that, in such cases, the maritime law passes by the thing and places the liability on the sovereign owner alone, and not upon the maritime instrumentalities of his sovereignty. The cases of The Davis, 10 Wall. [77 U. S.] 15. and The Siren, 7 Wall. [74 U. S.] 152, are not at all in conflict with this. In the case of The Davis, the property was cotton shipped by the treasury agent of the United States, from Savannah, to the cotton agent in New York, and does not appear to have been in any manner devoted to the public use or connected with the operations of the government. In fact, it appears to have been property collected under the abandoned and captured property act, and shipped to New York for sale, so that the proceeds might go into the treasury, in accordance with the requirements of that act. The Siren was a case of prize, and the question was, whether damages caused by a collision, for which she was in fault, while on her way into port for adjudication, should be paid out of the proceeds of her sale on condemnation. No question of public use was involved. There was nothing to take it out of the general rules of maritime law, except its public ownership, and that, all will concede, is not enough. Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the government. There may be some expressions of the learned justices who wrote the opinions in these cases, which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but that question was not up for determination, and it is proper, therefore, to confine the actual decision to the cases as they stand.

In England, since the time of Edward I., it has been the practice to give the subject a suit against the crown, in the form of a "petition of right," which, being addressed to the sovereign in person, sets forth the grievance and asks redress. This the sovereign grants by directing "his judges to do justice to the party aggrieved." Thereupon, a judicial investigation of the matter is had, precisely the same as in suits between subject and subject. U. S. v. O'Keefe, 11 Wall. [78 U. S.] 178, 183. In admiralty, the lords commissioners of the admiralty represent the crown, and, in cases coming within the admiralty jurisdiction, they direct the admiralty proctor to appear and answer a suit to be commenced in the admiralty court. This is equivalent to a waiver by the crown of its privileges as sovereign, and to a consent that the rights of the parties be tried and determined in a suit as between subject and subject. In such cases, process never issues against the vessel, or, if it does, the vessel is not seized, but, when the necessary consent to the suit is given, the crown appears, and the trial is had. In the case of The Athol, 1 W. Rob. Adm. 374, the suit was not, in form even, in rem, but in personam. An application was made for a monition against the lords commissioners, "calling upon them to show cause why damage should not be pronounced for, and compensation awarded to owners of the ship and cargo, and to the master and crew, for the loss of their effects," in a case of collision with a troopship belonging to the crown and at the time engaged in public service. The process was at first refused, on the ground that it could not be enforced if the lords of the admiralty declined to appear, and also on the ground, that, if it should be found that damages had been occasioned by the fault of the Athol, payment could not be enforced. Subsequently, the lords of the admiralty came in voluntarily, and the case was heard and decided. The cases of The Swallow, 1 Swab. 30, and The Inflexible, Id. 32, were, in form, against the commanders of the vessels. By its appearance in this form of proceeding, the crown places itself on an equality with a subject, for the purposes of the controversy in hand, waiving all its privileges of sovereignty. The Lord Hobart, 2 Dod. 100, and

The Marquis of Huntly, 3 Hagg. Adm. 246, were, in form, suits in rem, but there was no seizure and no bail. This was only another way of bringing the crown into court. The form was unimportant. What was wanted was the voluntary appearance of the crown in court, and a waiver of its sovereign exemptions. For that purpose a suit, such as could be entertained by an admiralty court, was required, and, when the submission of the crown was obtained, the facts were adjudicated as between subject and subject. The suits were modes of proceeding resorted to with the consent of the crown, for the purpose of determining the question whether the crown should make good the loss. For that purpose the crown voluntarily laid aside its sovereignty and consented to be treated, in all that related to the inquiry, as a subject.

This, I think, is all that can be claimed from the English cases. The policy of that government is to submit itself to the jurisdiction of its own courts, on applications for a redress of grievances; and a suit in admiralty is a proper form of proceeding, in cases of maritime loss. For that reason the practice prevails of submitting all such grievances to the determination of that court. This is far from deciding that public ships can be subjected to maritime liens, without the express consent of the government to which they belong. That is the question which is now under consideration, and I do not understand that The Siren and The Davis, supra, go further than to decide that the property of the government, not devoted to the public use, is subject to such liens.

It seems to me, therefore, that, upon the main question, the case is with the claimant, and that the libel must be dismissed. The stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug. The stipulation takes the place of the vessel, and, for all the purposes of the trial, the case goes on as if the vessel were itself in court.

A decree may be prepared dismissing the libel, with costs in both courts.

FIDELITY INS., ETC., CO. (FARQUAHAR v.). See Case No. 4,676.

Case No. 4,759.

FIEDLER et al. v. CARPENTER et al.

[2 Woodb. & M. 211.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

PLEADING AT LAW—AMENDMENT OF DECLARATION — WRIT OF ENTRY TO FORECLOSE MORTGAGE — PLEA OF NON TENURE.

1. An amendment may be allowed of a declaration after a special plea, replication and demurrer, provided the cause of action remains the same, and costs are paid, arising from the demurrer.

2. A declaration is not good in a writ of entry to foreclose a mortgage, unless counting on a mortgage, and using words to show that a foreclosure is desired rather than possession to take the profits.

3. When amended in proper form, non tenure is a bad plea to such a declaration, whether put in by the mortgagor or any other person in possession, who is sued.

[Cited in Macy v. De Wolf, Case No. 8,933.]

4. To most real actions, non tenure is in Massachusetts a good plea either in bar or abatement; though in some states and in England it is good only in abatement.

This was a writ of entry for a tract of land, situated in Attleborough, counting on the seizin of the demandants [Ernest Fiedler and others] within twenty years, and a disseizin by the tenants. The latter [Ansel Carpenter and others] pleaded in bar, that a portion of the premises belonged to one Joseph Wilkinson, and they held it under him as tenants at will only, and as to the residue, that he had a mortgage thereof, under which, since this suit was instituted, he had entered and dispossessed them. The demandants replied, that the tenants and one Royal Sibly, long before the date of this suit, conveyed the demanded premises to them in mortgage, to hold the same in fee and mortgage by the defendants, and has since disseized them thereof. To this the tenants demurred. The demandants afterwards moved for leave to amend their declaration by inserting, in the appropriate places, that they were seized of the premises in mortgage as well as in fee. The case was submitted without argument for the tenants, but on the part of the demandants several cases were cited in writing in support of judgment in his favor, as if on a mortgage, for the balance alleged to be due.

Mr. Farnsworth, for demandants.

T. Coffin, for tenants.

WOODBURY, Circuit Justice. The first question in this case relates to the propriety of the amendment, asked for by the demandants. There can be no doubt, that the suit in point of fact was brought for the purpose of foreclosing a mortgage from the tenants to the demandants, though one is not referred to in the declaration. An amendment is usually permissible when the cause of action is the same, and the evidence to be offered is the same. Perley v. Brown, 12 N. H. 493. The tenants do not in their plea deny the seizin of the demandant, nor set up any title in themselves to any freehold in the premises. And when the demandants, in their replication, describe their seizin to be by means of a mortgage from the tenants to them, the demurrer to this replication admits the truth of that allegation. If an amendment, then, is granted, so as to introduce this admitted fact in the declaration,

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

the real cause of action will not be changed thereby, and the recovery will be for less than it might be on the original declaration. That is, it would be then only as in mortgage or conditional, whereas now, it would be absolute if at all for the demandants. But as the demandants might now not be entitled to judgment at all against the tenants, if claiming a fee against them not in mortgage; and they pleading non tenure, or that they hold less than a freehold estate, the amendment may be very important in respect to costs in this action, and may save the expense of a new suit to foreclose the mortgage. I shall, therefore, allow it, but the application for it being so late, after plea pleaded in bar, and the change caused by it having so important an influence, it must be on terms. The 10th rule of this court requires special terms, if an amendment be not asked till an issue is joined. Those terms would be all the costs to the tenants, and none to the demandants till the motion was made, if the tenants had any equities in their defence, or could have been at all misled as to the wishes of the demandants originally to do nothing except foreclose their mortgage. As the circumstances stand, however, though not probably misled, yet the tenants have been obliged to plead specially before the leave to amend was asked, and the amendment is an important one. They are, therefore, to have their own costs up to the time of the amendment asked, but nothing since.

The next question is, supposing the amendment made, can the demandant, after the plea of non tenure in bar, have judgment to foreclose his mortgage against the tenants? This question seems fully settled in this state by several adjudged cases, mostly referred to by the counsel for the demandant. It is well established, that after such a plea as this in abatement, to such a writ as this was originally, the action cannot proceed, as a fee cannot be demanded of, or a seizin restored by, a tenant unless claiming at least a freehold estate. Brown v. Miltimore, 2 N. H. 442; Stearns, Real Act. 207. It seems also to have been held in Massachusetts, that non tenure may, as done here, be pleaded in bar as well as in abatement. Fales v. Gibbs [Case No. 4,621]; Jackson, Real Act. 91, 92; 3 Mass. 312; 10 Mass. 64; 11 Mass. 216. But the supreme court of the United States have in one case considered the matter properly pleaded in abatement only. [Green v. Liter] 8 Cranch [12 U. S.] 229. And the practice accords with that in New Hampshire and in England. 2 N. H. 10, 442; Booth, Real Act. 28; Rast. Ent. 225. And, perhaps, the allowance of it in bar is justifiable only in states and courts where pleas in abatement must be filed early in the term. As this court must, in the practice in this respect, comply with what existed here in 1789 [Wayman v. Southard] 10 Wheat. [23 U. S.] 1; [Bank of U. S. v. Halstead] Id. 51,—and for aught which appears, it was the same then as now, this plea would be valid against the original form of the action. But as it is, after amended, so as to be an action by a mortgagee against the mortgagor, to foreclose the mortgage, it seems fully settled in this state, that non tenure, however pleaded, is no defence to an action appearing in the declaration to be for that purpose. Penniman v. Hollis, 13 Mass. 429, 430; Walcutt v. Spencer, 14 Mass. 412; 15 Mass. 268. If it was, a mortgage could seldom be foreclosed by a suit, as the mortgagor usually remains in possession, and as a mortgagor, he is at law never tenant of the freehold, but commonly a mere tenant at will, and being only such a tenant quodam modo. 1 Pow. Mortg. 136, 137; 1 N. H. 169; Doug. 22, 282; Cholmondeley v. Clinton, 2 Jac. & W. 183; President, etc., of Waltham Bank v. Inhabitants of Waltham [10 Metc. (Mass.) 334]. The action to foreclose may, therefore, be against any person in possession. Hunt v. Hunt, 17 Pick. 121; Shelton v. Atkins, 22 Pick. 74. And it is not brought so much to recover seizin as to collect the debt due, and the demandant is not to be put in possession, if the debt is paid within the time allowed by law by any one in possession.

In this particular case, where the tenant himself executed the mortgage to the demandant, it is argued, also, that the latter is estopped by his deed to deny he is tenant of the freehold to the demandant. But no precedent is cited to support this view, and, on principle, it strikes me, that he would be estopped to deny only, that he once was possessed of a freehold, when he made the conveyance, rather than that he was when the suit was brought. The deed rather shows that he has parted with a freehold, than retains it. It is true, that in equity the mortgagor is sometimes considered still to retain an equitable freehold. Pow. Mortg. 157a; 1 Atk. 603. And that may be one additional reason why in this proceeding, under a statute, which, in a suit at law, allows the mortgagor time to redeem, instead of considering the estate as forfeited by non-payment at the day agreed, the mortgagee should recover, though the mortgagor, as tenant, pleads non tenure.

A mortgagor is treated in America as having, for most purposes at law, a freehold, till he quits possession, as against all but the mortgagee. 4 Kent, Comm. 160; [Robinson v. Campbell] 3 Wheat. [16 U. S.] 226, note; 6 Johns. 290. Some of the cases seem to hold the same as against the mortgagee, and the latter as possessing only a chattel interest. Clark v. Beach, 6 Conn. 142; 20 Me. 111; 11 N. H. 55. But this is doubtful, except for certain purposes, as dower, taxation, voting, settlement cases, &c. 2 Greenl. 173, 387; 6 N. H. 25; President, etc., of Waltham Bank v. Inhabitants of Waltham [supra]; 11 N. H. 62, 274; 10 N. H. 504. In these the mortgagor in posses-

sion is often to be considered as the owner. 2 Doug. 631; Rigney v. Lovejoy, 13 N. H. 251; 5 N. H. 420, 430. It may be also, that when one has disseized or entered on his grantee, he may not be allowed "to qualify his own wrong." Jackson, Real Act. 97; Goldes. 43. But whichever of these may be the true grounds, or the strongest for the decision of the court, it is in favor of sustaining an action like this in the amended form by the mortgagee against his mortgagor. The demandants must take care to insert in the amendment any averment required by the practice here to justify a judgment of foreclosure, and not a mere judgment for possession to receive the rents and profits.

Let the entry, then, be, that the demandants are allowed to amend on paying the tenants their cost till the motion was made, and then, that the replication is good, and the demandants entitled to judgment for a foreclosure of the mortgage.

Case No. 4,760.

FIEDLER v. MAXWELL.

[2 Blatchf. 552.][1]

Circuit Court, S. D. New York. Feb. 1853.

CUSTOMS DUTIES—UNDERVALUATION—SPECIE AND PAPER CURRENCY — UNLAWFUL DETENTION OF GOODS BY COLLECTOR—TROVER—DEFENSE.

1. Where an invoice sets forth the prices of goods in a foreign paper currency, and also carries them out reduced to a specie standard, and the importer makes the entry in the specie value, and, on appraisement, the value is returned at the invoice paper currency prices, which is greater by 10 per cent. that the specie value—It seems, this is not such an excess of appraised value over the value declared in the entry as to warrant the imposition of a penalty of 20 per cent. for undervaluation.

2. Trover will lie against a collector who unlawfully detains the goods of an importer, and it is no defence that the collector acts under the instructions of the secretary of the treasury.

This was an action of trover against [Hugh Maxwell] the collector of the port of New-York, for the conversion of certain merchandize imported by the plaintiff [Ernest Fiedler]. The merchandize in question was invoiced at Trieste and imported thence. The invoices, two in number, set forth the prices of the goods in Austrian paper florins, and carried them out reduced to the specie standard. The entry on both invoices was made in specie value only. The invoice charges were raised by the appraisers, or rather confined to the nominal value stated in paper currency, and the custom house appraisers, and also merchant appraisers on a re-appraisement, returned the goods to have been charged at proper prices in that currency. The plaintiff made his entry at the specie value of the importations, and, this being more than 10 per cent. below the paper denomination, a duty was charged on the difference, and also a penal duty of 20 per cent. The invoices on entry were accompanied by the certificate of the American consul at Trieste, that the paper currency at the time was depreciated 17½ per cent. Oral proof of the same fact was given before the jury on the trial, and it was not controverted by the defendant. The plaintiff made due protest in writing against the exaction of the additional and penal duties, tendered to the collector in specie the legal duties, and demanded the delivery of his goods. This being refused, he brought an action of trover against the collector in the supreme court of the state, and the cause was removed by the defendant, by certiorari, into this court. On the trial, a verdict was taken by consent for $901, subject to adjustment at the custom house and to the opinion of the court on a case to be made.

John S. McCulloh, for plaintiff.

J. Prescott Hall, Dist. Atty., for defendant.

BETTS, District Judge. This case embraces several questions which have been passed upon by this court. The law thus settled must be considered as the law governing the subject, until it is changed by the supreme court or by congress. The plaintiff was entitled to enter his goods at the specie value of the Austrian florin, on payment of the legal duties chargeable upon that amount. Grant v. Maxwell [Case No. 5,699]. The defendant, therefore, had no authority in law to impose duties on any other valuation.

It is exceedingly doubtful whether, if these goods had been subject to duty on a paper valuation, the collector could have also imposed a penal duty because of a difference of more than 10 per cent. between silver and paper currency. This could hardly, in any reasonable acceptation, be considered an excess of appraised value over the value declared in the entry; because, the invoice accompanies the entry, and the transcription of the summation of its charges into the entry does not, without the presentation of the invoice, constitute the proceeding known to the law or in practice as an entry made. Under such circumstances, when the valuation insisted upon by the government and that claimed by the importer are both of them on the face of the invoice, placing the latter alone upon the scrip called the entry, could not, except under the severest interpretation of the language of the act, subject the goods to a penal duty.

Be that as it may, it is clear, upon the main point, that the plaintiff was entitled to enter his importations at their specie value in the Austrian market.

The only point not covered by previous decisions of this court relates to the form of the action. There are two cases decided by

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the supreme court (Conard v. Pacific Ins. Co., 6 Pet. [31 U. S.] 262, and Tracy v. Swartwout, 10 Pet. [35 U. S.] 80), which recognize it as a clear principle of law, that an importer can maintain trespass or trover against a United States officer for the detention of his goods on the ground that they are subject to a lien on behalf of the government, if no such lien is given by law. A collector of the customs cannot defend himself against such an action by showing that he acted under the instructions of the secretary of the treasury in enforcing the payment of duties or obtaining due security therefor. If his acts are not warranted by law, the owner of the goods can assert his right by an action of trover, and will be entitled to full remuneration for the injury done him.

Judgment must be rendered for the plaintiff upon the verdict, according to the stipulation in the case, with costs.

*

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